WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

2013 Wisconsin Act 1, Relating to the Regulation of Ferrous Mining Permitting Process, Enforcement and Taxation

2013 Wisconsin Act 1 ("the Act"), relating to the regulation of ferrous (i.e., iron) mining, creates an expedited process and modified permitting standards to facilitate permits for ferrous mining in the state. It generally does not change Wisconsin law governing the mining of non-ferrous minerals. The Governor signed the Act into law on March 11, 2013.

This memorandum describes changes made by the Act to the process for obtaining Department of Natural Resources (DNR) approval for ferrous mining activities, enforcement of a ferrous mining permit, and the taxation of ferrous mining activities.

Before engaging in ferrous mining, a mine operator may also be required to obtain permits and approvals under various state and federal laws for environmental and natural resource impacts related to mining. Changes made by the Act to those related environmental and natural resource laws are discussed in a separate memorandum (Information Memorandum 2013-03, *2013 Wisconsin Act 1, Relating to the Regulation of Ferrous Mining Changes to Related Environmental and Natural Resources Laws*).

Throughout this memorandum, references to "prior law" refer to the metallic mineral mining law, which the Act generally retains for non-ferrous minerals, but which the Act makes inapplicable to ferrous mining.

CHANGES TO THE PERMITTING PROCESS FOR EXPLORATION, PROSPECTING, AND MINING

In Wisconsin, DNR authorization is required before a person may engage in any of three levels of activity related to mining metallic[1] minerals: exploration, prospecting (also called bulk

[1] The mining of nonmetallic materials, such as sand and gravel, is governed under a separate statute.

sampling), and mining.[2] The DNR may issue a mining permit following a multi-stage process involving public hearings, preparation and public review of an environmental impact statement, and the approval of various state and federal permits and approvals relating to environmental and natural resources impacts resulting from mining and activities secondary to mining.

Prior to the passage of the Act, Wisconsin's mining law generally did not distinguish between the mining of ferrous and nonferrous minerals.[3] ***The Act*** creates such a distinction. It creates a separate, expedited process governing the issuance of permits and approvals for ferrous mining activities. In addition, the Act sets forth most of the procedures and requirements for ferrous mining by statute, rather than a combination of statute and administrative rule, as under prior law.

EXPLORATION LICENSE

Exploration generally involves drilling holes not more than 18 inches in diameter to examine geologic features. It is typically a first step to determine whether mining a given ore deposit may be feasible.

Application

Prior law required an applicant for an exploration license to submit the following materials:

- An application fee of $300.
- A $5,000 bond.[4]
- A certificate of insurance affording personal injury and property damage protection in an amount deemed adequate by the DNR but not less than $50,000.
- An application on a form prepared by the DNR.

The Act retains those requirements for ferrous mining exploration, with the following exceptions. First, it caps the amount of damage protection required for the certificate of insurance at $1 million. Second, it sets forth the required components of the application in statute, specifically requiring the application to include an exploration plan and a reclamation plan, both containing specified components.

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[2] As discussed below, a mine operator may also be required to obtain permits and approvals under various state and federal laws for environmental and natural resource impacts before conducting metallic mining in the state.

[3] However, see the discussion below regarding special restrictions that apply to the mining of sulfide minerals.

[4] As under prior law, the Act allows the DNR to increase the amount of the bond if it determines that the amount of the bond is inadequate to fund the termination of all drillholes for which the explorer is responsible.

Standards for Issuance of a License

Prior law required the DNR to issue an exploration license upon an applicant's satisfactory completion of all conditions in the administrative rules chapter governing exploration. The DNR was also required to deny an exploration license if it found that proposed exploration would not comply with the minimum statutory standards governing mining activities and reclamation or if the applicant was in violation of ch. 293, Stats., or any administrative rule governing exploration. The issuance of a license was also subject to various conditions relating to the permanent and temporary abandonment of drill holes.

Under ***the Act***, the DNR must deny an exploration license if it finds that, after the activities in the exploration plan and reclamation plan have been completed, the exploration will have a substantial and irreparable adverse impact on the environment or present a substantial risk of injury to public health and welfare. Unless it provides written notification to the applicant of its intent to deny an exploration license on those grounds, the DNR is required to issue the license according to the timeline described below. The Act requires the DNR to include requirements in the license that are substantially similar to the conditions required under prior law.

Timeline

Prior law required the DNR to issue an exploration license within 10 business days after it received a completed application, or within 10 business days or by July 1st, whichever is later, if the application was for the upcoming license year.[5] Prior law did not provide a deadline by which an application would be considered complete.

The Act retains the 10 business day deadline under prior law. However, under the Act, an application for an exploration license is considered to be administratively complete on the day that it is submitted, unless, before the 10th business day after receiving the application, the DNR provides the applicant with written notification that the application is not administratively complete. The Act specifies that the DNR may not consider the quality of the information provided when determining whether an application for an exploration license is administratively complete. Instead, the DNR may make such a finding only if one of several specified components of the application is missing. If an item is missing and is requested by the DNR, the DNR must either issue the exploration license or provide written notification of its intent not to issue the license within seven business days of an applicant's submission of the item.

The Act requires the DNR to provide the applicant with an opportunity to correct any deficiencies in the exploration plan or restoration plan within 10 business days. If the applicant amends the exploration plan or reclamation plan and corrects the deficiencies, the DNR must issue the exploration license within 10 business days of receipt of the amended exploration or reclamation plan (or by July 1 if the license is for the upcoming year and this

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[5] Under prior law and the Act, a "license year" is the period of time commencing on July 1st of any year and ending on the following June 30th.

date is later). If the DNR does not comply with these requirements, the application is automatically approved and the DNR is required to issue an exploration license.

Environmental Review

Prior law did not specify whether an environmental impact statement (EIS) or environmental assessment (EA) were required for an application for an exploration license, although it appears to be unlikely that an EIS would have been required for such an application.[6] ***The Act*** specifies that neither an EIS nor an EA are required.

Confidentiality

Under ***prior law***, the DNR was not expressly required to treat information related to an exploration project as confidential. ***The Act*** requires the DNR and the state geologist to protect as confidential: (1) any information, other than effluent data, contained in an application for an exploration license, upon a showing that the information is entitled to protection as a trade secret; and (2) any information relating to the location, quality, or quantity of a ferrous mineral deposit, to production or sales figures, or to processes or production unique to the applicant or that would tend to adversely affect the competitive position of the applicant if made public.

Notice Procedure

Under ***prior law***, an explorer was required to notify the DNR of the explorer's intent to drill on a parcel by registered mail at least 10 days before beginning the drilling. The explorer was also required to notify the DNR orally or by writing before the actual commencement of drilling each drillhole and at least 24 hours before filling a drillhole. Under ***the Act***, the explorer must notify the DNR of the explorer's intent to drill at least five days before drilling and is not required to notify the DNR before the actual commencement of drilling or filling a drillhole.

Inspections

Under ***prior law***, the DNR was authorized to enter and inspect an exploration site to determine the state of compliance with metallic mineral exploration laws, and an explorer was prohibited from obstructing, hampering, or interfering with an inspection. These requirements are retained under ***the Act***, along with a requirement that no inspector may obstruct, hamper, or interfere with exploration activities.

PROSPECTING AND BULK SAMPLING APPROVAL

Prospecting, also called "bulk sampling," involves more extensive examination of an ore deposit than is done through exploration. It may involve the collection of ore samples by means such as excavating, trenching, and construction of ramps and tunnels.

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[6] An EIS is required under s. 1.11 (2), Stats., when an agency takes a major action that significantly affects the quality of the human environment.

Approval Process

Under ***prior law***, a person was required to obtain a prospecting permit before engaging in prospecting. The process for obtaining a prospecting permit involved nearly all of the same steps required to obtain a mining permit, described below, including a notice of intent requirement, an environmental impact statement (in most cases), a master hearing, and requirements for reclamation.

The Act eliminates prospecting permits for ferrous mining. In lieu of a prospecting permit, the Act authorizes a person to submit a plan to the DNR before conducting "bulk sampling," defined to mean excavation by removal of less than 10,000 tons of material for purposes of assessing a ferrous mineral deposit. At the same time that the bulk sampling plan is submitted, the applicant must submit a "pre-application description," described in the section of this memorandum on pre-application notification, for the potential full mining operation.

The bulk sampling plan must include the following components:

- A description of the site, including its size and the number of acres to be disturbed.
- A description of methods to be used.
- A site-specific plan for controlling surface erosion.
- A revegetation plan that describes how environmental impacts will be avoided or minimized to the extent practicable.[7]
- The estimated time for completing the bulk sampling and revegetation.
- A description of any known adverse environmental impacts that are likely to be caused by the bulk sampling and how those impacts will be avoided or minimized to the extent practicable.
- A description of any adverse effects that the bulk sampling might have on specified historic properties.

Within 14 days of receiving a bulk sampling plan, together with a $5,000[8] bond, the Act requires the DNR to identify all approvals required before the bulk sampling plan may be implemented, and any waivers, exemptions, or exceptions to those approvals that are potentially available. An application for such an approval is considered administratively complete 30 days after it is submitted to the DNR unless the DNR notifies the applicant that the application is incomplete and identifies information necessary to complete the application,

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[7] By requiring "revegetation" rather than "reclamation," the Act appears to suggest that full topographic restoration of the site may not be required for bulk sampling.

[8] The Act authorizes the DNR to increase the amount of the bond if it determines that $5,000 is inadequate to cover the costs of revegetation.

in which case the application is considered complete when the DNR receives the additional information identified.

Notwithstanding conflicting review periods set forth in statute or administrative rules that generally govern the process for applying for such approvals, the Act requires the DNR to approve or deny an application for a waiver or exception to determine that approval is not needed within 30 days of the date when the application is administratively complete. No public hearing on such applications or determinations is required under the Act.

The DNR must likewise approve or deny most other types of required approvals within 60 days of the date when the application for an approval is administratively complete. The Act requires the DNR to hold a public informational hearing on these types of approvals and to issue a public notice that: (1) includes information about the activity for which the approvals are required; (2) provides information about the opportunity to submit written comments to the DNR about the activity within 30 days of the notice; and (3) provides the date, time, and location of the public informational hearing, which must be held within 30 days of publishing the notice. The DNR must generally combine the public comment periods and hold one combined public informational hearing on these approvals.

Notwithstanding generally applicable standards for various environmental and natural resource approvals required in connection with bulk sampling, the Act requires the DNR to require the bulk sampling activity to be conducted at locations that result in the fewest overall adverse environmental impacts. When determining whether to approve or deny applications for such approvals, the DNR must consider relevant proposals to offset environmental impacts, such as mitigation of impacts to wetlands and proposed measures to offset impacts to navigable waters.

The DNR must also act on any required construction site erosion control and stormwater management approval, notwithstanding any authority that has been granted to local governments to administer such approvals.

In addition, the Act generally prohibits the DNR from removing a parcel from the managed forest and forest crop programs based on the cutting of forest crops or other activities related to bulk sampling for ferrous minerals by a person who has the necessary approvals from the DNR for bulk sampling. The prohibition applies only if the area that will be affected does not exceed five acres. The Act also requires that a revegetation plan include forestry practices that will generally ensure that the timber, forest crops, and other vegetation that will be cut or otherwise affected will be restored unless the property is within a mining site described in a preapplication notification or an application for a ferrous mining permit.

The Act allows the DNR to modify an application for an approval related to bulk sampling in order for the application to meet the requirements applicable to the approval.

MINING PERMITTING PROCESS

Timeline

Under ***prior law***, the process to obtain a mining permit was estimated to take at least 2-1/2 years, and estimates were longer if a project was complex or generated significant public input. Several deadlines limited the time period within which the DNR was required to act. However, several stages in the process--most notably the time periods during which draft and final environmental impact statements were prepared--were not subject to a statutory timeline.

Under ***the Act***, the mining permit application process begins with the submission of a pre-application notice, described below. The applicant must submit the notice at least 12 months before submitting the mining permit application.

Upon submittal of an application for a ferrous mining permit, the DNR is required to determine whether the application is complete within 30 days. If the DNR determines that the application is complete, the DNR is required to notify the applicant and the application is deemed administratively complete when the DNR sends the notification. If the DNR determines that the application is not complete, the DNR may make one request for additional information. Within 10 days of receiving additional requested information from the applicant, the DNR is required to notify the applicant as to whether it has received all of the requested information. When the DNR sends this final notification, the application is deemed to be administratively complete.[9] The Act does not prohibit the DNR from determining that a mining permit application is incomplete based on the quality of the information submitted with the application.

The Act generally requires the DNR to issue or deny a mining permit *no more than 420 days* after the day on which the application for a mining permit is deemed administratively complete, unless an extension to that timeline is approved. The Act provides for one extension of no more than 60 days. The applicant and the DNR must mutually agree to the extension and the extension must be necessary for one of the following reasons:

- To enable the DNR and the U.S. Army Corps of Engineers (ACE) to jointly prepare their environmental impact statements.

- New information or a change to the mining proposal necessitates additional time to review the application.

In addition to the mining permit, the Act requires the DNR to approve or deny all environmental and natural resource permits required for a ferrous mining project by the same 420 to 480-day deadline required for processing the mining permit application, provided that

[9] If the DNR fails to meet one of these timelines, the application is deemed administratively complete at the end of the timeline.

the applicant submits the applications for the related permits in time to allow them to be considered at the public information hearing for the mining permit.[10]

Alternatively, the Act authorizes an applicant, as part of an application for a ferrous mining permit, to specify a timeline for the DNR's permit review. The alternate timeline must be longer than the general 420-day review period under the Act.

Memorandum of Understanding with Federal Regulatory Agencies

Prior law did not expressly require the DNR to seek to enter into a memorandum of understanding with the ACE or other federal agencies that may have a role in permitting a ferrous mine. ***The Act*** requires the DNR to seek to enter into a memorandum of understanding with any federal regulatory agency with responsibilities related to a potential ferrous mining operation. The Act specifies that the memorandum of understanding would cover timelines, sampling metrology, and any other issue of mutual concern related to the processing of a ferrous mining permit application.

Refund of Fees and Mandamus Action

Under ***the Act***, if the DNR does not approve or deny a mining permit within the 420 to 480-day deadline described above, then the DNR is required to refund the fees paid to the DNR by the applicant for DNR evaluation of the mining project and related approvals and the preparation of the EIS by a consultant. The Act also provides that the applicant may bring an action for mandamus to compel the DNR to issue its decision and directs the court to award the applicant its costs if the DNR did not comply with the deadline. The mandamus action must be filed in the circuit court in the county in which the majority of the mining site is located.

Pre-Application Notification

As under prior law, the Act requires an applicant for a mining permit to submit a notice to the DNR prior to the submission of a mining permit application. Under ***prior law***, a person intending to apply for a metallic mining permit was required to first submit a "notice of intent" to the DNR. The notice of intent served as an indication that the potential applicant was interested in developing a mine and would be collecting data to support a mining permit application. The notice of intent generally was required to be submitted prior to collecting data to support a mining permit application.[11]

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[10] The Act creates a separate process for the DNR to follow when evaluating an application received too late to allow it to be considered at the public informational hearing for the mining permit but before the DNR issues the decision to grant or deny the application for the mining permit. For these applications, the Act establishes a general 75-day review period and requires a public hearing. The Act specifies that applications for related approvals applied for after the issuance of a mining permit generally are to be evaluated using the generally applicable processes and timelines for such approvals.

[11] However, the DNR could consider data collected before the notice of intent was submitted if it determined that the benefits of admitting the data outweighed the policy reasons for excluding it.

Under prior law, the filing of the notice of intent triggered a process in which the DNR was required to advise the potential applicant about specific environmental and quality assurance requirements the person was required to provide for a mining permit application and any required environmental impact report; the methodology and procedures to be used in gathering information; the type and quantity of required information on the natural resources at the proposed mining site; the timely application date for all other necessary approvals to facilitate the consideration of all approvals at the master hearing; whether the DNR would accept general environmental data submitted by the potential applicant with the notice of intent; and preliminary verification procedures to be conducted by the DNR. The DNR could revise or modify requirements relating to information which must be gathered and submitted by the potential applicant. The DNR could also require the potential applicant to develop a "scope of study" designed to comply with the DNR's informational requests.

The Act requires a permit applicant to notify the DNR and the ACE in writing of the intention to file an application for a mining permit. The notification expresses a potential mining permit applicant's intention to file an application for a mining permit. The notification need not be submitted before data is collected, but it must be submitted at least 12 months prior to submitting a mining permit application. At the same time that an applicant submits the notification required under the Act, the applicant must also submit a "pre-application description" of the mining project, to include a map and various specified information regarding the proposed site.[12]

After an applicant submits a pre-application notice, the Act requires the potential applicant to meet with the ACE to discuss federal environmental review. The DNR must also to meet with the applicant to make a preliminary assessment of the project's scope, make an analysis of alternatives, identify potential interested persons, and ensure that the applicant is aware of all required approvals, the environmental impact report requirement, and the information the DNR will require to enable a mining permit application to be processed in a timely manner. Within 60 days of the meeting, the Act requires the DNR to provide to the applicant any available information relevant to the potential impact of the project on threatened or endangered species and historic or cultural resources and any other information relevant to impacts that are required to be considered in the EIS. The Act does not authorize the DNR to request a "scope of study" document. A pre-application notification is not required if a mining permit applicant files the application no more than one year after the DNR denied a previous application for the same mining proposal.

Public Hearings and Contested Case Hearing; Frivolous Claims

Under ***prior law***, the process for obtaining a metallic mining permit involved a minimum of three public hearings: an informational hearing regarding the notice of intent to file an application; an informational meeting regarding a draft environmental impact statement; and a "master hearing" regarding the mining permit and related environmental and natural resource approvals. To the extent practicable, the DNR was required to include all related

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[12] If the applicant engages in bulk sampling before applying for a mining permit, then the pre-application description must be submitted together with the bulk sampling permit application.

permits applied for in connection with a proposed mining operation within the scope of the master hearing.[13] A master hearing on a mining permit included both general public testimony and a contested case hearing. During the public testimony portion of the hearing, all interested persons were required to be given an opportunity to express their views on any aspect of the matters under consideration. Persons who participated as parties in the contested case portion of the master hearing could submit legal briefs and evidence and call and cross-examine witnesses, who testified under oath.

Under ***the Act***, the DNR must hold an informational hearing, which covers the mining permit, all other approvals, and the EIS.[14] Prior to the hearing, the DNR must make the application for the ferrous mining permit, applications for related permits and approvals, the EIS, and any analyses or preliminary determinations available for review in the city, village, or town where the proposed mining site is located. Interested persons may submit written or oral comments regarding a mining permit application. Within its posted notice regarding a mining permit application, the DNR must describe the opportunity for written public comment by any person within 45 days after the notice is published, and provide the date, time, and location of the public informational hearing.

In addition, the DNR must hold a public informational hearing following receipt of an applicant's pre-application description and bulk sampling plan. The hearing must be held in the county in which the majority of the proposed mining site is located. To the extent possible, the topics at issue in the hearing must include the pre-application description and all permits and approvals required in connection with bulk sampling. If no approvals are required in connection with bulk sampling, or the applicant does not propose to conduct bulk sampling, then the hearing covers the pre-application description.

The Act provides for an opportunity for a contested case hearing for petitioners entitled to a contested case hearing under s. 227.42, Stats., if the petitioner is aggrieved by a DNR decision to grant or deny a ferrous mining permit, a decision to grant or deny a related approval, or a final decision on the EIS for a proposed mine. A contested case hearing generally must be requested within 30 days after the DNR issues its final permit decision. The final decision of the hearing examiner generally must be issued no more than 150 days after the DNR issues the decision. If the hearing examiner does not issue a final decision by this deadline, the DNR's decision is affirmed. The hearing examiner is prohibited from issuing a stay of the activity authorized under the decision during the administrative review period.

The Act also provides opportunity for contested case hearings on DNR decisions related to a mining operation that are issued after the DNR approves the mining permit.

Under ***current law***, if a hearing examiner finds that an administrative hearing commenced or continued by a petitioner or a claim or defense used by a party is frivolous, the hearing

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[13] After an applicant submitted a notice of intent under prior law, the DNR was required to inform an applicant as to the timely application date for all approvals, licenses, and permits issued by the DNR in connection with the proposed operation, so as to facilitate consideration of those matters at the master hearing.

[14] The DNR is required to accept testimony on specified factors in relation to any proposed water withdrawal.

examiner is required to award the successful party the costs and reasonable attorney fees that are directly attributable to responding to the frivolous petition, claim, or defense. A petition for a hearing or a claim or defense is frivolous if the hearing examiner finds at least one of the following:

- That the petition, claim, or defense was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

- That the party or the party's attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

With respect to ferrous mining, ***the Act*** also allows a hearing examiner to find that a petition for a hearing or a claim or defense is frivolous if it was commenced, used, or continued primarily for the purpose of causing delay to an activity authorized under a license that is the subject of the hearing.

Contents

Under ***prior law***, an application for a metallic mining permit was required to include all of the following components:

- A mining plan.

- A detailed reclamation plan.

- The name and address of each owner of land and holder of an option or lease on land within the mining site.

- All permits held by the applicant.

- Evidence that the applicant had applied for necessary environmental and zoning approvals and permits.

- Information on the applicant's history, including any forfeitures, felony convictions, bankruptcies, and permit revocations.

- Other pertinent information requested by the DNR.

The Act retains most of those components but eliminates the requirement that the applicant submit "other pertinent information requested by the DNR." The Act also modifies the requirement that an applicant provide evidence of approval submissions, specifically by requiring evidence that the applicant will apply, rather than has applied, for environmental and natural resource approvals related to the mining operation. The Act also requires a waste site feasibility study as part of the mining plan, whereas under prior law, a waste site feasibility study was submitted and reviewed separately. In addition, the Act modifies the requirements related to mining and reclamation plans, as described below.

Mining Plan

Under ***prior law***, a mining plan was required to include:

- A detailed map of the proposed mining site.
- Details of the nature, extent, and final configuration of the proposed excavation, including the nature and depth of overburden (i.e., the rock and soil located above the mineral to be mined).
- Specified information relating to proposed operating procedures.
- Demonstrations of satisfactory evidence that the proposed mining operation would be consistent with the reclamation plan and comply with various specified standards.
- A pre-blasting survey.

The Act modifies several of the general components of the mining plan required under prior law. Under the Act, the mining plan may contain aerial photographs in lieu of a detailed map, if the photographs show the details of the site to the DNR's satisfaction. The Act eliminates the required demonstrations relating to the following subjects from the mining plan and instead includes them in the reclamation plan: grading and stabilization of excavation and deposits; stabilization of merchantable by-products; protection of topsoil; and the achievement of aesthetic standards. It likewise eliminates required demonstrations regarding the maintenance of adequate vegetative cover and the impoundment of water from the mining plan. With regard to a demonstration relating to the adequate diversion and drainage of water, the Act adds the phrase "to the extent possible" to the relevant standard. Finally, with regard to a demonstration related to the backfilling of excavations, the Act retains the standard prohibiting violations of groundwater quality standards but removes a standard prohibiting an adverse effect on public health or welfare.

Reclamation Plan

Under ***prior law***, a reclamation plan was required to include detailed information and maps regarding reclamation procedures and demonstrations of satisfactory evidence that the proposed reclamation would conform with the following minimum standards:

- All toxic and hazardous wastes, refuse, tailings, and other solid waste shall be disposed of in conformance with applicable state and federal statutes or regulations.
- All tunnels, shafts, or other underground openings shall be sealed in a manner which will prevent seepage of water in amounts which may be expected to create a safety, health, or environmental hazard, unless the applicant can demonstrate alternative uses which do not endanger public health and safety and which conform to applicable environmental protection and mine safety laws and rules.
- All underground and surface runoff waters from mining sites shall be managed, impounded, or treated so as to prevent soil erosion to the extent practicable,

flooding, damage to agricultural lands or livestock, damage to wild animals, pollution of ground or surface waters, damage to public health, or threats to public safety.

- All surface structures constructed as a part of the mining activities shall be removed, unless they are converted to an acceptable alternate use.

- Adequate measures shall be taken to prevent significant surface subsidence, but if such subsidence does occur, the affected area shall be reclaimed.

- All topsoil from surface areas disturbed by the mining operation shall be removed and stored in an environmentally acceptable manner for use in reclamation.

- All disturbed surface areas shall be revegetated as soon as practicable after the disturbance to stabilize slopes and prevent air and water pollution, with the objective of reestablishing a variety of plants and animals indigenous to the area immediately prior to mining, unless such reestablishment is inconsistent with statutory requirements. Plant species not indigenous to the area may be used if necessary to provide rapid stabilization of slopes and prevention of erosion, if such species are acceptable to the DNR, but the ultimate goal of reestablishment of indigenous species shall be maintained.

In addition, if the anticipated life and total area of the mineral deposit were of sufficient magnitude, as determined by the DNR, the plan was required to include a comprehensive long-term plan showing the manner, location, and estimated timetable for reclamation. Finally, if it was physically or economically impracticable or environmentally or socially undesirable for the reclamation process to return the area to its original state, the applicant was required to provide reasons that the reclamation process would be impracticable or undesirable, and a discussion of alternative conditions and uses to which the affected area could have been put.

As with the mining plan, ***the Act*** retains some and modifies other components of the reclamation plan under prior law. In particular, the Act retains the requirement that the plan include a map, and it requires similar map features as are required under prior law, including detailed information regarding specified reclamation procedures such as the proposed interim and final topography of the site, the proposed final land use, and plans for long-term maintenance of the mining site. Likewise, the Act retains standards related to sealing tunnels, removing surface structures, measures to prevent surface subsidence, and the management of underground and surface runoff waters. It also retains the provision specifying that plant species not indigenous to the area may be used if necessary to provide rapid stabilization of slopes and to prevent erosion. In addition, the Act retains accommodation under prior law for alternative options where it is physically or economically impracticable or environmentally or socially undesirable for the reclamation process to return the area to its original state.

The Act modifies the standard regarding the storage of removed topsoil for use in reclamation. Specifically, the Act allows topsoil to be used in reclamation "or in the mitigation or minimization of adverse environmental impacts," whereas prior law requires disturbed topsoil to be used for reclamation. The Act also specifies that the standard requiring revegetation of all disturbed surface areas as soon as practicable after the disturbance to stabilize slopes and

prevent air and water pollution shall be satisfied "to the extent practicable." In addition, the Act removes the requirement that plant species not indigenous to the area may be used only if such species are acceptable to the DNR.

Finally, the Act eliminates the separate comprehensive plan requirement for ferrous mining operations. However, as mentioned, it retains the requirement that plans for long-term maintenance of the site be included in the general reclamation plan.

Standards for Issuance of a Mining Permit

Under ***prior law***, the DNR was required to issue a mining permit if all of the following six standards were satisfied:

- The mining plan and reclamation plan were reasonably certain to result in reclamation of the mining site.
- The proposed mine would comply with applicable air, ground and surface water, and solid and toxic waste disposal requirements.
- A proposed surface mine site was not unsuitable for surface mining. A site was unsuitable if the mining activity was reasonably expected to irreparably damage specified unique features of the land or habitat required for specified endangered species.
- The proposed mine would not endanger public health, safety, or welfare.
- The proposed mine would result in a net positive economic impact in the area reasonably expected to be most impacted by the mining activity.
- The proposed mining operation conformed with all applicable zoning ordinances.

The Act likewise requires the DNR to issue a mining permit if seven conditions are satisfied. The Act retains one of the six conditions set forth in prior law -- the requirement that the proposed mining will result in a net positive economic impact in the area.

Of the five remaining conditions for approval under prior law, the Act eliminates and replaces two and amends three conditions. First, the Act eliminates the condition requiring that a proposed mining site not be unsuitable for mining (however, as described below, the Act retains unsuitability as a basis for denial of the permit). Second, the Act eliminates the condition requiring the proposed operation to comply with all applicable administrative rules governing air, groundwater, surface water, and solid and hazardous waste management. The Act replaces those conditions with conditions that the applicant has *committed* to conducting the proposed mining in compliance with the mining permit and other approvals and that the waste site feasibility study and plan of operation must comply with the relevant waste site submissions required under the Act.

The Act modifies the three remaining conditions. First, whereas prior law required a mining operation to conform with all applicable zoning ordinances, the Act requires that the applicant

has applied for applicable zoning approvals. Second, whereas prior law required that the mining plan and reclamation plan be reasonably certain to result in reclamation of the mining site consistent with the mining statutes and administrative rules, the Act requires that the mining plan and reclamation plan be reasonably certain to result in reclamation of the mining site consistent with the statute. Finally, whereas prior law required that a mining operation would not endanger public health, safety, or welfare, the Act requires that a mining operation is reasonably certain not to result in substantial adverse impacts to public health, safety, or welfare.

Lastly, the Act adds an additional condition requiring that the mining proposal is likely to meet or exceed the requirements of any municipal floodplain zoning ordinance applicable to the proposed mining, to the extent that the ordinance has not been made inapplicable pursuant to an agreement negotiated between the municipal government and the applicant.

Grounds for Denial of a Mining Permit Application

Under ***prior law***, the DNR was required to deny an application for a mining permit if any of the six standards for issuance of a mining permit, listed above, were not satisfied. In addition, the DNR was required to deny the permit if the applicant, or an officer or director of the applicant, had forfeited a bond posted in accordance with mining activities in this state within a specified timeframe, or if the proposed mining activity could reasonably be expected to create one or more of the following problems:

- Landslides or substantial deposition from the proposed operation in stream or lake beds that could not be feasibly prevented.

- Significant surface subsidence that could not be reclaimed because of the geologic characteristics present at the proposed site.

- Hazards resulting in unpreventable, unavoidable, unmitigable, irreparable damage to various types of structures, improvements, and natural resources.

The Act modifies the grounds for denial of a mining permit application in two ways. First, it modifies the definition for the unsuitability of a mining site. Under prior law, a site was unsuitable if the mining activity was "reasonably expected" to destroy or irreparably damage specified features. Under the Act, a site is unsuitable if "it is more probable than not" that the mining activity will irreparably damage specified features. Also within the definition, as in prior law, the Act includes protected species habitat that cannot be reestablished elsewhere or unique land features that cannot have their unique characteristic preserved by relocation or replacement elsewhere. However, the Act excludes archaeological areas and other lands designated by the DNR from the unique land features to be taken into consideration.

Second, the Act includes a narrower set of circumstances in which landsides, subsidence, or hazards give rise to a mandatory denial than applied under prior law. Specifically, the Act requires that the irreparable damage to specified structures be physical in nature in order for a hazard to the structure to qualify as grounds for denial of a mining permit. It also removes the general category of property "designated by the DNR" from the list of structures to be protected from hazards resulting in irreparable damage.

Finally, the Act eliminates the requirement under prior law that the DNR was required to deny a mining permit if the proposed project did not conform with all applicable zoning ordinances.

Exemptions

As under prior law, the Act requires that an applicant for a mining permit may request exemptions from various requirements related to metallic mining. Under ***prior law***, the DNR was authorized to grant an exemption from the requirements of the metallic mineral mining chapter in the administrative code, if the exemption did not result in the violation of any federal or state environmental law or endanger public health, safety, or welfare or the environment, but the DNR was not required to do so.

Under ***the Act***, the DNR must grant an applicant's request for an exemption from the requirements under the new ferrous mining law established under the Act if all of the following apply:

- The exemption is consistent with the purposes of the ferrous mining law.
- The exemption will not violate other environmental laws.
- The exemption will not violate federal law.
- The exemption will not result in significant adverse environmental impacts off of the mining site.
- The exemption will not result in significant adverse environmental impacts on the mining site, or such adverse impacts will be offset through mitigation.

In addition to the above requirements, the Act provides that federal standards for granting exemptions may apply in some circumstances.

Prior law generally required the DNR to act on an exemption request within 15 days. However, the 15-day timeline did not apply if the requested exemption required an exception from the mining statute. ***The Act*** retains the 15-day timeline but removes the exception for exemptions from statutory requirements.

Prior law required certain procedures to be followed, including a requirement that requests for exemptions generally were to be submitted at least 90 days in advance of the master hearing (for the applicant) or at least 30 days before the hearing (for persons other than the applicant). It also required the DNR to publish notice of a requested exemption. In addition, prior law provided a process by which a hearing could be held to review a proposed exemption. In contrast, ***the Act*** does not restrict when an exemption may be requested, does not require public notice of a potential exemption, and does not provide for a process by which a public hearing may be held to review a proposed exemption.

ENVIRONMENTAL REVIEW

Environmental review is a major component of the process to obtain approval for a metallic mining operation. Environmental review typically involves the preparation of an EIS.

When Required

Prior law required the DNR to prepare an EIS for every metallic mining permit. The EIS was required to describe the short-term and long-term impacts of the proposed mining operation on tourism, employment, schools, medical care facilities, private and public social services, the tax base, the local economy, and other significant factors.

The Act retains the requirement that an EIS be prepared for each proposed ferrous mining operation. However, it removes "other significant factors" from the items that must be considered in an EIS, and adds archeological sites to the list of items that must be considered.

With regard to prospecting, ***prior law*** acknowledged that an EIS may in some cases be required under s. 1.11 (2), Stats., which requires state agencies to prepare an EIS when taking "major actions" that significantly affect the quality of the human environment. ***The Act*** specifies that the DNR is not required to prepare an EIS for exploration or bulk sampling.

Use of a an Environmental Impact Report

Prior law authorized the DNR to require that a potential mining permit applicant submit an environmental impact report (EIR), which served as a starting point for compilation of a draft EIS. In addition, the DNR was authorized to accept original data submitted by an applicant as part of an EIR, if the data related to impacts essential to a reasoned choice among significant alternatives to the proposed action; the data met the requirements outlined in the DNR's instructions to the applicant; and one or more of the following applied:

- The DNR, its consultant, or a cooperating state or federal agency collected sufficient data to perform a limited statistical comparison with the EIR data and was able to demonstrate that the data sets were statistically similar within a reasonable confidence limit.

- The data were determined to be within the range of expected results by an expert who was employed by, or was a consultant to, the DNR or in a cooperating state or federal agency.

- The DNR or its consultant or other cooperating state or federal agencies witnessed actual collection and analysis to a sufficient extent to verify the methodology as scientifically and technically adequate for the tests being performed.

The Act requires an applicant for a ferrous mining permit to submit an EIR together with the mining permit application. The EIR must include: a description of the proposed mining project; environmental conditions and anticipated environmental impacts; socioeconomic conditions and anticipated socioeconomic impacts; details of any wetlands mitigation program; any measures to offset navigable waters impacts; any proposed changes to forest

designations; and alternatives to the mining project. The Act *requires* the DNR to use original data provided in an EIR in the EIS if the report contains information required for an EIS and any of the three conditions listed in bulleted form above applies.

REIMBURSEMENT OF DNR COSTS

Prior law required applicants for a prospecting or mining permit to pay an initial fee in an amount estimated by the DNR to cover costs incurred by the department in connection with processing permit applications. Applicants were also required to pay a separate fee to cover the costs of an environmental impact statement, including the cost to the DNR of hiring consultants in preparation of the statement. In addition, applicants were required to pay various fees for related approvals under state environmental and natural resources laws.

The Act likewise requires an applicant for a mining permit to reimburse the DNR for costs related to the evaluation of a mining permit application. However, the Act generally caps costs to be paid by an applicant at $2 million, plus the full cost of a competitively bid contract for preparation of an EIS and the DNR's costs in providing wetland boundary determination or delineation services, if the DNR provides such services at the applicant's request. The Act provides that costs shall be paid according to the following fee schedule. First, $100,000 must be paid with the submission of a bulk sampling plan or a notice of intent to file a mining permit, whichever occurs earlier. Second, an additional fee of $250,000 must be paid when the DNR provides cost information demonstrating that the initial $100,000 has been fully allocated against actual costs. Three additional fees of $250,000 each must similarly be paid after the DNR demonstrates that prior fees have been fully allocated against actual costs.

In addition, except for the fee required for an approval under the Great Lakes Compact, the Act provides that an applicant for a mining permit is not required to pay any application or filing fee for any approval other than a mining permit, notwithstanding general statutory provisions requiring fees for various environmental permits and approvals.

BOND FOR RECLAMATION, CERTIFICATE OF INSURANCE, AND IRREVOCABLE TRUST AGREEMENT

Prior law required an applicant to submit bonds in connection with exploration, prospecting, and mining. An applicant for an exploration license was required to submit a bond of $5,000 to the DNR prior to conducting exploration. An applicant for a prospecting or mining permit was required to provide a bond[15] to the DNR after a permit was approved but before beginning operations. The bond was conditioned on faithful performance of all of the requirements of the pertinent statutes and administrative rules and was required to be in an amount equal to the estimated cost to the state, as determined by the DNR, of fulfilling the reclamation plan, in relation to that portion of the site that would have been disturbed by the end of the following year.

[15] In lieu of a bond, the applicant may deposit cash, certificates of deposit, or government securities with the DNR.

The Act likewise requires a $5,000 bond to be submitted prior to conducting exploration. For bulk sampling, the Act requires a $5,000 bond, which may be increased by the DNR. The Act does not modify prior law with regard to a bond requirement for a ferrous mining permit, with one exception: the Act expressly excludes the cost of long-term care of the mining waste site from the estimated cost to the state of fulfilling the reclamation plan.

In addition to a bond, ***prior law*** required a mine operator to submit a certificate of insurance after a prospecting or mining permit was approved but before beginning operations. Under prior law, the certificate of insurance was required to afford personal injury and property damage protection in an amount determined to be adequate by the DNR but not less than $50,000.

After a ferrous mining permit is approved, ***the Act*** likewise requires the permit holder to submit a certificate of insurance affording personal injury and property damage protection in an amount determined to be adequate by the DNR but not less than $50,000. However, the Act provides that the amount of personal injury and property damage protection required may not exceed $1 million. The Act does not require a certificate of insurance to be submitted in connection with bulk sampling.

Prior law also required an applicant for a metallic mining permit to propose an irrevocable trust agreement with a trust fund in an amount to assure adequate funds to undertake the prevention and remediation relating to specified events, such as hazardous waste spills and the failure of a mining waste facility to contain waste. ***The Act*** does not require an irrevocable trust agreement.

MODIFICATION OF AN EXISTING MINING PERMIT

Under ***prior law***, the operator of a metallic mine was authorized to apply to the DNR for an amendment of a mining permit, mining plan, or reclamation plan at any time. In general, the DNR was required to process an application for a proposed increase or decrease to the size of a mining site or a "substantial" change to a mining or reclamation plan in the same manner as the original mining permit application.

Under ***the Act***, a ferrous mine operator may also request a change to a mining permit, the mining plan, the reclamation plan, or the mining waste site feasibility study and plan of operation at any time. The Act requires the DNR to grant such a request, unless it determines that the requested change makes it *impossible* for the permit holder to substantially comply with the approved mining plan, reclamation plan, or mining waste site feasibility study and plan of operation. If the DNR determines that the requested change would make substantial compliance impossible, or if it finds, based on a review conducted no more frequently than every five years, that because of changing conditions, including changes in reclamation costs or technology, the reclamation plan is no longer sufficient to reasonably provide for reclamation of the mining site, the DNR must require the operator to submit necessary amended plans or studies. The Act provides that the general ferrous mining permit application procedures generally apply to the plan amendments.

RESTRICTION ON MINING SULFIDE MINERALS

Under ***current law***, the DNR is prohibited from issuing a permit for the mining of a sulfide ore body unless the DNR determines, based on information provided by a mining permit applicant and verified by the DNR, that sulfide mining operations, with certain restrictions, have been operated and closed without polluting groundwater or surface water from acid drainage or from the release of heavy metals or other significant environmental pollution. This requirement is titled the "sulfide mining moratorium law."

Under ***prior law***, the sulfide mining moratorium law defined "sulfide ore body" broadly as "a mineral deposit in which metals are mixed with sulfide minerals." ***The Act*** modifies this definition of "sulfide ore body" to mean "a mineral deposit in which nonferrous metals are mixed with sulfide minerals."

JUDICIAL REVIEW

Current law and the Act allow for judicial review of final DNR decisions and generally limit the scope of judicial review to a bench trial based on the administrative record assembled by the DNR. ***The Act*** requires an action for judicial review of any decision of the DNR under the ferrous mining law to be brought in the county in which the majority of the proposed exploration site, bulk sampling site, or mining site is located.

CHANGES TO ENFORCEMENT AND TAXATION

ENFORCEMENT OF A MINING PERMIT BY THE DNR AND THE DEPARTMENT OF JUSTICE

As with prior law, the Act provides for enforcement of a mining permit and reclamation plan by the DNR and the Department of Justice (DOJ). Specifically, if the DNR finds a violation of law or any unapproved deviation from a mining or reclamation plan, it must take one of the following actions: issue an order requiring the mine operator to come into compliance within a specified time; require the alleged violator to appear before the DNR for a hearing; or request the DOJ to initiate an enforcement action against the violator.

The Act also provides for the same penalties as prior law, except that prior law authorized penalties for violations of the relevant statute and rules, whereas the Act authorizes penalties for violations of the relevant statute and permits or orders. However, the Act prohibits the imposition of forfeitures during the time that mining is authorized under procedures established in the Act for amending a mining permit.

Prior law authorized the DNR to issue a stop order to a mining operator, requiring immediate cessation of mining, at any time that the DNR determined that the continuance of mining constituted an immediate and substantial threat to public health and safety or the environment. Under ***the Act***, the DNR is not authorized to issue a stop order if it makes such a determination. Instead, in such situations, the Act authorizes the DNR to request that DOJ initiate an action for injunctive or other relief in the circuit court of the county in which the mine is located.

In addition, under ***prior law***, any citizen was authorized to intervene in an enforcement action brought by the DOJ. ***The Act*** retains the right of intervention but limits it to persons having an interest that is or may be adversely affected in the enforcement action.

CITIZEN SUITS

Under ***prior law***, citizen suits were an additional mechanism by which the metallic mining law could be enforced. Any citizen was authorized to commence a civil action against the DNR, alleging that the DNR had failed to perform acts or duties under the mining law. In addition, a citizen could bring a civil action against any person alleged to be in violation of the mining law.

Under ***the Act***, no such citizen suits would be authorized with regard to ferrous mining.

NET PROCEEDS OCCUPATION TAX

A net proceeds occupation tax is imposed on net income from the sale of "metalliferous" minerals extracted in the state. The tax rate is graduated, ranging from 0% to 15%, depending on the amount of net proceeds per year. The tax brackets are adjusted for inflation.

Under ***prior law***, all revenue from the net proceeds occupation tax was distributed to the investment and local impact fund, a fund established to receive revenues relating to metallic mining. The fund is managed by an 11-member board, which makes specified payments to local governments in areas affected by mining. Under ***the Act***, for ferrous mines, 60% of the net proceeds occupation tax revenue is transferred to the investment and local impact fund, and 40% is transferred to the state's general fund.

The investment and local impact fund board must make specified mandatory payments to local governments in an area affected by metallic mining. If revenues remain after mandatory payments have been made, the board may distribute additional revenues to such local governments for one of 10 specified purposes. The Act requires the board to give preference to private sector economic development projects when making such payments.

Finally, the Act specifies that a person who is subject to the net proceeds occupation tax must use generally accepted accounting principles to determine the person's tax liability.

FEES REQUIRED UNDER CH. 70, STATS.

In addition to, or as offsets to, the net proceeds occupation tax revenue, the investment and local impact fund receives revenue from several fees required in connection with a mining operation. Applicable fees, assessed under ch. 70, include notice of intent fees, a construction fee, and an administrative fee. With the revenue from those fees and the net proceeds occupation tax, the Investment and Local Impact Fund Board makes certain mandatory and discretionary payments to local governments in an area impacted by a mine. ***The Act*** retains these fees and payments and increases the notice of intent fees from $50,000 to $75,000.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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