

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: EA-14-18

Relating to: Nonferrous Metallic Mineral Exploration, Bulk Sampling, Prospecting, Mining and Mining Waste Management – Chapters NR 130, NR 131, NR 132 and NR 182

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

The proposed rule changes will be proposed as permanent rules.

2. Detailed description of the objective of the proposed rule:

The rule changes are necessary to implement recent statutory changes enacted in 2017 Wisconsin Act 134, correct inconsistencies between the administrative rules and the statutes, and to provide greater clarity to provisions that have historically been challenging to interpret and administer.

The current set of mining administrative rules were created in 1982. The rules contain chapters on nonferrous metallic mineral exploration (NR 130), nonferrous metallic mineral prospecting (NR 131), nonferrous metallic mineral mining (NR 132) and nonferrous metallic mineral mining wastes (NR 182). Various statutory changes to the mining law have been made since that time, but the rules have not been revised to reflect those changes. Further, 2017 Wisconsin Act 134 includes specific changes to the mining administrative rules and also made extensive revisions to various aspects of the regulatory framework applicable to nonferrous metallic mineral mining-related activities which will necessitate additional rule revisions.

Since 1982, the department has implemented the rules to regulate metallic mineral exploration activity and to conduct the review of several prospective mining projects. The department has implemented the rules in the regulation of actual mining operations including the Flambeau Mine. In the course of applying the rules, the department has identified a number of rule provisions that have been problematic to interpret and administer. A subset of the anticipated rule changes will be focused on clarifying those provisions and providing additional certainty to the review and regulatory processes.

The department may also pursue additional rule changes which are reasonably related to those specifically discussed in this scope statement and which are identified as the rule-drafting progresses.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

2017 Wisconsin Act 134 made a number of policy changes that require changes to the mining rules. Some of the major areas of focus for the rule changes include:

1. Further definition of how groundwater quality standards are applied at metallic mining sites. The department is required to determine, on a case-specific basis, the depth at which groundwater enforcement standards are applied. Act 134 establishes that an applicant must demonstrate the project will comply with groundwater quality standards for a period of 250 years following closure of the mining waste facility. Rule changes are needed to incorporate these concepts and provide technical clarification regarding how these determinations and demonstrations are made.
2. Act 134 creates two new forms of financial assurance applicable to metallic mining operations. Rule changes are needed to incorporate these new financial assurance mechanisms and provide a framework for determining the amount of the financial assurance related to anticipated repair and replacement of various pollution control design elements.
3. Act 134 creates a new permitting criterion requiring the department to find that the proposed project will incorporate technology that will ensure compliance with applicable environmental protection laws and rules. Rule changes may provide clarification as to how the department will make this determination and what information may be needed to support the department's determination.
4. Act 134 makes substantial changes to the permitting processes for mining and prospecting projects, including the preapplication notification process, and the rules will need to be modified to incorporate those changes.
5. Act 134 creates regulatory processes and minimum standards related to bulk sampling projects including plan and bond submittals, approvals, licensing, inspections, enforcement and bond release requirements. There currently are no rules related to the regulation of bulk sampling. Proposed rules would be developed to implement the bulk sampling regulatory framework created in Act 134.
6. Act 134 includes provisions that either directly or indirectly repealed specific rule requirements including those related to regulation of mining activities near wetlands, and the irrevocable trust fund. The rules will need to be revised to reflect those changes.
7. Act 134 effectively exempts mining waste facilities from paying waste facility license and plan review fees. Such fees are currently specified in NR 182 and those provisions will need to be changed.

In addition to changes necessary due to enactment of Act 134, the existing rules are also inconsistent with the statutes as amended by other statutory changes enacted since the inception of the rules in 1982. Some of these areas of inconsistency include:

- The nonferrous mining law (s. 293.32, Stats.) requires an applicant to submit the application fee for a prospecting or a mining permit at the time of preapplication notification and establishes a general approach for assessing additional fees through the permit review process. Current provisions of chapters NR 131 and 132 are inconsistent with the statute by specifying remittance of an application fee as part of the permit application submittal.
- Section 293.37(2)(e), Stats., requires a broad assessment of the applicant's compliance history to include bond forfeiture, bankruptcy, felony convictions and permit revocation as part of the permit review process. These considerations are also included in the statutory criteria for denial of a mining permit. The existing rules are inconsistent with the statutes in that they only require the Department to consider whether an applicant or related entities have forfeited any reclamation bonds in the United States in the previous 20 years.
- As provided in s. 293.49(1)(a)5), Stats., the department, as a condition of issuing a mining permit, must make a specific finding that the proposed mining project will "result in a net positive economic impact...". Chapter NR 132 reflects older statutory language and requires the department to deny a mining permit if it finds the project will result in a "net substantial adverse economic impact...". -

While there is only a slight variation in the wording of these provisions, the requisite findings are different.

- The process specified in the law (s.293.55, Stats.) related to review of modification requests has been revised to place certain procedural requirements on requests for substantial modifications to existing permits and approved plans. Ch. NR 132 provides a general process by which all modification requests are treated similarly and does not make a distinction between substantial modifications and relatively inconsequential changes.
- Section 289.41, Stats., specifies the acceptable means of providing financial assurance for long-term care of mining waste facilities and requires owners of mining waste to maintain financial assurance for at least forty years following closure of the facility. Parallel provisions in ch. NR 182 allow use of financial assurance mechanisms that are no longer acceptable under the statutes and contain provisions for termination of financial assurance requirements that are inconsistent with s. 289.41(1m)(g).
- Chapters NR 131 and NR 132 each contain a list of 172 Scientific Areas which are included as lands that are “unsuitable” for surface mining or prospecting. Under current nomenclature in the statutes and other rules of the department, such areas are referred to as State Natural Areas. In addition, since promulgation of the mining rules in 1982, many more such areas have been formally designated.
- Chapter 293 directs the department to adopt rules establishing minimum qualifications for applicants for prospecting and mining permits. Such qualifications have not been established in Chapters NR 131 and NR 132.

The third category of possible rule changes are those that would be intended to provide greater clarity and effectiveness to the rules based on past experience in implementing the rules over the past 35 years. Examples of areas where clarification may be considered include:

- The process for assessing success and completion of reclamation under s. 293.63, Stats.
- The criteria related to issuance of the certificate of completion, the regulatory status of mining sites for which certificates of completion have been issued and the residual reclamation bond under s. 293.63.
- Minimum baseline monitoring requirements under s. 293.31, Stats., and sections NR 131.05, NR 132.05 and NR 182.08 related to applications for permits and approval of a mining waste facility and s. NR 150.30 related to information to support preparation of an Environmental Impact Statement.
- Minimum requirements for conducting groundwater modeling assessments of proposed mining operations and mining waste facilities under s. 293.37(5), Stats., and NR 182.08(2)(e)9.
- The scope and applicability of the Contingency Plan required under ss. NR 182.08(i) and 182.09(d) and the Risk Assessment required under s. NR 132.07(3)(i).
- The exploration licensing requirements in Ch. NR 130 should be reviewed to determine whether additional information related to ensuring conformance with the statutorily prescribed minimum standards for exploration should be required as part of the licensing process.

In 2017 Wisconsin Act 108, codified at s. 227.22(4), Stats., the legislature directed agencies to review enactments to determine whether rulemaking is necessary because of statutory changes. If an agency determines that rule revisions are necessary because, for example, rules are unauthorized or are inconsistent with the statutes, section 227.22(4) requires the agency to take action to revise or repeal the rules. In compliance with s. 227.22(4), the department has reviewed 2017 Wisconsin Act 134 and has determined that rulemaking is necessary to address the statutory changes made by the legislature. The department is also proposing to revise rules that have been superseded or that require amendment due to prior legislative changes.

As an alternative to the proposed rule-making, the department could scale back on the scope of the intended rules changes. The department could consider a petition to the legislative council staff requesting repeal of any unauthorized rules under Wis. Stat. s. 227.26(4)(b). The repeal would not, however, allow the department to propose replacement of outdated rule language with language that is consistent with current statutes. The agency could also focus only on the changes needed to bring the rule into conformance with the current statutes. Limiting the rulemaking in this way would not allow consideration during the rulemaking process of any proposals for clarifying existing rules. The department has included the potential for rulemaking clarifications in this scope statement. During the rulemaking process, the department will consider whether specific clarifications are most appropriately dealt with through rulemaking, through guidance, or on a case-by-case basis on a given project.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Chapter 293, Stats., contains numerous provisions granting rule-making authority to the department. Following is a discussion of the most pertinent provisions as related to the anticipated rule revisions.

- 293.13 (1) (b) – The department is directed to establish, by rule, minimum qualifications for applicants for prospecting or mining permits
- 293.13 (2) (a) – The department is required to develop rules that adopt minimum standards for exploration, prospecting, mining and reclamation.
- 293.15 (9) – The department is directed to write rules by which the department may grant exemptions, modifications or variances from any rule under chapter 293 or under chapters 289-292 as related to nonferrous mining waste.
- 293.15 (10) – The department is directed to promulgate rules regarding minimizing, segregating, backfilling or marketing mining waste
- 293.15 (11) – The department is directed to develop rules establishing groundwater quantity and/or quality standards for any prospecting or mining site including standards for mining waste sites.
- 293.21 – The department is authorized to write rules pertaining to different aspects of metallic mineral exploration including license fees, drillhole fees, notifications and inspections and a procedure for bond release.
- 293.32 (1) – The department is directed to establish application fees for proposed prospecting and mining projects.

Chapter 289, specifically sections 289.05(2) and (3), authorize the department to promulgate rules related to essentially all aspects of a metallic mining waste facility including the location, design, operation, closure and long-term care of such facilities.

Lastly, the department also has rule-making authority under s. 227.11(2)(a) which authorizes the department to adopt rules interpreting the provisions of chapter 293 if the department considers it necessary to effectuate the purpose of the statute. The department considers the rule changes proposed above necessary to effectuate the purpose of legislative changes made to the mining laws. As noted above, 2017 Wisconsin Act 134 made significant modifications to the prospecting and mining permit review and approval processes in addition to other aspects of the regulatory framework applicable to metallic mineral prospecting and mining activities. These and other statutory changes result in direct conflicts and inconsistencies between the law and existing administrative rules necessitating certain rule revisions. The proposed changes to clarify certain statutory and rule provisions are also necessary to

carry out the purpose of the nonferrous metallic mineral exploration, bulk sampling, prospecting, mining, and mining waste site statutory provisions.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule :

It is estimated that approximately 1600 hours of department staff time will be necessary to complete the rule changes. This estimate includes staff time related to working with a technical advisory committee.

6. List with description of all entities that may be affected by the proposed rule :

The proposed rule changes will predominantly affect business entities involved in metallic mining activities, namely mineral exploration companies and mining companies. Others affected could include federal agencies, local units of government and tribal governments. The rules will involve substantial stakeholder interest from environmental groups, trade associations, and municipal government associations,

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule :

There are no corresponding federal regulations pertaining specifically to metallic mineral exploration, bulk sampling, prospecting or mining. Various federal environmental protection regulations administered primarily by the state apply to specific aspects of metallic mineral mining activities, but are not directly affected by the proposed rule changes. Examples of such regulations include those related to storm water management, wastewater discharge, air emissions, wetland impacts and solid and hazardous waste management.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

The proposed rule changes are not expected to result in a significant economic impact on small businesses. Given the capital-intensive nature of metallic mineral exploration and mining project development, such activities have generally not been conducted by small businesses. Since the department began regulating these activities in the late 1970's, the vast majority of companies engaged in exploration and all of the companies pursuing mining permits in this state have been large corporations.

9. Anticipated number, month and locations of public hearings:

The department anticipates holding 3 public hearings in mid-2019. The department will hold these hearings to solicit public comments from the public and interested parties in various locations around the state, including areas where metallic mineral mining and exploration has most recently occurred and where potential future mining activities could take place. The hearings are tentatively planned to be held in Madison, Antigo and Ladysmith.

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