



## WISCONSIN LEGISLATIVE COUNCIL

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TO: MEMBERS OF THE ASSEMBLY COMMITTEE ON JOBS, SMALL BUSINESS, AND  
THE ECONOMY

FROM: Anna Henning, Staff Attorney, and Larry Konopacki, Senior Staff Attorney

RE: 2011 Assembly Bill \_\_ (LRB-3520/1), Relating to the Regulation of Ferrous Metallic Mining

DATE: December 9, 2011

This memorandum describes 2011 Assembly Bill \_\_\_\_ (LRB-3520/1) (“the bill”), relating to the regulation of ferrous mining.<sup>1</sup> Among other legislative findings, the bill provides that it is state public policy to attract and aid new mining enterprises and expand the mining industry in the state. Based on that and other findings, the bill establishes an expedited process and modifies standards to facilitate permits for ferrous mining.

This memorandum begins with a brief overview of the bill (page 2). The memorandum then describes changes to current mining law made by the bill with respect to the following subjects:

- Exploration license (page 4).
- Prospecting (page 5).
- Mining permitting process (page 7).
- Environmental review (page 16).
- Reimbursement of Department of Natural Resources (DNR) costs (page 16).
- Bond for reclamation (page 17).
- Restrictions on the mining of sulfide minerals (page 17).

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<sup>1</sup> The bill defines “ferrous mineral” to mean “an ore or earthen material in natural deposits in or on the earth that primarily exists in the form of an iron oxide, including taconite and hematite.”

- Judicial review of DNR decisions relating to mining (page 18).
- Conflicts between the mining law and other laws (page 18).
- The net proceeds occupation tax imposed on income from the sale of metallic mining minerals (page 18).
- Enforcement by the Department of Justice (page 20).
- Citizen suits (page 20).
- Local impact committees (page 21).
- Regulation of the processing and disposal of mining waste (page 21).
- Regulation of impacts to wetlands (page 25).
- Regulation of impacts to navigable bodies of water (page 29).
- Regulation of surface water and groundwater withdrawals (page 31).
- Regulation of groundwater quality (page 33).
- Shoreland and floodplain zoning programs (page 34).

## **OVERVIEW**

Under current law, DNR authorization is required before a person may engage in any of three levels of activity related to mining metallic<sup>2</sup> minerals: exploration, prospecting, and mining. Exploration involves drilling holes not more than 18 inches in diameter to examine geologic features. Prospecting involves more extensive examination of an area, including the collection of ore samples by means such as excavating, trenching, and construction of ramps and tunnels, but not including activities intended for and capable of commercial exploitation of an ore body. Mining refers to the activities conducted in connection with extracting minerals for commercial purposes, including the extraction of minerals and the various infrastructure and waste processing activities required to support the extraction. To date, the DNR has approved only one metallic mining operation under the existing metallic mining statutes—the Flambeau Mine located in Rusk County. A few other mining operations have been proposed, but the proposals were abandoned.

Under current law, the DNR may issue a metallic mining permit following a multi-stage process involving one or more contested case 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. Examples of related approvals include drainage and fill permits for activities affecting wetlands and

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<sup>2</sup> The mining of nonmetallic materials, such as sand and gravel, is governed under a separate statute.

streams; approvals for high capacity wells; wastewater discharge permits; and air emissions permits. In general, related permits and approvals are evaluated using the same standards that apply outside the mining context. Exceptions apply to wetlands, groundwater regulation, and solid waste facilities, for which unique statutory or administrative rule provisions apply to mining operations.

Unlike in some states, Wisconsin's mining law generally does not distinguish between the mining of ferrous and nonferrous minerals.<sup>3</sup> The bill creates such a distinction. It creates a new statutory subchapter governing ferrous mining and provides a more expedited approval process for ferrous mining than applies to other metallic mining.

Key changes made by the bill include:

- A new 360-day deadline for DNR approval of ferrous mining permits and all related environmental approvals.
- Removal of the DNR's discretion with regard to determining when ferrous mining permit applications are complete.
- Elimination of contested case hearings relating to prospecting and mining permits.
- Elimination of the requirement that the DNR hold a separate hearing regarding the environmental impact statement for a ferrous mining project.
- An expedited process for prospecting for ferrous minerals to make the process of obtaining approval for prospecting a middle step between exploration and mining. Under current law, the process for obtaining approval for prospecting is similar to the process for obtaining a mining permit.
- Replacement of DNR rule-making authority with detailed statutory provisions for ferrous mining permits and related approvals.
- A \$1.1 million cap on the amount of DNR costs to be reimbursed by a mining permit applicant.
- A provision specifying that conflicts between the ferrous mining law and other statutes will be resolved in favor of the ferrous mining law.
- Elimination of citizen suits as a mechanism for enforcing compliance with ferrous mining permits and laws.

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<sup>3</sup> However, see the discussion below regarding restrictions on sulfide mining under current law. In Michigan, general rules governing metallic mining require a mining operator to adhere to specified criteria, including notice requirements and the submission of an environmental plan. [R 425.1-425.49.] A different set of rules establish more stringent requirements for the mining of nonferrous minerals. [R 425.101-425.602.] In Minnesota, nonferrous mining and ferrous mining are likewise governed by two separate chapters in the administrative rules. [chs. 6130 and 6132, Minn. Adm. Code.] In both Michigan and Minnesota, metallic mining laws applicable to ferrous mining predated rules governing nonferrous mining.

- Reductions to the time period during which a mine operator is required to show proof of financial responsibility for the long-term care of a ferrous mining waste site.
- Less stringent wetland regulations for ferrous mining projects, particularly with respect to allowing mitigation of impacts to certain wetlands.
- Streamlined process and reduced requirements to obtain permits for water withdrawals and for activities that impact navigable bodies of water.
- Exemption from shoreland and floodplain zoning ordinances for ferrous mining projects.

### **EXPLORATION LICENSE**

Under *current law*, the timeline and application requirements for a license to engage in exploration of a potential mining site are established by administrative rule and application procedures developed by the DNR. In contrast, *the bill* establishes the procedure and detailed application components for obtaining an exploration license by statute.

#### **Application**

Under *current law*, an applicant for an exploration license must submit the following materials:

- An application fee of \$300.
- A \$5,000 bond.<sup>4</sup>
- 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.

[s. NR 130.05, Wis. Adm. Code.]

*The bill* retains those requirements, with the following exceptions. First, it caps the amount of damage protection required for the certificate of insurance at \$100,000. 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.

#### **Standards for Issuance of a License**

Under *current law*, the DNR must issue an exploration license upon an applicant's satisfactory completion of all conditions in the administrative rules chapter governing exploration. The DNR must deny an exploration license if it finds that proposed exploration will not comply with the minimum statutory standards governing mining activities and reclamation or if the explorer is in violation of ch.

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<sup>4</sup> Under current law and the bill, the DNR may 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.

293, Stats., or any administrative rule governing exploration. [ss. NR 130.06 and 130.09, Wis. Adm. Code.] The issuance of a license is “subject to” various conditions relating to the permanent and temporary abandonment of drill holes.

Under *the bill*, 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 bill requires the DNR to include requirements in the license that are substantially similar to the “subject to” license conditions under current law.

### **Timeline**

Under *current law*, the DNR must issue an exploration license within 10 business days after it receives a completed application, or within the later of 10 business days or July 1st if the application is for the upcoming license year.<sup>5</sup> Current law does not provide a deadline by which an application will be considered complete.

*The bill* retains the 10 business days deadline under current law. However, under the bill, 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. In addition, the bill 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, 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 DNR must then 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).

### **PROSPECTING**

Under *current law*, a person must obtain a prospecting permit before engaging in prospecting. The process for obtaining a prospecting permit involves nearly all of the same steps required to obtain a mining permit, described below, including a notice of intent requirement, environmental review (in most cases), one or more contested case hearings, and requirements for reclamation.

In lieu of the prospecting permit, *the bill* requires 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

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<sup>5</sup> Under current law and the bill, a “license year” is the period of time commencing on July 1 of any year and ending on the following June 30.

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 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.
- 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.

By requiring “revegetation” rather than “reclamation,” the bill may require a lesser standard for returning the site to its original or an equivalent condition. Although the term “revegetation” is not defined in the bill, it appears to suggest that full topographic restoration of the site may not be required.

Under the bill, after the applicant submits materials for all required approvals, permits, and waivers identified by the DNR related to the prospecting permit, together with a \$5,000<sup>6</sup> bond, those materials are considered to be administratively complete on the 30th day after the DNR receives them. Within 14 days of receiving a bulk sampling plan, the bill requires the DNR to identify all approvals, permits, and waivers required under state and federal environmental and natural resources laws before the prospecting plan may be implemented. At the same time, the DNR must 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. The bill requires the DNR to take various mitigation and compensation actions proposed by a mining operator into account when acting on the various environmental and natural resource approvals related to prospecting activity.

Notwithstanding conflicting review periods set forth in statute or administrative rules, the bill requires the DNR to approve or deny all applications for waivers, exceptions, and determinations that approval is not needed within 30 days of the date when the materials are administratively complete. It must likewise approve or deny all other required approvals within 60 days of the date when the materials

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<sup>6</sup> The bill authorizes the DNR to increase the amount of the bond if it determines that \$5,000 is inadequate to cover the costs of revegetation.

are administratively complete. Within that timeframe, the bill also requires the DNR to issue a public notice regarding the proposed bulk sampling activities, draft approvals, pre-application description, and the opportunity for comment. Also within that timeframe, the DNR must provide an opportunity for public comment and hold a single public informational hearing covering all approvals.

### **MINING PERMITTING PROCESS**

*The bill* makes significant changes to the process for obtaining a mining permit for a ferrous mining operation as compared to current law. Some key changes include an overall deadline for approval or denial of a mining permit, elimination of a separate hearing to review the environmental impact statement, and the elimination of contested case hearings from the permit review process.

#### **Timeline**

Under *current law*, the process to obtain a mining permit lasts at least 2-1/2 years, and may take longer if a project is complex or generates significant public input. Several deadlines limit the time period within which DNR must act. However, several stages in the process—most notably the time periods during which draft and final environmental impact statements are prepared—are not subject to a statutory deadline.

The permit approval process begins with the submission of a “notice of intent” to submit a mining permit application. The notice of intent begins the pre-application process, described below. The DNR must hold an informational hearing regarding an applicant’s notice of intent no less than 45 days or more than 90 days after the applicant submits the notice of intent. Within 90 days of the close of that hearing, the DNR must provide specified information (described in the section on pre-application notification) to the potential applicant. [s. NR 132.05 (4), Wis. Adm. Code.]

At that time, the DNR may also request a “scope of study,” in which data requirements, specific methodologies, a tentative schedule for collection of field data, names of people who will be responsible for data collection, and related information are identified. If the DNR requests a scope of study, the study must be submitted by the potential applicant within 120 days of the DNR’s request. The DNR must accept, reject, or modify the scope of study within 60 days of its receipt. [s. NR 132.05 (7), Wis. Adm. Code.]

After an applicant submits an application for a mining permit, the DNR prepares a draft environmental impact statement. The DNR must hold an informational meeting regarding the draft environmental impact statement no sooner than 30 days and no later than 60 days after the document is released.

The DNR then prepares the final environmental impact statement. After the final environmental impact statement is released, the DNR must hold a “master hearing” no sooner than 120 days and no later than 180 days after it releases the final environmental impact statement.<sup>7</sup> The DNR must make the

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<sup>7</sup> A “master hearing” is a hearing to consider both the mining permit application and applications for various related environmental and natural resource approvals required in connection with a mining permit. Public hearing procedures are discussed in greater detail below.

final decision regarding a mining permit within 90 days of the completion of the record from the master hearing.<sup>8</sup>

Under *the bill*, 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.

After the mining permit application is submitted, the bill requires the DNR to issue or deny a mining permit *no more than 360 days* after the day on which an application for a mining permit is deemed “administratively complete.” Under the bill, an application for a mining permit is deemed to be administratively complete on the 30th day after the DNR receives the application, unless the DNR provides the applicant with written notice prior to that date that the application is not complete. The DNR may determine that an application is incomplete only if the applicant fails to submit one of the following four items: a submission fee; a mining plan; a reclamation plan; or a mining waste site feasibility study and plan of operation. The bill does not appear to authorize the DNR to determine that an application is incomplete based on an assessment of the content of the materials submitted.

In addition to the final mining permit, the bill requires the DNR to approve or deny all environmental and natural resource permits related to the project by the same 360-day deadline required for processing the mining permit application, provided that the applicant submits the application for the related permits no later than 60 days after the day on which the application for the mining permit is administratively complete. If the applicant submits an application for a related permit more than 60 days after submitting the mining permit application, the deadline for approval is extended by the number of days past the 60th day that the applicant submits the application.

### *Automatic Approval*

*Current law* does not provide for the automatic approval of a mining permit in the event that the DNR does not act within the statutory timeline. Under *the bill*, if the DNR does not issue or deny a mining permit within the 360-day deadline described above, then the permit application is automatically deemed to have been approved. The permit applicant may then commence ferrous mining activities, regardless of any delay in DNR issuance of the permit.

### *Pre-Application Notification*

Although the documents serve somewhat different functions, both current law and the bill require an applicant for a mining permit to submit a document to the DNR prior to the submission of a permit application. Under *current law*, a person who intends to apply for a metallic mining permit must first submit a “notice of intent” to the DNR. The notice of intent is an indication that the potential applicant is interested in developing a mine and will be collecting data to support a mining permit application. The notice of intent generally must be submitted prior to collecting data to support a mining

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<sup>8</sup> Decisions regarding related DNR permits and approvals must be approved or denied in accordance with this same timeframe, provided that the applications for such permits and approvals are submitted in a timely manner. [s. 293.43 (1m) (b), Stats.]



permit application.<sup>9</sup> The notice of intent includes information regarding the potential application; a map of the proposed mining site; the date on which the prospective applicant intends to file a mining permit application; environmental data; and a preliminary project description. The notice need not be submitted within any particular time of the mining permit application; however, because it generally must be submitted before any data is collected, it would typically need to be submitted well in advance of the permit application.

Under current law, the filing of the notice of intent triggers a dialogue whereby the DNR advises the potential applicant about specific environmental and quality assurance requirements the person must 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 will accept general environmental data submitted by the potential applicant with the notice of intent; and preliminary verification procedures to be conducted by the DNR. [ss. 293.31 (4) and 293.43 (1m), Stats.; s. NR 132.05 (4), Wis. Adm. Code.] The DNR may revise or modify requirements relating to information which must be gathered and submitted by the potential applicant. [s. NR 132.05 (5), Wis. Adm. Code.] The DNR may also require the potential applicant to develop a “scope of study” designed to comply with the DNR’s informational requests. [s. NR 132.05 (7) (a), Wis. Adm. Code.] The filing of a notice of intent also triggers fees, described in the section on the net proceeds occupation tax and Mining Investment and Local Impact Fund, that support local governments as they negotiate with a potential mine operator.

*The bill* requires a permit applicant to submit a “pre-application notification.” 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 bill, 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.<sup>10</sup> After an applicant submits a pre-application notice, the bill requires the DNR 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. After the meeting, the bill 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 environmental impact statement.

The bill requires an applicant to submit an environmental impact report, described below. Unlike current law, it does not authorize the DNR to request a “scope of study” document. In addition,

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<sup>9</sup> However, the DNR may consider data collected before the notice of intent if it determines that the benefits of admitting the data outweigh the policy reasons for excluding it. [s. 293.31, Stats.]

<sup>10</sup> 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.

as mentioned below, the pre-application notification submitted under the bill does not appear to trigger fees to support activity by local impact committees as does the notice of intent under current law.

### **Public Hearings**

Under *current law*, the process for obtaining a metallic mining permit involves 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. The DNR is authorized to hold additional hearings relating to any aspect of the administration of the metallic mining statutes. [s. 293.15, Stats.]

To the extent practicable, the DNR is required under current law to include all related permits applied for in connection with a proposed mining operation within the scope of the master hearing.<sup>11</sup> A master hearing on a mining permit includes both general public testimony and a contested case hearing. During the public testimony portion of the hearing, all interested persons must be given an opportunity to express their views on any aspect of the matters under consideration. During the contested case hearing, persons who participate as parties may submit legal briefs and evidence and call and cross-examine witnesses, who testify under oath. Under current law, a second contested case hearing may also be held after a mining permit is issued.

Under *the bill*, the DNR is not required to hold informational hearings regarding the notice of intent or the draft environmental impact statement. In addition, the bill eliminates the contested case portion of the master hearing and specifies that no person is entitled to a contested case hearing regarding a ferrous mining permit or any other approval issued by DNR in connection with a ferrous mining operation. Instead, the bill requires the DNR to hold one informational hearing to cover the mining permit, all other approvals, and the environmental impact statement. In addition, DNR must make the applications for the ferrous mining permit, applications for other permits related to a proposed mining operation, the environmental impact statement, 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, DNR must describe the opportunity for written public comments by any person within 45 days after the notice is published, and shall provide the date, time, and location of the public information hearing.

### **Contents**

Under *current law*, an application for a metallic mining permit must include all of the following components:

- A mining plan.

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<sup>11</sup> After an applicant submits a notice of intent under current law, the DNR must 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 hearing on the mining permit.

- 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 has 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.

[s. 293.37 (2), Stats.]

*The bill* eliminates the requirement that the applicant submit “other pertinent information requested by the DNR.” The bill 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 bill also requires a waste site feasibility study, described below, as part of the mining plan, whereas under current law, a feasibility study is submitted and reviewed separately. In addition, the bill modifies the mining and reclamation plans, as described below.

### ***Mining Plan***

Under *current law*, a mining plan must 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 will be consistent with the reclamation plan and comply with various specified standards.
- A pre-blasting survey.

[s. NR 132.07, Wis. Adm. Code.]

*The bill* modifies several of the general components of the mining plan required under current law. Under the bill, 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. In addition, information regarding the nature and depth of the overburden is not required. The bill also eliminates the 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 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 bill adds the phrase “to the extent possible” to the relevant standard. Finally, with regard to a demonstration related to the backfilling of excavations, the bill retains the standard prohibiting violations of groundwater quality standards but removes a standard prohibiting an adverse affect on public health or welfare.

### ***Reclamation Plan***

Under ***current law***, a reclamation plan must include detailed information and maps regarding reclamation procedures and demonstrations of satisfactory evidence that the proposed reclamation will 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 statute. 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 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 are of sufficient magnitude, as determined by the DNR, the plan must include a comprehensive long-term plan showing the manner, location, and estimated timetable for reclamation. Finally, if it is physically or economically impracticable or environmentally or socially undesirable for the reclamation process to return the area to its original state, the applicant must provide reasons that the reclamation process would be impracticable or undesirable, and a discussion of alternative conditions and uses to which the affected area can be put. [s. NR 132.08, Wis. Adm. Code.]

As with the mining plan, *the bill* retains some and modifies other current components of the reclamation plan. In particular, the bill retains the requirement that the plan include a map, and it requires similar map features as are required under current 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 bill 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 bill retains accommodation under current 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 bill modifies the standard regarding the storage of removed topsoil for use in reclamation. Specifically, the bill allows topsoil to be used in reclamation “or in the mitigation or minimization of adverse environmental impacts,” whereas current law requires all disturbed topsoil to be used for reclamation. The bill 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 bill removes the requirement that plant species not indigenous to the area may be used if necessary only if such species are acceptable to the DNR.

In addition, the bill 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 *current law*, the DNR *must issue* a mining permit if all of the following six standards are satisfied:

- The mining plan and reclamation plan are reasonably certain to result in reclamation of the mining site.
- The proposed mine will comply with applicable air, ground and surface water, and solid and toxic waste disposal requirements.
- A proposed surface mine site is not unsuitable for surface mining. A site is unsuitable if the mining activity is reasonably expected to irreparably damage specified unique features of the land or habitat required for specified endangered species.

- The proposed mine will not endanger public health, safety, or welfare.
- The proposed mine will result in a net positive economic impact in the area reasonably expected to be most impacted by the mining activity.
- The proposed mining operation conforms with all applicable zoning ordinances.

[s. 293.49 (1), Stats.]

*The bill* likewise requires the DNR to issue a mining permit if six conditions are satisfied. The bill retains two of the six conditions set forth in current law—namely those requiring that the proposed mining is not likely to result in substantial adverse impacts to public health, safety, or welfare and requiring that the proposed mining will result in a net positive economic impact in the area.

Of the four remaining conditions for approval under current law, the bill eliminates and replaces two and amends two. First, the bill eliminates the condition requiring that a proposed mining site not be unsuitable for mining (however, as described below, the bill retains unsuitability as a basis for denial of the permit). Second, the bill 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 bill 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 bill.

The bill modifies the two remaining conditions. First, whereas current law requires a mining operation to conform with all applicable zoning ordinances, the bill requires that the applicant *has applied* for applicable zoning approvals. Second, whereas current law requires 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 bill requires that the mining plan and reclamation plan be reasonably certain to result in reclamation of the mining site consistent with the statute.

### **Grounds for Denial of a Mining Permit Application**

Under *current law*, the DNR *must deny* an application for a mining permit if any of the six standards for issuance of a mining permit, listed above, is not satisfied. In addition, the DNR must deny the permit if the applicant, or an officer or director of the applicant, has forfeited a bond posted in accordance with mining activities in this state within a specified timeframe, or if the proposed mining activity may 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 cannot be feasibly prevented.
- Significant surface subsidence that cannot 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.

[s. 293.49 (2), Stats.; s. NR 132.10 (1), Wis. Adm. Code.]

**The bill** 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 current law, a site is unsuitable if the mining activity is “reasonably expected” to destroy or irreparably damage specified features. Under the bill, a site is “unsuitable” if “it is more probable than not” that the mining activity will irreparably damage specified features. Also within the definition, both current law and the bill include 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 bill excludes archaeological areas and other lands designated by the DNR from the unique land features to be taken into consideration.

Second, the bill includes a narrower set of circumstances in which landslides, subsidence, or hazards give rise to a mandatory denial than apply under current law. Specifically, the bill 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 protected from hazards resulting in irreparable damage.

Finally, the bill eliminates the requirement under current law that the DNR must deny a mining permit if the proposed project does not conform with all applicable zoning ordinances.

### **Exemptions**

Under current law and the bill, an applicant for a mining permit may request exemptions from various requirements related to metallic mining. Under **current law**, the DNR is authorized to grant an exemption, but is not required to do so. In contrast, **the bill** requires the DNR to grant an exemption if the request is consistent with the purposes of the iron mining statutes, will not violate other environmental laws, and will either not result in significant adverse environmental impacts, or such adverse impacts will be offset through compensation or mitigation.

Under **current law**, the DNR generally must act on an exemption request within 15 days. However, the 15-day timeline does not apply if the requested exemption requires an exception from the mining statute. **The bill** retains the 15-day timeline but removes the exception for exemptions from statutory requirements.

**Current law** requires certain procedures to be followed, including the requirement that requests for exemptions generally must 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). The DNR is also required to publish notice of a requested exemption. In addition, current law provides a process by which a hearing may be held to review a proposed exemption. In contrast, **the bill** 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. *Current law* requires the DNR to prepare an environmental impact statement for every metallic mining permit. The statement must 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. [s. 293.39, Stats.] As mentioned, the DNR must issue a draft environmental impact statement before preparing a final environmental impact statement. In addition, the DNR may require that a potential mining permit applicant submit an environmental impact report, which serves as a starting point for compilation of the draft environmental impact statement.

*The bill* retains the requirement that an environmental impact statement be prepared for each proposed ferrous mining operation and makes a few changes to the process. The bill removes “other significant factors” from the factors that must be considered in the statement. In addition, the bill requires an applicant for a ferrous mining permit to submit an environmental impact report together with the mining permit application. Finally, as mentioned, the bill does not require a public hearing regarding a draft environmental impact statement.

With regard to prospecting, *current law* acknowledges that an environmental impact statement may in some cases be required under s. 1.11 (2), Stats., which requires state agencies to prepare environmental impact statements when taking “major actions” that significantly affect the quality of the human environment. Current law does not explicitly require that such a statement be prepared for all prospecting permits. [s. 293.35 (5), Stats.] In contrast, *the bill* specifies that the DNR is not required to prepare an environmental impact statement for exploration or bulk sampling approvals.

## **REIMBURSEMENT OF DNR COSTS**

Under current law, applicants for a prospecting or mining permit must pay an initial fee in an amount estimated by the DNR to cover costs incurred by the department in connection with processing permit applications, excluding costs related to the evaluation of the environmental impact statement. [s. 293.32, Stats.] Such applicants must also 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. [s. 23.40 (3), Stats.] In addition, the applicants must pay various fees for related approvals under state environmental and natural resources laws.

When the DNR issues or denies a prospecting or mining permit, or when a permit application is withdrawn, the DNR must compare the fees paid for the prospecting or mining permit, together with fees paid for specified related approvals, with the actual costs incurred by the department. The amounts are then reconciled such that the applicant will have paid all costs incurred by the DNR, but not more than that amount.

*The bill* likewise requires an applicant for a mining permit to reimburse the DNR for costs related to the evaluation of a mining permit application and preparation of an environmental impact statement. However, the bill caps costs to be paid by an applicant at \$1.1 million. The bill provides that an amount no greater than \$1.1 million 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, the bill 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**

*Current law* requires an applicant to submit bonds in connection with exploration, prospecting, and mining. An applicant for an exploration license must submit a bond of \$5,000 to the DNR prior to conducting exploration. An applicant for a prospecting or mining permit must provide a bond<sup>12</sup> to the DNR after a permit has been approved but before beginning operations. The bond is conditioned on faithful performance of all of the requirements of the pertinent statutes and administrative rules. The bond must 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 will be disturbed by the end of the following year.

*The bill* likewise requires a \$5,000 bond to be submitted prior to conducting exploration. For bulk sampling, the bill requires a \$5,000 bond, which may be increased by the DNR. The bill does not modify current law with regard to a bond requirement for a ferrous mining permit, with one exception: the bill 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.

### **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. [s. 293.50, Stats.] This requirement is titled the “sulfide mining moratorium law.”

The concern with the disturbance of sulfide minerals is that when exposed to oxygen and water, sulfide minerals may undergo a series of chemical and biochemical reactions that produce acidic products which may have negative effects related to changing the pH level in groundwater and surface water and by dissolving other minerals, which may cause the release of heavy metals.

The sulfide mining moratorium law defines “sulfide ore body” broadly as “a mineral deposit in which metals are mixed with sulfide minerals.” Iron ore itself is not a sulfide ore. However, based on consultation with geologists at the U.S. Geological Survey and the DNR, virtually all geological formations in the state contain at least trace amounts of sulfide minerals, which means that this law

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<sup>12</sup> In lieu of a bond, the applicant may deposit cash, certificates of deposit, or government securities with the department.

could apply to any type of mining project. Although the DNR reports that it would be unlikely to apply the sulfide mining moratorium law to a ferrous mining project for which only trace amounts of sulfide minerals are present or the sulfide minerals that are present are avoidable, the breadth of the definition of “sulfide ore body” could create uncertainty as to the legitimacy of a prospective challenge to the DNR on this point.

*The bill* amends the sulfide mining moratorium law, making it applicable only to nonferrous mining. In particular, it modifies the definition of “sulfide ore body” to mean “a mineral deposit in which nonferrous metals are mixed with sulfide minerals.”

Regardless of whether the sulfide mining moratorium law would be applied, any mining operation would be required to manage acid production in its surface and groundwater management activities.

### **JUDICIAL REVIEW**

*Current law and the bill* allow for judicial review of final DNR decisions regarding metallic mining. In addition, they both generally limit the scope of judicial review to a bench trial based on the administrative record assembled by the DNR. [s. 227.57, Stats.] Thus, under the bill, as under current law, judicial review of DNR’s decisions would generally not entail the taking of testimony or opportunities to introduce new evidence.

However, because *the bill* eliminates contested case hearings for ferrous mining permits, the scope of review would be narrower under the bill than under current law. Specifically, the administrative record under the bill would not include any sworn testimony, depositions, or other forms of evidence typically introduced during litigation.

### **CONFLICT WITH OTHER STATUTES**

Under *current law*, if there is a conflict between a substantive standard in the metallic mineral mining law and another state or federal standard, the other standard controls. [s. 293.93, Stats.] However, procedures and timelines in the mining law apply to all permits and approvals required in connection with a metallic mine, provided that an applicant submits applications for such approvals in a timely manner. [s. 293.43 (1m) (b), Stats.]

Under *the bill*, if there is a conflict between the ferrous mining statute and another state environmental statute, the ferrous mining statute will control. The bill does not differentiate between substantive and procedural provisions for that purpose.

### **NET PROCEEDS OCCUPATION TAX, FEES, AND THE MINING INVESTMENT AND LOCAL IMPACT FUND**

Under *current law*, a net proceeds occupation tax is imposed on net income from the sale of “metalliferous”<sup>13</sup> minerals extracted in the state. The tax rate is graduated, ranging from 0% to 15%

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<sup>13</sup> The term “metalliferous” is not expressly defined in the Wisconsin statutes. Examples of common definitions for the term include “containing metal” and “yielding metal.”

depending on the amount of net proceeds per year, and the tax brackets are adjusted for inflation. All revenue from the net proceeds occupation tax is distributed to the Mining Investment and Local Impact Fund.

In addition to, or as offsets to, the net proceeds occupation tax revenue, the Mining Investment and Local Impact Fund receives revenue from several fees required in connection with a mining operation. First, an applicant for a mining permit must pay \$50,000 at the time the applicant submits a notice of intent to submit a mining permit to the DNR (and up to two subsequent payments of \$50,000 each during the application process). In addition, each person constructing a metallic mine must pay a construction fee, in an amount sufficient to make one-time construction payments. Finally, a mine operator with gross proceeds must pay an additional administrative fee of an amount calculated by the Department of Revenue (DOR). [ss. 70.395 (2) (dc) and (dg) and 70.3965, Stats.]

The Mining Investment and Local Impact Fund's board makes mandatory and discretionary payments to local governments affected by metallic mining. The following are payments that *must* be made from the fund:

- ***First dollar payments*** in an amount adjusted for inflation (\$206,700 in fiscal year (FY) 2010-11) to each county,<sup>14</sup> city, town, and village in which metalliferous minerals are extracted, and to each Native American community<sup>15</sup> that has tribal lands within a municipality qualified to receive a first dollar payment.
- ***For counties***, 20% of the tax collected from persons extracting metallic minerals in the county or a statutory maximum amount that is adjusted for inflation (\$516,800 in FY 2010-11), whichever is less.
- ***One-time construction payments*** (\$206,700 in FY 2010-11) to each municipality and Native American community that contains at least 15% of a minable ore body for which construction has begun but extraction has not begun.
- ***For a project reserve fund***, 10% of the taxes paid by each mine plus all accrued interest on that amount is paid to the fund, to be used to ensure minimum payments and reimbursements and indemnify municipalities for reclamation expenses.

[s. 70.395 (2) (d), Stats.]

The board may also distribute discretionary payments to school districts, municipalities, and local impact committees. [s. 70.395 (2) (f), (fm), and (g), Stats.] Discretionary payments are limited to specified funding sources and uses. For example, the board may distribute funds from the \$50,000 application fee filed with a notice of intent to a county, town, village, city, tribal government or local impact committee, and such funds must be used for legal counsel, qualified technical experts, and other expenses that directly relate to the good faith negotiation of a local agreement with a mining permit applicant.

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<sup>14</sup> Current law provides for proportional allocation of first dollar payments to counties if minerals are extracted in two or more counties. [s. 70.395 (2) (d) 3., Stats.]

<sup>15</sup> Section 70.395, Stats., uses the term "Native American community." That term is not defined.

*The bill* does not modify current law with regard to the net proceeds occupation tax and the Mining Investment and Local Impact Fund, with two exceptions. First, with regard to ferrous mines, under the bill, 50% of net proceeds occupation tax revenue from ferrous mines must be deposited in the state's general fund. The remaining 50% of such revenue is to be transferred to the Mining Investment and Local Impact Fund.

Second, it appears that the \$50,000 fee (and subsequent \$50,000 payments) required to be submitted together with a notice of intent under current law does not apply to ferrous mining permit applicants under the bill.<sup>16</sup>

### **ENFORCEMENT BY THE DEPARTMENT OF JUSTICE**

*Current law and the bill* provide 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.

Current law and the bill also provide for identical penalties, except that current law authorizes penalties for violations of the relevant statute and rules, whereas the bill authorizes penalties for violations of the relevant statute and permits or orders. Because the bill removes rule-making authority with regard to ferrous mining, it does not authorize penalties for the violation of administrative rules. Specifically, both current law and the bill authorize forfeitures of not less than \$10 nor more than \$5,000 per day of a violation. [s. 293.83, Stats.] However, the bill prohibits the imposition of forfeitures during the time that mining is authorized under procedures established in the bill for amending a mining permit.

*Current law* authorizes the DNR to issue a stop order to a mining operator, requiring immediate cessation of mining, at any time that the DNR determines that the continuance of mining constitutes an immediate and substantial threat to public health and safety or the environment. [s. 293.83 (4) (a), Stats.] Under *the bill*, the DNR is not authorized to issue a stop order if it makes such a determination. Instead, in such situations, the bill 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 *current law*, any citizen may intervene in an enforcement action brought by the DOJ. [s. 293.89 (2) (a) 2., Stats.] *The bill* 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 *current law*, citizen suits are an additional mechanism by which the current mining law is enforced. Any citizen may commence a civil action against the DNR, alleging that the department has failed to perform acts or duties under the mining law. In addition, a citizen may bring a civil action against any person alleged to be in violation of the mining law. [s. 293.89, Stats.]

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<sup>16</sup> However, the bill authorizes local impact committees formed with regard to ferrous mine proposals to receive such funds.

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

### **LOCAL IMPACT COMMITTEES**

Under *current law*, one or more counties, towns, villages, cities, or tribal governments likely to be substantially affected by a proposed mining operation may establish a local impact committee. A local impact committee may facilitate communications, review and comment on proposed operations, and conduct other activities relating to a proposed mining operation. Such committees may submit a request to obtain operating funds from the Mining Investment and Local Impact Fund, described above.

*The bill* generally retains the authority under current law relating to local impact committees. However, with regard to ferrous mining, as described above, although it retains the authority of local impact committees to receive such funds, the bill may be interpreted to eliminate the fee requirement from which the Mining Investment and Local Impact Fund derives funds for local impact committee activities.

### **MINING WASTE**

Mining operations produce waste in the form of overburden (material above the mineral to be mined), tailings (material that remains after the sought-after mineral is extracted and processed), and waste rock (rock that does not include sufficient quantity of the sought-after mineral to be processed). Under *current law*, with the exception of responsibility for long-term care of the mining waste site, the disposal of solid wastes from a mining operation is generally governed by administrative rules. When promulgating those rules, the DNR is required to consider the special requirements of metallic mining operations in the location, design, construction, operation, and maintenance of facilities for the disposal of metallic mining wastes, as well as any special environmental concerns that will arise as a result of the disposal of metallic mining wastes into consideration when promulgating those rules. [s. 289.05 (2), Stats.]

Under *the bill*, the disposal of mining waste is governed by the new ferrous mining statute, and approvals and demonstrations for a mining waste site or facility are submitted as part of a mining permit. The bill specifies that the DNR may not regulate the use of mining waste in reclamation or the construction of any facility or structure except through the department's review of the mining plan and reclamation plan and the approval of the application for the mining permit.

### **Feasibility Study and Plan of Operation**

Under *current law*, an applicant must submit a feasibility report (the bill terms it a "feasibility study") and a plan of operation relating to the disposal of solid waste resulting from the mine. *The bill* requires a feasibility study to be submitted as part of a mining permit application whereas, under current law, feasibility reports are submitted and processed separately.

Current administrative rules acknowledge that the amount of data that must be included in a feasibility report varies according to the type of site. However, *current law* requires specified minimum information to be provided in a feasibility report.<sup>17</sup>

The feasibility study required to be submitted under *the bill* includes many of the same components required under current law, but the bill modifies or eliminates several requirements. For example, under current law, an applicant for a mining waste site approval must submit demonstrations showing that there is a reasonable certainty that the facility will not result in a violation of groundwater quality standards beyond the boundaries of the design management zone, discussed below. In contrast, the bill requires modeling to assess waste site performance at a depth of not more than 1,000 feet into the Precambrian bedrock or the depth of the mining excavation, whichever is greater. In addition, the bill retains the requirement that alternatives to the design and location be identified, but it removes requirements for demonstrating a site selection process fulfilling specified criteria to minimize the overall adverse environmental impact of the waste site. In addition, the bill eliminates some required information regarding site closing and other submissions relating to the long-term care of the waste site.

In addition to the feasibility report, *current law* requires an applicant for a mining waste site approval to submit a plan of operation. A plan of operation must contain: engineering plans; an operations manual; a design report; a detailed contingency plan; and an appendix. All of those components must include specific information detailed in the administrative rules. [s. NR 182.09, Wis. Adm. Code.] *The bill* retains most of the required components of the operation plan, but it eliminates portions of the operations manual required under current law and makes other minor modifications.

### *Standards for Approval of a Mining Waste Site*

As noted, *the bill* prohibits the DNR from regulating mining waste sites except in connection with a mining permit. Thus, although the bill incorporates many of the standards used in the DNR review of mining waste site applications under current law, those standards are generally included as

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<sup>17</sup> In particular, current law requires the following information to be included, at a minimum:

- General information regarding the proposed facility, such as site location, contact information, and estimated quantities of waste.
- The results of a characterization and analysis of all mining wastes to be disposed of or stored in the waste site, including an evaluation of the quantities, variability, and physical, radiologic and chemical properties of the proposed waste based on testing of representative samples.
- A discussion of regional site setting, addressing hydrology, geology, climatology, and other characteristics of the region; and the proposed design of the facility.
- A preliminary water budget for the periods before construction, during operation, and after closure of the waste facility.
- An analysis of the impact of the waste site on aesthetics; data regarding the safety factors of tailing pond embankments.
- A contingency plan in the event of an accidental or emergency discharge or other unanticipated condition.
- An economic analysis for site closing and long-term care of the waste site.
- Alternatives to the design and location of the proposed waste site.
- An appendix that includes specified scientific samples, methodology, and references.

[s. NR 182.08 (2), Wis. Adm. Code.]

required demonstrations to be included in the feasibility study and plan of operation, rather than as standards for the DNR decisions regarding the mining waste site. In addition, the bill modifies some technical demonstrations required under current law.

Specifically, *current law* requires slopes of a completed waste site to be no less than 2% and no greater than 33%. *The bill* requires a demonstration that such slopes be no less than 2% and no greater than 50%.

Similarly, whereas *current law* requires that embankment materials or drainage or filter bed materials be compacted to 95% of maximum dry density, *the bill* requires a demonstration that such materials be compacted to 90% of maximum dry density.

In addition, *the bill* eliminates a requirement that a mine waste facility, where practicable, should be located so that tailings pipelines do not cross any major watercourse or pass through any wetland. The bill also removes a standard requiring that high priority be given to selecting a design and operating procedure for the waste sites that provides for the reclamation of all disturbed sites and minimizes the risk of environmental pollution.

#### **Restrictions on the Location of a Mining Waste Site**

Both current law and the bill restrict the locations where a mining waste site may be located. Under *current law*, a mining waste site may not be located in the following areas: within areas identified as unsuitable for mining under the provisions discussed above, taking the presence of endangered and threatened species into account; within 1,000 feet of any navigable lake, pond, or flowage; within 300 feet of a navigable river or stream; within a floodplain; within 1,000 feet of the edge of the right-of-way for a state trunk highway, interstate, or federal highway, state or federal park, scenic easement purchased by the DNR or the Department of Transportation (DOT), the boundary of a designated scenic or wild river, a scenic overlook designated by the DNR, or a bike or hiking trail designated by the federal government or state Legislature; within 1,200 feet of any public or private water supply well; within an area which contains known mineral resources; within 200 feet of a property line; or within an area where the DNR determines there is a reasonable probability that the waste will result in a violation of surface water or groundwater quality standards. [s. NR 182.07, Wis. Adm. Code.]

*The bill* includes similar location criteria, with some exceptions. Namely, it does not have any restriction relating to the unsuitability of the area for mining. In addition, the restrictions for locations within 1,000 feet or 300 feet of specified navigable waters do not apply under the bill to activities that are approved by the DNR under specified statutory provisions created by the bill. Finally, the bill does not include the restriction on locations where the DNR determines that there is a reasonable probability that the waste will result in a violation of surface water or groundwater quality standards.

#### **Inspection and Monitoring of a Mining Waste Site**

Under *current law*, the DNR may either require the owner or operator of a solid waste disposal site or facility to conduct specified monitoring or conduct its own monitoring of the site or facility. [s. NR 182.13 (1), Wis. Adm. Code.]

*The bill* retains the DNR's authority to require a site operator to conduct monitoring, but it does not expressly authorize the department to monitor the site or facility. The bill also retains provisions regarding the scope and frequency of monitoring that the DNR may require, with some exceptions. Exceptions generally relate to the submission of specified samples to the DNR. Specifically, the bill eliminates provisions requiring the submission of water elevation measurements and sampling and requiring specified types of groundwater sampling. With regard to the inspection of active and inactive dams connected with the waste site, the bill retains detailed inspection requirements, but eliminates the requirement that the results of such inspections be submitted to the DNR. Instead, under the bill, the results must be recorded in an operating log. The bill does not expressly authorize the DNR to inspect a waste site operating log.

Under *current law*, a qualified representative of the owner of a mine waste facility must visually inspect various aspects of the facility at least weekly to check for specified conditions such as structural weakening, damage to fences or barriers, and possible environmental damage. *The bill* retains the visual inspection requirement but provides that such inspections must be conducted on a monthly, rather than weekly, basis.

#### **Recordkeeping and Reporting Requirements**

*Current law* requires owners of mine waste disposal sites or facilities to keep an operating log, retain certain records, and submit specified information to the DNR. [s. NR 182.14, Wis. Adm. Code.] Under *the bill*, no recordkeeping requirements apply to a ferrous metal surface mine that is backfilled with mining waste. For other mining waste sites and facilities, the bill retains some and modifies other recordkeeping requirements.

Specifically, the bill generally retains the record retention requirements that apply under current law. The bill references the operating log in connection with requirements for inspections, but it eliminates the general operating log requirements. Finally, the bill eliminates some reporting requirements and retains other reporting requirements. Specifically, the bill eliminates provisions requiring a mine owner to: relay specified conditions to the DNR within five days; submit duplicate copies of specified records to the DNR upon closure of the facility; forward monitoring data to the DNR on a quarterly basis; and notify the DNR prior to cessation of disposal operations. The bill retains a requirement to submit an annual summary report, containing statistical summaries of annual and cumulative project data.

#### **Proof of Financial Responsibility for Long-Term Care of the Mining Waste Site**

Under *current law and the bill*, an owner of a mining waste facility must demonstrate proof of financial ability to pay for the long-term care of a mining waste site. (Under current law, a similar requirement applies to waste site facilities for prospecting.)

Under *current law*, a mining waste facility owner must prove his or her financial ability to provide for the long-term care of the site by submitting a bond, irrevocable trust, escrow account, or other specified mechanism to prove financial responsibility. After 40 years have passed since the closure of the mining waste site, the owner may apply to the DNR for termination of its obligation to



provide proof of financial responsibility for the long-term care of the site.<sup>18</sup> If the owner does not submit such an application, the obligation to maintain proof of financial ability continues indefinitely. [s. 289.41 (1m) (b) 2m., Stats.]

After an owner submits an application to have the obligation terminated, the DNR may terminate the owner's obligation following the opportunity for a public hearing, and after a public hearing is held, if requested by a political subdivision or any six persons within 30 days of the publication of the opportunity for a hearing. The DNR may grant a termination of the proof of financial responsibility obligation, after holding a 30-day public comment period and a public hearing, if a hearing is requested, if it determines that proof of financial responsibility for long-term care of the site is no longer required. The DNR must make its decision within 120 days after the publication of a notice regarding the opportunity for public comment or within 60 days after a public hearing is adjourned, whichever is later. [s. 289.41 (1m) (g), Stats.]

Under *the bill*, a mine operator's obligation to provide proof of financial responsibility for long-term care of a mining waste site ends automatically when 40 years have passed since the closure of the site. In addition, after 20 years have passed since the closure of the site, an owner of a mining waste site may apply to the DNR to have its obligation terminated. Within 30 days of receipt of the application to terminate the obligation, the DNR must provide notice to the public of an opportunity for comment on terminating the mine operator's obligation. Within 120 days of posting such notice, the department must render a decision regarding termination of the obligation. The bill does not provide for a public hearing regarding that question.

### **Fees Relating to Solid Waste Disposal**

Under *current law*, an applicant for a mining solid waste facility generally must pay a plan review fee when submitting a plan for a solid waste site and a license fee after closure of the site. In addition, owners or operators of licensed mining waste disposal facilities generally must pay a tonnage fee for each ton of waste received and disposed of at a waste disposal facility, or a minimum waste management fund base fee of \$100, whichever is greater. An owner or operator of a waste disposal site must also pay a groundwater fee; an environmental repair fee; a waste facility siting board fee; and a recycling fee.

*The bill* exempts ferrous mining projects from three of seven fees generally assessed with regard to solid waste disposal. Specifically, it eliminates the license fee, tonnage fee, and recycling fee for waste sites and facilities constructed for ferrous mine operations.

### **IMPACTS TO WETLANDS**

With respect to wetlands, *the bill* does not change the general jurisdiction of the state, the permitting process that the DNR uses for evaluating applications for water quality certification, the concept that wetland water quality standards require that various functional values of wetlands be protected from adverse impacts, or the criteria to be used to assure the maintenance or enhancement of

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<sup>18</sup> Regardless of the time period during which a mining site owner must maintain proof of financial responsibility, the owner's legal liability for the site continues in perpetuity and transfers together with the ownership of the site.

these functional values. Similar to current law, the bill requires wetland impacts to first be avoided, then minimized, and then mitigated.

However, the bill makes several significant changes to the standards governing wetland permits, as detailed below. Unlike current law, the bill *requires* the DNR to issue water quality certifications if any impacts that remain after all practical measures are taken to avoid and minimize impacts are offset by mitigation, as defined in the bill and discussed below.

### **Wetland Permitting Process**

Under *current law*, a person who proposes to place fill in wetlands in Wisconsin generally must obtain a permit. If the wetland is a “federal wetland” the applicant must obtain a permit from the U.S. Army Corps of Engineers (ACE) and the DNR must certify that the activity will not violate the state’s water quality standards for wetlands, termed a “water quality certification.” The DNR generally issues a water quality certification if it finds that no practicable alternative exists that would avoid adverse impacts to wetlands, all practicable measures to minimize adverse impacts to the functional values of the affected wetlands have been taken, and the activity will not result in significant adverse impacts to wetland functional values or to water quality, or cause other significant adverse environmental consequences. [s. 281.37 (2) (b), Stats.; s. NR 103.08 (4) (a), Wis. Adm. Code.]

Placing fill in non-federal wetlands<sup>19</sup> in Wisconsin also requires water quality certification from the DNR but is not subject to the ACE permit requirements. Numerous activities other than filling (such as draining or dredging) may also be evaluated based on their effects on wetlands as part of the review of any separate permit requirement for such an activity. Water quality standards for wetlands are narrative standards that describe “beneficial uses” or “functional values”<sup>20</sup> of a wetland such as flood water retention, groundwater recharge or discharge, and fish and wildlife habitat. [ss. 281.15 and 281.36, Stats.; s. NR 1.95 (3) and chs. NR 102-105 and 299, Wis. Adm. Code.]

Under current law, with respect to metallic mining, wetland impacts and other environmental impacts are balanced, recognizing that it may be impossible to site a mine without some adverse impacts to wetlands, as mining activities are defined by the location of the ore body and limited by cost and technological constraints.

Under *the bill*, for federal wetland approvals, the DNR may impose requirements in addition to those contained in an ACE permit only as required to address impacts not addressed in the ACE permit. The bill prohibits the DNR from requiring more mitigated acres than the acreage required under the ACE permit.

For non-federal wetlands, the bill limits the DNR’s review to evaluating alternative site configurations within the area of the ore body to be mined and directs the DNR to determine which

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<sup>19</sup> Non-federal wetlands are “nonnavigable, isolated, intrastate wetlands,” which were removed from the ACE’s jurisdiction by the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

<sup>20</sup> For a description of wetland functional values as codified by the DNR, see ss. NR 1.95 (3) (b) and 132.06 (4) (g), Wis. Adm. Code.

configuration best avoids and minimizes impacts to non-federal wetlands. It directs the DNR, in evaluating these impacts, to recognize all of the following:

1. The limitations associated with the location of the ore body.
2. The need for the processing facilities and waste sites to be contiguous to the mine.
3. The presumption that there will be impacts to non-federal wetlands.

The bill also includes a general legislative finding that because of the fixed location of ferrous mineral deposits, it is probable that mining those deposits will result in adverse impacts to areas of special natural resource interest (“ASNRI”), and to wetlands in areas of special natural resource interest (“ASNRI wetlands”), and that the use of wetlands for mining activities in a way that would result in a significant adverse impact on wetlands is presumed to be necessary.<sup>21</sup>

Finally, the bill requires that in evaluating the significant adverse impacts to wetlands, the DNR must compare the functional values of the wetlands that will be impacted by the mining project with other wetlands and water bodies in the region.

### **Exemptions**

#### ***Exempt activities in wetlands***

Under **current law**, the following activities are generally exempt from permitting requirements for non-federal wetlands: normal farming, silviculture, or ranching activities; maintenance, emergency repair, or reconstruction of damaged parts of structures that are in use in a wetland; construction or maintenance of irrigation or drainage ditches; and construction or maintenance of farm roads, forest roads, or temporary mining roads that is performed in accordance with best management practices, as determined by the DNR. However, the exemptions do not apply to new activities, activities that impair the flow or circulation of a non-federal wetland, or activities that reduce the reach of a non-federal wetland. [s. 281.36 (4), Stats.]

**The bill** retains the exemptions provided under current law. However, the bill does not include the restriction on the exemptions as applied to new activities, activities that impair the flow or circulation of a non-federal wetland, or activities that reduce the reach of a non-federal wetland.

#### ***Artificial wetlands***

Under **current law**, artificial wetlands are also currently exempt from wetland water quality standards unless the DNR determines that significant functional values are present. [s. NR 103.06 (4), Wis. Adm. Code.] **The bill** includes an exemption for artificial wetlands but does not condition this exemption on the DNR not determining that significant functional values are present.

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<sup>21</sup> Under current law, an ASNRI is defined as an area that possesses significant ecological, cultural, aesthetic, educational, recreational, or scientific values. ASNRI wetlands are further defined as wetlands both within the boundary of ASNRI and wetlands that are in proximity to or have a direct hydrologic connection to ASNRI. [See s. NR 103.04, Wis. Adm. Code.]

### Wetland Mitigation

The term “wetland mitigation” or “compensatory mitigation” refers to actions taken to offset the negative impacts of a project on wetlands. These activities may consist of the restoration or enhancement of previously destroyed or degraded wetlands or the creation of new wetlands or the purchase of credits from a wetland mitigation bank.<sup>22</sup> Wetland mitigation may be part of both the ACE and the DNR wetland permitting processes.

Under *current law*, the DNR may not consider a mitigation proposal unless the applicant demonstrates that all appropriate and practicable measures will be taken to avoid and minimize adverse impacts on wetlands. [s. 281.37 (2) (b), Stats.; s. NR 103.08 (4) (a), Wis. Adm. Code.] A similar requirement is included in the bill.

As noted above, under current law, a water quality certification analysis for wetlands includes the evaluation of the overall impact of a proposal on wetland functional values. [s. NR 103.08 (2) and (4) (a), Wis. Adm. Code.] Where mitigation may be included in a proposal, the DNR may consider the positive effect of mitigation as part of its evaluation of wetland functional values. [s. NR 103.08 (4) (a) 3., Wis. Adm. Code.] The DNR’s authority to consider mitigation projects does not *entitle* the applicant to a permit or other approval in exchange for conducting a mitigation project; rather, mitigation is intended to *allow* the DNR to approve permit applications that it might be inclined to disapprove, absent the opportunity to use mitigation to offset the negative impacts of a proposed project.

*The bill* allows the applicant to propose a wetlands compensation and mitigation program to offset any significant impacts to wetlands. The bill lists the activities that can be part of such a program and includes activities that would not qualify as wetland mitigation under current law. Under the bill, a wetland compensation and mitigation program may include any of the following:

- Compensation and mitigation activities, as defined in the bill.
- Protection of upland groundwater recharge areas.
- Shoreline stabilization projects.
- Riparian restoration projects.
- Purchase of credits from a mitigation bank, located anywhere in the state.

*Current law* prohibits the DNR from considering proposed mitigation as part of the review of an application for water quality certification for any part of a project that will adversely impact an ASNRI wetland. [s. 281.37 (2) (c), Stats.; s. NR 103.08 (4) (b), Wis. Adm. Code.] Under *the bill*, mitigation may be used to offset adverse impacts to all types of wetlands, including ASNRI wetlands.

With limited exceptions, *both current law and the bill* require the equivalent of 1-1/2 acres of mitigated wetlands for every acre that is adversely impacted. [s. NR 350.06, Wis. Adm. Code.] Under

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<sup>22</sup> “Mitigation project” means the restoration, enhancement, or creation of wetlands to compensate for adverse impacts to other wetlands. “Mitigation project” includes using credits from a wetlands mitigation bank. [s. 281.37 (1) (b), Stats.]

**current law**, in determining this equivalency, restoration, enhancement, and creation of wetlands are weighted differently: each acre restored wetland receives one credit; each acre of enhanced wetland receives zero to one credit; and each acre of created wetland receives 1/2 credit. [s. NR 350.07, Wis. Adm. Code.] Under **the bill**, restoration, enhancement, and creation of wetlands are weighted equally.

**Current law** generally requires that mitigation must occur within 1/2 mile of an impacted wetland, which is considered “on-site” mitigation. If the DNR determines that on-site mitigation is not practicable, or that it is ecologically preferable that the mitigation occur off-site, the DNR must allow mitigation to be performed as near as practicable to the location of the adversely impacted wetland. [s. NR 350.04, Wis. Adm. Code.] **The bill** adds a third scenario in which off-site mitigation is authorized. Under the bill, mitigation may occur off-site if on-site mitigation is not practicable, or if off-site mitigation is ecologically preferable, or if there is insufficient wetland acreage on-site. As noted, under the bill, such mitigation may include purchases of credits from a mitigation bank located anywhere in the state.

### **IMPACTS TO NAVIGABLE WATERS**

**Current law** requires DNR permits for the following activities affecting navigable water bodies: placing structures and deposits in navigable waters; constructing bridges and culverts; enlarging and protecting waterways; changing stream courses; and removing material from beds of navigable water bodies.

**The bill** creates a separate framework for regulating impacts to navigable waters in the context of a ferrous mining permit. Specifically, before engaging in any “navigable water activity,” defined to mean any of the activities for which DNR permit approval is required under current law, the bill requires a person conducting bulk sampling or mining to either obtain a permit created under the bill or negotiate a contract with the DNR that includes specified components. In addition, whereas under current law a mine operator may need to submit multiple permit applications for different activities impacting navigable waters, the bill specifies that a person applying for more than one permit or contract for a navigable water activity may submit a single application.

The bill also makes changes regarding *who* may apply for a permit to engage in a navigable water activity. **Current law** requires applicants for some permits (for example, permits for structures and deposits and permits for changing stream courses) to be riparian land owners. In contrast, **the bill** provides that persons engaged in bulk sampling or mining need not be a riparian owner to obtain any of the permits related to navigable water impacts required under current law.

### **Permit Standards**

As mentioned, **current law** requires permits to be obtained for each of five types of activities affecting navigable water bodies. For all of the navigable waters permits, current law specifies some types of activities that are exempt from the individual permit requirement.

Where individual permits are required under current law, each permit type has a different set of applicable standards. First, for structures and deposits in navigable waters, the DNR must issue an individual permit to a riparian owner for a proposed structure or deposit if it makes all of the following findings: the structure or deposit will not materially obstruct navigation; the structure or deposit will not

be detrimental to the public interest; and the structure or deposit will not materially reduce the flood flow capacity of a stream. In determining whether to issue an individual permit to the owner of a proposed pier or wharf, the DNR may not deny the permit unless it considers specified alternatives.

Second, for bridges and culverts, the DNR must issue an individual permit if it finds that the bridge or culvert will not materially obstruct navigation, will not materially reduce the effective flood flow capacity of a stream, and will not be detrimental to the public interest.

Third, for the protection and enlargement of waterways, the DNR must issue an individual permit if it finds all of the following: the activity will not be detrimental to the public interest; the activity will not cause environmental pollution; any enlargement connected to a navigable waterway complies with all of the laws relating to platting of land and sanitation; and no material injury will result to the riparian rights of any riparian owner of real property that abuts any water body affected by the activity.

Fourth, for changing stream courses, the DNR must issue an individual permit if it makes all of the following findings: the applicant is the owner of any land upon which the change in course or straightening of the navigable stream will occur; the proposed change of course or straightening of the navigable stream will improve the economic or aesthetic value of the applicant's land; the proposed change of course or straightening of the navigable stream will not adversely affect the flood flow capacity of the stream or otherwise be detrimental to the public interest; and the proposed change of course or straightening of the navigable stream will not be detrimental to the rights of other riparian owners located on the stream or all of these riparian owners have consented to the issuance of the permit.

Finally, for removal of material from beds of navigable water bodies, the DNR must issue an individual permit if it finds the issuance of the permit will be consistent with the public interest in the lake or stream. Relevant notice and hearing requirements apply to all five of these individual permit applications. [ss. 30.12, 30.123, 30.19, 30.195, and 30.20, Stats.]

In addition, the DNR may enter into a contract on behalf of the state for the removal and lease or sale of any material from the bed of any navigable lake or of any outlying waters if the contract is consistent with public rights. Furthermore, the DNR may enter into a contract on behalf of the state for the removal and lease or sale of any mineral, ore, or other material from beneath the bed of a navigable water that the state owns if the contract will be consistent with public rights and if the navigable water will not be disturbed in the removal operation. [s. 30.20 (2), Stats.]

In contrast, *the bill* establishes a single set of standards governing the issuance of a navigable water activity permit. Specifically, it requires the DNR to issue a permit or enter into a contract approving a navigable water activity if all of the following apply: the activity will not significantly impair public rights and interest in navigable water; the activity will not significantly reduce the effective flood flow capacity of a stream; the activity will not significantly affect the rights of riparian owners or the applicant has obtained the consent of all affected riparian owners; and the activity will not significantly degrade water quality.

## WATER WITHDRAWALS

Under *current law*, separate DNR approvals are required for withdrawals of large quantities of surface water from a lake or stream and withdrawals of large quantities of groundwater. Current law provides specific rules governing such activities in the context of mining projects. Specifically, for metallic mining projects, a surface water withdrawal permit is generally required for the withdrawal of water from a lake or stream if the withdrawal will result, in any 30-day period, in a water loss of two million gallons per day above the authorized base level<sup>23</sup> of water loss of the person making the withdrawal. A high-capacity well approval is generally required for the withdrawal of groundwater or the dewatering of a mine if the capacity and rate of withdrawal of all wells involved in the withdrawal of groundwater or the dewatering of mines exceeds 100,000 gallons each day. In addition, a new or modified surface water or high-capacity well approval is typically required if water withdrawals will result in a water loss beyond a specified threshold amount.

*The bill* similarly requires that a person must obtain a permit before withdrawing or using surface water and before withdrawing groundwater as part of a mining or bulk sampling operation if the capacity and rate of withdrawal of all wells involved in the withdrawal of groundwater or the dewatering of mines exceeds 100,000 gallons each day. However, the bill does not require separate approvals for those two types of water withdrawals. Instead, for ferrous mining projects, the bill creates a single permit, termed a “mining water withdrawal permit.” The mining water withdrawal permit is governed by different standards than apply under current law.

Under *current law*, upon receipt of an application for a surface water withdrawal permit relating to a metallic mining project, the DNR must determine the minimum stream flow or lake level necessary to protect public rights, the minimum flow or level necessary to protect the rights of affected riparian owners, the point downstream beyond which riparian rights are not likely to be injured by the proposed withdrawal, and the amount of surplus water at the point of the proposed withdrawal.<sup>24</sup> The DNR must also hold a public hearing on the permit to take testimony on specified issues, such as public rights and benefits and the rights of competing users of the water resources. Within 30 days of the hearing, the DNR must issue or deny the permit, based on the following standards:

- If injury to public rights exceeds the public benefits generated by the mining, the DNR must deny the permit.
- If the proposed withdrawal will consume nonsurplus waters and will unreasonably injure rights of riparians who are beneficially using such waters, the DNR must deny the permit, unless it grants a permit based on modifications of a proposed withdrawal made to avoid injury to public or riparian rights or all affected riparians consent to the proposed withdrawal.
- In all other cases, the DNR must grant the permit.

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<sup>23</sup> In general, the authorized base level of water loss is a water loss the person reports under existing approvals for water withdrawals. If the person has no existing approvals, the base level is zero.

<sup>24</sup> “Surplus water” means water of a stream that is not being beneficially used, as determined by the DNR. [ss. 30.01 (6d) and 293.65 (2) (b), Stats.]

[s. 293.65 (2), Stats.]

Regarding groundwater withdrawals, current law requires the DNR to conduct an environmental review prior to approving construction of a high-capacity well if any of the following criteria apply:

- The well is located in a groundwater protection area, defined as an area within 1,200 feet of a specified outstanding or exceptional resource water that is not a trout stream.
- More than 95% of the amount of water withdrawn by the well will be lost from the water basin in which the well is located as a result of interbasin diversion or consumptive use, or both.
- The well may have a significant environmental impact on a spring.

[s. 281.34 (4), Stats.]

With certain exceptions, the DNR may not approve construction of a high-capacity well that will impair a public water supply, cause significant environmental impact to a groundwater protection area, result in a water loss greater than 95%, or have a significant environmental impact on a spring. The DNR may include conditions in a permit necessary to avoid any of these impacts. [s. 281.34 (5), Stats.]

*The bill* replaces the standards applicable to both surface water withdrawal permits and high-capacity well construction approvals. Under the bill, the DNR generally must issue a mining water withdrawal permit if the withdrawal or use of the surface water or groundwater satisfies all of the following requirements:

- The proposed withdrawal and uses of the water are substantially consistent with the protection of public health, safety, and welfare and will not be significantly detrimental to the public interest.
- The proposed withdrawal and uses of the water will not have a significant adverse impact on the environment and ecosystem of the Great Lakes basin or the Upper Mississippi River basin.
- The proposed withdrawal and use of the water will not be significantly detrimental to the quantity and quality of the waters of the state.
- The proposed withdrawal and use of the water will not significantly impair the rights of riparian owners or the applicant obtains the consent of the riparian owners.
- The proposed withdrawal and use of the water will not result in significant injury to public rights in navigable waters.
- If the withdrawal or the use of the water will result in an interbasin diversion, relevant statutory requirements are satisfied.
- The proposed withdrawal or use of the water will comply with any requirements imposed by the DNR to offset significant impacts to public or private water supplies.



An applicant for a mining water withdrawal permit must submit a plan containing proposed conservation measures to meet the standards listed above. The DNR may require one or more specific conservation measures to be included in the plan. If the DNR finds that the standards above will be satisfied through the implementation of some or all of the conservation measures contained in the plan, it must issue the water withdrawal permit.

In addition, if the DNR finds that the applicant cannot meet all of the standards, the department must nevertheless issue the water withdrawal permit if it determines that the public benefits resulting from the mining operation exceed any injury to public rights and interests in a body of water. In making such determinations, the bill requires the DNR to recognize that the withdrawal and use of the waters of the state in connection with mining is in the public's interest and welfare and fulfills a public purpose. The bill also requires the DNR to consider several specific factors regarding the public benefits of mining operations and other public and private interests. The bill also authorizes the DNR to require a permit applicant to offset a significant impact to a public or private water supply. Finally, the bill authorizes the DNR to impose specified reasonable additional permit conditions, provided that the conditions relate to specified issues and do not interfere with the mining operation or bulk sampling or limit the amount of water to be used for the mining operation or bulk sampling.

### **GROUNDWATER QUALITY**

Under *current law*, the DNR develops enforcement standards in consultation with the Department of Health Services (DHS) for certain chemical substances found in groundwater that are of concern for public health. The DNR also establishes preventative action limits, which represent the percentage of an enforcement standard that may trigger action by DNR to prevent further groundwater contamination.

Outside the boundaries of a designated "design management zone," current law requires certain projects requiring DNR approval, including mining and prospecting operations, to adhere to such enforcement standards.<sup>25</sup> For mining sites and mining waste sites, if an enforcement standard is exceeded outside the boundaries of a design management zone, the DNR may act to prevent any new releases of the substance from traveling beyond the design management zone or other applicable point of standards application and restore groundwater quality within a reasonable period of time.<sup>26</sup> [s. NR 140.26 (2) (a), Wis. Adm. Code.]

Under current law, the horizontal distance to the boundaries of a design management zone for metallic mining projects is generally: 1,200 feet from the outer waste boundary for a mining waste facility; 1,200 feet from the edge of a metallic mineral surface mine or surface prospecting excavation;

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<sup>25</sup> Current law exempts metallic mining projects from general statutes governing groundwater quality and authorizes the DNR to promulgate rules establishing groundwater standards for metallic mining projects, notwithstanding statutes that generally govern groundwater quality. [ss. 160.19 (12) and 293.15 (11), Stats.] However, DNR administrative rules require prospecting and mining sites and mining waste sites to comply with generally applicable groundwater quality standards. [s. NR 182.075, Wis. Adm. Code.]

<sup>26</sup> A smaller design management zone has the effect of stricter regulation, because enforcement actions are taken when contaminants have traveled a lesser distance in groundwater than would be the case with a larger design management zone.

and 1,200 feet from the maximum outer edge of the underground prospecting or mine workings for an underground metallic mineral mine or prospecting excavation.

Under *the bill*, the boundaries of design management zones for ferrous mining operations are generally 1,200 feet from the engineered structures of a mining waste site, including any wastewater and sludge storage or treatment lagoon, the edge of the mine and adjacent mine mill and ferrous mineral processing and other facilities, or at the property boundary, whichever distance is less.

The bill also modifies the DNR's authority to change a given design management zone. Under current law, the DNR may reduce the distance to the boundary of a design management zone for a metallic mining site in specified circumstances, but it may not expand it. In contrast, the bill authorizes the DNR to expand a design management zone for a ferrous mining site by an additional 1,200 feet in any direction, if the DNR determines that preventive action limits and enforcement standards will be met at the boundary of the expanded design management zone and that preventive action limits and enforcement standards cannot be met at the boundary of the zone if it is not expanded. The bill does not appear to authorize the DNR to reduce the size of a design management zone for ferrous mining projects.

Finally, the bill modifies the vertical boundaries of design management zones. Under current law, design management zones for metallic mining sites extend vertically from the land surface through all saturated geological formations. Under the bill, the vertical distance to the boundary of the design management zone extends no deeper than 1,000 feet into the Precambrian bedrock under a ferrous mining site, or the final depth of the mining excavation, whichever is greater.

### **SHORELAND AND FLOODPLAIN ZONING**

The state shoreland and floodplain zoning programs establish building setback, grading, lot size, and other parameters for land located within 1,000 feet of a navigable lake, pond, or flowage, and for land up to 300 feet from a navigable river or stream (or to the landward side of the floodplain of a river or stream, whichever distance is greater). The programs operate as a state and local partnership, whereby the DNR establishes standards, which then are incorporated in local zoning ordinances and enforced by local governments. The state's floodplain zoning program is also based on minimum requirements established by the Federal Emergency Management Agency, which requires states to have a floodplain zoning program in order to qualify for subsidized flood insurance and disaster relief due to flooding.

Under *current law*, an applicant for a mining permit must demonstrate compliance with shoreland and floodplain zoning ordinances as a condition for DNR approval of the mining permit. In contrast, *the bill* specifies that ferrous metallic mining operations are not subject to local shoreland and floodplain zoning ordinances and that the DNR may not prohibit ferrous metallic mining activities on the basis of nonconformance with a shoreland or floodplain zoning ordinance.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

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