



WISCONSIN LEGISLATIVE COUNCIL

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TO: REPRESENTATIVE FRED CLARK AND REPRESENTATIVE DANA WACHS

FROM: ^{LK} Larry Konopacki, Senior Staff Attorney, and Anna Henning, ^{AH} Staff Attorney

RE: Questions Related to 2013 Assembly Bill 1 and 2013 Senate Bill 1 - Mining Near Waters of the State

DATE: February 15, 2013

This memorandum addresses questions that you have posed related to 2013 Senate Bill 1 and 2013 Assembly Bill 1 ("the bill"), which creates an expedited process and modified permitting standards to facilitate permits for ferrous mining in the state and exempts ferrous mining from current state metallic mineral mining laws. We have provided answers to your questions below.

DOES THE BILL ALLOW MINERAL EXTRACTION IN OR UNDER WATERS OF THE STATE?

Under both current law and the bill, a number of factors must be considered in determining whether a particular mining activity could be permitted under or in waters of the state¹. However, the bill does include modifications to certain requirements in current law that may make it more likely that the Department of Natural Resources (DNR) would approve mining activities in or near navigable waters.

For instance, both the bill and current law authorize the DNR to approve the removal and lease or sale of material from the bed of a navigable water. Under current law, a contract for the removal and lease or sale of material such as minerals or ore from the bed of a navigable water owned by the state must be consistent with public rights and must contain

¹ "Waters of the state" is defined to include those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction. [s. 281.01 (18), Stats.]

conditions necessary to protect the public interest and the interests of the state. The navigable water may not be disturbed in the removal operation.

Under the bill, such a contract entered into by the DNR may not significantly impair public rights and interest in navigable water, significantly reduce the effective flood flow capacity of a stream, significantly affect the rights of riparian owners (without their consent), or significantly degrade water quality. In addition, the bill requires an applicant for this type of approval to propose "measures" to meet these requirements that include providing public access to, restoring, or enlarging other navigable waters, improving public rights or interests in navigable waters, offsetting significant impacts to water quality or quantity, enhancing flood storage, conservation, and mitigation.²

The changes in the approval requirements and the addition of the use of measures to offset impacts to navigable waters may combine to make the DNR more likely under the bill than under current law to approve an activity such as a contractual removal of minerals or ore from the bed of a navigable water.

WHAT LEGAL RIGHTS AND REMEDIES, OR OTHER PROTECTIONS, ARE AVAILABLE TO RIPARIAN PROPERTY OWNERS UNDER THE BILL?

Under Wisconsin law, "riparian rights" include a waterfront owner's right to reasonable use of the water for domestic, agricultural, and recreational purposes. The bill regulates withdrawals of ground and surface water and specified impacts to navigable waters conducted as part of a ferrous mining operation. Among other criteria, an applicant for a navigable water activity permit under the bill must demonstrate that the activity will not significantly affect the rights of riparian owners, or that the applicant has obtained the consent of all affected riparian owners. Similarly, an applicant proposing to withdraw more than 100,000 gallons of surface or groundwater each day must demonstrate that the proposed withdrawal and use of the water will not significantly impair the rights of riparian owners, or that the applicant has obtained the consent of the riparian owners.

As is discussed below, when issuing such permits, the DNR will exercise discretion to determine whether a given impact will significantly affect or impair the rights of riparian owners. If a riparian owner disagrees with the DNR's determination, the owner would have the opportunity under the bill to request a contested case hearing to challenge the department's decision to grant the permit. Following a contested case hearing on the decision, the owner would also have the opportunity to petition for judicial review.

Under current law, unchanged by the bill, a ferrous mine operator does not have condemnation authority. As described above, the right to various uses of water is a component of riparian property ownership. Any activities that would jeopardize those uses could be construed as a taking of or other intrusion into that property right, and may give rise to a private cause of action to protect that private interest.

² See below for more detail on these approval requirements and measures.

Under current law and the bill, the public trust doctrine may also serve as a source of protection for the riparian rights of property owners. Wisconsin Constitution, Article IX, Section 1, provides that the "river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor." That provision has been interpreted to mean that the Wisconsin Legislature is trustee for the citizens' rights to navigate and enjoy recreational activities in the waters of the state. Thus, the state has a fiduciary duty to manage the trust for the benefit of the citizens of the state. This interpretation is known as the "public trust doctrine."

The Wisconsin Supreme Court interprets the public trust doctrine broadly, to encompass a broad range of public rights. However, although the state must protect the broad set of public rights in the waters of the state, the state may "authorize limited encroachments upon the beds of such waters where the public interest will be served." [*Hixon v. Public Service Commission*, 146 N.W.2d 577, 618 (Wis. 1966).] In past cases, the Wisconsin Supreme Court has upheld "minor alterations" to navigable waters, which the court viewed as improving public rights in such waters. For example, in *State v. Public Service Commission*, the court upheld an act authorizing the partial filling of a lake in order to create a parking lot and swimming beach. [81 N.W.2d 71 (1957).] The court emphasized the Public Service Commission's finding that the changes to the lake would generally not materially impair, and would in fact improve, navigation in some respects. Specifically, the court emphasized the following five facts when upholding the filling of a portion of the lake at issue in the case:

- Public bodies will control the use of the area.
- The area will be devoted to public purposes and open to the public.
- The diminution of lake area will be very small when compared with the whole of the lake at issue.
- None of the public uses of the lake as a lake will be destroyed or greatly impaired.
- The disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the park created as a result of the fill.

[*Id.* at 73-74.] By referring to benefits in "the area" to be filled, the court focused its analysis on a comparison of the public benefits and public harms occurring at the same site.

If any activity permitted under the bill were to violate the public trust doctrine, a riparian property owner or other person may be able to prevent the activity. Wisconsin statutes and caselaw allow a citizen to bring suit, pursuant to the public trust doctrine, directly against a private party for abatement of a public nuisance when the citizen believes that the

DNR has inadequately regulated the private party. [s. 30.294, Stats.; *Gillen v. City of Neenah*, 219 Wis. 2d 806 (1998).]

UNDER THE BILL, COULD A RIPARIAN PROPERTY OWNER WHO DOES NOT OWN THE MINERAL RIGHTS TO HIS OR HER PROPERTY BE FORCED TO ALLOW WATER WITHDRAWALS FROM OR WATER DISCHARGES FROM THE PROPERTY IN SUPPORT OF A FERROUS MINE?

Under current law, unchanged by the bill, it is possible that a ferrous mining operation may be legally entitled to use water on land for which the mining operator holds the mineral rights. The surface rights and the mineral rights of property can be severed and held by different parties, and they often are. Conflicts may arise in such cases when mineral rights are exercised.

Generally, the owner of mineral rights is considered to hold the "dominant estate," meaning that that owner's reasonable use of the property to exercise those mineral rights takes priority over owners of other rights, such as surface rights. However, the owner of the mineral rights only has the rights that were conveyed with the mineral rights. If the owner of the mineral rights seeks to conduct activities that are beyond the scope of those rights, the owner of the surface rights may have a private cause of action to prevent such activities.

For example, if the owner of the mineral rights of a riparian property were to seek to withdraw water from or discharge water from the riparian property in support of ferrous mining on the property or on other property in the area, the owner of the surface rights may be able to prevent such an activity on the grounds that the holder of the mineral rights does not have the right to conduct the activity. The terms of the easement, deed, or other conveyance, dictate the scope of the rights of each owner.³ In such cases, Wisconsin courts review the legal instrument granting the property right in question to determine the intention of the parties. [*Konneker v. Romano*, 2010 WI 65.]

IS THERE ANY LEGAL OR ADMINISTRATIVE PRECEDENT FOR INTERPRETING THE TERM "SIGNIFICANTLY"?

The terms "significant" and "significantly" are used in various state and federal statutes. The terms appear throughout the bill. For example, they appear in the standards that would apply to the issuance of various permits that may be required in connection with a ferrous mine.

The meaning of any new statutory language depends on statutory context and is subject to interpretation, first by the agency or department tasked with implementing a given

³ Under current law, after April 9, 1994, a riparian owner whose land abuts a navigable water may not grant any easement or similar right to the riparian rights in the land to another person, except for a right of access to the water. [s. 30.133 (1), Stats.] However, that prohibition did not apply to conveyances granted before that time. In addition, the bill provides an exception to that prohibition for easements and other conveyances entered into in connection with a ferrous mine.

provision, and, in some cases, through judicial review of an agency's application of its interpretation.

The area of environmental law in which the term "significantly" has been most often interpreted is in the context of the environmental review process required under the National Environmental Protection Act (NEPA) and the Wisconsin Environmental Protection Act (WEPA). NEPA requires that a federal agency prepare a detailed statement, known as an "environmental impact statement," for every major federal action that significantly affects the quality of the human environment. [42 U.S.C. s. 4332.] WEPA requires the same of state agencies. [s. 1.11, Stats.] In that context, state and federal courts generally have deferred to agencies expertise in making determinations regarding whether a particular harm is "significant." [See, e.g., *State ex rel. Boehm v. Department of Natural Resources*, 497 N.W.2d 445 (Wis. 1993) (deferring to the DNR's expertise regarding the decision whether an environmental impact statement was required); *Habitat Educ. Ctr., Inc. v. United States Forest Serv.*, 673 F.3d 518, 529 (7th Cir. 2012) ("determining significance is a factual question requiring technical expertise").]

IS THERE ANY PRECEDENT IN WISCONSIN LAW FOR THE MITIGATION OF IMPACTS TO STREAMS, RIVERS, AND LAKES?

The short answer is that there appears to be no such precedent in the context of navigable waters. Under the bill, a person proposing a ferrous mine in Wisconsin must obtain a "navigable waters activity" permit for certain activities affecting navigable waters, including 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.

As described above, the bill requires the DNR to issue a navigable waters activity permit 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.
- The activity will not significantly degrade water quality.⁴

⁴ Those standards, are similar to standards that apply under current law for navigable waters activities in the context of a power plant approval. [See s. 30.025 (3), Stats.] However, standards in current law use the term "unduly" where the bill uses the term "significantly."

The bill also requires an applicant to propose "measures" to meet the above requirements and to propose a schedule for implementing the measures. Measures that an applicant may propose include:

- Providing public access to, restoring, or enlarging up to 1.5 acres of navigable waters in exchange for each acre of navigable waters that is significantly impacted.
- Improving public rights or interests in navigable waters.
- Offsetting significant impacts to water quality or quantity.
- Enhancing flood storage.
- Compensation or mitigation as provided under the wetlands provisions in the bill.
- Conservation measures as provided under the water withdrawal provisions in the bill.

Under the bill, if the DNR determines that the approval requirements will be met by implementing some or all of the measures proposed by the applicant, the DNR must determine which measures are required and approve a schedule for implementation, and is required to approve the navigable waters activity.⁵

In Wisconsin, the concept of offsetting environmental impacts with environmental improvements elsewhere (typically referred to as "mitigation") is commonly used in the context of wetlands regulation, but does not appear to have been used in the context of navigable waters impacts.

In *State v. Public Service Commission*, described above, the court used a public benefits-vs.-public harm balancing approach to determine if an activity was permissible under the public trust doctrine. Wisconsin courts have not specifically addressed whether off-site public benefits in navigable waters of the types allowed to be proposed as "measures" under the bill would be legally sufficient to overcome harm to public rights in another body of water.

HOW WOULD THE REQUIREMENT THAT AN APPLICANT "OBTAINS THE CONSENT OF RIPARIAN OWNERS" BE CONSTRUED?

As described above, one of the standards that must be satisfied under the bill in order for an applicant to obtain a navigable waters activity permit in connection with a ferrous mine is that the navigable waters activity either will not significantly affect the rights of riparian owners, or the applicant has obtained the consent of the riparian owners.

Any determination as to whether the rights of riparian owners are significantly affected by a proposed navigable waters activity is subject to DNR interpretation. The process of how

⁵ Under the bill, these measures may also be used to offset impacts to navigable waters resulting from water withdrawals related to ferrous mining.

the DNR would evaluate such an interpretation and the subsequent opportunities for interested parties to seek modifications in such a determination are described in more detail above. If the DNR determines that an activity will have a significant effect on the rights of riparian owners, the activity could not be conducted unless the affected riparian owners expressly consented to the activity. The DNR would be likely to inform the riparian owners about the potential impacts of the activity and require a written authorization from those owners. However, if mineral rights and other rights in property are severed and held by different parties, there may be some question as to whether the owners of each of these types of interests must consent to such impacts.

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

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