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41ST ASSEMBLY DISTRICT

SB 349: Nonmetallic Mining
Testimony of State Representative Joan Ballweg
Senate Committee on Workforce Development, Forestry, Mining, and Revenue
October 24, 2013

Thank you, Chair Tiffany and members of the committee for scheduling this hearing on Senate Bill 349. Since the start of this biennial session, it has been clear that our focus is on creating jobs and moving our economy forward. Wisconsin has an abundant supply of sand, and this industry has made a positive impact for over a century.

Near my home in Green Lake County there are currently 18 nonmetallic mines, including 12 gravel pits, five sand mines and one quarry. Three sand mines, one gravel pit and that quarry are within four miles of the house that I have lived in for the past 36 years; the home where I raised my three children.

This industry's history in my area is one of good jobs and being good neighbors and community partners. The operations in my area have not been the cause for environmental concerns.

The building we are in today boasts of seven types of granite and 36 varieties of marble, some from Wisconsin, others from throughout the United States and Europe as well. All of the various types of stone were cut from a hill. These are resources that we treasure, but that we use on a daily basis.

Data compiled as of 2010 showed that nonmetallic mining was a $2 billion per year industry in Wisconsin. At that time, there were five industrial sand mines and five industrial sand processing plants. In just three years, the numbers have grown to 105 sand mines and 65 processing plants, with further investment and expansion still possible. A recent analysis of just one proposed facility in Wood County found that it would create $161 million in capital investment, 930 new jobs and $58.7 million in annual earnings when fully operational.

Our goal with this legislation is to maintain the state's high standards regarding air and water quality, while providing access to this abundant natural resource in an environmentally responsible manner. Regulatory certainty, rather than a patchwork of different regulations from various jurisdictions, will help attract future investment and growth in this industry. Recognizing the key role of the Department of Natural Resources (DNR), we added two positions during the budget to help achieve greater environmental compliance while reducing regulatory uncertainty.

I look forward to listening to the discussion during today's hearing and working toward building a partnership between the sand industry and local government that-can positively impact this growing industry in Wisconsin. At this time, I would be happy to take questions from committee members.

STATE REPRESENTATIVE
CHRIS DANOU

WISCONSIN STATE ASSEMBLY

92nd DISTRICT

Testimony before the Senate Committee on Workforce Development, Forestry, Mining and Revenue

Representative Chris Danou – 92nd Assembly District
October 24, 2013

Chairman Tiffany and Members of the Committee, thank you for allowing me to take a few minutes to testify on Senate Bill 349 this morning.

I rarely choose to testify in front of committees on legislation that I have not co-authored. Instead I prefer to let my vote in committee or on the floor make clear where I stand on a particular piece of legislation. However, sometimes legislation is introduced that requires me to speak up one way or another. As a result of Senate Bill 349, I have decided to testify today to express my strong opposition to this bill.

Before I get into the specifics, I wish to address the way this bill appeared before you today and express my frustrations with the authors of this bill and its supporters. As many of you may or may not know, the district I represent and the general surrounding area is the epicenter of the frac sand boom in Wisconsin. Arguably, the impacts of this bill will perhaps be felt most significantly in the district and region I represent.

I became aware of this bill in a general email eight days ago. The email was like any other general email that asks for co-sponsorship to a piece of legislation. I would think, and I would hope that when a legislator has an idea for legislation that will not impact their district, they would reach out to the legislator in that particular area. After all, information and insight is helpful, but courtesy is appreciated and expected. In the case of SB 349, none of my colleagues from the area or I were given advance notice to this bill. I believe that is nothing short of disrespectful to the citizens I represent. The short timelines and hastiness of the co-sponsorship process cause me to question the real motivations for this bill, and why it is so obviously being rushed through on the fast track.

I think the heavy turnout in opposition to this bill from constituents of mine offers a clue. My Assembly district covers almost all of Buffalo and Trempealeau Counties, along with the western half of Jackson County. My wife and I are raising our two sons in Trempealeau County, which has the most sand mine operations in all of Wisconsin's 72 counties. In fact, over the last 36 months, Trempealeau County has granted approval to 26 companies mining and processing silica sand on a total of 4,733 acres. Sand mines have been popping up at such an alarming rate that people all over the county have become concerned about health, safety and aesthetic appearance to our unique landscape. The bluffs in our area are not only unique to Wisconsin, they are unique to the world.

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They took millions of years to create from being situated along an ancient ocean coast and avoided being flattened by glaciers 10,000 years ago. As a result, we have the beautiful driftless area, but geologists have discovered that the sand within them will help us extract oil and natural gas. While we know the mines are blasting out valuable sand, we do not yet know potential health implications. As a result, the Trempealeau County Board enacted a one-year moratorium on any new mines so they could take some time to study and analyze impacts on safety as well as water and air quality. Is this unreasonable action? Absolutely not, because it does not shut down current mines, but rather takes just one year's time to study health and safety impacts to determine if it's responsible to allow more sand mines to open and operate in our community. I think it's worth pointing out that the Trempealeau County Board passed the moratorium on August 30th and here we are today on October 24th.

Getting back to the issues of the bill itself. It is a clear attack on local control and the abilities of our communities to have some input on what they want their communities to be. Whether you approve are opposed to sand mining, or you have no opinions at all, this is still a bad bill for local communities. As a state representative, I have been consistent in my belief that local communities have the right and obligation to make decisions that impact the future of their communities, whether it involves the siting of wind turbines, or the siting of sand mines. The state has an important role in setting minimum health and environmental standards, and providing technical assistance and expertise in determining those standards. I find it ironic, that suddenly Sen. Tiffany is a great supporter of the DNR setting standards and trusting their expertise after he railed against wildlife biologists and their management of the deer herd. I also will note a bill I have written, Assembly Bill 308, gives the DNR the eight additional and necessary staff for monitoring nonmetallic mining activities is just sitting in committee. It has been abundantly clear for some time that the DNR does not have adequate staffing levels to monitor this booming industry. So we have depended on local county and municipal officials for monitoring, and even in some cases, local citizens. This bill would take away the ability of local governments to even require MONITORING of these sites, to make sure that health, environmental and safety standards are being met. It would also take away the ability of local governments to seek damages caused to roads by creating an unrealistic burden of proof.

Let me be very clear, I am not opposed to non-metallic mining and processing, but it needs to be adequately regulated, both at the state and local level. Local communities and neighbors that are most directly affected by what is a significant long-term change should have the ability to have some say in the regulation and oversight. Let me also be clear that I think most operators of these facilities want to be good neighbors, or at least say they do to my constituents and me.

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STATE REPRESENTATIVE
CHRIS DANOU
92nd DISTRICT

WISCONSIN STATE ASSEMBLY

However, support for bills like this do lead me to question whether or not some of these companies truly are interested in being good neighbors and are willing to make ling-term commitments to the community. I have already seen some companies claim to be good neighbors by making agreements with local municipalities, and then turn around to seek annexation into another municipality to get out from under the agreement. Not only does this create needless friction between communities, it is a business practice that is unethical and untrustworthy. A responsible company that is a good community member, should have no need for legislation like this. They should be able to sit down with local governments and negotiate an agreement in good faith that both parties can live with. The number of permits issued in my district alone should demonstrate that local governments are not creating a difficult environment to operate in. They, just like any one of you or anyone here today, want to make sure they have clean air and water, and safe roads as they work, live and raise a family in our community. This bill takes away their ability to guarantee they have these values and gives too much influence to business interests.

Thank you for your time and I urge you to reject this flawed legislation.

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WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: REPRESENTATIVE CHRIS DANOU

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

RE: 2013 Senate Bill 349, Relating to Local Regulation of Nonmetallic Mining, Air and Water Quality, Explosives, Highway Use Contracts, and Borrow and Material Disposal Sites

DATE: October 23, 2013

This memorandum responds to your request for a description of 2013 Senate Bill 349 ("the bill"), relating to local regulation of nonmetallic mining, explosives, borrow and material disposal sites, and certain environmental impacts, and to highway use agreements. The memorandum addresses several issues selected by your office, including the bill's effect on existing ordinances and permits, practical implications for various types of municipalities,[1] and options under the bill for municipal action to address an imminent threat to public safety.

THE BILL

The bill makes various changes affecting local authority to regulate nonmetallic mining and certain other activities. Several of those changes specifically relate to nonmetallic mining, whereas other changes are not specific to nonmetallic mining.[2] In addition to the changes affecting local regulatory authority, the bill includes provisions relating to liability for damage to highways and to the Department of Natural Resources (DNR)'s authority to establish air and water quality standards for nonmetallic mines.

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[1] In general, the term "municipality," as used in this memorandum, refers to any city, village, town, or county.

[2] Under current law, unchanged by the bill, "nonmetallic mining" means all operations or activities for the extraction from the earth for sale or use by the operator of mineral aggregates or nonmetallic minerals such as stone, sand, gravel, asbestos, beryl, clay, feldspar, peat, talc, and topsoil, including such operations or activities as excavation, grading, and dredging. In addition, the term includes on-site processes that are related to the extraction of mineral aggregates or nonmetallic minerals, such as stockpiling of materials, blending mineral aggregates or nonmetallic minerals with other mineral aggregates or nonmetallic minerals, crushing, screening, scalping, and dewatering. [s. 295.11 (3), Stats.]

Changes Specific to Regulation of Nonmetallic Mining

The following changes specifically relate to the regulation of nonmetallic mining:

Authority to Enact and Enforce Non-Zoning Police Power Ordinances

Under *current law*, Wisconsin municipalities generally may regulate nonmetallic mining by enacting one of three general types of ordinances - nonmetallic mining reclamation ordinances, zoning ordinances, and non-zoning ordinances enacted pursuant to general police powers.[3] Counties must, and towns, villages, and cities may, enact nonmetallic mining reclamation ordinances, which must comply with minimum reclamation standards promulgated by the DNR.

Zoning ordinances are ordinances adopted to promote the public health, safety, and welfare by regulating land use. In general, counties, cities, villages, and towns are authorized to enact zoning ordinances. However, special restrictions apply to town zoning.[4]

Municipal governments also exercise police powers to regulate public health, safety and welfare, other than by means of zoning ordinances. Under a 2012 Wisconsin Supreme Court decision, *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, a Wisconsin municipality may regulate nonmetallic mining pursuant to non-zoning police powers if the ordinance does not have characteristics that make it a "zoning ordinance." The court emphasized that the review of any particular ordinance is fact-specific, but noted the following characteristics shared by traditional zoning ordinances:

- The division of a geographic area into multiple zones or districts.
- The allowance and disallowance of certain uses by landowners within established districts or zones.
- A purpose of directly controlling where, rather than how, a use takes place.
- The classification of uses in general terms and the attempt to comprehensively address all possible uses in a geographic area.
- A fixed, forward-looking determination about what uses will be permitted as opposed to a case-by-case, ad hoc determination of what uses the landowner will be allowed to conduct.

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[3] For more detailed information regarding local regulation of nonmetallic mining in Wisconsin, see *Regulation of Sand Mining in Wisconsin*, IM-2013-14, http://legis.wisconsin.gov/lc/publications/im/IM2013_04.pdf.

[4] A town that is not authorized to exercise village powers may exercise zoning authority only if it is located in a county that has not enacted a county zoning ordinance. [s. 60.61 (2), Stats.] A town that is authorized to exercise village powers may enact zoning ordinances despite the existence of a county ordinance, subject to approval by town meeting or referendum, and approval by the county board. [s. 60.62, Stats.]

- The allowance by certain landowners to maintain their use of the land even though such use is not in conformance with the ordinance because the landowners' use of their land was legal prior to the adoption of the zoning ordinance.

[*Zwiefelhofer*, ¶¶ 36, 38-42.]

The bill prohibits counties, towns, cities, and villages from enacting or enforcing ordinances, except for zoning and nonmetallic mining reclamation ordinances, that apply to nonmetallic mining and regulate how a use of land takes place or that affect the use of land. The effect of that provision would be to restrict local regulation of nonmetallic mining through non-zoning police power ordinances that regulate or affect the use of land for nonmetallic mining. The bill generally does not affect local governments' zoning authority.

Codification of the Diminishing Assets Rule

Current law generally prohibits municipalities from enforcing zoning ordinances against "nonconforming uses," defined to mean uses that existed lawfully before a current zoning law took effect. Various statutory provisions limit the application of that protection, for example, when an original nonconforming use is expanded or discontinued. [*See, e.g.*, ss. 60.61 (5) (am) and 62.23 (7) (h), Stats.]

However, as interpreted in various Wisconsin judicial decisions, particularly in the context of quarrying, a landowner who is excavating a natural resource is held to be "using" all of a given natural resource, including portions of the resource that are on contiguous land and have not yet been excavated. Thus, when determining the existing use that is to be protected as a nonconforming use, the right to continue to extract all of the natural resource previously allowed is protected. [*See, e.g., Smart v. Dane County Board of Adjustments*, 501 N.W.2d 782, 785 (Wis. 1993).] That legal interpretation is commonly referred to as the "diminishing assets rule," because it protects the use of a natural resource asset that has a value which diminishes as it is extracted. The practical theory supporting the rule is that it is not possible to excavate all parts of a natural resource at one time; thus, an operator should be allowed to continue excavation in the area. [*Sturgis v. Winnebago Adjustment Board*, 413 N.W.2d 642, 643 (Wis. Ct. App. 1987).]

The bill codifies the diminishing assets rule in the context of nonmetallic mining. Specifically, under the bill, a zoning ordinance may not prohibit the continued extraction of a nonmetallic mining mineral from a nonconforming nonmetallic mining location. The bill defines "nonconforming nonmetallic mining location" as land on which nonmetallic mining was occurring when nonmetallic mining became a nonconforming use, including land that is contiguous to such land if the contiguous land is under common ownership or control with the land on which the nonmetallic mining was occurring.

Nonmetallic Mining Reclamation Ordinances

Under ***current law***, nonmetallic mining reclamation ordinances must include reclamation standards that meet or exceed standards promulgated by the DNR and set forth in

ch. NR 135, Wis. Adm. Code. The relevant DNR rules establish both general standards and standards specific to surface water and wetlands protection, groundwater protection, topsoil management, grading and slopes, topsoil redistribution, and revegetation and site stabilization. [ss. NR 135.07 through 135.12, Wis. Adm. Code.] Several of those standards reference generally applicable environmental standards. For example, the rules specify that nonmetallic mining reclamation must be conducted in a manner that does not cause pollutant limits set in the state's groundwater quality standards to be exceeded.

A municipality must deny an application for a nonmetallic mining reclamation permit if the municipality finds that the nonmetallic mining site cannot be reclaimed in compliance with the reclamation standards contained in the ordinance. [s. NR 135.22, Wis. Adm. Code.] The following general standards apply to nonmetallic mining operations under current law:

- **Refuse and other solid wastes.** Nonmetallic mining refuse must be reused in accordance with a reclamation plan. Other solid wastes must be disposed of in accordance with applicable DNR rules.
- **Area disturbed and contemporaneous reclamation.** Nonmetallic mining reclamation must be conducted, to the extent practicable, to minimize the area disturbed by nonmetallic mining and to provide for nonmetallic mining reclamation of portions of the nonmetallic mining site while nonmetallic mining continues on other portions of the nonmetallic mining site.
- **Public health, safety, and welfare.** All nonmetallic mining sites must be reclaimed in a manner so as to comply with federal, state, and local regulations governing public health, safety, and welfare.
- **Habitat restoration.** When a reclamation plan requires plant, fish, or wildlife habitat, the habitat must be restored, to the extent practicable, to a condition at least as suitable as that which existed before the lands were affected by nonmetallic mining operations.
- **Compliance with environmental regulations.** Reclamation of nonmetallic mining sites must comply with any other applicable federal, state, and local laws, including those related to environmental protection, zoning, and land use control.

[s. NR 135.06, Wis. Adm. Code.]

In addition, a municipality may issue a nonmetallic mining permit subject to general or site-specific conditions, if the conditions are needed to ensure compliance with the rules promulgated by the DNR. A municipality may not impose conditions as part of a nonmetallic mining reclamation permit that do not relate to reclamation of the nonmetallic mining site. [s. NR 135.21, Wis. Adm. Code.]

The bill prohibits DNR from establishing nonmetallic mining reclamation standards relating to water quality or quantity or air quality that are more restrictive than the generally applicable standards established by statute or rule in the state.

In addition, the bill prohibits municipalities from enacting or enforcing nonmetallic mining reclamation ordinances that do any of the following:

- Include a standard of air quality or water quality.
- Require a nonmetallic mining operator to obtain a permit or other form of approval in addition to a nonmetallic mining reclamation permit.
- Impose any requirement related to monitoring water quality or quantity or air quality.
- Include standards that are more restrictive than DNR's nonmetallic mining reclamation standards or the generally applicable standards under current law relating to air quality or water quantity or quality.

Generally Applicable Changes Relating to Local Government Authority

The following changes do not specifically relate to the regulation of nonmetallic mining. They are broadly applicable.

Local Environmental Regulations

Under *current law*, municipal actions in the area of environmental regulation are in some cases preempted under state or federal law. Where such actions are not preempted, municipalities generally may enact ordinances or take other actions that address environmental protection, if such action is within the scope of their police powers.

The bill prohibits municipalities, unless specifically required or authorized to do so by another statute, from taking certain actions relating to air and water pollution. Specifically, with the exception of the regulation of open burning, the bill prohibits municipalities from doing any of the following, unless statutorily authorized or required to do so:

- Establishing or enforcing a water quality standard, an ambient air quality standard, standard of performance for new stationary sources, or other emission limitation related to air quality.
- Issuing permits or any other form of approval related to air quality or water quality or quantity.
- Imposing any restriction related to air quality or water quality or quantity.
- Imposing any requirement related to monitoring air quality or water quality or quantity.

In addition, the bill specifies that certain general statutory authorities relating to home rule and public peace and good order may not serve as bases for the actions listed above.

Current law also authorizes a county, after consulting with cities and villages within the county, to establish and administer an air pollution control program. Such programs may, by ordinance, require stricter or more extensive air pollution control requirements than apply under state law. [s. 285.73, Stats.]

The bill repeals the authority for county-administered air pollution control programs.

Regulation of the Use of Explosives

Under *current law*, the Department of Safety and Professional Services (DSPS) must promulgate rules to ensure the safety of mines, explosives, quarries, and related activities. [s. 101.15 (2) (e), Stats.] At least in some circumstances, municipal ordinances regulating such activities might be found to be preempted by the DSPS rules.

The bill generally prohibits cities, villages, towns, and counties from regulating the use of explosives in connection with mining, quarrying, and related activities. However, the bill authorizes those municipalities to regulate blasting schedules by issuing a conditional use permit.

Highway Use Contracts

In general, under *current law*, no local authority may enact or enforce any traffic regulation that in any manner excludes or prohibits any motor vehicle from the "free use of all highways." [s. 349.03 (2), Stats.] Thus, although municipalities are authorized to take certain actions to prevent damage to highways or recover money damages resulting from injuries to highways, current law does not otherwise appear to authorize municipalities to enter agreements that impose fees based on highway use ("highway use agreements").

The bill authorizes counties, cities, villages, and towns to execute highway use agreements, with certain restrictions. The bill authorizes a municipality to enter into a contract with a highway user that requires the highway user to reimburse the governmental unit for the cost of repairs to a highway. Such repairs must be necessitated by actual damage to the highway caused by the highway user. The bill generally prohibits a municipality from imposing any other fee or other charge on a highway user.

Under the bill, a highway use agreement must satisfy all of the following requirements:

- The repairs to the highway are completed before reimbursement is required by the highway user.
- The proportion of damages to the highway caused specifically by the highway user and the cost of repairs attributable to that share of damages must be determined by an engineer chosen by agreement of the municipality and the highway user.

- The costs of the engineer's services are paid in equal shares by the highway user and the municipality.

In addition, under the bill, a highway use agreement may require a highway user to show proof of financial security sufficient to pay for the cost of repairs to a highway necessitated by actual damage to the highway specifically caused by the highway user. The proof of financial security may be provided in the form of a bond, deposit of funds, established escrow account, letter of credit, or a demonstration of financial responsibility by meeting net worth requirements or other form of financial assurance conditioned on the faithful performance of rules established by the DNR in the context of nonmetallic mining reclamation.

The proof of financial security must satisfy the following requirements:

- The amount of financial security required does not exceed the reasonable expected payments for damages expected to be caused during the three years following the date the amount is determined.
- The amount of financial security is determined by an engineer chosen by agreement of the municipality and the highway user.
- The costs of the engineer's services are paid in equal shares by the highway user and the municipality.
- The amount of financial security is not required to be recalculated more often than once per year, unless the highway user proposes changes to the highway user's proposed highway use that were not anticipated in the last calculation of financial security.

Liability for Damage to a Highway

Under *current law*, a person who injures a highway by specified actions or by "any other act" may be held liable to the municipality in charge of highway maintenance for treble damages. [s. 86.02, Stats.]

The bill limits the application of that statute to damage to a highway that is caused willfully or that results from an unlawful act. In addition, the bill provides that this statute does not apply to damage caused by a vehicle when the vehicle is operated under a highway use contract authorized under the bill.

Borrow and Material Disposal Sites

Under *current law*, municipal zoning ordinances are inapplicable to borrow sites[5] and material disposal sites[6] utilized by the Department of Transportation (DOT) in certain state

[5] A "borrow site" means any site from which soil or a mixture of soil and stone, gravel, or certain other material is excavated for use in a specified DOT project.

highway construction and transportation projects. Zoning ordinances are inapplicable to such sites only if certain criteria are satisfied. [ss. 84.06 (12) and 85.193 (2), Stats.]

The bill retains the criteria under current law for inapplicability of zoning ordinances to certain borrow and material disposal sites, but it expands the scope of the exceptions under current law to apply to municipal actions other than zoning. Specifically, under the bill, no city, village, town, or county may enact or enforce any ordinance, resolution, or other requirement, including a zoning ordinance, that applies to the borrow sites and material disposal sites specified under current law.

EFFECT ON EXISTING ORDINANCES, PERMITS, AND USE AGREEMENTS

In general, the provisions of the bill that limit local regulation expressly apply to both the enactment and enforcement of ordinances and other requirements that are inconsistent with the bill. For that reason, the provisions of any local ordinance or other requirement that are prohibited under the bill would become unenforceable on the day following the bill's enactment. Certain other provisions limit the imposition of a restriction by a local government, and would likely be interpreted to apply to ongoing or future impositions of restrictions, including those made pursuant to existing permits and approvals.

With respect to highway use agreements, the bill provides for the modification or replacement of existing agreements. The bill authorizes any highway user that is a party to a highway use contract that is inconsistent with the requirements under the bill to petition the relevant municipality for the replacement or modification of any existing highway use agreement when the bill becomes effective. Upon receiving such a petition, the bill requires the municipality to participate in good faith in modifying or replacing the agreement. After a new or modified agreement is negotiated, any provisions of an existing agreement that are inconsistent with the bill's requirements automatically terminate.

PRACTICAL IMPLICATIONS FOR MUNICIPALITIES THAT HAVE ENACTED ORDINANCES REGULATING NONMETALLIC MINING

The bill's practical effect on municipalities that have enacted nonmetallic mining ordinances would vary based on the legal authority a given municipality relied upon when enacting such regulations. The bill will have relatively little effect on ordinances enacted pursuant to local zoning authority. The bill will have some effect on nonmetallic mining reclamation ordinances, particularly if such ordinances include standards that include provisions that exceed general standards for air and water quality or water quantity under state law, or impose monitoring conditions. Arguably, the bill's most significant practical impact will apply to municipalities that have enacted ordinances (other than nonmetallic mining reclamation ordinances) pursuant to non-zoning police powers.

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[6] A "material disposal site" means any site off of the transportation project property used for the lawful disposal of surplus materials from a transportation project and that is under the direct control of the transportation project contractor of subcontractor.

For example, if a municipality has enacted an ordinance prohibiting nonmetallic mining activities on any land within the municipality during a given time period, whether that ordinance is enforceable under the bill depends on whether it was enacted as a zoning ordinance or pursuant to non-zoning police powers. If the ordinance was enacted as a zoning ordinance, then its enforceability is not affected by the bill. If, instead, the ordinance was enacted as a non-zoning, general police powers ordinance, then it would not be enforceable following the bill's enactment.

Some municipalities may have relied on non-zoning police powers to regulate nonmetallic mining because a zoning change was practically or politically infeasible. For example, a town may have determined that it would lack county board approval for a zoning change. Arguably, the bill's practical effect will be most significant for municipalities in that situation.

AUTHORITY TO ADDRESS IMMINENT THREATS TO PUBLIC SAFETY CAUSED BY NONMETALLIC MINING PURSUANT TO POLICE POWERS

As described above, the bill generally prohibits cities, villages, towns, and counties from enacting or enforcing certain ordinances pursuant to non-zoning police powers. Specifically, a municipality is generally prohibited from enacting or enforcing such an ordinance if the ordinance is applicable to nonmetallic mining and regulates how a use of land takes place or affects the use of land. The bill retains municipal zoning authority and retains certain municipal authority relating to the enactment of nonmetallic mining reclamation ordinances.

If a given threat to public safety caused by nonmetallic mining activity is not regulated through a municipality's zoning or nonmetallic mining reclamation ordinance, the bill would limit the municipality's authority to address the concern through the enactment of a general police power ordinance that regulates how a use of land takes place or affects the use of land. The extent to which such authority would be limited under the bill may depend on the interpretation of the phrase "regulates how a use of land takes place or affects the use of land." In some circumstances, a municipality might successfully argue that certain actions taken pursuant to general police powers to prevent a threat to public harm, while relevant to nonmetallic mining activities, do not regulate how a use of land takes place or affect the use of land.

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

AH:LAK:jal

KATHLEEN VINEHOUT
STATE SENATOR

Testimony on SB 349
Senate Committee on Workforce Development, Forestry, Mining and Revenue
October 24, 2013

I represent more sand mines than any other Legislator. I represent Trempealeau County where a quarter of all mines and processing plants in the state are located. I've seen communities grapple with the sand rush since 2010. I've received over 500 contracts from constituents who are concerned about sand mines in their neighborhood.

I've seen communities work with good operators and bad operators.

There are good operators like Badger Mining that are embraced by the community. Other communities have had many problems...heavy truck traffic and silica dust close to schools, tourism businesses that had to close or are worried about the loss of customers, farmers worried about the health of livestock – especially poultry; explosives blasting throughout the night or too close to homes. In response, communities adopted reasonable ground rules to ensure the health, safety and welfare of residents.

Hundreds of people have spent thousands of hours working out these agreements with sand mines. These ordinances give people a little sense of protection. This isn't about being against or for sand mines this is about local people's ability to negotiate with industry.

These agreements help all the mines be good neighbors. The agreements give some certainty to people that they won't lose their well water or have the water contaminated; so they won't have their kitchen shelves covered with sand dust; so the plaster wall will be repaired that was cracked by blasting; be woken up at night by clanging rail cars or truck headlights shining in their bedroom windows. Local people have stepped up to develop ground rules to ensure the sand mines are good neighbors.

SB 349 would undermine the efforts of hundreds of citizens. It would take away, especially in unzoned towns, people's ability to control what happens in their neighborhood. This bill would roll back protections given to locals who use the police powers of towns and counties.

This bill creates a new and very difficult to prove standard for locals to collect damages to roads. Please understand: local road money has been cut back year after year. Many towns are now turning asphalt roads back into gravel. Many roads have not been repaired in years. The heavy truck traffic related to mines is not a historical use of these roads. Without additional money coming in the only way roads will be upgraded for sand mine trucks is if the town takes money set aside for another project and uses this for the sand mines. I and many of my constituents live on gravel roads. It does not take long at all for these roads to be torn up with heavy truck traffic.

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This bill would take away the ability of local people to protect themselves from air pollution, water damage, contamination or draw down and invalidate ordinances controlling blasting and payment for road damage.

This part of the bill does not apply just to sand mines – but to any local ability to protect health and safety related to water, air and the use of explosives that is not expressly authorized in another part of Wisconsin law. This bill would stop any local unit from establishing or enforcing any water quality standard, issuing permits related to water quality, or quantity, imposing restrictions related to water quality and requiring any monitoring or water. There is similar language in the bill related to air quality.

The bill says when there's not a consensual agreement between the participating parties the mine is going to force the issue. If a mine can't convince their neighbors that this is a good thing, why should Madison politicians get involved?

The effect of this very wide reaching language is to create tremendous uncertainty. My phone has been ringing off the hook as locals asked me questions that are just not clearly answered by anyone:

Can a gravel pit convert to a sand mine under the language in the bill related to the Diminishing Asset Rule? I can't get an answer.

Will zoning ordinances that require a sand mine to reimburse a neighbor who loses the use of his or her well be invalidated? I don't know.

Will the Trempealeau County moratorium be invalid? No one knows.

Will the Town of Greenfield be able to keep all of its agreement with the Unimin mine? This is not at all clear. How about the town of Howard?

The truth is: a lot of things in these ordinances we have no idea what a court is going to do.
The list of questions is very long. The answers are very limited.

The proponents of this bill claim it gives regulatory certainty. The exact opposite is what's the truth. This bill throws into question hundreds of agreements, ordinances and conditional use permits. Each individual provision of a permit is going to be subject to litigation and court challenges.

The communities do not have the resources to stand up to a Texas oil or natural gas company. The effect of this bill is to run roughshod over the rights of local people to have a say in what happens in their neighborhoods.
This bill is about less protection and more cost. It is about silencing the voice of the people. It undermines 100 years of relationships between locals and the state of Wisconsin. It allows out-of-state corporations to control what happens in Wisconsin.

I've seen the big pick-up trucks with Texas license plates. I've heard the lawyers from the oil and natural gas industry. I see what's happened to the Department of Natural Resources. If you want them to regulate the mines, maybe you need to add some inspectors.

The people I represent keep asking me, "Why do Madison politicians want to tell us what to do? They don't live here." I don't have an answer for them.

William Mavity
Pepin County Board, District 12 Supervisor

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email:

CONFIDENTIAL AND PRIVILEGED PER RULE 904.08 *(offer to compromise)*

October 17, 2013

Tanya M. Bruder, Esq.
Spangler, Nodolf, Bruder & Klinkhammer, LLC
4410 Golf Terrace, Suite 120
Eau Claire, Wisconsin 54701

Re: Proposed Amendment to Pepin County Highway Upgrade and Maintenance Agreement

Dear Ms. Bruder:

This responds to your request presented to the Highway Committee on October 8, 2013, to amend the County's Highway Upgrade and Maintenance Agreement with Greg Bechel Trucking and Excavating, LLC (Bechel). The present agreement allows no more than eighty (80) operations (truck loads) per day of frac sand transported out of the mine. Your proposed amendment would increase this daily number to 110 operations from January 1 of each year until the County imposes its Spring road bans, and to 100 operations per day from the date the Spring load bans are removed through the remainder of the year. Your proposed amendment to increase the number of daily loads would increase the anticipated gross revenues for Bechel by more than 25%. However, your proposal does not address nor provide consideration for the County or the two towns (Frankfort and Waterville) through which the haul route passes in return for an agreement to increase daily operations.

The Committee was first informed of Bechel's desire to increase the daily operations when Greg Bechel appeared before the Committee on September 10, 2013. Mr. Bechel told the Committee that he wanted to increase the daily operations by ten loads per day. The Committee had discussions with representatives of both Town Boards regarding a ten loads per day increase. Both towns have informed the Committee that they strongly oppose an increase of any kind in the daily operations.

It is the present sense of the Highway Committee that no increase of more than ten loads per day would be acceptable in an amendment to the agreement, and if that number were to be agreed upon, the County and each of the two towns would require

annual payments in cash for their respective transportation budgets. If Bechel is not interested in negotiating an amendment within that framework of ten loads and consideration for the County and towns, then there will be no further negotiations.

Our present agreement is only 14 months old. It was the product of lengthy, thorough and expensive negotiations. It is a comprehensive and fair agreement which the County has no interest in changing in light of the opposition of the two towns, without significant consideration paid to the towns and county for its agreement.

I look forward to your response.

Very truly yours,

William Mavity

William Mavity, Chair
Pepin County Highway Committee

c: Supervisors Ron Weiss (Vice-Chair), Bruce Peterson and Mike Murray

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MEMORANDUM

TO: Honorable Members of the Senate Committee on Workforce Development, Forestry, Mining, and Revenue

FROM: Daniel Bahr, Legislative Associate

DATE: October 24, 2013

SUBJECT: Senate Bill 349

The Wisconsin Counties Association (WCA) thanks the committee for the opportunity to discuss Senate Bill 349 relating to local regulation of nonmetallic mining. WCA is testifying for information purposes only. At this time, the Wisconsin Counties Association has no formal position on SB 349 in its entirety. However, as we move forward in the process it is worth noting that WCA has concerns with certain provisions in the bill. From local highway use agreements, to the provisions of a nonmetallic mining ordinance, county government is charged with protecting its citizens and with serving the best interests of our taxpayers. One of our association's key missions has always been to preserve local control as we believe local decisions are best made at the local level.

Yesterday, key county stakeholders came together to discuss various aspects of SB 349. I wish to thank the bill authors Sen. Tiffany and Rep. Ballweg for attending and for hearing from our membership. WCA would also like to thank their staff members, Jennifer Esser, Eric Searing and Vince Williams for setting up the aforementioned meeting. Because of your efforts, county professionals in the areas of Transportation, Environment and Land Use had the opportunity to directly discuss key components of the proposed legislation. Both legislators were receptive and indicated a willingness to consider changes suggested by our members.

There are several environmental issues that create questions or concerns for our members, such as the preemption of specific permitting ordinances, the preemption of any local regulation applicable to a borrow site or a material disposal site and the question of a county's ability to regulate a nonmetallic mine by conditional use permit. Our members have also expressed concerns related to road use agreements with the Frac Sand Industry. These issues include the status of currently existing contracts and the potential financial burden of fronting one half of the engineering cost for multiple highway damage assessments.

WCA's objective in this process is to work with the bill authors and industry stakeholders in order to produce the best public policy possible. We look forward to continuing the discussion on SB 349 in order to produce balanced and workable public policy that is acceptable to our membership.

SB 349 testimony of Dick Marino
on behalf of the Wisconsin Transportation Builders Association
October 24, 2013

Introduction

Chairman Tiffany, Committee Members, good morning, my name is Dick Marino and I am the Vice President for Real Estate Services at the Kraemer Company, a road construction and aggregate producer, based in Plain, Wisconsin, a village in Sauk County of 800 residents. I appreciate the opportunity to comment on SB 349 and appear today on behalf of the Wisconsin Transportation Builders Association (WTBA) in support of the bill. The WTBA is a state-wide association of 275 members that is widely recognized for its expertise, the effectiveness of its programs, and the long-term impact of its forward-looking vision on the development of a competitive Wisconsin transportation system. We are also members of the Aggregate Producers of Wisconsin.

With regards to this legislation, since 1980, I have been in charge of the zoning and permitting for the company. In that capacity I have appeared hundreds of times in front of Town planning committees, Town Boards, County Planning and Zoning committees and County Boards of Adjustment. Since we have quarries and gravel pits in 27 counties and over 130 townships, I have had varied experience working with zoned and unzoned townships and citizen committees. I have also had the pleasure of being an elected trustee on the Village of Plain board and being a citizen member of the Village's Plan Committee.

Comments on SB 349

SB 349 addresses the three questions: (1) who should be responsible for siting of a nonmetallic site; (2) who should regulate those sites for air and water quality standards and permits and blasting standards: and, (3) what does a reasonable local road agreement look like in order for local government to recover actual damages caused by a single user.

Before any of these regulatory concerns are raised, a company needs to identify a site that meets its criteria for a feasible non-metallic mining site. What is common among every company is that we need to find a site that can produce high quality aggregate in an area where there is need for such material. With the migration from urban areas back to rural areas, these sites are becoming harder to find. Every large, open area is not able to be developed. We need to identify a suitable area of material, an owner that is interested in

developing his property into a non-metallic mine, a parcel of land that is correctly zoned or can be changed to the correct zoning, has adequate access, and, yes, where there are a limited number of affected neighbors. Once these criteria have been met, the zoning process can begin.

Over the past 30 plus years, the zoning process has changed greatly. When I first started, zoning consisted of making little more than a courtesy visit to the Town board, receiving their approval and then going to the County for a public hearing and, in almost all cases, receiving approval. The county attached a few conditions, such as hours of operation, requiring us to follow all DNR regulations, etc. It was usually a quick and painless process. Now, with the advent of comprehensive planning requirements, we have our first public hearing in front of the Town Planning Committee. This can be one meeting or multiple meetings until the committee members feel that they have enough input from the proposed mine operator, land owner and the general public. Once this committee feels it has enough information to offer a recommendation, the proposal is presented to the Town Board. The Town Board then addresses this request, reviews the Planning committee's recommendation while again holding a public hearing. This request can then be approved, denied or held over for more public input. Once a decision is made by the Town Board, the request is moved on to the County where, depending on whether a zoning change is also needed, it will go to the Planning and Zoning Committee, if a change of zoning is needed, or directly to the County Board of Adjustment for review. In all cases, public hearings are again held with input from the county's regulatory Zoning Department. These permits, if issued, will have conditions attached, such as hours of operation, property screening needed, access routes, and adherence to DNR requirements for reclamation (NR 135), stormwater controls, blasting regulations and any others that the BOA sees fit, almost always incorporating any input it received from the town.

Now due to the Zwiefelhofer decision, almost on a weekly basis, we find that zoned and unzoned townships, where we have existing non-metallic mines, have proposed or passed new licensing requirements to take advantage of this decision. These new requirements are in addition to any existing conditions that are already in place. These new requirements have a tendency to share some commonality. That is, they limit the amount of material that can be produced at an existing site before fairly severe regulations and costs are implemented. They also usually place additional well water testing requirements, sometimes to wells as far as 3 ½ miles, implement new or revised road agreements covering haul routes and limiting transportation to those designated routes, with large financial assurances for road repair and maintenance, set air and dust standards and acceptable noise levels. I want to reiterate that these requirements are in addition to all of the permit requirements we have been faithfully following for many years. Hopefully you can understand our confusion. To continue traveling on the roads that we have used for many years, we now need to agree to complex road agreements that

stipulate the travel routes we are allowed to use and the number of trucks that can travel these roads. Even though these are public roads, we need to post financial bonds to guarantee that any road damage is repaired by us, in many cases whether it can be proved we did the damage or not.

In conclusion, we do not believe that this overlap of police power and zoning is good government or good business. As an industry, we do not object to regulation, we object to overregulation.

Thank you.

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To: Senate Committee on Workforce Development, Forestry, Mining and Revenue

From: Curt Witynski, Assistant Director, League of Wisconsin Municipalities

Date: October 24, 2013

Re: SB 349, Limiting Municipal Authority to Regulate Water Quality and Quantity, Air Quality, Borrow Pits Associated with DOT Projects, and Nonmetallic Mining

The League of Wisconsin Municipalities opposes SB 349, which broadly prohibits municipalities from regulating water quality and quantity, air quality, borrow pits and material disposal sites related to DOT construction projects, and nonmetallic mining. We oppose this bill for the following reasons:

Elimination of Municipal Home Rule Authority with respect to Water and Air Issues. The bill expressly states that municipalities cannot rely on their broad police powers, also known as statutory home rule powers, to regulate water quality and quantity and air quality. It is true that under the bill a municipality may take actions related to water quality or quantity and air quality that are specifically authorized by state statute. However, this is a complete reversal of the tradition of home rule in this state. Under home rule, the state has granted municipalities broad general powers to regulate for the health, safety and public welfare of the community. A municipality may use these powers to address local issues of concern unless the state has specifically prohibited such regulations. In this bill, the opposite approach is taken. Under SB 349, a municipality has no home rule powers and may only regulate water quality and quantity and air quality if expressly authorized to do so by a state statute.

By taking away statutory home rule powers, the bill prevents municipalities from being able to address unique concerns or problems that the legislature hasn't anticipated and therefore has not specifically authorized municipalities to address locally. Local home rule powers allow municipalities to be innovative and quickly respond to local conditions and concerns.

For example, under this bill a community that has significant flooding problems would be unable to impose certain regulations on new development designed to address the unique flooding concerns of the community. Similarly, this bill would prohibit a municipality from prohibiting outdoor woodburning boilers within dense neighborhoods to address air quality concerns.

Prohibition on Local Regulation of Borrow and Material Disposal Sites. SB 349 expands on language in current law prohibiting municipalities from applying zoning regulations to borrow sites and material disposal sites for DOT projects. The bill prohibits municipalities from regulating in any manner these sites. Communities in this state are already concerned about their

inability to respond to citizen concerns raised by the location of DOT project borrow sites and disposal sites. The City of Brookfield, for example, has significant concerns over the possible location of a material disposal site associated with the zoo interchange project near a residential district in the city. In response to the city's concerns, legislation is currently being circulated for co-sponsors that would go in the opposite direction of this bill. LRB 3210 creates exceptions to the preemption under current law of local zoning ordinances relating to borrow sites and material disposal sites. It would allow a municipality to regulate such sites in any residential area that has more than 500 residents living within a one–mile radius of the material disposal site. The bill would also allow a municipality to regulate, by ordinance, the hours of operation, noise or traffic volume relating to, any borrow site or material disposal site. LRB 3210 recognizes a difference between rural areas and denser, more populated urban areas. SB 349 needs to be amended to do the same.

Municipalities are frustrated by the state's recent tendency to interfere with matters of local control. This bill continues that pattern. The League urges you to vote against recommending passage of this bill. Thanks for considering our concerns.

From: kevin [mailto:kevin@tremplocounty.com]
Sent: Wednesday, October 23, 2013 8:00 AM
To: Sen.Vinehout
Subject: Please read, thank you

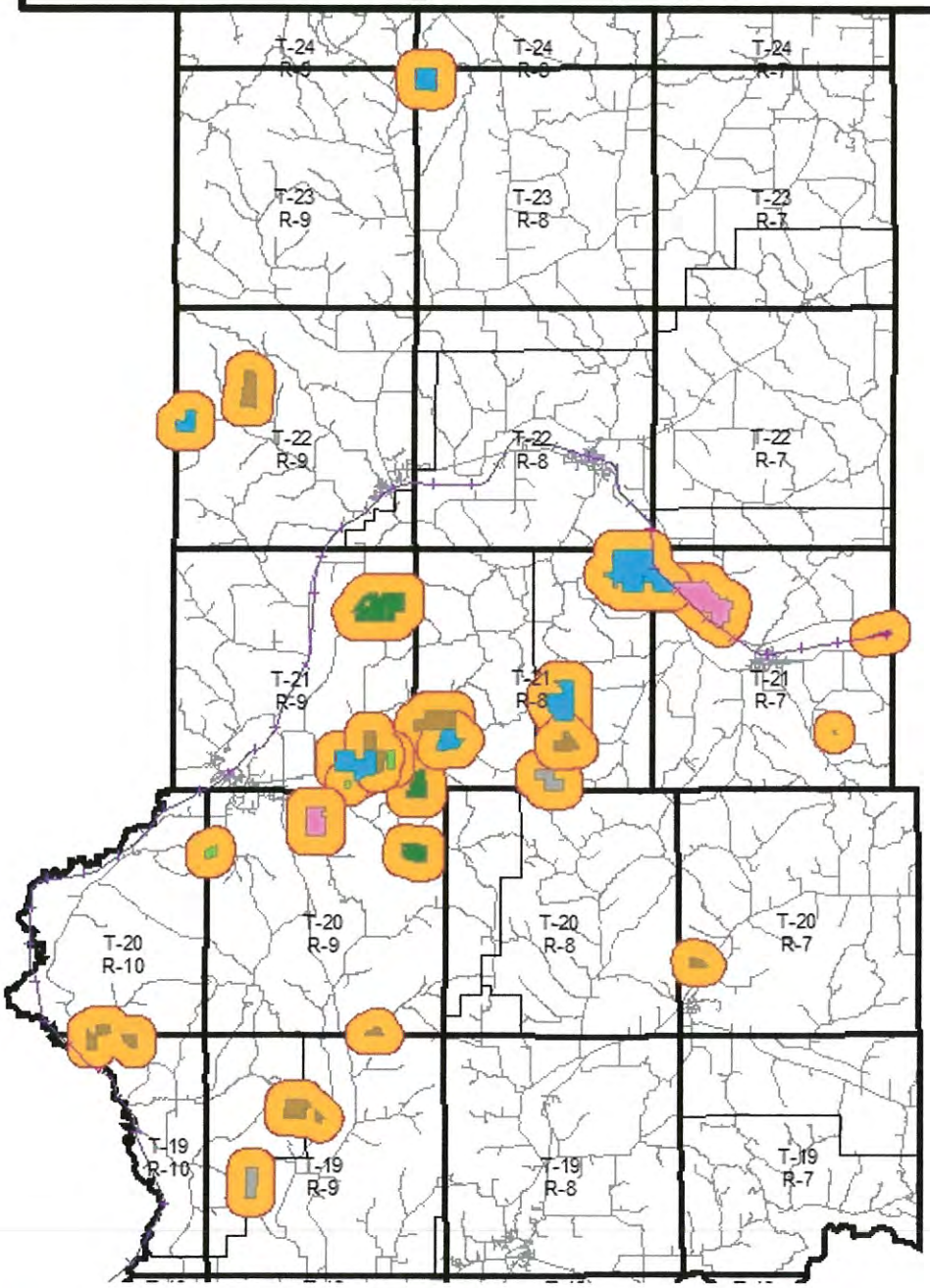
Trempealeau County has been entirely under County Zoning since 1972 and adopted a Non-Metallic Mining Ordinance in 1997 long before the current demand of mining. To date we have received and held public hearings for 30 Industrial Sand Conditional Use applications, 28 where issued with only 2 denials for very specific reasons. The process in place by Trempealeau County as well as several other Counties is working well. We require a letter from each Town Board where a Conditional Use Application has been applied for to submit a letter with their opinion in support or in opposition to the request. In many if not all cases the Town Board will attach proposed Conditions for my Committee to consider when approving the permit for Non-Metallic Mining in their perspective Town. The Conditions are very site specific, related to unique environmental issues, health and safety issues and when applicable road use agreements to protect the quality of the public roads. The industry is working through the local process, receiving operating permits and actively mining sand at multiple locations in our Counties.

With that said, we currently have every operating (6) Industrial Sand mine in Trempealeau County under some kind of DNR citation or violation from Storm Water and Discharge issues. This is an industry and use that needs to be regulated, at the local level and under local jurisdiction. There is not enough DNR staff available to conduct an adequate job to protect the unique environmental issues that are present in each of our counties and are not the same from County to County. My staff works weekly with DNR staff to protect the Health, Safety and Environment for all. The system we have in place now is mirrored in many other Counties and is working by the number of operating Industrial Sand mines across the State and the numbers continue to grow. Each and every County/Town has unique features that rarely meet the "cookie cutter" approach and should be allowed to regulate those unique aspects at the County or Town level. If the system was broken and industry was not allowed to move forward at all then the need for further regulation should be looked at with a state wide rule making process. That is not the current status even with temporary Moratoriums in some areas of the state to allow additional studies and much needed information to answer unknowns related to this Industry. Trempealeau County has possibly more permitted Industrial Sand sites than any other County in Wisconsin, our system works, please allow us the ability to continue to exercise local control to protect and assist in the proper extraction of Industrial Sand through a local permitting process and Ordinance regulation.

Thank you,

Kevin Lien
Director
Department of Land Management
Trempealeau County
36245 Main Street - P.O. box 67
Whitehall, WI 54773
715-538-2311 ext. 255
Kevin@tremplocounty.com

Industrial Sand Operations
Trempealeau County, WI
August 12, 2013



Processing Operational
Extraction Operational
Annexed Operational
In Process (Processing)
In Process (Extraction)
Old Limestone Mine
Rail Loadout
2500ft Buffer
Roads

1:290,000

0 15,000 30,000 60,000 90,000 120,000 150,000 Feet

Trempealeau County Department of Land Management

(715) 538-2311 ext. 223 Courthouse, P.O. Box 67, Whitehall, WI 54773

N

Jake Budish

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR BOB JAUCH

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

RE: 2013 Senate Bill 349, Relating to Local Regulation of Nonmetallic Mining, Air and Water Quality, Explosives, Highway Use Contracts, and Borrow and Material Disposal Sites

DATE: October 23, 2013

This memorandum responds to your request for a description of 2013 Senate Bill 349 ("the bill"), relating to local regulation of nonmetallic mining, explosives, borrow and material disposal sites, and certain environmental impacts, and to highway use agreements. The memorandum addresses several issues selected by your office, including the bill's effect on existing ordinances and permits, practical implications for various types of municipalities,[1] and options under the bill for municipal action to address an imminent threat to public safety.

THE BILL

The bill makes various changes affecting local authority to regulate nonmetallic mining and certain other activities. Several of those changes specifically relate to nonmetallic mining, whereas other changes are not specific to nonmetallic mining.[2] In addition to the changes affecting local regulatory authority, the bill includes provisions relating to liability for damage to highways and to the Department of Natural Resources (DNR)'s authority to establish air and water quality standards for nonmetallic mines.

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[1] In general, the term "municipality," as used in this memorandum, refers to any city, village, town, or county.

[2] Under current law, unchanged by the bill, "nonmetallic mining" means all operations or activities for the extraction from the earth for sale or use by the operator of mineral aggregates or nonmetallic minerals such as stone, sand, gravel, asbestos, beryl, clay, feldspar, peat, talc, and topsoil, including such operations or activities as excavation, grading, and dredging. In addition, the term includes on-site processes that are related to the extraction of mineral aggregates or nonmetallic minerals, such as stockpiling of materials, blending mineral aggregates or nonmetallic minerals with other mineral aggregates or nonmetallic minerals, crushing, screening, scalping, and dewatering. [s. 295.11 (3), Stats.]

Changes Specific to Regulation of Nonmetallic Mining

The following changes specifically relate to the regulation of nonmetallic mining:

Authority to Enact and Enforce Non-Zoning Police Power Ordinances

Under ***current law***, Wisconsin municipalities generally may regulate nonmetallic mining by enacting one of three general types of ordinances - nonmetallic mining reclamation ordinances, zoning ordinances, and non-zoning ordinances enacted pursuant to general police powers.[3] Counties must, and towns, villages, and cities may, enact nonmetallic mining reclamation ordinances, which must comply with minimum reclamation standards promulgated by the DNR.

Zoning ordinances are ordinances adopted to promote the public health, safety, and welfare by regulating land use. In general, counties, cities, villages, and towns are authorized to enact zoning ordinances. However, special restrictions apply to town zoning.[4]

Municipal governments also exercise police powers to regulate public health, safety and welfare, other than by means of zoning ordinances. Under a 2012 Wisconsin Supreme Court decision, *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, a Wisconsin municipality may regulate nonmetallic mining pursuant to non-zoning police powers if the ordinance does not have characteristics that make it a "zoning ordinance." The court emphasized that the review of any particular ordinance is fact-specific, but noted the following characteristics shared by traditional zoning ordinances:

- The division of a geographic area into multiple zones or districts.
- The allowance and disallowance of certain uses by landowners within established districts or zones.
- A purpose of directly controlling where, rather than how, a use takes place.
- The classification of uses in general terms and the attempt to comprehensively address all possible uses in a geographic area.
- A fixed, forward-looking determination about what uses will be permitted as opposed to a case-by-case, ad hoc determination of what uses the landowner will be allowed to conduct.

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[3] For more detailed information regarding local regulation of nonmetallic mining in Wisconsin, see *Regulation of Sand Mining in Wisconsin*, IM-2013-14, http://legis.wisconsin.gov/lc/publications/im/IM2013_04.pdf.

[4] A town that is not authorized to exercise village powers may exercise zoning authority only if it is located in a county that has not enacted a county zoning ordinance. [s. 60.61 (2), Stats.] A town that is authorized to exercise village powers may enact zoning ordinances despite the existence of a county ordinance, subject to approval by town meeting or referendum, and approval by the county board. [s. 60.62, Stats.]

- The allowance by certain landowners to maintain their use of the land even though such use is not in conformance with the ordinance because the landowners' use of their land was legal prior to the adoption of the zoning ordinance.

[*Zwiefelhofer*, ¶¶ 36, 38-42.]

The bill prohibits counties, towns, cities, and villages from enacting or enforcing ordinances, except for zoning and nonmetallic mining reclamation ordinances, that apply to nonmetallic mining and regulate how a use of land takes place or that affect the use of land. The effect of that provision would be to restrict local regulation of nonmetallic mining through non-zoning police power ordinances that regulate or affect the use of land for nonmetallic mining. The bill generally does not affect local governments' zoning authority.

Codification of the Diminishing Assets Rule

Current law generally prohibits municipalities from enforcing zoning ordinances against "nonconforming uses," defined to mean uses that existed lawfully before a current zoning law took effect. Various statutory provisions limit the application of that protection, for example, when an original nonconforming use is expanded or discontinued. [*See, e.g.*, ss. 60.61 (5) (am) and 62.23 (7) (h), Stats.]

However, as interpreted in various Wisconsin judicial decisions, particularly in the context of quarrying, a landowner who is excavating a natural resource is held to be "using" all of a given natural resource, including portions of the resource that are on contiguous land and have not yet been excavated. Thus, when determining the existing use that is to be protected as a nonconforming use, the right to continue to extract all of the natural resource previously allowed is protected. [*See, e.g., Smart v. Dane County Board of Adjustments*, 501 N.W.2d 782, 785 (Wis. 1993).] That legal interpretation is commonly referred to as the "diminishing assets rule," because it protects the use of a natural resource asset that has a value which diminishes as it is extracted. The practical theory supporting the rule is that it is not possible to excavate all parts of a natural resource at one time; thus, an operator should be allowed to continue excavation in the area. [*Sturgis v. Winnebago Adjustment Board*, 413 N.W.2d 642, 643 (Wis. Ct. App. 1987).]

The bill codifies the diminishing assets rule in the context of nonmetallic mining. Specifically, under the bill, a zoning ordinance may not prohibit the continued extraction of a nonmetallic mining mineral from a nonconforming nonmetallic mining location. The bill defines "nonconforming nonmetallic mining location" as land on which nonmetallic mining was occurring when nonmetallic mining became a nonconforming use, including land that is contiguous to such land if the contiguous land is under common ownership or control with the land on which the nonmetallic mining was occurring.

Nonmetallic Mining Reclamation Ordinances

Under ***current law***, nonmetallic mining reclamation ordinances must include reclamation standards that meet or exceed standards promulgated by the DNR and set forth in

ch. NR 135, Wis. Adm. Code. The relevant DNR rules establish both general standards and standards specific to surface water and wetlands protection, groundwater protection, topsoil management, grading and slopes, topsoil redistribution, and revegetation and site stabilization. [ss. NR 135.07 through 135.12, Wis. Adm. Code.] Several of those standards reference generally applicable environmental standards. For example, the rules specify that nonmetallic mining reclamation must be conducted in a manner that does not cause pollutant limits set in the state's groundwater quality standards to be exceeded.

A municipality must deny an application for a nonmetallic mining reclamation permit if the municipality finds that the nonmetallic mining site cannot be reclaimed in compliance with the reclamation standards contained in the ordinance. [s. NR 135.22, Wis. Adm. Code.] The following general standards apply to nonmetallic mining operations under current law:

- **Refuse and other solid wastes.** Nonmetallic mining refuse must be reused in accordance with a reclamation plan. Other solid wastes must be disposed of in accordance with applicable DNR rules.
- **Area disturbed and contemporaneous reclamation.** Nonmetallic mining reclamation must be conducted, to the extent practicable, to minimize the area disturbed by nonmetallic mining and to provide for nonmetallic mining reclamation of portions of the nonmetallic mining site while nonmetallic mining continues on other portions of the nonmetallic mining site.
- **Public health, safety, and welfare.** All nonmetallic mining sites must be reclaimed in a manner so as to comply with federal, state, and local regulations governing public health, safety, and welfare.
- **Habitat restoration.** When a reclamation plan requires plant, fish, or wildlife habitat, the habitat must be restored, to the extent practicable, to a condition at least as suitable as that which existed before the lands were affected by nonmetallic mining operations.
- **Compliance with environmental regulations.** Reclamation of nonmetallic mining sites must comply with any other applicable federal, state, and local laws, including those related to environmental protection, zoning, and land use control.

[s. NR 135.06, Wis. Adm. Code.]

In addition, a municipality may issue a nonmetallic mining permit subject to general or site-specific conditions, if the conditions are needed to ensure compliance with the rules promulgated by the DNR. A municipality may not impose conditions as part of a nonmetallic mining reclamation permit that do not relate to reclamation of the nonmetallic mining site. [s. NR 135.21, Wis. Adm. Code.]

The bill prohibits DNR from establishing nonmetallic mining reclamation standards relating to water quality or quantity or air quality that are more restrictive than the generally applicable standards established by statute or rule in the state.

In addition, the bill prohibits municipalities from enacting or enforcing nonmetallic mining reclamation ordinances that do any of the following:

- Include a standard of air quality or water quality.
- Require a nonmetallic mining operator to obtain a permit or other form of approval in addition to a nonmetallic mining reclamation permit.
- Impose any requirement related to monitoring water quality or quantity or air quality.
- Include standards that are more restrictive than DNR's nonmetallic mining reclamation standards or the generally applicable standards under current law relating to air quality or water quantity or quality.

Generally Applicable Changes Relating to Local Government Authority

The following changes do not specifically relate to the regulation of nonmetallic mining. They are broadly applicable.

Local Environmental Regulations

Under *current law*, municipal actions in the area of environmental regulation are in some cases preempted under state or federal law. Where such actions are not preempted, municipalities generally may enact ordinances or take other actions that address environmental protection, if such action is within the scope of their police powers.

The bill prohibits municipalities, unless specifically required or authorized to do so by another statute, from taking certain actions relating to air and water pollution. Specifically, with the exception of the regulation of open burning, the bill prohibits municipalities from doing any of the following, unless statutorily authorized or required to do so:

- Establishing or enforcing a water quality standard, an ambient air quality standard, standard of performance for new stationary sources, or other emission limitation related to air quality.
- Issuing permits or any other form of approval related to air quality or water quality or quantity.
- Imposing any restriction related to air quality or water quality or quantity.
- Imposing any requirement related to monitoring air quality or water quality or quantity.

In addition, the bill specifies that certain general statutory authorities relating to home rule and public peace and good order may not serve as bases for the actions listed above.

Current law also authorizes a county, after consulting with cities and villages within the county, to establish and administer an air pollution control program. Such programs may, by ordinance, require stricter or more extensive air pollution control requirements than apply under state law. [s. 285.73, Stats.]

The bill repeals the authority for county-administered air pollution control programs.

Regulation of the Use of Explosives

Under *current law*, the Department of Safety and Professional Services (DSPS) must promulgate rules to ensure the safety of mines, explosives, quarries, and related activities. [s. 101.15 (2) (e), Stats.] At least in some circumstances, municipal ordinances regulating such activities might be found to be preempted by the DSPS rules.

The bill generally prohibits cities, villages, towns, and counties from regulating the use of explosives in connection with mining, quarrying, and related activities. However, the bill authorizes those municipalities to regulate blasting schedules by issuing a conditional use permit.

Highway Use Contracts

In general, under *current law*, no local authority may enact or enforce any traffic regulation that in any manner excludes or prohibits any motor vehicle from the "free use of all highways." [s. 349.03 (2), Stats.] Thus, although municipalities are authorized to take certain actions to prevent damage to highways or recover money damages resulting from injuries to highways, current law does not otherwise appear to authorize municipalities to enter agreements that impose fees based on highway use ("highway use agreements").

The bill authorizes counties, cities, villages, and towns to execute highway use agreements, with certain restrictions. The bill authorizes a municipality to enter into a contract with a highway user that requires the highway user to reimburse the governmental unit for the cost of repairs to a highway. Such repairs must be necessitated by actual damage to the highway caused by the highway user. The bill generally prohibits a municipality from imposing any other fee or other charge on a highway user.

Under the bill, a highway use agreement must satisfy all of the following requirements:

- The repairs to the highway are completed before reimbursement is required by the highway user.
- The proportion of damages to the highway caused specifically by the highway user and the cost of repairs attributable to that share of damages must be determined by an engineer chosen by agreement of the municipality and the highway user.

- The costs of the engineer's services are paid in equal shares by the highway user and the municipality.

In addition, under the bill, a highway use agreement may require a highway user to show proof of financial security sufficient to pay for the cost of repairs to a highway necessitated by actual damage to the highway specifically caused by the highway user. The proof of financial security may be provided in the form of a bond, deposit of funds, established escrow account, letter of credit, or a demonstration of financial responsibility by meeting net worth requirements or other form of financial assurance conditioned on the faithful performance of rules established by the DNR in the context of nonmetallic mining reclamation.

The proof of financial security must satisfy the following requirements:

- The amount of financial security required does not exceed the reasonable expected payments for damages expected to be caused during the three years following the date the amount is determined.
- The amount of financial security is determined by an engineer chosen by agreement of the municipality and the highway user.
- The costs of the engineer's services are paid in equal shares by the highway user and the municipality.
- The amount of financial security is not required to be recalculated more often than once per year, unless the highway user proposes changes to the highway user's proposed highway use that were not anticipated in the last calculation of financial security.

Liability for Damage to a Highway

Under *current law*, a person who injures a highway by specified actions or by "any other act" may be held liable to the municipality in charge of highway maintenance for treble damages. [s. 86.02, Stats.]

The bill limits the application of that statute to damage to a highway that is caused willfully or that results from an unlawful act. In addition, the bill provides that this statute does not apply to damage caused by a vehicle when the vehicle is operated under a highway use contract authorized under the bill.

Borrow and Material Disposal Sites

Under *current law*, municipal zoning ordinances are inapplicable to borrow sites[5] and material disposal sites[6] utilized by the Department of Transportation (DOT) in certain state

[5] A "borrow site" means any site from which soil or a mixture of soil and stone, gravel, or certain other material is excavated for use in a specified DOT project.

highway construction and transportation projects. Zoning ordinances are inapplicable to such sites only if certain criteria are satisfied. [ss. 84.06 (12) and 85.193 (2), Stats.]

The bill retains the criteria under current law for inapplicability of zoning ordinances to certain borrow and material disposal sites, but it expands the scope of the exceptions under current law to apply to municipal actions other than zoning. Specifically, under the bill, no city, village, town, or county may enact or enforce any ordinance, resolution, or other requirement, including a zoning ordinance, that applies to the borrow sites and material disposal sites specified under current law.

EFFECT ON EXISTING ORDINANCES, PERMITS, AND USE AGREEMENTS

In general, the provisions of the bill that limit local regulation expressly apply to both the enactment and enforcement of ordinances and other requirements that are inconsistent with the bill. For that reason, the provisions of any local ordinance or other requirement that are prohibited under the bill would become unenforceable on the day following the bill's enactment. Certain other provisions limit the imposition of a restriction by a local government, and would likely be interpreted to apply to ongoing or future impositions of restrictions, including those made pursuant to existing permits and approvals.

With respect to highway use agreements, the bill provides for the modification or replacement of existing agreements. The bill authorizes any highway user that is a party to a highway use contract that is inconsistent with the requirements under the bill to petition the relevant municipality for the replacement or modification of any existing highway use agreement when the bill becomes effective. Upon receiving such a petition, the bill requires the municipality to participate in good faith in modifying or replacing the agreement. After a new or modified agreement is negotiated, any provisions of an existing agreement that are inconsistent with the bill's requirements automatically terminate.

PRACTICAL IMPLICATIONS FOR MUNICIPALITIES THAT HAVE ENACTED ORDINANCES REGULATING NONMETALLIC MINING

The bill's practical effect on municipalities that have enacted nonmetallic mining ordinances would vary based on the legal authority a given municipality relied upon when enacting such regulations. The bill will have relatively little effect on ordinances enacted pursuant to local zoning authority. The bill will have some effect on nonmetallic mining reclamation ordinances, particularly if such ordinances include standards that include provisions that exceed general standards for air and water quality or water quantity under state law, or impose monitoring conditions. Arguably, the bill's most significant practical impact will apply to municipalities that have enacted ordinances (other than nonmetallic mining reclamation ordinances) pursuant to non-zoning police powers.

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[6] A "material disposal site" means any site off of the transportation project property used for the lawful disposal of surplus materials from a transportation project and that is under the direct control of the transportation project contractor of subcontractor.

For example, if a municipality has enacted an ordinance prohibiting nonmetallic mining activities on any land within the municipality during a given time period, whether that ordinance is enforceable under the bill depends on whether it was enacted as a zoning ordinance or pursuant to non-zoning police powers. If the ordinance was enacted as a zoning ordinance, then its enforceability is not affected by the bill. If, instead, the ordinance was enacted as a non-zoning, general police powers ordinance, then it would not be enforceable following the bill's enactment.

Some municipalities may have relied on non-zoning police powers to regulate nonmetallic mining because a zoning change was practically or politically infeasible. For example, a town may have determined that it would lack county board approval for a zoning change. Arguably, the bill's practical effect will be most significant for municipalities in that situation.

AUTHORITY TO ADDRESS IMMINENT THREATS TO PUBLIC SAFETY CAUSED BY NONMETALLIC MINING PURSUANT TO POLICE POWERS

As described above, the bill generally prohibits cities, villages, towns, and counties from enacting or enforcing certain ordinances pursuant to non-zoning police powers. Specifically, a municipality is generally prohibited from enacting or enforcing such an ordinance if the ordinance is applicable to nonmetallic mining and regulates how a use of land takes place or affects the use of land. The bill retains municipal zoning authority and retains certain municipal authority relating to the enactment of nonmetallic mining reclamation ordinances.

If a given threat to public safety caused by nonmetallic mining activity is not regulated through a municipality's zoning or nonmetallic mining reclamation ordinance, the bill would limit the municipality's authority to address the concern through the enactment of a general police power ordinance that regulates how a use of land takes place or affects the use of land. The extent to which such authority would be limited under the bill may depend on the interpretation of the phrase "regulates how a use of land takes place or affects the use of land." In some circumstances, a municipality might successfully argue that certain actions taken pursuant to general police powers to prevent a threat to public harm, while relevant to nonmetallic mining activities, do not regulate how a use of land takes place or affect the use of land.

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

AH:LAK:jal

AGGREGATE PRODUCERS OF WISCONSIN

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Testimony Presented to the Senate Committee on Workforce Development, Forestry, Mining and Revenue
Bob Bingen, President, Aggregate Producers of Wisconsin
October 24, 2013

Introduction

Chairman Tiffany, Committee Members, I appreciate the opportunity to comment on SB 349 and appear today on behalf of the Aggregate Producers of Wisconsin (APW) in support of the bill.

My name is Bob Bingen and I am the current President of APW, which is a statewide trade association of over 100 aggregate producing companies and associate members who provide goods and services to the aggregate industry in Wisconsin.

I am also Vice President of Quarry Operation for Michels Materials, a division of Michels Corporation, headquartered in Brownsville, Wisconsin and an active member of both APW and the Wisconsin Transportation Builders Association (WTBA)

Relevant to this legislation, my experience includes 21 years of service on the Town of Addison Board. I was first elected in 1992, and have served as Chairman of the Town Board since 1995. Our Town took over zoning from Washington County in 1986 and I have also served as Chairman of the Plan Commission since 1995.

Between my town board experience and my job at Michels Materials I have conservatively attended over 1500 town meetings over the past 21 years.

Comments on SB 349

From our perspective, we see this bill as true regulatory reform. It addresses three main questions: (1) who should be responsible for siting of a nonmetallic site; (2) who should regulate those sites for air and water quality standards and permits —— and blasting standards: and, (3) what does a reasonable local road agreement look like in order for local government to recover actual damages caused by a single user.

These are important questions for the nonmetallic mining industry and APW believes this bill fairly and adequately addresses each question.

Police Power vs. Zoning: The bill does not remove local siting of nonmetallic mining operations —— it makes it clear that siting be addressed through the zoning authority and the zoning framework; the same framework that has been used to address nonmetallic mining siting issues in Wisconsin for decades, prior to the Zwiefelhofer decision.

Our organization identified early on that the *Zwiefelhofer vs. Town of Cooks Valley* case had significant implications for our industry. Unfortunately, we were right. When that case was certified to the Wisconsin Supreme Court, we participated in the case and filed an amicus brief in support of the local court decision to preserve zoning.

In our view, the local court got it right — it found that a nonmetallic mining ordinance should go through zoning and follow zoning procedure. The State Supreme Court disagreed — it essentially said a nonmetallic mining licensing ordinance could bypass zoning and be adopted under general police powers — at least in that particular case.

The problem is that case has spread. As a result, and since the decision was issued in February of 2012, we have seen an emerging trend of police power ordinances. For us that creates a very inefficient, costly and redundant regulatory framework for siting and operating a nonmetallic mine.

No unit of local government is excluded from zoning — they either control it, or participate in it or choose not to zone — that is their choice. But when we have to answer to the zoning authority for approval and then separately answer to other authorities under police power we have a redundant system. Inefficient government, at any level, is not good for taxpayers or regulated businesses.

The importance of preserving zoning authority as the appropriate framework for local siting of nonmetallic mining also relates to the case law and current state law around zoning. One of the most critical and court tested aspects of zoning is that if a business legally establishes operations under the zoning of the day — future zoning changes, which might prohibit siting of such a business going forward, may not put an existing operation out of business. Under the zoning framework, when we legally open a mining site we are confident that we have legal nonconforming use rights should the zoning in an area be changed in the future. Under police power authority and ordinances we have no such assurance.

The uncertainty around who might exercise police power and in what fashion and at what point in time — and the extent to which legal nonconforming use rights are preserved under police power — creates regulatory havoc or at least regulatory confusion. It has a real chilling effect on economic development and business expansion in this state.

This bill preserves zoning as the appropriate local siting authority and statutorily recognizes a key aspect of our legal nonconforming use rights by codifying the diminishing asset rule, which has been adopted and affirmed in a number of court cases.

Environmental Regulation and Blasting Standards: With regard to air and water quality permits and standards, the nonmetallic mining industry is regulated by the Wisconsin Department of Natural Resources (DNR).

We operate under DNR issued air permits, which are designed to ensure that public health and the environment are protected based on ambient air quality standards established by federal US EPA.

We also operate under DNR issued water permits relating to storm water management and process wastewater discharges. Again those permits and conditions are based on public health and environmental standards in compliance with the federal Clean Water Act and federal US EPA health risk-based standards.

This bill does not relieve the nonmetallic mining industry, or any other Wisconsin business, of complying with any applicable state or federal air and water quality standard. What it does do is say is that the Wisconsin Department of Natural Resources (which has been delegated by U.S. EPA to administer the federal Clean Air Act and federal Clean Water Act in Wisconsin) is the appropriate regulatory authority to deal with such issues.

Similarly, the bill recognizes that blasting standards are appropriately regulated by the Department of Safety and Professional Services (DSPS). Blasting is regulated under Wisconsin Administrative Code, Chapter SPS 307, which includes state requirements for use of blasting materials, notification, compliance record keeping, and control of adverse effects and incorporates, by reference, national standards for explosive materials. (NFPA 495, Explosive Materials code, 2006).

As a Town Chairman, I think you do a disservice to local governments and to regulated businesses if you don't affirm that the responsibility for these air and water quality and blasting standards rest with the appropriate state agency. When it comes to adopting these types of technical standards and permits — local government simply does not have the expertise or resources to adequately regulate these issues.

Local Road Agreements: I have personally negotiated a number of local road agreements. Such agreements are not foreign to the construction aggregate industry. What is foreign and of significant concern are the types of road agreements we have recently seen being leveraged against some industrial sand mining operations.

We appreciate that we are part of the communities that we live and work in and we also recognize that we need good roads to get our materials to market. We also accept that we should be responsible for paying for actual road damage caused by our operations.

That said, we are talking about the use of public roads, roads that we help pay for, like all other users, through the truck titling and licensing fees, gas tax, property tax, and state road aids that go to local government.

As I read this bill, as a town chairman and as an aggregate producer I am looking for fairness. I think this bill passes that test.

If our Town needs to post a special weight limit on a road due to deterioration or soggy conditions or other special or temporary conditions we have that authority under current

law and maintain that authority under the bill. We also maintain the authority to contract with a user to exempt them from the posted limit if we have a contract in place with a road user to reimburse the town for damage done to the road.

This bill does not remove the opportunity or option to contract for recovery of road damages —— it does set parameters around how those contracts are structured.

In brief, those parameters provide that: (1) local government may not charge an upfront fee or tax for perceived future damage; (2) the user is responsible for actual damage caused by their use and must reimburse local government for their share of actual costs when local government repairs the damage; and, (3) damages are determined by an engineer mutually agreed to and paid for by local government and the highway user.

In addition, the bill provides that local government may require a highway user to post financial assurance to ensure the user has the means to pay for actual damages caused by that user. The amount of financial security that may be required is limited to damages reasonably expected to be caused over the following three years and that estimate can be recalculated annually. Finally, the bill provides that proof of financial security may be provided in any form that is acceptable for demonstrating financial assurance under the statewide nonmetallic mining reclamation requirements established by DNR.

Based on my experience, this bill strikes a fair balance on road agreement contracts —— a balance that reflects the typical road agreements our members have successfully negotiated with local government throughout the state.

Summary

1. SB 349 maintains local control for the siting and conditional use permitting of nonmetallic sites —— but does so through the appropriate zoning authority

2. SB 349 maintains environmental and blasting standards designed to protect public health but rightfully specifies that those issues be managed by the agency that is best equipped to administer those regulations in the state.

3. SB 349 maintains local government posting authority and authority to contact for recovery of road damages —— but does so in a fair and balanced way for any highway user.

In closing, I would suggest that this is one of the most important job creation economic development pieces of legislation to come before the legislature this session. It improves our state's regulatory climate by clearly stating which unit of government is responsible for which aspect of nonmetallic mining and merits your support.

Wisconsin Towns Association

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To: Senate Committee on Workforce Development,
Forestry, Mining, and Revenue
From: Richard J. Stadelman Executive Director
Re: SB 349 Relating to Local Regulations of Nonmetallic Mining
Date: October 23, 2013

Wisconsin Towns Association oppose SB 349 relating to local regulations of nonmetallic mining as introduced. There are several areas of concern in the bill draft that our Association oppose. This memo will identify these areas and through my verbal testimony I will try to explain why they are problematic.

1. Page 8, Sec. 10, lines 10 through 21 provide a prohibition on towns, villages, cities, and counties from enacting a licensing ordinance to regulate nonmetallic mining.

As a result of the expansion of industrial frac sand mining in our state in the last two to three years towns have adopted licensing ordinances, under their police powers using village powers to protect public health, safety and welfare. The bill would only allow towns to use zoning to regulate nonmetallic mining operations.

In Wisconsin, approximately 750 towns are under county zoning, approximately 260 towns have their own zoning, and about 240 to 250 towns have no town or county zoning other than shoreland and floodplain zoning at the county level. Towns who have no zoning would not be able to regulate nonmetallic mining operations to protect their community interests. Town zoning is a legal process that must follow statutory procedures to be adopted and must be consistent with comprehensive planning. These legal procedures take time to adopt. Many towns used the licensing ordinances to react to the expansion of industrial sand mining in the past two to three years.

Licensing ordinances allowed the towns to require industrial sand mine operations to come to the table in obtaining a permit to address various concerns of the town residents as a part of their application for a license and have become the basis for agreements with the town and mine operator.

The ordinances have the applicant to address such site issues as follows:

Specific property on-site mine control provisions in the permit for protection of adjacent or near land owners and residents, including:

a) Buffer zones/setbacks from property and road lines
b) Berms/screening/other aesthetic controls
c) Fencing
d) Specific Notice provisions to neighbors regarding blasting, drilling or other possible nuisance actions
e) Erosion/run-off controls

f) Noise Controls
g) Air/dust controls
h) Light pollution controls
i) Ground water/surface water protection controls
j) Hazardous waste controls
k) Specific site boundaries

Applicants under many ordinances are required to describe the following operational concerns:

i. Hours/days of site operation (including related off-site facilities site)
ii. Road access location(s) at site
iii. Water usage at site
iv. Hazardous waste storage at site
v. Chemical/flammable material storage at site
vi. Specific areas to be mined at site, including the timeline and sequence or areas to be mined
vii. Location of buildings, structures and equipment at site
viii. Erosion/surface water controls to site from adjacent or near landowners
ix. Specific public health and safety daily requirements at, near or as a result of the site operations, including:
a. Vehicle traffic impacts as a result of the daily operations
b. Material or dust discharge off-site from transport vehicles from site.

These examples of what is required for nonmetallic industrial sand operations are similar concerns that are often required to be submitted in a conditional use application under zoning. These issues are often required of other industrial and commercial land uses. The industrial sand mines were not being treated differently than other large industrial operations of other types when locating in towns and counties.

The licensing ordinances have become the basis for towns to enter long-term agreements with the industrial sand mine operator to provide assurance to the town and their residents that local site impacts of such an industrial site will be addressed while at the same time giving the mine operator a long term permit to operate (often 20 years or more).

Towns that do not have zoning would lose the leverage to have the mine operators come the table to enter agreements. The agreements, by mutual agreement, have gone beyond the site specifications listed above, to include additional protections for neighbors such as monitoring of down gradient private wells, diminution of value provisions to assure neighbors private property values will not be lost, and other protections that adjoining neighbors are asking for.

Towns that are under county zoning have also expressed concern that in some counties the county ordinances are out of date and do not address the new and extended industrial sand mine operations that were unknown to exist less than three years ago. In some cases county boards have not viewed the exercise of conditional uses of industrial sand mines as a part of their county role, but rather want to encourage industrial sand mines without protections to neighbors.

The role of mutually agreed upon agreements between towns and mine operators to provide comfort and assurances to neighboring properties can not be over stated. Without the ability of towns to get the mine operators to the table, neighboring citizens will lose the legal assurances that agreements have provided. Without such agreements neighboring individual citizens only recourse will be civil litigation against the mine operators, which can be very costly for all parties. Agreements under the licensing ordinances has given the industry stability and reduced the threat of lawsuits.

It needs to be stated that the exercise of village powers by towns has been in state law for over 100 years. The Wisconsin Supreme Court unanimous decision in Zwiefelhofer v. Town of Cooks Valley, 338 Wis. 2d, 448 (2012) upheld the right of towns to adopt licensing ordinances for the purpose of regulating operations, such as industrial sand mines, to protect public health, safety and welfare. This type of authority has been exercised in the past in other regulatory settings. In the past when industries claimed licensing ordinances were unreasonable they could seek legal challenges to overturn the ordinance, to my knowledge there have been no town industrial licensing ordinances found to be invalid to date. Also in other examples, where the state legislature has addressed preemption of local ordinances (such as landfill siting, large livestock operations, or wind turbine siting), the legislative action was done leaving some form of local control in place subject to state standards. SB 349 totally preempts licensing ordinances on nonmetallic mining without authority for many towns to protect public health, safety and welfare.

Wisconsin Towns Association opposes the prohibition of licensing ordinances to regulate nonmetallic mining operations.

As to other provisions that SB 349 addresses that are limited to local authority of nonmetallic mining operations:

2. Wisconsin Towns Association does not oppose the codification of the "diminishing asset rule" in the bill because this is current court doctrine, but believes there may need to be language modification to ensure that the principle can be implemented properly at the local level.
3. Wisconsin Towns Association does not take a position on the proposed changes to Wis. Chapter 84 and 85 regarding expanding the preemption of local authority over borrow sites on state highway projects. We recognize that local zoning was preempted in the past and this expands the change for borrow sites under state highway projects to include a preemption of other local regulations.
4. Wisconsin Towns Association does not have any comments on the provision on page 11, lines 5 to 9 which provides the DNR may not establish nonmetallic mining reclamation standards that are more restrictive than the chapters listed.

As to other provisions of SB 349 that apply beyond nonmetallic mining operations, our comments are as follows:

5. While Sec. 14 of SB 349, lines 18-23 states local governments may still enforce limits on blasting schedules on nonmetallic mines, towns without town zoning would not be able to adopt such schedules. If there is no county zoning or the county ordinance does not address blasting schedules, these towns are without any recourse to control blasting schedules.
6. Wisconsin Towns Association opposes the provisions on page 10 and 11 of SB 349 which provide the state with exclusive authority over air quality, water quality, and water quantity of any activities in the state, not just nonmetallic mining. While our Association does not recommend local jurisdictions establishing air quality or water quality standards for nonmetallic mining, including industrial sand operations, there are other potential activities that local governments should have the authority to regulate to protect their community. One that has arisen recently is the use of "precision spray irrigation of liquid

manure" on large farms. There are no state standards for this activity, yet the Wisconsin Dept. of Health has raised the question of possible drift of pathogens from such operations. Local jurisdictions should have the right to establish standards to protect air quality on activities that the state has not taken action yet identified possible health issues.

In addition to this example there is concern that the specific limitation on imposing any requirements related to monitoring water quality or quantity or air quality on page 11 lines 16 and 17 of the bill draft, may preempt the type of monitoring that is required of many industries under common zoning conditional use permits. We would ask that this authority to monitor under the zoning ordinance authority be clarified and retained. A preemption of basic monitoring for any air quality, water quality or water quantity issue will result in strong backlash from neighbors of may different industries around the state, not just industrial sand mines.

7. The provisions of SB 349 relating to highway reimbursement contracts on pages 12-14 of the bill require substantial rewriting for a number of reasons. First these requirements will apply to all highway users that receive written permission under Sec. 349.16 the seasonal and special weight limit authority. Sec. 24 of the bill would apply to farmers, loggers, manure haulers, and any other highway user that enters a contract to reimburse under Sec. 349.16. These users would be required to pay for one half of the cost of the engineering study to determine the possible financial assurance that is required. Often these users are only using the highway for a limited number of days at specific time and dates. This requirement for engineering study for all highway contracts to be valid is unnecessary and overkill to address the concerns of the nonmetallic mining industry. Either delete these provision entirely or limit them to nonmetallic mining or even limit them to industrial sand mining operations.

   In addition the limitations of the amount of financial security on page 13 lines 7-21 are not consistent with existing practices in determining amount the financial security required. The bill draft limits the amount of projected damage to 3 years. Many highways are not reconstructed on a three year cycle and thus the bill draft does not adequately address the holding of financial assurance for a time consistent with normal highway reconstruction.

   We have serious concerns why the local jurisdiction should be responsible for one half the costs of the engineering study when in particular the need for the study is one particular business, such as a industrial sand mine. This provision could well lead to local jurisdictions just saying no to any highway agreements and posting highways to protect their investment and protect their taxpayers. Half of the cost of engineering for highways that are to be constructed for heavy vehicle usage for the benefit of one industry should not be borne by the whole community.

8. The requirement on line 20 to 21 of page 12 that the repairs must be done before reimbursement is required is an unreasonable burden on local government. This means that local government would have to front full costs of a highway project that was in most cases the sole responsibility of one business. While the financial assurance provisions of Sec. 295.12 (3) (g) of Wis. Statutes for reclamation requirements may be adequate for reclamation projects at the end of the nonmetallic mining operation, these prohibition of having a cash escrow account available for highway reconstruction which is paid as the highway is used limits the best financial assurance that is currently being used with most

of the industry's consent. While there should be no tax or severance fee per ton charged for general government purposes from nonmetallic mining operations, the use of an escrow account based upon tonnage produced is a logical proxy for the potential impact on the highway as it is being used. This option should be included under the law upon mutual agreement of the parties. Caps on maximum amount in escrow can be agreed upon and other protections for the industry user of the highway, but SB 349 goes too far to protect the industry and should be greatly modified.

9. The changes to Sec. 86.02 of Wis. Statute on lines 16 and 17 on page 9 are not acceptable to towns. The use of Sec. 86.02 to recover damage to highways by users has not been used to recover "treble damages" in any cases that I know of, but it has been used to recover the actual damages when a highway user causes damage. The sentence that I have identified would force the local jurisdiction to prove willful (which I believe has been defined as 'intentional") acts or an unlawful act. Many of the incidents where this section has been used would be impossible to say that the highway user intended to cause damage. In the case of overweight vehicles, which would be unlawful act, the vehicle or vehicles causing the damage are long gone and proof of overweight would be impossible to establish after the fact. We can understand the language on lines 15 and 16 of page 9 that when a highway agreement exists Sec. 86.02 should not apply, especially the treble damages, but lines 16 and 17 should be removed from the bill.

Our Association believes that the current authority of towns and counties to regulate nonmetallic mining operations should be retained. Preempting town licensing ordinances for nonmetallic mines would leave many towns and town residents without protections that have already been granted and agreed to by the over 100 industrial sand operations existing in Wisconsin. We thank the sponsors of this bill for continuing to hear our concerns and talk with our Association, but in the end believe this bill as drafted goes too far to protect nonmetallic mining, particularly industrial sand mines, to the detriment of residents in the area. Industrial sand mining has not been shut down or even slowed down by ordinances adopted at the local level, which are a legitimate exercise of town police power to protect public health, safety and welfare.

WISA
WISCONSIN INDUSTRIAL SAND ASSOCIATION

The Wisconsin Industrial Sand Association

The **Wisconsin Industrial Sand Association** is a statewide organization formed in 2012 to promote safe and responsible sand mining practices. WISA works to promote science- and fact-based discussions and to create a positive dialogue among the industry, citizens and government officials on sand mining issues. Sand mining in Wisconsin dates back more than a century. Today, WISA members support more than **500 jobs** at about a **dozen facilities** in Wisconsin and have invested more than **$600 million** in the state.

WISA members follow the Association's strict **Code of Conduct** – a mandatory set of guiding principles and performance standards that reinforce the Association's goal of being the leader in healthy, safe and environmentally responsible sand mining in Wisconsin.

The WISA **Code of Conduct** requires its members to:

- Make a strong commitment to exceed federal, state and local requirements for environmental operations. As part of this commitment to a healthy and sustainable environment, WISA members must apply for, obtain and maintain in good standing Tier 1 participation in the **Wisconsin DNR Green Tier Program** for each industrial sand facility within the state of Wisconsin.

- Promote **clean water and air standards** consistent with facts and science, utilize **advanced technology to reduce emissions** and implement government-approved, **comprehensive land reclamation plans** to ensure the environment is protected.

- Put a high premium on health and safety by implementing **stringent policies** to eliminate potential adverse health effects associated with silica exposure. That includes adopting **monitoring procedures**, conducting **regular occupational health evaluations** and voluntarily seeking to **exceed regulations** regarding occupational exposure to silica. That commitment also extends to the goal of **zero workforce accidents and injuries**.

- Work collaboratively with local officials and neighbors in the community. WISA members want to play **an active and positive role** in supporting local educational programs, promoting environmental projects, developing wildlife habitat and supporting other community activities.

WISA aims to show that, with a proper balance between sound operations, adherence to responsible regulations and good community relationships, the sand mining industry can operate safely, protect the environment and continue to generate a significant and positive economic impact.

WISA members are companies with Wisconsin-based mining and/or processing operations that agree to adhere to our Code of Conduct and high standards of operations, care greatly about environmental sustainability and are committed to meeting or exceeding all local and state regulations. Organizations affiliated with the industry can become Friends of WISA.

Members:
- Badger Mining Corporation
- Fairmount Minerals/WI Industrial Sand Co.
- Unimin
- U.S. Silica

Friends:
- Aring Equipment Company
- Bahr Electric, LLC
- Brickl Bros, Inc.
- Cardinal FG
- Cedar Falls Building Systems Inc.
- Champion Charter
- Classification & Flotation Systems
- FABCO/Caterpillar
- Faith Technologies, Inc.
- GZA GeoEnvironmental Inc.
- Indianhead Insurance
- Interstate Tree Land Clearing Co.
- I&S Group
- J Carpenter Environmental
- Jasper Engineering & Equipment
- Kestrel Management
- L&S Electric, Inc.
- MAB Equipment
- Market & Johnson
- Michael Best & Friedrich
- Mid-state Contracting LLC
- National Industrial Sand Association
- Neo Solutions
- Northland Engineering
- Nortrax
- Olson Explosives
- Quick Supply Company
- RB Scott Company
- RM Schlosser Excavating LLC
- Roland Machinery
- Ruder Ware
- Southwest Sand Distributors, LLC
- Strupp Trucking, Inc.
- TCI Manufacturing & Equipment Sales
- Unified Theory Inc.
- Vibra-Tech
- We Energies
- Westbrook Associated Engineers, Inc.
- WIPFLI LLP –CPAs & Consultants
- Xcel Energy

For more information, visit www.WisconsinSand.org
WISA is also on Facebook, Twitter and LinkedIn

Wisconsin Industrial Sand Association Members

Badger Mining Corporation – www.badgerminingcorp.com
Badger Mining Corporation was founded in 1949 and is headquartered in Berlin, Wis. BMC is a privately held, family-owned, international corporation that manufactures industrial silica sand and other aggregates. The company's products are used in multiple industrial, environmental and construction-related applications all over the world. BMC has two plants in Wisconsin in addition to its corporate headquarters, and a network of distribution centers across the U.S. and Canada. BMC is a Tier 1 participant in the Wisconsin DNR Green Tier program, and the company's core values focus on contributing to the success of its associates, customers and communities.

- Wisconsin locations: Berlin, Fairwater, Taylor

Fairmount Minerals – Wisconsin Industrial Sand Company – www.fairmountminerals.com
Fairmount Minerals, with headquarters in Chesterland, Ohio, was founded in 1978. The company has operated in Wisconsin since 1996. Fairmount is a market-driven company with strategically located facilities in North America, Europe, and Asia, supported by a global distribution and customer support network. Aside from being one of the largest producers of industrial sand in North America, Fairmount has become a world-leading expert in the science and art of transforming sand into value-added products used for a variety of industries including oil and gas, water filtrations, foundry, glass, sports, recreation and building. Fairmount Minerals' global operations include nine mining and mineral processing plans and nine manufacturing and coating facilities, one resin-producing operation, three custom blending plants and four administrative R&D offices. Fairmount/WISC is a Tier 1 participant in the Wisconsin DNR Green Tier program.

- Wisconsin Locations: Hager/Bay City, Maiden Rock, Menomonie, Oakdale, Readfield

Unimin – www.unimin.com
Unimin Corporation was founded in 1970, with operations headquartered in New Canaan, Conn. Unimin is one of North America's leading producers of non-metallic industrial minerals and is part of the worldwide Sibelco group, a privately held mineral and mining company. Unimin is a worldwide supplier to the glass, ceramic and lighting industries, to oil and natural gas and service companies and to paint, plastic, rubber and composite manufacturers. It is also an integral supplier to the metallurgical and foundry industries and participates in a wide range of civil, industrial, environmental and building-related applications. Unimin operates 44 mineral processing plants and 12 offices, technical centers and analytical laboratories throughout North America. Unimin has operated in Wisconsin since 1983 and is a Tier 1 participant in the Wisconsin DNR Green Tier program.

- Wisconsin Locations: Portage, Tunnel City

U.S. Silica – www.ussilica.com
U.S. Silica, which traces its beginning to the late 1800s, is headquartered in Frederick, Md. U.S. Silica is a leading silica sand supplier with a focus on performance materials essential to modern living. With more than 200 unique products, the company's standard offerings are used in a variety of industries and applications, including glass, chemical, foundry, recreation, building and industry filtration. U.S Silica is an innovator in industrial silica products and solutions and a leading supplier to domestic oil and natural gas operations. The company's facilities, strategically located in 13 states and globally in China, are situated on or near the best available mineral resources for that geographical region. U.S. Silica has operated in Wisconsin since 2012 and is a Tier 1 participant in the Wisconsin DNR Green Tier program.

- Wisconsin Locations: Sparta

For more information, visit www.WisconsinSand.org
WISA is also on Facebook, Twitter and LinkedIn

Wisconsin Farmers Union

UNITED TO GROW FAMILY AGRICULTURE

TO: Senate Committee On Workforce Development, Forestry, Mining and Revenue Members
DATE: October 23, 2013
RE: Testimony on SB 349: Preemption of Local Regulation
FROM: Scott Karel, WFU Government Relations Associate

Good morning and thank you Chairman Tiffany and other members of the committee for holding this hearing today. My name is Scott Karel and I represent the Wisconsin Farmers Union. I am here today to speak in opposition of the this bill that would take away the ability for town and county governments to be able to use the police power to regulate a variety of issues that affect their constituents, most noticeably, frac sand mines. This is a very important issue to our members, so important that maintaining local control of frac sand mines was made a special order of businesses at our state convention this past January. Our members are confused and concerned as to why some legislators feel the need to strip away the ability to regulate frac sand mining from town and county governments who are currently doing so in an efficient and effective manner. Essentially, this bill is the state stepping into an area where they are not needed.

Nonmetallic Mining Ordinances Are Not a Bar To Frac Sand Operations

There is a misconception occurring currently where some believe that the fact a town or county has a mining ordinance means that non-metallic mining has been shut off in these areas. However, this is not the case. Frac sand companies still find it profitable to establish operations in towns and counties that have nonmetallic mining ordinances. In many instances, the frac sand mining industry actively offered input on the development of these ordinances.

As an example, I would like to call your attention to the map attached to my testimony. This map shows three adjacent townships located in Chippewa County; the Town of Auburn, the town of Cooks Valley, and the town Howard. All three of these towns have passed ordinances regulating non-metallic mining. As you can see from the map the green shaded areas are locations of permitted mining and the areas in yellow are proposed mining sites. All three townships contain active mines and since this map was current as of last fall, it is likely that many of proposed mining sites are now in operation. Chippewa County is in the heart of frac sand county, and even in areas under local regulation mining is still ongoing. The assertion that local ordinances are killing the frac sand industry is false. It is possible to have both frac sand operations, and local control to ensure that the operations are carried out in a manner that is consistent with the public health, safety, and welfare.

Frac Sand Regulations Should Be A Local Determination

Furthermore, the expansion of industrial scale sand mining and processing raises significant economic, environmental, and quality of life issues, including water and air

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Wisconsin Farmers Union
UNITED TO GROW FAMILY AGRICULTURE

quality, quantity of ground water use, road and highway impacts and costs, reclamation plans, property values for adjacent landowners, and mining and plant operating procedures. Our members believe that the economic, environmental, and quality of life impacts of these operations are primarily issues of local concern. Our members are so concerned about these issues that our organization, along with the Wisconsin Towns Association and the Institute for Agriculture and Trade Policy commissioned an independent study which identified the costs and benefits of frac sand mining in the state of Wisconsin which I urge everyone here to take a look at.

While we have been flooded with data about the benefits of these mines, our study identified several concerns that could be very costly to local communities as a result of frac sand mines.[1] These issues included significant road congestion, road safety hazards, air pollution, and damage to local public roads. Also, there was the potential for higher levels of noise from blasting, industrial processing equipment, and heavy trucks, possibly 24 hours a day. Finally, there is the potential for damaging ground and surface water resources.[2]

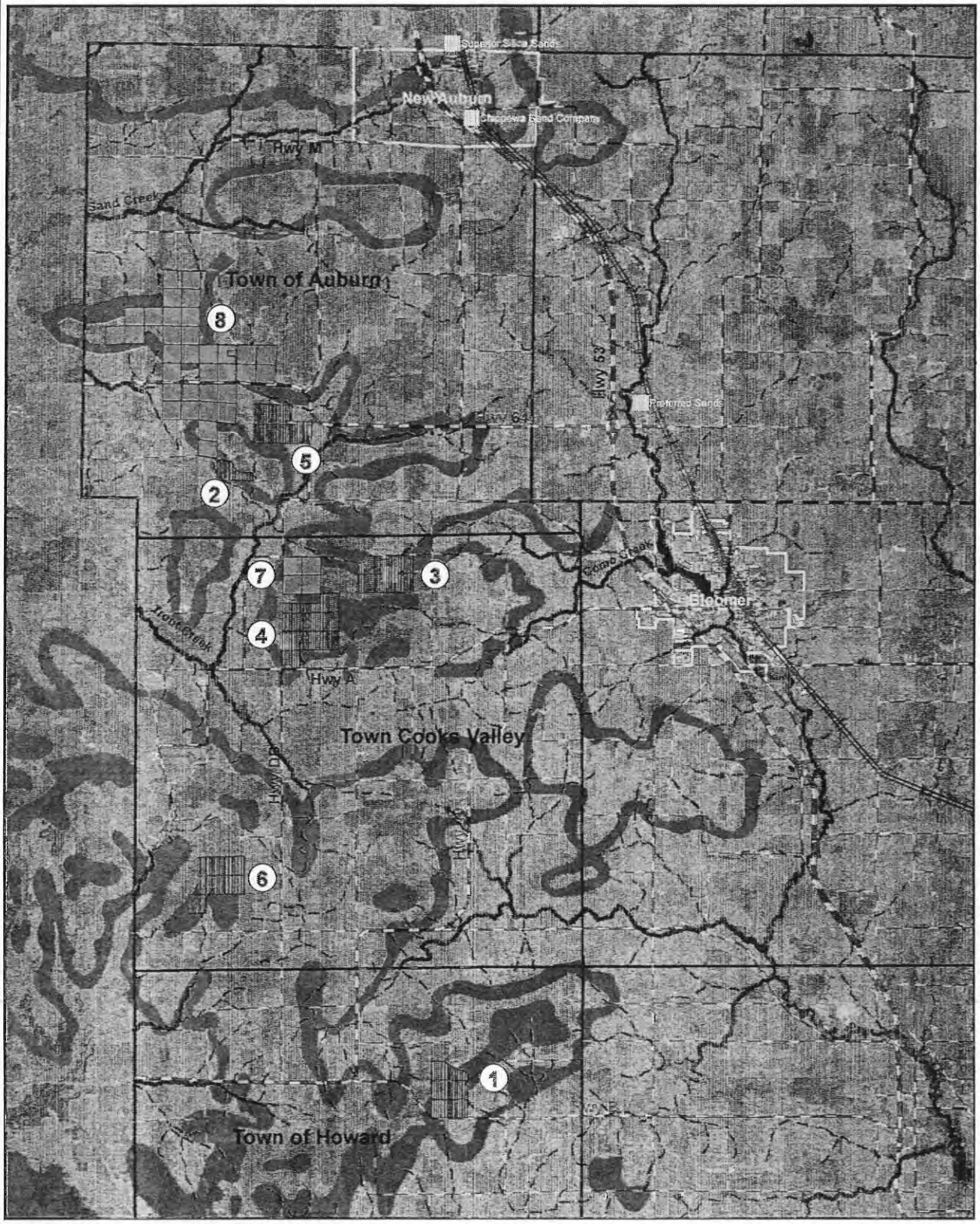
All of these issues that were described in the study have one thing in common; they are local, not statewide, issues. No proposed mining site is identical, therefore it makes no sense to have a single and inflexible regulation to cover every single non-metallic mine in the state. It is because of this variability that town and county officials have been able to use their local non-metallic mining ordinances to tailor agreements with frac sand companies with their specific local issues in mind. However, through this proposed bill, the state is telling these towns and counties that their specific concerns do not matter and that the deals they have been able to negotiate to protect their constituents are invalid.

In conclusion, I would like to reiterate Wisconsin Farmers Union's opposition to this bill and thank the committee for allowing me to speak on this manner today.

Scott Karel
Government Relations Associate
Wisconsin Farmers Union
skarel@wisconsinfarmersunion.com / 608-234-3741

[1] http://www.wisconsinfarmersunion.com/webfiles/fnitools/documents/2013_10_18_fracsandmining.pdf, P. 29
[2] *Id.* P.30

Location of NMM in Bedrock
Permits & Permit Applications in Chippewa County



Legend

- State Highways
- County Highways
- Town Roads
- Intermittent Stream
- Perennial Stream
- Bedrock Formations
- City - Village
- Towns
- Permitted Mine Parcels
- Plan Review In Process
- Dry Processing
- Wet Processing

1 0 1 2 Miles

N

Date : 10/31/2011

Chippewa County
Land Conservation and Forest Management

Path: H:\ADMIN\CO_REGS\MINES\NR135\TRACKING\NMM_MAPS\Bedrock_Mining_Map_10-31-2011.mxd

Before the Wisconsin Senate
Committee on Workforce Development, Forestry, Mining, and Revenue

October 23, 2013
Hearing on SB 349

Comments of Paul G. Kent on behalf of Municipal Environmental Group – Wastewater Division

My name is Paul Kent and I have been practicing environmental law for over 30 years on behalf of businesses, municipalities and individuals. In the past several years I have worked with several dozen towns to develop responsible frac sand licensing ordinances and believe that this bill is unwarranted limitation on local governments to control such operations. I will save my comments on those issues for another time.

I am here today on behalf of the Municipal Environmental Group Wastewater Division (MEG) because this bill has several sections that are not limited to frac sand, but attempt to preempt all local control over water and air quality. MEG is an association of more than 100 municipalities throughout the state of Wisconsin. For 25 years, MEG has been an advocate for municipalities in wastewater and water quality matters. I am here on their behalf because this bill has potentially catastrophic affects on the ability of local governments to fulfill their obligations to manage wastewater and stormwater.

In particular, Section 15 prohibits municipalities from using their police power to impose "any restriction related to water quality or quantity" unless "specifically required or authorized by another statute." The bill expressly provides that city and village police powers cannot satisfy that requirement. This is a major problem.

Cities and villages who maintain sewer and stormwater utilities, have relied on their general police powers as the basis of authority to enact regulations relating to sewage and water. For example, most wastewater utilities have sewer use ordinances that regulate the discharges that can be made to their system and many have pretreatment ordinances that regulate industrial discharges and require discharge permits. These ordinances are often based on permit requirements imposed upon the municipality by DNR or based upon federal requirements for receiving clean water funds. But there is no specific *statutory* authority for these activities other than the police power, largely because that has never been an issue until now.

To be clear, municipalities are required to have wastewater discharge permits under Wis. Stat. ch. 283. The permit requirement is "specifically required." But the authority to adopt ordinances to implement federal and state clean water act requirements through local ordinances stems from municipal police powers. If you take those away, municipalities will be in the untenable situation of not having the authority they need to comply with state and federal law requirements.

In addition, even apart from federal and state mandates, many municipalities utilize police power ordinances to achieve important water quality goals consistent with the federal and state clean water act. For example, under NR 211 municipal facilities with a design flow of greater than 5 million gallons per day (mgd) may be required to have a pretreatment program. Currently, there are approximately two dozen municipalities required to have such programs. There are however, many communities below this mandatory threshold that have adopted pretreatment requirements

by ordinance to ensure compliance with their permits. They would be unable to do so in the absence of police power authority.

A different problem exists for stormwater management. There is specific statutory authority granted to cities in Wis. Stat. § 62.234 to manage stormwater through zoning to meet the standards in Wis. Stat. § 281.33. Those standards are now the statewide standards under Wis. Admin. Code ch. NR 151 relating to water quality for storms up to the two-year storm event. However, there are many types of stormwater ordinances that are not subject to Wis. Stat. § 281.33, particularly as they relate to flood control for larger storm events. Because those standards are not authorized or required as part of stormwater zoning, a city would have to rely on its police powers for such ordinances. That was what was contemplated when the exemption, now in Wis. Stat. § 281.33(6), was written. That exemption allowed for municipal flood control ordinances notwithstanding the uniform standards. Whether this exemption from uniform standards could serve as an authorization under this bill is at best an open question.

While a full review of all of the ramifications of this bill will take more time, we can say this: at best, removing municipal police powers to regulate water quality and quantity will create confusion and litigation. At worst, it will deprive local governments of the authority they need to carry out state and federal requirements for which there is no express statutory authority, and it will deprive local governments of the ability to make sound water and land use decisions.

For these reasons MEG opposes this bill. I am open for questions, or can be contacted at pkent@staffordlaw.com or 608-259-2665. Thank you.

Aaron Scott
Area Manager for Wisconsin Industrial Sand Company
Menomonie, Wisconsin

Testimony in favor of SB 349

My name is Aaron Scott. I am currently an Area Manager for Wisconsin Industrial Sand Company ("WISC"), a division of Fairmount Minerals.

I am here to speak in favor of the Regulatory Certainty Act.

WISC is proud to do business in the State of Wisconsin. I grew up in Eau Claire, attending high school and college there, and feel fortunate to work for a company that is as ethical and responsible as WISC.

WISC is proud of its strong record of environmental stewardship and its experience managing an important natural resource. In fact, just this past year, WISC became the first nonmetallic mining company in the State to achieve Green Tier certification from the DNR. We also received Master Status from the Wisconsin Sustainable Business Council Green Masters program.

WISC is also proud of the strong, positive economic impact it has had and, we hope, will continue to have in the communities where we operate and the State as a whole. WISC provides good paying jobs to its employees, not to mention the vendors and contractors WISC hires to provide products and services.

Finally, WISC is proud of the direct financial contributions it has made to the communities where we operate, which include hundreds of thousands of dollars in contributions to local schools, fire and EMS departments and parks, just to name a few. Last year we donated over $176,000 to local schools through education grants along with over $150,000 in charitable donations.

For the past 5 years I have been the plant manager at WISC's industrial sand mine and processing facility in the Town of Red Cedar near Menomonie. WISC's Menomonie facility was started in 2007 and we have been successfully operating since then.

A significant part of WISC's decision to start the Menomonie facility was to supply sand to Cardinal Glass, a local producer of float glass right there in Menomonie. Our relationship with Cardinal Glass has been a benefit to both of us and has helped Cardinal remain competitive and continue to be a strong employer in the community.

WISC's Menomonie facility was originally permitted under Dunn County's zoning ordinance. In late 2006, we obtained a Conditional Use Permit from the County Board of Adjustment. We continued to operate successfully under the CUP without incident or complaint, and on two occasions our CUP was amended at our request by the Board of Adjustment to accommodate changes in our operations.

By all indications, things were going very well at our Menomonie facility. Our relationship with Cardinal Glass remained strong and, again, we were operating successfully without incident or complaint.

However, in late 2012, we learned about plans by the Town of Red Cedar Board of Supervisors to consider the adoption of a local licensing ordinance that would specifically regulate nonmetallic mining in the Town. Despite our presence in the Town, we were not consulted about these plans, and in the early part of 2013, we learned that the Town Board adopted a nonmetallic mining licensing ordinance.

When we obtained a copy of the Town's licensing ordinance, we were very concerned to say the least. The licensing ordinance, which we understand was modeled after a similar Town of Howard ordinance, contained provisions that we believe are prohibitive of mining. It would not have been possible for us to comply with those requirements and continue mining sand the way we had been, if at all.

There were a number of provisions that would have effectively shut down our operation. The ordinance contained set back requirements that would make mining unfeasible on the property where our mine is located. The ordinance also contained a provision that would allow the Town to make up new standards after an application was filed.

In the Town of Red Cedar you could say we were lucky. We met with the Town officials and, based on our strong record of operating without complaint for several years, the Town exempted us from their ordinance as a preexisting use. However, that exemption only applies to our existing operation and does not allow us to expand.

Also, the ordinance remains in effect and it is doubtful any other nonmetallic mining companies would seek to open a facility in Red Cedar.

While we managed to avoid being shut down entirely by the Town of Red Cedar Ordinance, our experience in the Town of Oak Grove, in Pierce County has been far worse.

WISC has been prevented from opening a nonmetallic mine in the Town of Oak Grove as a result of a nonmetallic mining licensing ordinance adopted by Oak Grove. The Town of Oak Grove adopted a moratorium in the spring of 2012 *after* WISC submitted its application for a CUP from the County to operate an underground nonmetallic mine. A year later, it adopted a licensing ordinance with provisions that are equally prohibitive of nonmetallic mining as the Red Cedar Ordinance.

We have been unable to move forward with the Oak Grove project because of that Town's licensing ordinance. Thus, despite the fact that nonmetallic mining is a lawful use of land under Pierce County zoning, Oak Grove can effectively prohibit that use of land under its own ordinance.

Also, we also learned recently that the Town of Trenton, also in Pierce County, was considering the adoption of a nonmetallic mining ordinance. WISC operates an underground mine and processing facility in Trenton that dates back nearly a century. WISC has operated this facility for many years without incident.

Our Trenton facility operates pursuant to a CUP issued by the Pierce County Land Management Committee – which has many years of experience in the oversight and regulation of nonmetallic mines in the County.

We do not believe local licensing ordinances – that create an additional layer of local regulation on nonmetallic mining operations – make sense.

We believe in strong regulation of nonmetallic mining at the local, state and federal levels of government. And at WISC, we have shown a strong commitment to not only meeting, but exceeding those regulations.

However, the use of land should be regulated through local zoning ordinances. Land use should not also be subject to licensing ordinances that create a duplicate permitting process.

I strongly encourage the legislature to pass the Regulatory Certainty Act, SB 349.

Thank you.

51470 Deer Rd.
Cashton WI
54619

William Gruendeer

Im nekumani, Deer clan member of the Ho čąk nation, and am citizen of this. I want you, this legislators, to hear what I have to say! your job is to listen to us, not pave the way for corporations to make money. the people gave you a job! not the corporations, you are there because you're supose to represent the people, not the corporate elites, A lot of them are in it for money and if you're not representing us, what are you doing sitting there. SB349 will take away our right to be able to protect our air, sacred water, sacred lands and to leave it in the hands of the Drill, they are understaffed and they don't enforce the rules. my culture, for hundreds of years, knows what it's like to be exploited, our rivers are now polluted, our trees, decimated, the government is ruled, as any nation family, we know what losing rights is, 1978, we were finally able to have our religion back. now, you should listen us. in our culture we watch over and take care of the sacred water, sacred land this is our future, not for the hungry ghost. you can't eat money, let us speak for... to protect our Sacred Water, our sacred land.

Public Hearing October 24, 2013 Madison

My name is Victoria Trinko. I reside at 3717 County Highway A, Bloomer, WI. I am a retired speech clinician raising beef cattle on the farm my father bought in 1936. I am also the clerk of the Town of Cooks Valley.
The town board of Cooks valley has been dealing with the sand mine issue since 2008 when we heard about the possibility of sand mines coming to the Town of Cooks Valley. Our aim when drafting the ordinance was not to stop mining in the Town of Cooks Valley but to protect the health, safety and welfare of the citizens of our town. We adopted our nonmetallic mining ordinance in July of 2008 and amended it in December of 2008 to accomplish this goal.
Opposition to our nonmetallic mining ordinance began in Nov. of 2008, when a group of citizens with silica sand located on their properties, attempted to revoke our village powers at the special meeting of the electors for the budget. This item was not on the agenda so the motion was invalid.
Early April of 2009, the same group of citizens circulated a list of people to replace the current board on the ballot saying the board and clerk were embezzling money.
Also in April of 2009, this group of citizens, with lawyer in tow, reopened the annual meeting and again tried to revoke village powers. It was defeated by other citizens in the town.
In October of 2009, the Town of Cooks Valley was sued by 4 citizens in the town. We were taken to court and the judge in Chippewa County ruled it invalid. Ron Fanetti, our chairman with 20 years experience, became a specific target of slurs and innuendo by this group. He died three years ago today, while working on town business up to four days before he died. Our present Chairman, Darrel Fehr, had an unenviable position to step into.
After the ruling in the Chippewa County Court, we appealed the decision and this case eventually went to the Wisconsin Supreme Court where it was ruled valid by unanimous decision in February of 2012.
After all this time, work, effort and struggle, you now want to take away our local power because the sand companies do not want to have restrictions placed on them that protect the health, safety and welfare of the citizens of our towns.

Three Sand companies began operations in the Town of Cooks Valley while our ordinance was in litigation. Since the Supreme Court ruling, we have been working on the permitting process with these three sand companies. On October 16, 2013 we completed the permit process with the third company. This third company, Chippewa Sands, located within ½ mile northwest of my farm, started construction and operation in the spring of 2011.

On July 11, 2011, I commented on dust billowing from the Chippewa Sands mine site. We were told a water truck would be on site in the next week and a new road was being built.

On October 10, 2011, I again commented on the dust blowing off the sand mine site and was told the water truck came and then went to the neighboring Village of New Auburn.

I was often in my fields that summer and fall and could feel dust clinging to my face and gritty particles in my teeth.

In April of 2012, I developed an intermittent sore throat and raspy voice.

In September of 2012, I visited my Dr. who referred me to a pulmonary specialist.

In October 2012, I was diagnosed with asthma due to my environment and started on an inhalant and nasal spray to alleviate my breathing symptoms.

In November of 2012, my daughter arrived home from Australia and said our home smelled like I had just swept the garage. She developed a cough, sore throat and a raspy voice within two weeks.

Early January of 2013, I purchased a heppa home air filter for $1000.00, which runs 24/7 to keep the silica sand dust out of my home. I have not opened my windows since the fall of 2012 due the silica sand blowing through the air. I used to have the luxury of cooling my house by opening my windows at night. Since I could no longer do that, I used my air conditioner, which brought in the outside air and silica dust. The air conditioner has become counterproductive; cooling my house while making it harder for the air filter to keep the air in my home clean to breathe.

On July 5, 2013, the wind blew out of the southeast and dust began rising out of the sand mine from all the mine site areas, creating an atmosphere so thick it obscured the bluff across the road from my home. Thankfully, when the wind is from the south I can be outside without symptoms occurring. When the wind is from the west, north or northwest, I need to wear a protective mask while outside for any length of time. Working near the road while the trucks are hauling sand and even with a south wind, I develop a sore throat and raspy voice.

While on a vacation for a month this summer, my symptoms lessened and disappeared so that the last days of my vacation, I did not take my medication. While driving home from Eau Claire after my trip, within a mile of the Howard sand mine, my throat started swelling, and by the time I arrived home, it was sore and my voice was hoarse.

On Sept 28, 2013, dust continued to blow off the mine site, now a common occurrence. At this time, my home furnace brings in the outside air and I experience a hoarse voice and sore throat even with the air filter.

Sand mine companies moved into towns because they were vulnerable with no zoning or prior knowledge of the extensiveness of this industry.
Slowly, towns have been working to protect their citizens from the hazards of these mining operations.

The gas and oil companies have had exemptions from the Clean Air and Water Act since 2005, due to the Halliburton Loophole legislated by Dick Cheney. Having protection

from revealing the chemicals and hazards of this industry at the federal level, companies expect and demand limited oversight at the state and local level. State requirements are soulfully lacking in depth and requirements to control the hazards of this industry. This industry has since acted with impunity related to safety and health of employees and residents of communities where they extract sand or conduct hydraulic fracturing or 'fracking'. Studies being conducted concerning the health hazards, the economic impact on communities, and water and air pollution contradict the claims of this industry. This industry hired the same public relations company to advertize the safety of silica sand and fracking that was retained by the tobacco industry to sell the notion to the public that smoking was not harmful. This public relations strategy indicates we are being sold a tainted bill of goods.

We need to retain our local control over this sand mining industry to protect the health, safety and welfare of our citizens. The state has to extend and strengthen their regulations, not weaken them, to protect our citizens and environment,.

This bill is a slap in the face to the local town governments.

Thank you

SIERRA CLUB
FOUNDED 1892

John Muir Chapter

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Oppose SB 349 to Remove Local Control for Mining,
Before the Senate Committee on Workforce Development, Forestry, Mining, and Revenue
October 24, 2013, 9:30 AM, 411 S

Thank you for accepting our comments today. The Sierra Club – John Muir Chapter represents over 15,000 Wisconsin citizens working to explore, enjoy, and protect Wisconsin's water, air, and land resources. Before I begin, I want to thank you, Senator Jauch for your exemplary work representing your constituents and championing conservation in the State Senate. While we certainly understand your decision to retire, we will also miss your voice of reason for the north woods.

We're here today to urge you to oppose SB 349 in order to preserve the ability of local communities to protect property values, public health, and natural resources against mining impacts. If passed, SB 349 would bar any local government from regulating the use of explosives in both frac sand and iron mining. This bill's draft was circulated on the same day as Ashland County began considering local regulation on the use of explosives to sample the taconite ore body proven to have high concentrations of grunerite, a mineral with asbestos fibers. Should Gogebic Taconite use blasting to obtain bulk samples, Ashland County deserves the right to enact requirements that will reduce the risk of disturbing these fibers. The danger to public health is real, as shown by a recent study that found that Minnesota iron mine workers exposed to asbestos-form fibers suffer from aggressive, incurable mesothelioma lung cancer at a rate that is 200% higher than expected.[1]

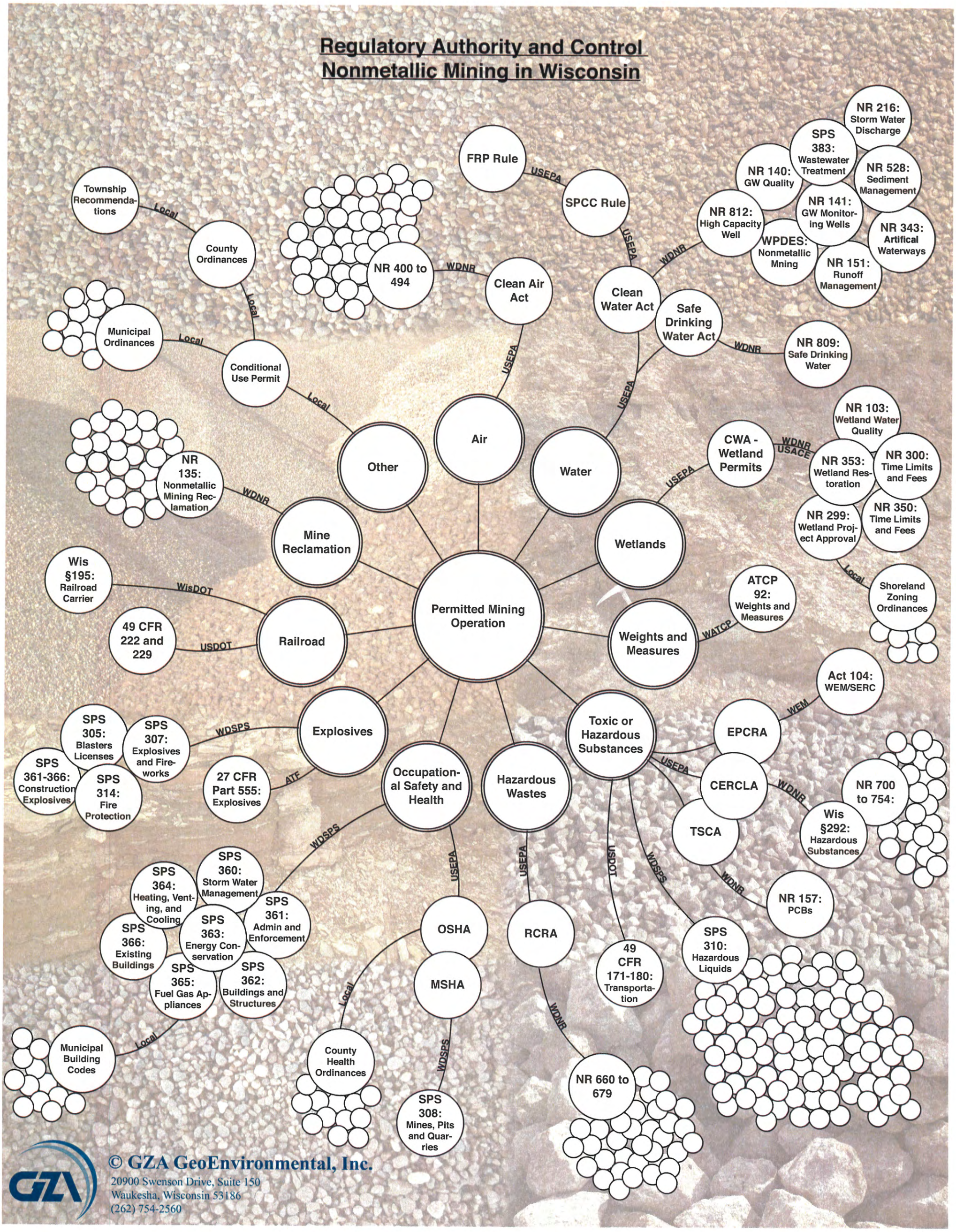
In addition, SB 349 directly attacks the recent Wisconsin Supreme Court decision upholding the right of local governments to regulate or, in rare cases, prohibit a frac sand mine proposal. This undermines our judicial branch of government, and it comes just weeks after Waupaca County enacted a temporary moratorium on sand mining needed to ensure that regulations are adequate to protect local residents and natural resources near the proposed Town of Union sand mine.

Preserving the rights of local communities to protect their drinking water, land resources, property values, and public health is more important than ever, given that our Department of Natural Resources lacks adequate mining oversight staff, and because agency enforcement actions are at the lowest levels in over a decade. [2]

Furthermore, the current level of meager local oversight rarely results in mining permits being denied. In fact, over 100 sand mines have been permitted over the past few years to fuel the natural gas fracking boom in other parts of the country.[3] Local regulations are essential for ensuring that companies don't jeopardize the communities from which they seek to extract resources.

So, again, the Sierra Club urges the Senate Workforce Development, Forestry, Mining, and Revenue Committee to oppose SB 349, in the spirit of upholding Wisconsin's longstanding tradition of respecting local governmental rights to enact reasonable restrictions and evaluation periods to protect residents from unsustainable or harmful developments. Thank you for considering our comments on this important matter.

Regulatory Authority and Control
Nonmetallic Mining in Wisconsin



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