# WISCONSIN LEGISLATIVE COUNCIL

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TO: SENATOR TOM TIFFANY AND REPRESENTATIVE SCOTT SUDER

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

RE: LRB-0762/1, Relating to the Regulation of Ferrous Metallic Mining and Related Activities

DATE: January 14, 2013

This memorandum describes LRB-0762/1 ("the bill"). The bill 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.

This memorandum begins with a description of changes made by the bill to the process for obtaining Department of Natural Resources (DNR) approval for ferrous mining activities, followed by changes made by the bill to various environmental and natural resource laws in the context of ferrous mining (beginning at page 20), and changes made to enforcement and taxation related to ferrous mining (beginning at page 39).

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

Under ***current law***, DNR authorization is required before a person may engage in any of three levels of activity related to mining metallic[1] minerals: exploration, prospecting (also called bulk sampling), and mining.[2] 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 does not include 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

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

[2] Before conducting ferrous mining, a mine operator may also be required to obtain permits and approvals under various state and federal laws for environmental and natural resource impacts related to mining.

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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 public hearings, preparation and public review of an environmental impact statement, and the approval of various state and federal permits and approvals relating to environmental and natural resources impacts resulting from mining and activities secondary to mining. Unlike some states' laws, Wisconsin's mining law generally does not distinguish between the mining of ferrous and nonferrous minerals.[3] ***The bill*** creates such a distinction. It creates a separate, expedited process governing the issuance of permits and approvals for ferrous mining activities. In addition, the bill sets forth most of the procedures and requirements for metallic mining by statute, rather than a combination of statute and administrative rule, as under current law.

## ***Exploration License***

### *Application*

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

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

[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 $1 million. Second, it sets forth the required components of the application in statute, specifically requiring the application to include an exploration plan and a reclamation plan, both containing specified components.

### *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 applicant is in violation of ch.

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

[4] 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 conditions required 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 10 business days or by July 1st, whichever is later, if the application is for the upcoming license year.[5] Current law does not provide a deadline by which an application will be considered complete.

***The bill*** retains the 10 business day 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. 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 and is requested by the DNR, the DNR must either issue the exploration license or provide written notification of its intent not to issue the license within seven business days of an applicant's submission of the item.

The bill requires the DNR to provide the applicant with an opportunity to correct any deficiencies in the exploration plan or restoration plan within 10 business days. If the applicant amends the exploration plan or reclamation plan and corrects the deficiencies, the DNR must issue the exploration license within 10 business days of receipt of the amended exploration or reclamation plan (or by July 1 if the license is for the upcoming year and this date is later). If the DNR does not comply with these requirements, the application is automatically approved and the DNR is required to issue an exploration license.

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

### *Environmental Review*

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

### *Confidentiality*

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

### *Notice Procedure*

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

### *Inspections*

Under ***current law***, the DNR may enter and inspect an exploration site to determine the state of compliance with metallic mineral exploration laws and an explorer may not obstruct, hamper, or interfere with an inspection. These requirements are retained under ***the bill***, along with a requirement that no inspector may obstruct, hamper, or interfere with exploration activities.

## ***Prospecting and Bulk Sampling Approval***

### *Approval Process*

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, an environmental impact statement (in most cases), a master hearing, and requirements for reclamation.

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

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

The bulk sampling plan must include the following components:

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

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

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

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

[8] 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.

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

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

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

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

## ***Mining Permitting Process***

### *Timeline*

Under ***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 timeline.

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.[9] The DNR must make the final decision regarding a mining permit within 90 days of the completion of the record from the master hearing.[10]

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.

Upon submittal of an application for a ferrous mining permit, the DNR is required to determine whether the application is complete within 30 days. If the DNR determines that the application is complete, the DNR is required to notify the applicant and the application is deemed administratively complete when the DNR sends the notification. If the DNR determines that the application is not complete, the DNR may make one request for additional information. Within 10 days of receiving additional requested information from the applicant, the DNR is required to notify the applicant as to whether it has received all of the requested information. When the DNR sends this final notification, the application is deemed to be administratively complete.[11] Unlike under previous versions, the bill does not prohibit the DNR from determining that a mining permit application is incomplete based on the quality of the information submitted with the application.

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

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

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

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[9] 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.

[10] Decisions regarding related DNR permits and approvals must also be approved or denied before this deadline, provided that the applications for such permits and approvals are submitted in a timely manner.

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

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

***Refund of Fees and Mandamus Action***

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

***Pre-Application Notification***

Although the notices serve somewhat different functions, both current law and the bill require an applicant for a mining permit to submit a notice to the DNR prior to the submission of a mining 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 permit application.[12] 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 submission 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

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[12] However, the DNR may consider data collected before the notice of intent is submitted if it determines that the benefits of admitting the data outweigh the policy reasons for excluding it. [s. 293.31, Stats.]

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 bill*** requires a permit applicant to notify the DNR and the ACE in writing of the intention to file an application for a mining permit. The notification expresses a potential mining permit applicant's intention to file an application for a mining permit. The notification need not be submitted before data is collected, but it must be submitted at least 12 months prior to submitting a mining permit application. At the same time that an applicant submits the notification required under the 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.[13]

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

***Public Hearings and Contested Case Hearing; Frivolous Claims***

Under ***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. A separate set of hearings are required in connection with a prospecting permit. 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.[14] 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. Persons who participate as

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[13] 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.

[14] 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 master hearing.

parties in the contested case portion of the master hearing may submit legal briefs and evidence and call and cross-examine witnesses, who testify under oath.

Under ***the bill***, the DNR must hold an informational hearing, which covers the mining permit, all other approvals, and the environmental impact statement.[15] Prior to the hearing, the DNR must make the application for the ferrous mining permit, applications for related permits and approvals, 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 comment by any person within 45 days after the notice is published, and shall provide the date, time, and location of the public informational hearing.

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

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

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

Under ***current law***, if a hearing examiner finds that an administrative hearing commenced or continued by a petitioner or a claim or defense used by a party is frivolous, the hearing examiner is required to award the successful party the costs and reasonable attorney fees that are directly attributable to responding to the frivolous petition, claim, or defense. A petition for a hearing or a claim or defense is frivolous if the hearing examiner finds at least one of the following:

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

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

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

[s. 227.483, Stats.]

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

***Contents***

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

- A mining plan.
- A detailed reclamation plan.
- The name and address of each owner of land and holder of an option or lease on land within the mining site.
- All permits held by the applicant.
- Evidence that the applicant 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*** retains most of those components but 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 as part of the mining plan, whereas under current law, a waste site feasibility study is submitted and reviewed separately. In addition, the bill modifies the requirements related to 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 required demonstrations relating to the following subjects from the mining plan and instead includes them in the reclamation plan: grading and stabilization of excavation and deposits; stabilization of merchantable by-products; protection of topsoil; and the achievement of aesthetic standards. It likewise eliminates required demonstrations regarding the maintenance of adequate vegetative cover and the impoundment of water from the mining plan. With regard to a demonstration relating to the adequate diversion and drainage of water, the 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 effect 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 statutory requirements. Plant species not indigenous to the area may be used if necessary to provide rapid stabilization of slopes and prevention of erosion, if such species are acceptable to 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 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 only if such species are acceptable to the DNR.

Finally, 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 seven conditions are satisfied. The bill retains one of the six conditions set forth in current law -- the requirement that the proposed mining will result in a net positive economic impact in the area.

Of the five remaining conditions for approval under current law, the bill eliminates and replaces two and amends three conditions. 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 three 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. Finally, whereas current law requires that a mining operation will not endanger public health, safety, or welfare, the bill requires that a mining operation not be likely to result in substantial adverse impacts to public health, safety, or welfare.

Lastly, the bill adds an additional condition requiring that the mining proposal is likely to meet or exceed the DNR's floodplain zoning rules.

***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 landsides, 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 to be 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 from the requirements of the metallic mineral mining chapter in the administrative code, if

the exemption does not result in the violation of any federal or state environmental law or endanger public health, safety, or welfare or the environment, but is not required to do so. [s. 293.15 (9), Stats., s. NR 312.19, Wis. Adm. Code.] ***The bill*** authorizes the DNR to grant an exemption from any requirements of the bill applicable to a mining permit application, mining permit, or other approval. 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 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. Environmental review typically involves the preparation of an EIS.

***When Required***

***Current law*** requires the DNR to prepare an EIS 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.]

***The bill*** retains the requirement that an EIS be prepared for each proposed ferrous mining operation. However, it removes "other significant factors" from the items that must be considered in an EIS.

With regard to prospecting, ***current law*** acknowledges that an EIS may in some cases be required under s. 1.11 (2), Stats., which requires state agencies to prepare an EIS when taking "major actions" that significantly affect the quality of the human environment. [s. 293.35 (5), Stats.] ***The bill*** specifies that the DNR is not required to prepare an EIS for exploration or bulk sampling.

***Use of a an Environmental Impact Report***

Under ***current law***, the DNR *may* require that a potential mining permit applicant submit an environmental impact report (EIR), which serves as a starting point for compilation of a draft EIS. In addition, the DNR *may* accept original data submitted by an applicant as part of an EIR, if the data

relates to impacts essential to a reasoned choice among significant alternatives to the proposed action; the data meets the requirements outlined in the DNR's instructions to the applicant; and one or more of the following apply:

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

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

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

[s. NR 150.25 (3) (b), Wis. Adm. Code.]

***The bill*** requires an applicant for a ferrous mining permit to submit an EIR together with the mining permit application. The EIR must include: a description of the proposed mining project; environmental conditions and anticipated environmental impacts; socioeconomic conditions and anticipated socioeconomic impacts; details of any wetlands mitigation program; any measures to offset navigable waters impacts; any proposed changes to forest designations; and alternatives to the mining project. The bill *requires* the DNR to use original data provided in an EIR in the EIS if any of the conditions listed above applies.

***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. [s. 293.32, Stats.] 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. However, the bill caps costs to be paid by an applicant at $2 million. The bill also requires the applicant to pay the full cost of a competitively bid contract for preparation of an EIS. The bill provides that costs shall be paid according to the following fee schedule. First, $100,000 must be paid with the submission of a bulk sampling plan or a notice of intent to file a mining permit, whichever occurs earlier. Second, an additional fee of $250,000 must be paid when the DNR provides cost information demonstrating that the initial $100,000 has been fully

allocated against actual costs. Three additional fees of $250,000 each must similarly be paid after the DNR demonstrates that prior fees have been fully allocated against actual costs.

In addition, except for the fee required for an approval under the Great Lakes Compact, the 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, Certificate of Insurance, and Irrevocable Trust Agreement***

***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[16] 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. [s. 293.51 (1), Stats.]

***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.

In addition to a bond, ***current law*** requires a mine operator to submit a certificate of insurance after a prospecting or mining permit has been approved but before beginning operations. Under current law, the certificate of insurance must afford personal injury and property damage protection in an amount determined to be adequate by the DNR but not less than $50,000. [s. 293.51 (2), Stats.]

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

***Current law*** also requires an applicant for a metallic mining permit to propose an irrevocable trust agreement with a trust fund in an amount to assure adequate funds to undertake the prevention and remediation relating to specified events, such as hazardous waste spills and the failure of a mining waste facility to contain waste. [s. NR 132.085, Wis. Adm. Code.] ***The bill*** does not require an irrevocable trust agreement.

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

***Modification of an Existing Mining Permit***

Under ***current law***, the operator of a metallic mine may apply to the DNR for an amendment of a mining permit, mining plan, or reclamation plan at any time. In general, the DNR must process an application for a proposed increase or decrease to the size of a mining site or a "substantial" change to a mining or reclamation plan in the same manner as the original mining permit application. [s. 293.55, Stats.; s. NR 132.12, Wis. Adm. Code.]

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

***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 or 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 arguably 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.] ***The bill*** requires a judicial review action to be brought in the county in which the majority of the proposed mining site is located.

***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*** retains current law with respect to local impact committees.

## *CHANGES TO RELATED ENVIRONMENTAL AND NATURAL RESOURCE LAWS*

Under current law and the bill, various permits and approvals may be required in addition to an exploration, prospecting/bulk sampling, or mining permit before a person may explore for or extract ferrous minerals in Wisconsin. Many of these approvals relate to environmental and natural resources impacts that may result from ferrous mining and activities secondary to mining. Examples of related approvals that may be required include permits for activities affecting wetlands and navigable waters; approvals for high capacity wells; wastewater discharge permits; and air emissions permits. In addition, a ferrous mining operation is subject to groundwater quality regulations and regulations governing the construction and monitoring of a mining waste facility. The bill makes various changes to the standards and procedures governing the issuance of certain environmental and natural resource approvals relating to ferrous mining.

***Impacts to Wetlands***

***Wetland Permitting Process***[17]

Under ***current law and the bill***, a wetland general permit[18] or wetland individual permit[19] is required if an activity will result in a discharge of dredged material or fill material into wetlands, unless

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[17] The Wisconsin Legislature recently enacted 2011 Act 118, which made extensive changes to the state's wetlands permitting process. The DNR has not yet had time to revise its administrative rules relating to wetland permitting to provide for consistency with this enactment. Therefore, this memorandum generally does not include evaluation of the Administrative Code related to wetlands, with limited exceptions.

the activity is exempt from this requirement. Current law and the bill prohibit the DNR from issuing either type of wetland permit unless it determines that the discharge will comply with all applicable water quality standards.[20] [s. 281.36 (3b) (b), Stats.] If an affected wetland is a "federal wetland," the applicant must also obtain a permit from the ACE.[21]

Under ***current law***, the DNR is required to establish wetland general permits for certain types of discharges, and may issue other wetland general permits to regulate other types of discharges. When drafting a wetland general permit, the DNR is required to impose requirements, conditions, and exceptions to ensure that the discharges that will occur under the permit will cause only minimal adverse environmental effects. A general permit may only apply to a single and complete project. The DNR may prohibit discharges under general permits into certain types of wetlands specified in statute. [s. 281.36 (3g), Stats.] The DNR may require a person seeking authorization for an activity under a general permit to apply for a wetland *individual* permit if, based on an inspection, it determines that conditions specific to the site require additional restrictions on the discharge in order to provide reasonable assurance that no significant adverse impacts to wetland functional values will occur.

Under ***the bill***, projects involving wetland impacts related to bulk sampling or ferrous mining may also be granted general permits under the current-law process, if applicable. Most of the requirements under current law relating to wetland general permits apply to a general permit related to bulk sampling or ferrous mining.

Under ***current law and the bill***, a wetland individual permit is required for a person to discharge dredged material or fill material into any wetland unless the discharge is authorized under a general permit or is exempt from permitting requirements. An application for a wetland individual permit must include an analysis of the practicable[22] alternatives that will avoid and minimize the adverse impacts of the discharge on wetland functional values[23] and that will not result in any other significant adverse environmental consequences.[24] [s. 281.36 (3m), Stats.]

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[18] A general permit is a permit that does not apply to a specific project. Instead, it applies statewide to any person authorized to engage in the activity covered by the permit.

[19] An individual permit is issued for a specific activity at a particular place.

[20] Water quality standards for wetlands are narrative standards that describe "beneficial uses" or "functional values" 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.]

[21] Federal wetlands are wetlands that are subject to federal jurisdiction under 33 U.S.C. s. 1344. Nonfederal 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).

[22] Under current law and the bill, "practicable" means reasonably available and capable of being implemented after taking into consideration cost, site availability, available technology, logistics, and proximity to the proposed project site, in light of the overall purpose and scope of the project. [s. 281.36 (1) (cp), Stats.]

[23] 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. The bill specifies a separate list of wetland functional values that are comparable to those under current

Under current law and the bill, the DNR must consider all of the following factors when it assesses the impacts of a project on wetland functional values:

- The direct impacts of the proposed project to wetland functional values.
- The cumulative impacts attributable to the proposed project that may occur to wetland functional values based on past impacts or reasonably anticipated impacts caused by similar projects in the area affected by the project.
- Potential secondary impacts of the proposed project to wetland functional values.
- The impact on functional values resulting from mitigation.
- The net positive or negative environmental impact of the proposed project.

In addition to these factors, ***the bill*** requires the DNR to evaluate whether the discharge will result in a significant adverse impact to wetland functional values by doing all of the following:

- Comparing the functional values of the wetland with other wetlands located within the boundaries of the mining site or within the same water management unit as the mining site and with other waters of the state that are located in the same water management unit.
- Taking into consideration the floristic province in which the mining site is located.

The bill also requires the DNR to determine the impact of a proposed discharge on wetland functional values by using wetland ecological evaluation methods that are jointly accepted by the ACE and the DNR and that are appropriate to the affected wetland.

Under ***current law***, the DNR is required to make a finding that a proposed project is in compliance with water quality standards and that a wetland individual permit may be issued if it determines that all of the following apply:

- The proposed project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts.
- All practicable measures to minimize the adverse impacts to wetland functional values will be taken.

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law and lists activities and effects that must be minimized for the purpose of maintaining or enhancing wetland functional values.

[24] Under current law and the bill, the DNR is required to limit its review of practicable alternatives to those that are located at or adjacent to the site of the activity if the applicant has demonstrated that the proposed project will result in a demonstrable economic public benefit. [s. 281.36 (3n), Stats.]

- The proposed project will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences.

[s. 281.36 (3n), Stats.].

Under ***the bill***, if the DNR determines that the three findings above apply, taking into account compensation for significant adverse impacts to wetland functional values provided in a mitigation plan, the DNR is required to make a finding that a discharge of dredged material or fill material is in compliance with all applicable water quality standards and is required to issue a wetland individual permit.

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 wetlands and that the use of wetlands for bulk sampling and mining activities in a way that would result in a significant adverse impact on wetlands is presumed to be necessary.

***Other Approvals Related to Wetlands***

Numerous activities other than a discharge of material may also be evaluated based on their effects on wetlands as part of the review of any separate permit requirement for such an activity. [s. NR 103.06, Wis. Adm. Code.] Because the Administrative Code related to wetland permitting has not yet been reconciled with 2011 Act 118, as noted above, it is not clear to what extent the standards for approval of a proposal to place dredged or fill material in a wetland apply to these other types of activities.

***The bill*** generally requires evaluations of wetland impacts for activities other than the discharge of dredged or fill material to be conducted in the same manner and subject to the same standards as described above for evaluations of proposed discharges.

***Federal Wetlands***

As noted above, if a proposed project will impact federal wetlands, the applicant must also obtain a permit from the ACE. Under ***current law***, the DNR generally processes wetland permits related to impacts to federal wetlands in the same manner as it would for non-federal wetlands. Under ***the bill***, the DNR may impose requirements on an approval related to a federal wetland in addition to those contained in an ACE permit only as required to address significant adverse impacts to wetland functional values, significant adverse impacts to water quality, or other significant adverse environmental consequences not addressed in the ACE permit.

***Wetland Mitigation***

The term "wetland mitigation" refers to actions taken to compensate for the negative impacts of a project on wetlands.[25] Examples of mitigation include restoring previously destroyed or degraded wetlands, creating new wetlands, and purchasing credits from a wetland mitigation bank.

Under ***current law***, the DNR must establish a mitigation program that applies only to the issuance of wetland individual permits. The mitigation must allow mitigation to be accomplished by any of the following methods:

- Purchasing or applying credits from a mitigation bank[26] in this state.
- Participating in the in lieu fee subprogram,[27] if established.
- Completing mitigation within the same watershed or within one-half mile of the site of the discharge.

Current law provides that purchasing credits from a mitigation bank and participation in the in lieu fee subprogram are the preferred types of mitigation. The DNR is required to establish mitigation ratios that are consistent with the federal regulations that apply to mitigation and mitigation banks, but the minimum ratio must be at least 1.2 acres for each acre affected by a discharge. Mitigation that occurs within the same watershed as the discharge or within one-half mile of the discharge need be only 90% of the ratio that would be required if the mitigation were to occur further from the site of the discharge. [s. 281.36 (3r), Stats.]

***The bill*** allows the applicant to propose a wetlands mitigation program to compensate for adverse impacts to functional values of wetlands. Mitigation projects may be performed by a person other than the applicant, if approved by the DNR. A wetland mitigation program must include all of the federal mitigation measures and may include any of the following:

- Implementation of a project for mitigation.
- Purchase of mitigation credits from a mitigation bank, including for a site in a mitigation bank that is located anywhere in the state (unless the mining project is in the ceded territory, as described below).
- Participation in the in lieu fee subprogram described above.

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[25] Under current law and the bill, "mitigation" is defined as the restoration, enhancement, creation, or preservation of wetlands to compensate for adverse impacts to other wetlands." [s. 281.36 (1) (bj), Stats.]

[26] The DNR is required to establish a system of service areas for the mitigation banks under the mitigation program that is geographically based on the locations of the major watersheds in the state.

[27] Current law authorizes the DNR to establish an "in lieu fee subprogram" as part of the mitigation program, under which payments are made to the DNR or another entity for the purposes of restoring, enhancing, creating, or preserving wetlands or other water resource features.

As part of a mitigation plan, the bill requires an applicant to identify and consider mitigation that could be conducted in the same watershed in which the mining site is located. If it is not practicable or ecologically preferable to conduct mitigation at an on-site location[28] or if there is no on-site location that will provide sufficient wetland acreage, the DNR must allow the applicant to conduct mitigation at an off-site location. The bill also requires wetland mitigation to compensate for impacts to wetlands located in the ceded territory[29] to occur within the ceded territory.

The bill limits the amount of required mitigation to 1.5 acres of mitigation per acre adversely impacted, and, for purposes of mitigation banks, counts each acre restored, enhanced, or created as one credit. With respect to federal wetlands, the bill also prohibits the DNR from requiring more mitigated acres than the acreage required under the ACE permit.

***Exemptions***

Under ***current law and the bill***, the following activities, among others, are exempt from wetland permitting requirements: maintenance, emergency repair, or reconstruction of damaged parts of structures that are in use in a wetland; construction or maintenance of irrigation ditches; maintenance of drainage ditches; and construction or maintenance of farm roads, forest roads, or temporary mining roads that is performed in accordance with best management practices. [s. 281.36 (4), Stats.] Under ***current law***, these exemptions do not apply to a new activity if the activity may impair the flow or circulation of a wetland or reduce the reach of a wetland. [s. 281.36 (5), Stats.] ***The bill*** does not include this restriction.

Under ***current law***, artificial wetlands are also 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 limit the exemption based on a determination by the DNR that significant functional values are present.

***Infringement of Public Rights***

Under ***current law***, the DNR has broad authority to proceed against possible violations of the statutes regulating discharges into wetlands for which the DNR determines that the public interest may not be adequately served by imposition of a penalty or forfeiture. Such a proceeding may result in an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the public interest. This type of order may be civilly enforced. [s. 30.03 (4), Stats.] ***The bill*** does not provide this authority to the DNR for wetlands activities related to ferrous mining.

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[28] The bill defines "on-site location" to mean a location that is on a mining site or within one-half mile of an outer boundary of a mining site.

[29] "Ceded territory" is defined in the bill to mean the territory in Wisconsin ceded by the Chippewa Indians to the United States in the treaty of 1837, 7 Stat. 536, and the treaty of 1842, 7 Stat. 591. The ceded territory covers roughly the northern third of the state.

***Impacts to Navigable Waters***

Under ***current law***, a person generally must obtain a permit from the DNR before conducting any of the following activities relating to navigable waters: 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. In some cases, such activities may be authorized by a general permit of statewide applicability. If an activity is not authorized under a general permit or explicitly exempted from regulation under state statute, an individual permit typically must be obtained.

For structures and deposits in navigable waters, the DNR must issue an individual permit for a proposed structure or deposit if the DNR makes all of the following findings:

- The applicant is a riparian owner.
- The structure or deposit will not materially obstruct navigation.
- The structure or deposit will not be detrimental to the public interest.
- The structure or deposit will not materially reduce the flood flow capacity of a stream.

[s. 30.12 (3m), Stats.]

For bridges and culverts, the DNR must issue an individual permit if it finds all of the following:

- The bridge or culvert will not materially obstruct navigation.
- The bridge or culvert will not materially reduce the effective flood flow capacity of a stream.
- The bridge or culvert will not be detrimental to the public interest.

[s. 30.123 (8), Stats.]

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.
- 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.

[s. 30.19 (4), Stats.]

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.
- 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.

[s. 30.195 (2), Stats.]

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 navigable water. The DNR may also 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.]

***The bill*** creates a single set of approval requirements governing all of the types of navigable waters impacts described above. Specifically, in the context of ferrous mining, the bill requires the DNR to issue an approval for a "navigable water activity," defined to mean any of the five types of activities for which a permit is required under current law, 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.[30]

The bill 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:

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[30] These findings necessary for approval of a navigable waters activity are similar to findings required under s. 30.025 (3) (b) for utility projects and facilities.

- 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.

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.

The bill specifies that a person need not be a riparian owner to apply for a navigable water activity approval under the bill, or to obtain a contract to engage in a navigable water activity.

***Destruction or Filling of a Lakebed***

***Current law*** specifically prohibits the DNR from authorizing the destruction or filling in of a lake bed in connection with a metallic mining permit, notwithstanding any other provision of law. [s. 293.13 (2) (d) 4., Stats.]

***The bill*** does not retain the specific prohibition regarding the destruction or filling of a lake bed in connection with a ferrous mining permit. Under the bill, any proposal to fill a lake bed in connection with a ferrous mining operation would be subject to the general standards in the bill governing the issuance of a permit for activities affecting navigable waters.

***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[31] 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

[31] 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.

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.[32] 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.

[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.]

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[32] "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.]

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 must be 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.

The bill also authorizes the DNR to require a permit applicant to offset a significant impact to a public or private water supply. 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, with one exception: if the DNR determines that a high-capacity well for a mining project may impair a privately owned high-capacity well, the DNR is required to include conditions to ensure that the privately owned high-capacity well will not be impaired, unless the private high-capacity well owner agrees to the impairment.

The bill does not exempt an applicant for a ferrous mining water withdrawal permit from the requirement to obtain a permit under the Great Lakes Compact law, if applicable.

Finally, once an applicant files an application for a water withdrawal permit, the bill authorizes the applicant to enter any land from which the applicant proposes to withdraw water or use water for the purpose of making any surveys required 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. ***The bill*** does not modify numerical groundwater quality standards and surface water quality standards.

***Design Management Zone***

Outside the boundaries of a designated "design management zone," certain projects requiring DNR approval, including mining and prospecting operations, must adhere to groundwater quality enforcement standards.[33] 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.[34] [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 and 1,200 feet from the edge of a metallic mineral surface mine or surface prospecting excavation or the property line, whichever is closer.

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 boundary of the property owned or leased by the mining operator, or on which the mining operator holds an easement, whichever is closer.

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[33] 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.]

[34] A smaller design management zone has the effect of stricter regulation, because DNR may require that actions be taken when contaminants have traveled a lesser distance in groundwater than would be the case with a larger design management zone.

The bill 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.

***Mandatory Intervention Boundary***

Under ***current law***, the operator of a mining site must monitor groundwater quality at locations approved by the DNR along and within the site's "mandatory intervention boundary." If a preventive action limit or enforcement standard is exceeded beyond the mandatory intervention boundary, the DNR must generally require a corrective response to prevent an exceedance of groundwater quality standards at the design management zone boundary. The horizontal distance to the mandatory intervention boundary is generally 150 feet from the outer waste boundary, the outer edge of the mine or prospecting excavation, or the outer edge of the underground workings as projected to the land surface. [s. NR 182.075 (1) (c), Wis. Adm. Code.]

***The bill*** creates similar requirements for a mandatory intervention boundary for ferrous mining sites but establishes a general horizontal distance to the mandatory intervention boundary of 300 feet from the outer waste boundary or the outer edge of the excavation, unless reduced by up to 150 feet by the DNR under specified conditions. The bill also provides that a ferrous mine operator is not required to conduct groundwater monitoring along mandatory intervention boundaries that are within other mandatory intervention boundaries.

***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 local zoning ordinances, including shoreland and floodplain zoning ordinances. However, in some cases, the DNR may directly authorize specified mining facilities in such areas, or municipalities may grant a special exemption or variance to accommodate a mining project. [See s. 289.35, Stats., and s. NR 116.21, Wis. Adm. Code.]

***The bill*** exempts specified activities relating to ferrous mining from shoreland zoning ordinances. Specifically, the bill provides that the DNR may not prohibit a waste site, structure, building, fill, or other development or construction activity in an area that would otherwise be prohibited under a shoreland zoning ordinance if the activity is authorized as part of a ferrous mining permit. It likewise provides that such activities do not violate shoreland zoning ordinances if they are authorized by the DNR as part of a mining operation covered by a ferrous mining permit. Finally, the bill specifies that an applicant for a ferrous mining permit need not obtain a variance from a shoreland zoning ordinance for such activities.

With respect to floodplain zoning, the bill specifies that municipal floodplain zoning ordinances may not prohibit development or construction activity authorized by the DNR in a mining permit except to the extent necessary for the municipality to maintain eligibility for participation in the National Flood Insurance Program. The bill also adds a condition for approval of a mining permit that requires that the mining proposal is likely to meet or exceed the DNR's floodplain zoning rules.

***Regulation of 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 arise as a result of the disposal of metallic mining wastes. [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 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.[35]

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. 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.

Under ***current law***, this modeling must assess the waste site's compliance with groundwater standards for an unspecified period of time following closure of the mining waste site. ***The bill*** limits the applicable time period for assessing such compliance to 100 years following the closure of a mine. 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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[35] 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 governing DNR approval of a mining waste site.

In addition, the bill modifies several technical demonstrations required under current law. First, ***the bill*** requires a demonstration that slopes of a complete waste be no less than 20% and no greater than 50%, versus no less than 20% and no greater than 33% under current law. Second, 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. Finally, the bill 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, 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, 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.
- 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 include a 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

associated with a mining waste site that are approved by the DNR as part of a wetlands certification, navigable water activity permit, or water withdrawal permit under the bill. In addition, the bill modifies the restriction for location near the property line to prohibit the location of a mining waste site within 200 feet of the outer boundary of the property owned or leased by the mining operator, or on which the mining operator holds an easement, excluding the portion of the site from which ferrous minerals were extracted that is backfilled with mining waste. 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 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.

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.] The recordkeeping and reporting requirements do not apply to a ferrous mineral surface mine that is backfilled with mining waste. [s. NR 182.02 (11), Wis. Adm. Code.]

For other mining waste sites and facilities, ***the bill*** retains some and modifies other recordkeeping requirements. First, the bill generally retains the record retention requirements that apply under current law. Next, 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 that the mine owner submit an annual summary report, containing statistical summaries of annual and cumulative project data. The bill also retains the exemption under current law for portions of a mine that are backfilled with mining waste.

***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 constructed for prospecting metallic minerals.)

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 the obligation to provide proof of financial responsibility for the long-term care of the site.[36] 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 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 to 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***, a person who proposes to construct 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.

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[36] 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.

***Possession and Transportation of Animals on the Threatened or Endangered Species List***

Unless authorized by a DNR permit, Wisconsin law generally provides that no person may take, transport, possess, process, or sell any wild animal listed on the DNR's endangered and threatened species list. [s. 29.604 (4), Stats.] ***Current law*** does not provide any special exemptions from those general prohibitions for metallic mining or prospecting activities.

***The bill*** authorizes a person to take, transport, or possess a wild animal on the DNR's endangered and threatened species list without a permit if all of the following apply:

- The person avoids and minimizes adverse impacts to the wild animal to the extent practicable.
- The taking, transporting, or possession does not result in wounding or killing the wild animal.
- The person takes, transports, or possesses the wild animal for the purpose of bulk sampling activities authorized under the bill.

***Effect of Other Laws***

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 generally control, regardless of the nature (substantive or procedural) of the conflicting provision. However, except with regard to procedural requirements, the statute that implements the Great Lakes Compact controls over the ferrous mining statute under the bill.

***Permit Procedure for Construction of Transmission Lines and Public Utilities***

The construction of high-voltage transmission lines, large electric generating facilities, or specified facilities or equipment for electric, natural gas, or water utilities may require approvals from both the DNR and the Public Service Commission (PSC). Under ***current law***, a person who proposes to construct such a project must submit a single permit application to the DNR in lieu of multiple permit applications that might otherwise be required. The combined permit application must be submitted at the same time the person files an application with the PSC. The DNR must participate in PSC investigations or proceedings with regard to the project. In addition, the DNR must take final action on an application within 30 days of the final action by the PSC. [s. 30.025, Stats.]

Under ***the bill***, a person who proposes to construct such a facility for ferrous mineral mining and processing activities may, but is not required to, submit a combined application for the various DNR permits that may be required. If the person elects to submit the combined application, the procedures

described above apply. If the person does not elect to submit a combined application, then the PSC approval and DNR permits may be processed separately.

## *CHANGES TO ENFORCEMENT AND TAXATION*

### *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.[37] 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 DNR 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.

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[37] Because the bill generally removes rule-making authority with regard to ferrous mining, it does not authorize penalties for the violation of administrative rules.

***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"[38] minerals extracted in the state. The tax rate is graduated, ranging from 0% to 15%, depending on the amount of net proceeds per year. The tax brackets are adjusted for inflation. Under current law, all revenue from the net proceeds occupation tax is 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, described below. [s. 70.375, Stats.]

Under ***current law***, all revenue from the net proceeds occupation tax is distributed to the investment and local impact fund. Under ***the bill***, 60% of the net proceeds occupation tax revenue is transferred to the investment and local impact fund, and 40% is transferred to the economic development fund.[39]

***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 include a notice of intent fee, a construction fee, and an administrative fee. With the revenue from those fees and the net proceeds occupation tax, the Investment and Local Impact Fund Board makes certain mandatory and discretionary payments to local governments in an area impacted by a mine. ***The bill*** generally retains the fees and payments under current law. However, it increases the notice of intent fee. Under ***current law***, 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. Under ***the bill***, these notice of intent payments are increased to $75,000.

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

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[38] The term "metalliferous" is not expressly defined in the Wisconsin statutes. Examples of common definitions for the term include "containing metal" and "yielding metal."

[39] There is historical precedent for a 60/40 split of net proceeds occupation tax revenue.