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WISCONSIN LEGISLATIVE COUNCIL  
INFORMATION MEMORANDUM

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**2011 Assembly Bill 426, Relating to the Regulation of Ferrous Mining, as Recommended for Passage: Changes to Enforcement and Taxation**

2011 Assembly Bill 426, relating to the regulation of ferrous (i.e., iron ore) mining, was introduced by the Assembly Committee on Jobs, Economy, and Small Business on December 14, 2011. On January 24, 2012, the committee voted to recommend passage of the bill, as amended by Assembly Substitute Amendment 1 to the bill. The bill exempts the mining of ferrous minerals from the current state metallic mineral mining law and creates an expedited process and modified standards to facilitate permits for ferrous mining in the state.

This memorandum describes the bill, as recommended for amendment and passage by the committee (“the bill”). Specifically, it describes changes made by the bill to the enforcement of a ferrous mining permit and taxation of ferrous mining activities. Companion information memoranda describe changes made by the bill to the process for obtaining Department of Natural Resources (DNR) approval for ferrous mining activities, and changes made to various environmental and natural resource laws with regard to ferrous mining.

The bill amends provisions governing the taxation of ferrous mining activities. In addition, it makes several changes to the methods by which a ferrous mining permit is enforced, including changes to citizen involvement in enforcement actions, and changes to the availability of claims for damages caused by a mining operation.

**ENFORCEMENT OF A MINING PERMIT BY THE DNR AND 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.<sup>1</sup> 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 may be 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.]

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

### **INVESTMENT AND LOCAL IMPACT FUND**

Under **current law**, several unique taxes and fees apply to metallic mining operations. The revenue from those taxes and fees are transferred to the investment and local impact fund, a fund established to receive revenues relating to metallic mining. The fund is managed by an 11-member board, which makes various mandatory and discretionary payments to local governments. **The bill** does not change the fund.

### **NET PROCEEDS OCCUPATION TAX**

Under **current law and the bill**, a net proceeds occupation tax is imposed on net income from the sale of “metalliferous”<sup>2</sup> minerals extracted in the state. The tax rate is graduated, ranging from 0% to 15% depending on the amount of net proceeds per year. The tax brackets are adjusted for inflation.

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<sup>1</sup> Because the bill generally removes rule-making authority with regard to ferrous mining, it does not authorize penalties for the violation of administrative rules.

<sup>2</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.”

Under **current law**, all revenue from the net proceeds occupation tax is distributed to the investment and local impact fund. Under **the bill**, 40% of the net proceeds tax revenue from ferrous mines must be deposited in the state's general fund. Sixty-percent of the revenue must be transferred to the investment and local impact fund.

[s. 70.375, Stats.]

### **FEES REQUIRED UNDER CH. 70, STATS.**

In addition to, or as offsets to, the net proceeds occupation tax revenue, the investment and local impact fund receives revenue from several fees required in connection with a mining operation. Under **current law and the bill**, applicable fees assessed under ch. 70 are as follows:

- **\$50,000 notice of intent fees.** A prospective applicant for a mining permit must pay \$50,000 together with a notice of intent to submit a mining permit application to the DNR. One or two subsequent payments of \$50,000 each may also be required during the application process.
- **Construction fee.** Each person constructing a metallic mine must pay a construction fee, in an amount sufficient to make one-time construction payments, discussed below.
- **Administrative fee.** A mine operator with gross proceeds must pay an additional administrative fee of an amount calculated by the Department of Revenue based on the operator's proportional share of the Investment and Local Impact Fund Board's administrative expenses.

[ss. 70.395 (2) (dc) and (dg) and 70.3965, Stats.]

### **PAYMENTS TO LOCAL GOVERNMENTS**

With the revenue from the net proceeds occupation tax and the fees described above, the Investment and Local Impact Fund Board makes mandatory and discretionary payments to local governments affected by metallic mining.

#### ***MANDATORY PAYMENTS***

Under **current law and the bill**, the following are payments that the board *must* make from the fund:

- **First dollar payments.** Payments in an amount adjusted for inflation (\$206,700 in fiscal year (FY) 2010-11) to each county,<sup>3</sup> city, town, and village in which

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<sup>3</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.]

metalliferous minerals are extracted, and to each Native American community<sup>4</sup> that has tribal lands within a municipality qualified to receive a first dollar payment.

- **20% payment to counties.** 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.
- **Construction payments.** One-time construction payments in an amount adjusted for inflation (\$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.
- **Project reserve.** For a project reserve, 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.]

### ***Discretionary Payments***

In addition to the mandatory payments described above, the Investment and Local Impact Fund Board *may* distribute discretionary payments to municipalities and local impact committees under ***current law and the bill***.<sup>5</sup> Discretionary payments are limited to the following specific funding sources and purposes:

- **\$50,000 notice of intent payments.** The board may distribute funds from the \$50,000 notice of intent fees to a county, town, village, city, tribal government or local impact committee. 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.
- **Payments to municipalities for specified purposes.** The board may make discretionary payments of net proceeds occupation tax revenue to municipalities for a number of specified purposes relating to the impacts of the mining operation.<sup>6</sup>

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<sup>4</sup> Section 70.395, Stats., uses the term “Native American community.” That term is not defined.

<sup>5</sup> A local impact committee is a committee formed by one or more counties, towns, villages, cities, or tribal governments likely to be substantially affected by potential or proposed mining. [s. 293.33, Stats.]

<sup>6</sup> Specifically, the board may distribute these discretionary payments for the following purposes, as the board determines necessary:

- Protective services, such as police and fire services associated with the construction and operation of the mine site.
- Highway repair or construction resulting from of the construction and operation of the mine site.
- Studies and projects for local development.
- Monitoring the effects of the mining operation on the environment.

Such payments must first be made to municipalities in which metallic minerals were extracted during the past three years or in which a mining permit has been issued to commence mining. Next, they may be made to municipalities that are adjacent to municipalities in which metallic minerals were extracted more than three years, but less than seven years before the current year. Finally, the payments may be made to other municipalities. For the purpose of such payments, “municipality” means any county, city, village, town or school district.

- **Payments to school districts.** Upon application from a school district, the board may distribute a payment to the school district in an amount equal to specified costs attributable to enrollment increases resulting from the development of metallic mineral mining operations.

[s. 70.395 (2) (f), (fm), and (g), Stats.]

### **CLAIMS FOR DAMAGES RESULTING FROM MINING**

Under **current law**, a person may file a claim with the Department of Safety and Professional Services (DSPS) for mining-related injuries, defined to mean death or injury to a person or property caused by environmental pollution from emissions, seepages, leakages, or other discharges from mine excavations or mining waste, or substantial surface subsidence from mine excavations. If the claim is not settled between the parties, the DSPS holds an adjudicatory hearing and awards damages to the claimant, not to exceed \$150,000, if the claimant demonstrates that he or she has incurred mining-related injuries. These damages are generally awarded without regard to fault.<sup>7</sup> The state may be able to recoup funds from the mining company as part of a civil action against the mining company. [s. 107.31, Stats.] **The bill** retains this claim system for injuries caused by ferrous mining.

Under **current law**, a person who claims that damage to the quantity or quality of his or her private water supply was caused by prospecting or mining may file a complaint with the DNR and may be able to obtain an immediate alternative source of water from the town, village, or city where the private water supply is located. The DNR may hold a hearing on the complaint

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- Extraordinary community facilities and services provided as a result of mining activity.
  - Legal counsel and technical consultants to represent and assist municipalities appearing before state agencies on matters relating to metalliferous mineral mining.
  - Other expenses associated with the construction, operation, cessation of operation or closure of the mine site.
  - The preparation of area-wide community service plans, which identify social, economic, educational, and environmental impacts associated with mining and set forth a plan for minimizing the impacts.
  - Provision of educational services in a school district.
  - Expenses attributable to a permanent or temporary closing of a mine including the cost of providing retraining and other educational programs designed to assist displaced workers in finding new employment opportunities and the cost of operating any job placement referral programs connected with the curtailment of mining operations in any area of this state.

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

<sup>7</sup> However, contributory negligence may decrease the amount of a claimant’s award. [s. 107.31 (3) (c), Stats.]

and must issue an order requiring the mining company to provide water to and pay damages to the person and to reimburse the local government that provided water to the person if the DNR concludes that the mining company is the principle cause of the damage to the private water supply. [s. 281.75, Stats.] Under **the bill**, this complaint system is not applicable to damages to water systems caused by ferrous mining.<sup>8</sup>

Under **current law**, a landowner or lessee with an annual family income of not more than \$65,000 may submit a claim to the DNR for a private water supply that is contaminated. If all conditions are met, the DNR may pay an amount up to 75% of the person's eligible costs to restore their private water supply, not to exceed \$12,000. This claim system does not apply to contamination that is compensable under the programs discussed above. [s. 293.65 (4), Stats.] Under **the bill**, this claim system is not applicable to contamination caused by ferrous mining.

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

This memorandum was prepared by Anna Henning, Staff Attorney, and Larry Konopacki, Senior Staff Attorney, on January 25, 2012.

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<sup>8</sup> The bill does authorize the DNR to require a permit applicant to offset a significant impact to a public or private water supply.