

Report From Agency

REPORT TO LEGISLATURE

NR 130, 131, 132 and 182, Wis. Adm. Code

Board Order No. EA-14-18
Clearinghouse Rule No. 20-043

Basis and Purpose of the Proposed Rule

The Department of Natural Resources is proposing changes to the administrative rules pertaining to nonferrous metallic mineral mining and related activities. Chapters NR 130 (Exploration and Bulk Sampling), NR 131 (Prospecting), NR 132 (Mining) and NR 182 (Mining Waste Management) are being repealed and recreated to correct inconsistencies with the existing statutes, bring the rules up to date with current technology and regulatory approaches, and improve overall clarity and effectiveness.

2017 Wisconsin Act 134 made substantial changes to the law related to nonferrous metallic mineral mining activities. The proposed rule changes implement those statutory revisions and also reflect previous statutory changes that were not subsequently implemented in the pertinent rules. Chapters NR 130, 131, 132 and 182, which have been mostly unchanged since their adoption in 1982, are also being revised to reflect new technology and regulatory approaches and standards developed over the past several decades. Lastly, the chapters have been reviewed to identify provisions that were unclear, ambiguous or difficult to interpret and implement and have been revised to provide greater clarity. Significant changes to the rules include: development of a separate regulatory framework pertaining to bulk sampling; incorporation of changes to the permit review process, groundwater protection provisions and financial assurance mechanisms resulting from Act 134; removal of specific provisions as directed in Act 134; and inclusion of provisions requiring applicants and regulated entities to provide an increased level of detail in certain application and approval submittals.

Summary of Public Comments

The department issued a draft economic impact analysis (EIA) and received one comment letter that did not include any specific concerns or issues. No changes to the draft EIA were necessary.

The department conducted a virtual public hearing to solicit public input on the draft rules. Twenty-four people preregistered for the hearing, with 19 registering as “as interest may appear”, 4 registering in opposition and 1 registering in support. Twenty-one people actually participated in the hearing and 8 individuals provided oral statements. In addition to the comments received during the hearing, 179 people submitted written comments, many of which were specific and technical in nature. Multiple commenters expressed concern with four topics; the department’s interpretation of the allowable scope of bulk sampling, the need for a mandatory public hearing at the preapplication stage of the mine permitting process, the unnecessary inclusion of vague or conditional provisions and the need to expand the scope of areas that are designated as unsuitable for prospecting or surface mining. The attached Comment Summary and Response document provides a detailed summary of all public comments.

Modifications Made

The department received comments on the draft rule suggesting that the interpretation of the scope of bulk sampling permissible under the proposed rule went beyond the statutory limits. The final rule includes changes to the bulk sampling provisions to more directly reflect the statute.

The draft rule included a discretionary public hearing which could be held at the time of submittal of the preapplication notification, the first formal step in the permitting process. In response to comments, the final rule requires that a hearing will be held to solicit public comment on the preapplication notification.

Many commenters suggested the rules included unnecessary use of qualifying language such as “to the extent feasible” or “to the extent practicable.” The draft rules were reviewed, and the qualifying language has been removed where appropriate.

As detailed in the attached Comment Summary and Response, referenced above, the final rule also reflects numerous specific and technical changes made in response to public comments.

The Natural Resources Board approved an amendment to the draft rule. Under the amendment, a provision has been added to the definition of “unsuitability” contained in chs. NR 131 and NR 132 to specify that additional areas of “unsuitability” must be designated by statute or administrative rule.

Appearances at the Public Hearing

As interest may appear

Steven Schreier, Oneida County Board

Allison Werner, River Alliance of Wisconsin **(Made an oral statement)**

Lisa Sadak

George Meyer, Wisconsin Wildlife Federation

Lucille Hanson

Bob Mahin

Noah Saperstein, Red Cliff Band of Lake Superior Chippewa

Dana Dziedzic, Aquila Resources, Inc

Robert Lundberg, Midwest Environmental Advocates **(Made an oral statement)**

Tom Jerow, Wisconsin's Green Fire **(Made an oral statement)**

Eric Rempala **(Made an oral statement)**

Debra Andrade

Jennifer Giegerich, Wisconsin Conservation Voters, Government **(Made an oral statement)**

Rick Kitchen

Mary Hansen

Margaret Upton, Aquila Resources

Melissa Cook, Menominee Indian Tribe of Wisconsin

Elizabeth Ward

Paula Mohan, UW-Madison

In opposition

Tina Van Zile, Sokaogon Chippewa Community **(Made an oral statement)**

Guy Reiter, Menikanaehkem Inc.

Mitchell Maricque

Thomas Hickey, River Alliance **(Made an oral statement)**

In support

Ronald Zabler **(Made an oral statement)**

Participated in the hearing but did not preregister and indicate a position on the rules

Dave Behrend

John Coleman

Douglas Cox, Menominee Indian Tribe of Wisconsin

Lucille Hanson

Philomena Kebec

Paula Mohan

Nathan Podany

Changes to Rule Analysis and Fiscal Estimate

No changes were made to the rule analysis or fiscal estimate.

Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse submitted comments on October 19, 2020. The comments pertained to: statutory authority; form, style, placement in administrative code; clarity, grammar, punctuation and use of plain language. Changes to the proposed rule were made to address all recommendations by the Legislative Council Rules Clearinghouse, except for those discussed below.

Comments related to Statutory Authority

Comment 1.a. - Chapter 293, Stats, directs the department to adopt minimum standards for nonferrous metallic mineral exploration, prospecting and mining by rule. The law specifies certain components that must be included in the minimum standards. The proposed rule appears to merely cross-reference the statutory requirement described above and authorize the department to impose site-specific conditions to implement that statutory requirement. The department should adopt specific standards by rule.

Response: The statutes, ss. 293.13(2)(b) and (c), Stats., effectively establish the minimum standards and the rules, specifically the detailed descriptions required under the rules such as NR 130.109(1)(a), are intended to generate the information by which the department can determine if the minimum standards will be met by specific proposals. No change was made.

Comment 1.c. - The statutes require a person seeking to commence drilling for nonferrous metallic mineral exploration to provide notice to the department “at least 10 days in advance of the commencement of drilling. The proposed rule requires such notices to be provided “at least 30 days in advance of the anticipated commencement of drilling” and specify that such notices must be publicly posted and transmitted to certain local and tribal officials. {s. NR 130.109 (1) (a)} What is the department’s authority for requiring a longer timeframe and various new disclosures for such notices?

Response: Under s. 293.21(4)(b), Stats., the department is authorized to establish, by rule, notification procedures applicable to various stages of drilling. The provisions in the proposed rules regarding the timing and informational requirements fall within that statutory authorization. No changes were made.

Comment 1.d. - The statutes require persons engaging in nonferrous metallic mineral exploration to obtain a license, to comply with certain reclamation standards promulgated by the department by rule, and to notify the department before drilling. The statutes do not appear to otherwise authorize the department to approve or deny such exploration. The proposed rule provides that the department “shall approve, conditionally approve, or deny” an exploration licensee’s notice of an intent to drill. (See proposed s. NR 130.109 (1) (d).) Please explain the department’s statutory authority for doing so.

Response: Under s. 293.21(4)(b), Stats., the department is authorized to establish, by rule, notification procedures applicable to various stages of drilling. The provisions in the proposed rules regarding approval of the notification to drill fall within that statutory authorization. No changes were made.

Comment 1.e. - Section 293.26 (2), Stats., specifies items a person must include in a bulk sampling plan. What is the department’s authority for requiring additional items in a bulk sampling plan under proposed s. NR 130.204 (2) (a)?

Response: The items not specified in the law but required under the proposed rule are a description of the potential mining site and the cost estimate for reclamation of the site. The description of the potential mining site is needed for overall context and is considered to be part of the description of the bulk sampling site required under s. 293.26(2)(a), Stats., and the reclamation cost information is needed to establish the ultimate amount of bond coverage, required under s. 293.26(9)(d), Stats.. No changes were made.

Comment 1.j. - Please explain the department’s authority for the visual standards in proposed ss. NR 131.111 (1), NR 132.111 (1) (e) and NR 132.111 (1). Because ch. 293, Stats., does not appear to address visual or aesthetic features of prospecting or mining sites, it would be helpful to explain how the requirements are necessary to ensure that operations are conducted “in a manner consistent with the purposes and intent of ch. 293, Stats.

Response: The provisions related to visual or aesthetic aspects of a project are intended to interpret the minimum standard under s. 293.13(2)(b)10, Stats., which requires “adequate screening” of the site. The intent is to minimize the visual/aesthetic impact of prospecting and mining sites. No changes were made.

Comment 1.n. - Section 293.53 (2), Stats., requires an operator of a nonferrous metallic mining site to submit an annual report to the department. In addition to that annual reporting requirement, s. NR 132.119 requires an operator to submit two separate annual reports relating to planned and completed reclamation activities. The statutory authority for those separate annual reporting requirements is unclear.

Response: Section 293.15(12), Stats., authorizes the department to “require all persons under its jurisdiction to submit such informational reports as the department deems necessary for performing its duties under this chapter.” The reporting requirements cited in the comment all fall within that authority. No changes were made.

Comment 2.e. - *Because ch. NR 182 is being recreated, the numbering in s. NR 182.1095 could be adjusted to avoid using double-letter numbering, to allow for double-letter numbered provisions in future rules revisions.*

Response: The department is not renumbering the proposed rule. Given the organization of the rule and the current numbering scheme, it will not be difficult to accommodate any future revisions.

Comments related to Clarity, Grammar, Punctuation and Use of Plain Language

Comment 5.h. - *How is the notice requirement under s. NR 130.109 (2) distinct from the notice requirement under s. NR 130.09 (1)? Could an anticipated date required under sub. (1) make the notice under sub. (2) unnecessary?*

Response: The first notice is in reference to submittal of the detailed Notice of Intent to drill which includes the detailed information describing the proposed activity and is subject to approval by the department. The second notice is a short-term notification of the actual commencement of drilling on a specific parcel. Both notices are necessary and convey different information. No changes were made.

Comment 5.s. - *Throughout s. NR 132.103, definitions that are identical to statutory definitions could be replaced with cross-references to the applicable statutory definitions, where applicable.*

Response: The rule has been reviewed and cross references have been added to most of the definitions where the rule essentially duplicates the statutory definition. However, some definitions, while similar, also include further explanatory provisions and in those cases, the proposed rules were not modified.

Final Regulatory Flexibility Analysis

The proposed rule changes are not expected result in significant economic impact on small businesses. Given the capital-intensive nature of metallic mineral exploration and mining project development, such activities have generally not been conducted by small businesses. Since the department began regulating these activities in the late 1970s, the vast majority of companies engaged in exploration and all of the companies pursuing mining permits in this state have been large corporations.

Response to Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not prepare a report on this rule proposal.