MINING REGULATIONS CONSENSUS GROUP

Pt 54

MINING IN NORTHERN WISCONSIN

CONSENSUS OR CONFLICT

* * *

The State of Wisconsin
Department of Justice

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1982

THE ENVIRONMENT AND THE ENGINEER

35th Annual Fall Conference
Wisconsin Society of Professional Engineers
LaCrosse, Wisconsin
September 1982

An environmental advocate does not often have an opportunity to make a formal presentation before a group of engineers. When the telephone call came to the Wisconsin Public Intervenor Office asking if we would be interested in attending your conference, we whole-heartedly accepted. I believe that it is very important that the professional engineering community have an opportunity to exchange views with environmental advocates. I believe that such exchanges will help both groups better understand each other's needs.

Today, I would like to discuss six general areas with you. These areas are: 1) an overview of the Wisconsin Public Intervenor; 2) the shoestring philosophy of development; 3) what the government must provide the developer; 4) a corporate look at environmentalists; 5) science as a tool in decisionmaking; 6) a look ahead, to 1983-'84.

I. AN OVERVIEW OF THE WISCONSIN PUBLIC INTERVENOR

The Wisconsin Public Intervenor is an assistant attorney general in the Wisconsin Department of Justice. The Office of Wisconsin Public Intervenor was mandated by the 1967 Wisconsin Legislature, when the Wisconsin Department of Natural Resources was created. The office was established at the request of the

Wisconsin Wildlife Federation and other traditional conservation forces.

The Wisconsin Public Intervenor office was created during a struggle to reorganize state government. A commission created by the Wisconsin Legislature (Kellett Commission) recommended the merger of the then existing Wisconsin Department of Resource Development and the Wisconsin Conservation Department. Conservation groups actively opposed such a merger fearing that the proposed department of natural resources could not be an effective advocate for resource conservation, since it would also be responsible for resource development.

Consequently, a compromise reorganization bill was adopted. One of the elements of that bill was the creation of a Public Intervenor, who would ensure a continued adversary process during regulation of water resources by the new Department of Natural Resources (DNR).

The Center For Public Representation has observed:

> [T]here is substantial evidence that the function assigned to the Public Intervenor by the legislature--acting as an advocate for such public rights--is as important as it was perceived by the legislature in 1967. Those who pollute water or air, dam streams for a recreational development, and take other actions which affect public rights in water and other natural resources usually have a substantial economic stake in the outcome of administrative and court proceedings affecting their activities. They are represented by counsel and an array of experts. The beneficiaries of "public rights," on the other hand, are diffuse, often unorganized and have only small economic stakes as individuals. Public rights will ordinarily go unrepresented unless the Public Intervenor is there.

Wisconsin Department of Administration, "The Public Intervenor In Wisconsin," published in November 1975, at 85-86.

There are currently two assistant attorneys general designated as Wisconsin Public Intervenors: Peter A. Peshek was appointed in May 1976. Thomas J. Dawson was appointed in September 1976.

The Public Intervenors have participated in a large and varied number of issues involving public rights in Wisconsin's environment. In almost every case, local citizens, often rural residents, have asked for assistance. Selection of issues for the Wisconsin Public Intervenor office is made by a Citizens Advisory Committee to the Public Intervenor. The Committee also is involved in major litigation-strategy decisions.

The purpose of the Citizens Advisory Committee is to ensure the accountability and credibility of the position. The first committee was appointed in 1976. At that time, Attorney General Bronson C. La Follette said that the Advisory Committee "was established to provide public input and assistance on environmental matters to the Attorney General and to [the] Public Intervenor." [June 3, 1976, press release.]

The current program priorities for the Wisconsin Public Intervenor, as recommended by the Citizens Advisory Committee in September, 1982, are shown below in descending ranking:

1 --Groundwater
1 --Pesticides
2 --Wetlands
3 --Multiple Uses of navigable waters (including aesthetics, user conflicts)
4 --Toxic Pollutants
5 --Mining
6 --WEPA (Wisconsin Environmental Policy Act) secondary impacts
7 --Public Trust Cases

In summary, the Wisconsin Public Intervenor "watchdogs" state agencies. When necessary, the Public Intervenor sues state agencies or developers when public rights in the environment are threatened.

II. THE SHOESTRING PHILOSOPHY OF DEVELOPMENT

Undoubtedly, many of you are regular readers of the Wall Street Journal. The August 31, 1982, edition carried an interesting front page article regarding Exxon Minerals Company, U.S.A. The article was highly critical of Exxon, and the theme found throughout the story is illustrated by the following sentence: "The disappointments at Exxon Minerals illustrate a central problem: The world's largest oil company has stubbed its toe in practically all its diversification moves."

Further in the story, former named and unnamed employes of Exxon Minerals Company talk about having "overstudied" and "overengineered" Exxon's mining projects. One employe is quoted as saying, "It was like NASA designing and building this mine." The story goes on:

> "This is a company used to building platforms in the North Sea. You have to do it solid and do it right. You can't not do it that way in mining. You've got to do it shoestring," because the return on investment is much lower than in petroleum, says a former Exxon Minerals employee who has worked in both industries.

I submit to you that the philosophy found in that last comment is one which is very central to developments in Wisconsin and to this State's environmental ethic. The former Exxon employe is suggesting that when you build oil platforms you have

to build them solid and you have to do it right. The speaker also suggests that, because the return on investment is lower for mining, you do not have to do it right. The speaker really suggests that, if it isn't oil, you do as little as you can and do it on a shoestring.

The "shoestring" philosophy is one which may provide very short-term rewards for the developer. In the long run, however, it poses serious economic and environmental dangers to a state, such as Wisconsin. Operations run on a shoestring theory can and do cause substantial pollution. Examples are found throughout Wisconsin.

Three examples immediately come to mind. First, we look at the groundwater pollution from the lead and zinc mining in southwestern Wisconsin. For years, the operators continually indicated that they were barely making a profit, and eventually they closed down in the late 1970's. After they closed, groundwater pollution became a major problem in the Shullsburg area. If you go to the Mineral Point area, you can observe several miles of Brewery Creek with its absolutely sterile waters, as a result of mining pollution. Shoestring operations do pollute.

Not too many years ago, a major paper company in Oconto County told citizens they could not afford to operate and end their pollution of the Oconto River. Wisconsin took the proper course. It told the paper company, you will end your pollution, and you will then decide what the economic consequences are of that decision. The company did clean up its operations. This

single company was emitting more pollution to the waters of this state than all paper companies on the Fox River together. Shoestring operations do pollute.

The Brownsville area has seen tremendous groundwater pollution from the cheese industry. Milk was being brought in from at least three states and turned into cheese. The expense associated with the proper disposal of cheese waste was offered as an excuse for not preventing groundwater pollution. The citizens of the Brownsville area found this unacceptable, and they began to force changes in the cheese industries operations. Rural Wisconsin citizens rejected the shoestring theory of development.

Those in the development field should not apologize for going the extra step and conducting the extra study or doing the extra engineering review. In fact, in the long run, such a careful developer is more likely to get its permit for controversial large projects. Such a developer is likely to be perceived by the neighbors as a good citizen. Such a developer is likely to save tremendous amounts of money in legal, technical and punitive costs associated with remedial actions to clean up an environment that has been injured.

To the supporters of shoestring development, I say, go someplace else other than Wisconsin. To those who want to develop a project, which meets the environmental laws of this state, I would say that, on the whole, the developer will find the environmental community of this state responsible, enlightened and cooperative. The environmental community recognizes the

significance of jobs to the well-being of the "human environment" of this state. There are many commonalities of interest between developers and environmental advocates.

III. THE NEED FOR CERTAINTY: A COMMON BOND BETWEEN THE DEVELOPER AND THE ENVIRONMENTAL ADVOCATE

One of the most frustrating problems facing an environmentalist, or a local community facing the prospect of a new development, is the inability to determine what the ground rules are under which the industry will operate. If there are no standards to measure the proposed project against, it is very frustrating for the local community or the environmentalist to decide whether the project should be permitted or not. The experience of the Wisconsin Public Intervenor is that industry faces the very same frustrations. Industry needs to know what are the rules. It is interesting to note that, after reviewing a company's files, one finds that developers share the very same frustrations of the local community and the environmental advocate. I would like to use the development of metal mining as an example of this phenomena.

In November of 1976, Kennecott Copper Corporation sought Wisconsin permits to mine its copper-ore body in the Town of Grant, Rusk County, Wisconsin. The 960-citizens of the Town of Grant stated their unified collective beliefs that it was premature to approve the permit applications.

The cities recognized that Wisconsin was not then in any position to determine intelligently whether, or under what

conditions, Kennecott should be permitted to mine its Ladysmith ore body. It was even more evident that the State of Wisconsin did not have a comprehensive and integrated regulatory scheme for copper and zinc mining.

What the citizens of the Town of Grant discovered, in the fall of 1976, was Wisconsin's regulatory void, which Kennecott had discovered in 1975. Two examples illustrate this point. For a long time, Kennecott did not know if the solid waste laws applied to mining. An internal Kennecott memorandum of December 5, 1975, said, "[T]he WDNR's oscillating their opinion re [solid waste rules] to the point that I advise we apply for a license." An earlier 1975 memorandum said, "Again the solid waste section is creating confusion. I am not clear whether we need either, none, or both of the [solid waste] licenses." The Wisconsin Legislature and the DNR clarified that issue on March 14, 1979, by requiring the mining companies to obtain solid waste licenses.

However, industry should not need to wait three and one-half years for such an answer.

Another confusion concerned the Wisconsin Pollutant Discharge Elimination System permit (WPDES). On April 15, 1975, Kennecott was orally informed that "we need to apply for ...[a WPDES] permit to discharge ... process plant tailings into our waste containment site." Subsequently, DNR told Kennecott that such a permit was not necessary. On November 1, 1976, the Wisconsin Public Intervenor filed a declaratory ruling petition with DNR, asking whether a WPDES permit was necessary for the

tailings pond as proposed by Kennecott, which would leak at least 27.8 gallons per minute. A ruling was never issued on that petition, but in the summer of 1980, a WPDES permit was issued for the Jackson County Iron Company tailings pond which was already leaking at a rate of 326 gallons per minute. Industry and the environmental community does not know yet how long a tailings pond must leak at a sufficient rate before it is classified as a pollution source requiring a WPDES permit.

Industry has a right to clear and detailed guidelines, which establish the comprehensive regulatory framework, under which it must operate. A Kennecott official wrote in May 1977: "Wisconsin ... possess[es] sufficient quantities of base metal mineralization to place it in a position of being a significant metal supplier. What remains to be seen, however, is whether it is prepared to provide a reasonable and stable regulatory environment."

IV. A DEVELOPER'S REACTION TO AN ENVIRONMENTALIST

There are common interests between developers and environmentalists which both groups must promote. However, do corporate developers always recognize this potential? I don't believe they do.

Industry does not maintain a singular view of environmentalists. While many industry representatives do not deal with environmentalists in a moderately progressive manner, others do. Some companies do not even hold a unified intramural

view when it comes to their own approach towards those who are raising environmental issues.

For example, the Wisconsin Public Intervenor took discovery of a developer for a DNR permit. This developer has a substantial business in the western part of the United States. During the course of discovery, documents were uncovered, containing the following observations by various agents or employes of the developer, about the Wisconsin Public Intervenor and his activities:

> 1. The Public Intervenor "is young, aggressive and ultra-ambitious. His role in the upcoming hearings is complex, for it is a mixture of using meetings as a political platform to further his own ends ... blended with the satisfaction of fighting multi-national corporations."
>
> 2. This [environmentalist] "does not have the money, nor do the residents of the township. We must get back to the residents of the town if we are going to erode the building base of opposition which this [environmentalist] is fostering ... I do not think that it is likely that the town will come through with the funds necessary for any extensive court fight on the project.

Compare these hostile views to those of other employes of the developer who were recommending the following:

> 1. If there is to be a major rewriting of [our application], then I would hope that some way would be found to involve a citizens committee.
>
> 2. I am convinced that Peshek is an open person, one who would be willing to sit down and negotiate. He should be involved in the planning process.
>
> 3. Peshek is a bright man ... with a deep sense of duty.
>
> 4. Instead of trying to second-guess Peshek, why doesn't [our company] go to him and ask what his concern is and offer to help resolve any uncertainties he may have? Would there be gain in the long run if

[our company] established dialogue and offer support as far as Peshek is willing to do so?

These two sets of quotations reflect the two options available to an industrial developer. The developer can take the low road and view the adversary as an absolute enemy, whose support should be eroded and whose financial limitations should be exploited. Or the company can take the position that the environmentalist has concerns which should be publicly addressed as they are representative of a legitimate point of view which is entitled to articulation.

The choice is clearly the developer's. In my opinion, the high road of full cooperation, public participation and disclosure works better for the developer, as it does for the local community and the environment.

An engineer for Kennecott stated this conclusion in yet a different manner: "Getting into bed with environmentalists might rub raw with many of our colleagues, but in this day and age I cannot recommend a better course of action for expedition of our project."

V. DECISIONMAKING AND ACCURATE SCIENCE DATA

The environmental decisionmaking process gives great weight to scientific data. Often decisions are made relying almost exclusively on the opinions or facts gathered by scientists. Unfortunately, this reliance is not always well placed.

Far too often, government makes decisions on data supplied by the developer. This data often is not verified. The

developer, in turn, often lacks an appropriate internal quality control system to make sure that the data it relies upon is accurate and complete. The Kennecott mining case provides some very interesting examples.

First, at the close of mining, Kennecott proposed to leave a 56-acre, 285-foot deep lake to be located some 300-feet from the Flambeau River. The water near the top of the pit lake would flow westerly toward the Flambeau River. The issue was whether the water near the top of the open pit lake would be contaminated.

The company alleged the water would not become contaminated, because the lake would become meromictic. A meromictic lake is one that does not turn over seasonally. Because the lower levels of the meromictic lake would contain the heavy metals and other environmentally dangerous materials, the theory was that there would be no potential danger to pollution of the Flambeau River.

DNR's environmental impact statement (EIS) of February 3, 1976, said, "Regardless of the method of filling the pit, the lake would eventually become meromictic." The EIS did not state who reached that conclusion, and upon what information, if any, it was based.

Despite DNR staff's absolute declarations that the lake would become meromictic, Kennecott was told, as early as 1973 by one of its consultants, that it could not be ascertained, with certainty, whether the lake would be meromictic or not. Even more disturbing is an April 21, 1977, letter from Kennecott which

said, in part, "Our recent investigations indicate that the lake would not become meromictic."

DNR did not advise the public that there were only 135 known meromictic lakes in the entire world in 1976. DNR did not tell the public that in 1976 there were only a very few man-made meromictic lakes.

Many of our regulatory agencies do a poor job verifying the accuracy of data submitted by developers. For example, there were thirty-three major studies reported by DNR in the Kennecott EIS. Of those thirty-three studies, only three of them were conducted by DNR. These three studies were principally animal counts and other such basic research.

Of the remaining thirty studies, DNR admittedly verified, in some fashion, only five of them. Therefore, twenty-five of the thirty-three studies that were the basis of the EIS, for the Kennecott mine were neither conducted by DNR nor verified by that state agency. This is very important because major flaws existed in the data which was collected by Kennecott. However, DNR did not know this because that state agency failed to verify much of the data or perform discovery, i.e., review Kennecott's files.

The Wisconsin Public Intervenor did review the developer's files. Our office found on April 19, 1976, memorandum, written between two Kennecott scientists, which dealt with the monitoring of water quality. The memo said, in part:

> A meeting was called to discuss with [our environmental consultant] and [our testing laboratories] repeated sloppy reporting of results, anomalous results, and the [consultant laboratories] inability to reproduce EPA standards on two

> occasions... .[consultants laboratory] could not adequately explain the results of the EPA "blanks" nor could they satisfy my inquiries regarding typographical errors and inconsistent significant figures on their report sheets.... Furthermore, I discovered that [our environmental consultant] has not been following EPA recommendations during their sampling.

Obviously, a well-established verification program between the state agencies and industry will minimize errors in baseline gathering. However, public confidence of such a baseline data gathering and verification program will only be established through processes which guarantee full due process to environmentalists and local units of government.

DNR's EIS indicated there were no known markets of pyrites that could be found in the Kennecott mine tailings. The EIS further indicated there was no alternative to land disposal of these materials.

The document did not indicate the qualifications of the unidentified person who wrote those sentences. The EIS failed to state the basis upon which those conclusions were reached.

We often have professionals who reach beyond their level of expertise in stating conclusions upon which public policy is based. This is particularly dangerous, because so often we wrap such public policy conclusions based on alleged technical or scientific factors.

A review of the Kennecott files showed a different perspective on the potential for the marketing of pyrites from

the Kennecott mine. For example, a December 4, 1978, Kennecott letter said, in part:

> In summary, what we have determined from all of those studies was that yes, there is a market for pyrite but, in each case, the potential customer would not commit themselves with an affirmed delivery date. Our present plans for the Flambeau project include a pyrite recovery circuit within the concentrator, which would extract approximately 90% of the pyrite.

An earlier Kennecott memorandum said that, of the alternatives studies, the production of sulfuric acid at Ladysmith is the only totally viable method for disposing of pyrites. If the acid produced could be sold at $35 to $55 per ton, return on investments (ROIs) of 12% to 23% could be obtained, respectively, for a total capital investment of approximately $13 million. The memo cautioned that additional market research is recommended to assess accurately the sulfuric acid demand/supply situation in the Midwest before a final decision is made.

On July 18, 1975, a Kennecott official said,

> Representatives of the WDNR have expressed concern that Kennecott does not have definite plans to treat the acidic effluent from the waste containment area, which is calculated to be about 25 gpm. I also have been concerned this might hold up the environmental impact statement approval and have requested that MMD/RC to review the alternative methods of disposal of pyrites from the mine tailings, even if it were a break even or loss proposition.

A fourth example that comes to light from the Kennecott files deals with the issue of wetlands. The Kennecott tailings basin was to be 156 acres, with approximately 19 of those acres being wetlands. The environmental community insisted that the wetlands were unnecessary for construction of the tailings

basin. However, t ecott insisted that, indeed, it wa: ıds. They gave us plenty of techn: ng reasons why this was true.

However, a rev wed an entirely different set of va lization of the wetlands beyond th pts from three Kennecott memorandums demonstrate the problem:

On February 26, 1976, a Kennecott official wrote,

> The Corps will review the public comments and then decide whether Flambeau Mining Corporation will be required to submit an environmental impact statement or not. If an environmental impact statement is required, it would take a year and a half to two years to get the Corps approval. An alternative to this would be to decrease the waste containment area by nineteen acres and stack the waste higher. This would be difficult to do and is not a good alternative, but the threat may be enough to cause the Corps to negotiate with Flambeau Mining Corporation to make a land trade and allow us to proceed with present plans without an environmental impact statement.

On April 9, 1976, the same official wrote another memorandum, which said,

> As an alternative, we could redesign the waste containment areas so that the Corps does not have any jurisdiction over the project. I feel we should reject this alternative for the following reasons:
>
> 1. We do not intend to start the project this year because of economic conditions and this delay will not materially hurt us;
>
> 2. Through some technicality or change in the law, the Corps could get jurisdiction over this project and immediately stop it until an environmental impact statement is prepared;
>
> 3. By getting an environmental impact statement from the State of Wisconsin and one from the Corps of Engineers, there is hardly any way that an

environmental group can intercede to stop this project or harass the project at a later date.

On September 25, 1978, this same official wrote,

> If the Corps of Engineers has to prepare an environmental impact statement, they will add another year to the permit system to mine at Flambeau (we have planned to revise our Mining Permit Application to cut out this 19 acres of wetland area so we do not have to involve the Corps of Engineers in our project).

In short, engineers and scientists often provide facts and theories which serve as a basis for public policy decisions. All to often, the decisionmaker fails to adequately explore the accuracy of these facts and theories. We must do a better job.

VI. A LOOK AHEAD

State agencies, local units of government, and various special interest groups often look to their technical people for advice. One of the obvious questions is what will be on the environmental agenda in 1983-'84? I would like to offer some closing observations about the immediate future issues.

Those affected by pollution in Wisconsin during the next few years will, generally, be residents of rural Wisconsin. The environmental problems that will need to be addressed within the next few years will, generally, come from rural Wisconsin citizens. Groundwater protection, animal waste regulations, wetlands protection, disposal of cheese wastes and pesticide regulations are areas of increased concern, in part, because of economic consolidation and growth, as well as the technological resolutions occurring in the Wisconsin agribusiness community.

The leadership of the agribusiness community is unprepared to deal with these realities. The moderate agribusiness community has no well-defined leadership prepared to address environmental problems in rural Wisconsin in the 1980's, or to find solutions to prevent pollution and to assist victims when pollution does occur. I urge the traditional agribusinesses and farm organizations to step up front and constructively participate in the development of environmental protection programs for rural Wisconsin. It is time for the moderate agribusiness community to join the consensus process.

The industrial communities are more familiar and comfortable with government programs that protect the environment. The Wisconsin Paper Council, the Wisconsin Solid Waste Association, the utility companies, and the Wisconsin Manufacturers and Commerce have all participated in rulemaking and bill writing utilizing the consensus process.

However, past accomplishments do not solve today's environmental problems. Industrial communities must support the following:

1. Groundwater Protection Legislation. The industrial community has failed to offer a specific program on this issue. It's time for them to come to the bargaining table with specific suggestions.

2. Citizens Lawsuit Legislation. Citizens should have the right to bring lawsuits to enforce environmental laws and end pollution.

3. State Permit Program for Wetlands. Wetlands are underprotected because the agribusiness community has blocked needed legislation. However, one of the reasons wetlands remain in danger in Wisconsin is that the industrial community has not provided its support

for state legislation creating a permit program for wetlands protection.

4. Citizens Participation Funding Legislation. Wisconsin has made significant gains in ensuring that citizens can effectively participate in environmental decisionmaking. We need to expand or create additional programs to ensure funding for citizens who want to participate in the government decisionmaking process. One obvious area, requiring such additional legislation, is the hazardous and solid waste siting approval process.

5. Comprehensive Pesticides Regulation. The chemical companies must support appropriate regulation, research, monitoring, and victim compensation programs.

CONCLUSION

Professional engineers and environmentalists, alike, have much to learn from each other. Wisconsin's environment will be the winner if we all succeed in better understanding each other's role in government decisionmaking.

Submitted by

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ENVIRONMENTAL DECISONMAKING IN THE 1980'S
CONSENSUS OR CONFLICT

Presented at Downtown Madison Rotary Club
August 18, 1982

The decade of the 1980's holds many challenges for Wisconsin's environment. Environmental protection programs will need to be established for groundwater, pesticides, wetlands, animal wastes, soil conservation, central business districts, and fertilizers. The question I will address today is what will the process be for determining those protection programs. Will the industrial and agri-business communities find themselves in a process of working with the environmental community or will Wisconsin see a substantial period of conflict and combat while the environment goes underprotected in this decade.

A CORPORATE LOOK AT ENVIRONMENTALISTS

Industry does not maintain a singular view of environmentalists. While many industry representatives do not deal with environmentalists in a moderately progressive manner, others do. Some companies do not even hold a unified view when it comes to their own approach towards those who are raising environmental issues.

For example, the Wisconsin Public Intervenor took discovery of a developer for a DNR permit. During the course of discovery, documents were uncovered, containing the following observations by various agents or employes of the developer about the Wisconsin public Intervenor and his activities:

1. The Public Intervenor "is young, aggressive and ultraambitious. His role in the upcoming hearings is complex, for it is a mixture of using meetings as a political platform to further his own ends ... blended with the satisfaction of fighting multi-national corporations."

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Compare these hostile views to those of other employes of the developer who were recommending:

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2. I am convinced that Peshek is an open person, one who would be willing to sit down and negotiate. He should be involved in the planning process.

3. Peshek is a bright man ... with a deep sense of duty.

4. Instead of trying to second-guess Peshek, why doesn't [our company] go to him and ask what his concern is and offer to help resolve any uncertainties he may have? Would there be gain in the long run if [our company] established dialogue and offer support as far as Peshek is willing to do so?

The two sets of quotations outlined above reflect the two options available to an industrial developer. The company can take the low road and view the adversary as an absolute enemy, whose support should be eroded and whose financial limitations should be exploited. Or the company can take the position that the environmentalist has concerns which should be publicly addressed, and that the environmentalist represents a legitimate point of view entitled to articulation.

The choice is clearly the developer's. In my opinion, the high road of full cooperation, public participation and disclosure works better for the developer, as it does for the local community and the environment.

METAL MINING--AN EXAMPLE OF CONSENSUS

So far, three possible economically feasible metaliferous deposits have been discovered in Northern Wisconsin. In 1968, Kennecott Copper Corporation found a 6 million ton copper-bearing ore body in the Town of Grant, near Ladysmith, Rusk County, Wisconsin. In 1974, Noranda announced the discovery of a 2.3 million ton zinc-copper body in Oneida County. In 1976, Exxon Minerals Company, U.S.A., announced its finding of at least a 70 million ton zinc-copper ore body located in the Towns of Nashville and Lincoln, Forest County, Wisconsin.

Kennecott was the first and only one of the three companies to seek state permits to mine its ore body. When the hearing on the permits was held in November, 1976, the 889 citizens of the Town of Grant stated their collective belief that it was premature to approve the permit applications.

The Town of Grant hired a well-respected trial attorney to protect its interests. It spent a substantial portion of the town's budget over the ensuing two and one-half years battling Kennecott. The Town of Grant solicited and received the support of the Natural Resources Defense Council and the Wisconsin Public Intervenor. Together, these three groups embarked on an effort to protect Wisconsin's human and natural environment from inadequately regulated mining.

All three lawyers and their clients recognized that Wisconsin, in 1976, was not then in any position to intelligently determine whether, or under what conditions, Kennecott should be permitted to mine the ore body. It was even more evident that Wisconsin did not have a comprehensive and integrated regulatory scheme for copper and zinc mining.

The legal and political fight between the Town of Grant and Kennecott was long and bitter. The mining permit hearing was indefinitely postponed in November, 1976, and ultimately dismissed in September, 1978. Eight legal proceedings were commenced. The approach employed by the Town of Grant and by Kennecott was one of conflict, both legal and political. The Town of Grant succeeded in all of the legal proceedings that have been completed. This sequence of events is most telling when viewed against a May 2, 1973, Wall Street Journal story, which quotes the then Kennecott president as predicting the Town of Grant mine "could be operating by 1976."

THE ROOTS OF CONSENSUS ON MINING ISSUES IN WISCONSIN

Immediately upon the adjournment of the Kennecott mining permit application hearings in November, 1976, there began a political process which would propel Wisconsin into the lead of national efforts to regulate metallic mining operations. The Natural Resources Defense Council, under the guidance of Attorney Frank M. Tuerkheimer, now United States Attorney for the Western District of Wisconsin, prepared a comprehensive paper on the inadequacies of the 1973 Metallic Mine Reclamation Act and made a

series of recommendations for changes. Special committees of the Legislature, which to that point had been principally concerned with taxation of mining operations, formed a special working group to evaluate the need for additional regulation of the industry.

The people of the Town of Grant came to Madison and did their own lobbying. They found that the Legislature was receptive. Industry was also willing to push for change. Exxon led the way for industry. In time, Kennecott also began to effectively, and positively, participate as new management concluded that conflict was a sure way to no mining in Wisconsin. Two days after Kennecott saw its mining permit application hearing adjourned in November, 1976, a Kennecott official told his superior what had become painfully obvious: "Getting into bed with environmentalists might rub raw with many of our colleagues, but in this day and age I cannot recommend a better course of action for expedition of our project." Inland Steel joined with Exxon and Kennecott in supporting important environmental initiatives.

THE ENVIRONMENT NEEDS CONSENSUS

Given the high rate of success in litigation, why is it then that the Town of Grant, the Town of Nashville, and the Town of Lincoln, the Wisconsin's Environmental Decade, Inc., the Wisconsin Public Intervenor, and others, were prepared to use consensus as a vehicle to meet the legitimate needs of the environment? Consensus makes sense for the environmental movement for at lest six reasons.

First, the results of a consensus approach tend to be logical. The ideas which survive the intense scrutiny in the negotiation process generally prove to be sensible. The work product survives scientific and legal policy analyses with all the competitors being represented.

Second, the end results of the political and legal process are often less certain than the rsults of a consensus process. In the legal process, particularly, a good advocate cannot always predict the outcome. Using consensus, one is able to have a greater degree of control over the outcome or work product developed.

Third, the State of Wisconsin has neither the personnel nor the financial resources necessary to allow Northern Wisconsin communities to feel comfortable with new mining operations. The mining companies who wish to develop major mining enterprises in Northern Wisconsin can provide major personnel and cash contributions to the process. For example, I estimate that Exxon has spent well in excess of $400,000 participating in the development of administrative rules for the protection of the environment from metallic mining waste. Kennecott has also spent a considerable sum of money doing similar things. The kind of expertise, both internal and external, that Exxon, Kennecott, and Inland Steel have been able to bring to bear on the process for wiring appropriate regulations are not available to citizens or local and state government in the State of Wisconsin. The consensus approach maximizes utilization of the companies' resources in helping to formulate public policy.

Fourth, there is a limit of energy and resources available to a local unit of government, or to an environmental group, to sustain over a prolonged period of time major political and legal initiatives. For a developer, who is prepared to sustain a legal or political fight for an indefinite or longer period, it is reasonable to expect that a prolonged struggle will wear down environmentalists or local citizens. Therefore, it is important that environmentalists and local units of government carefully pick their fights. If the environmental movement can secure its legitimate objectives without a fight, it should do so in order to save energy and resources for those times and places when conflict is inevitable.

Fifth, one of the significant reasons why the consensus approach to the development of mining regulations was selected was because the towns and the environmentalists needed allies to overcome the Wisconsin Department of Natural Resources' inability to decide the major issues surrounding mining in Northern Wisconsin. Exxon, later Kennecott and Inland Steel, came to recognize that mining in Northern Wisconsin would only be a reality if the state could complete its regulatory framework. For a variety of reasons--some internal to DNR, but some caused by the efforts of a mobilized consensus group--the Department came around to play a major role in the development of Wisconsin's mining policy during 1980.

Sixth, the consensus approach to policy development is a sound social and policital way to meet the legitimate needs of both industry and environment. It is an approach which should be encouraged, because it provides a vehicle for maximum citizen participation.

Althouth there are distinct advantages to the consensus approach to policy development, it should be recognized that there is room for differences of opinion and conflict. When and how such conflict will occur will depend on the good faith of those involved in the process, as well as on the complexity and difficulty of the policy issues. While consensus should be the primary tool for policy resolution, it must be recognized that conflict may still occur and that all parties reserve the right to diverge from the consensus approach, if it is believed that such a course is the only way in which the particular parties' legitimate needs can be protected.

RISKS OF PARTICIPATION IN CONSENSUS PROCESS

When participating in the consensus process for the development of public policy for metallic mining in Northern Wisconsin, environmental groups are exposed to three risks.

First, an outside observer may conclude that the environmental movement is being soft on the mining companies. This observation may be based on the fact that those participating in the consensus movement work very closely with the mining companies. There are fewer voices being heard and less antagonism is expressed to the media.

In June of this year, the Public Intervenor was accused of being "the James Watts of Wisconsin." I was accused of having sold out to the mining companies. While the perception of being soft on the mining companies may exist, it is not accurate. None of the parties to the consensus approach have lost sight of their individual needs. Private and public conversations and meetings are vigorous and, on occasion, even heated. Despite such conflict, however, the belief prevails that sound public policy will be developed if everyone cooperatively works with each other in an open and public process.

The second risk is the fact that consensus, to a large measure, is dependent upon the personalities responsible for representing various parties to the proceedings. If Jim Wimmer and Dick Olson from Kennecott, Jim Derouin from Exxon, or Jeff Bartell from Inland Steel were not the representatives of those companies, different political and legal strategies might well have been developed by the mining companies. For example, in January, 1979, I observed:

> This Kennecott [litigation] strategy simply depletes the resources and energies of those who should be working on ... policy items. ... This stonewalling also throws in disarray the ability of everyone else to process the policy problems in an orderly fashion. ... Those of us in Wisconsin must hope that the internal struggle that is occurring at Kennecott at this time will result in the newer progressive forces being able to take charge of mining operations in Wisconsin and that the result will be settlement of the eight legal proceedings.

Personalities do make the difference. In the case of Kennecott, the moderates within the company succeeded in convincing management that the consensus process was the way to go. As a result, Wisconsin's environmentalists, local units of government, and Kennecott have all won.

Third, there is the risk that some participants will be overwhelmed by the experience, expertise, and political muscle of others, particularly where the public forum which is part of the environmental movement's muscle is not used by tacit agreement. All parties to the consensus process need adequate resources to participate at arms-length.

CONSENSUS WORKS

Wisconsin has reacted in a comprehensive and creative way in preparing itself for a new era of metal mining. We have devised a program which will provide more information, more public participation opportunities, more environmental insurance programs, and more comprehensive standards for decisionmaking than for any other activity in the state, public or private, industrial, or agricultural. A few examples of these programs are worth noting.

First, we have established a metallic Mining Investment and Local Impact Fund Board, which provides funds in at least four significant areas: 1) it pays towns and tribal communities monies for them to hire attorneys and technical consultants to help them to evaluate whether a given mining project is environmentally sound; 2) it provides monies so that the

community can organize itself and can afford to send citizens to meetings and to participate in the political and legal decisions involved with mining; 3) it has helped pay for damages caused to individual citizens by mining-related activities; and 4) it is providing monies for economic and social studies necessary to better understand whether a given mining activity will, or will not, benefit a local community.

It should be emphasized that we have no such other impact board in the State of Wisconsin for any other industry. In addition, three mining companies and various local units of government, along with environmental advocates, convinced the Wisconsin Legislature to pass enabling legislation to permit potentially-impacted towns to receive substantial bloc grants from mining companies on an annual basis, beginning immediately, to provide them with more monies to effectively organize their communities, hire the necessary legal talent, and provide for consultants and other studies so that the citizens in these towns can effectively participate in the "go" or "no-go" decision on mining. These funds would be available so that towns with as few as 400 people, and Indian tribes with as few as 185 people, and help control their own destinies.

Second, Wisconsin has adopted a long-term liability legislation package. This legislation provides up to $150,000 per claim for a private injury to person or property based on a finding of strict liability. The claimant need only prove before a state agency that he/she was injured and that it was caused by mining. There need be no showing that the company acted in

negligence. The second part of the program provides that if Wisconsin does provide such remedy the state government can then go against the mining company to collect the damages. State government need not concern itself with the corporate structure, either at the time of mining or after mining. The parent corporation, or its successor, will be responsible. Again, it is noteworthy that such a program exists from an environmental prospective, for no other industry other than mining.

Third, Wisconsin's metal mining and reclamation laws have been completely rewritten. There are two concepts in those laws that are critical to the environment and to local units of government: 1) The standards for grant or denial of the permits are clearly articulated--they are balanced standards; 2) The statutes and draft rules provide an open and effective hearing process for citizens to help the state decide whether to permit, or not to permit, mining. The master hearing process contained in the law is not duplicated in any other environmental legislation. The regulatory agency and the developer will not be able to railroad the process over the objections of a citizen intervenor.

Fourth, the draft rules for mining contain a provision which permits any of those rules to be made stricter on a case specific basis for any proposed mining project. There are no other environmental rules in the State of Wisconsin, nor anywhere else in the country, which specifically permit an agency to make its rules stricter on a case specific basis if the environment warrants such protection. Many of our current environmental

statutes have a variance program in them. However, all of the variance programs are designed to give breaks to the industry and developer. This rules program will allow the citizen for the Department to urge the rules be made tougher if the environment needs such protection.

Fifth, the draft mining rules will require the mining companies to study, and under some circumstances require the marketing of the mining waste in lieu of perpetual storage in the north woods of Wisconsin. In short, it won't create tailings piles or waste rock areas for these materials can be utilized in the free marketplace. This policy initiative is yet unmatched for any other industry in Wisconsin.

Sixth, we all know that agriculture requires permits to divert water from streams for irrigation. The only nonagriculture enterprise requiring permits to divert surface water will be mining companies. In addition, we do not currently regulate groundwater quantity use. A comprehensive groundwater quantity use regulatory program has been adopted by the state Legislature and is embodied in the draft rules.

Finally, we have estblished a specific funding mechanism to provide individual rural Wisconsin citizens with monies and waters for damage caused to domestic or agricultural water supplies from mining activities. This program is in addition to, and supplements, long-term liability legislation.

These seven examples I have provided above are but the beginning of a long list of accomplishments that have occurred in Wisconsin to protect Wisconsin's environment from mining.

A LOOK AHEAD

Victims of pollution in Wisconsin during the next few years will generally be citizens of rural Wisconsin. The environmental problems that we are going to have to address within the next few years will generally come from rural Wisconsin. Groundwater protection, animal waste regulations, wetland protection, cheese whey disposal, and pesticide regulation are areas of increased concern, in part, because of economic consolidation and growth, as well as the technological resolutions occurring in the Wisconsin agri-business community.

The leadership of the agri-business community is not well prepared to deal with these realities. There is no clear and well-defined moderate agri-business community leadership prepared to address environmental problems in rural Wisconsin in the 1980's to find solutions to both prevent pollution and to assist victims when it does occur. I urge the traditional agri-businesses and farm organizations to step up front and constructively participte in the development of environmental metal programs. And it is time for the moderate agri-business community to join the concensus process.

The industrial community is more familiar and comfortable with government programs to protect the environment. The Wisconsin Paper Council, the Wisconsin Solid Waste Association, the utility companies, and the Wisconsin Manufacturers and Commerce have all participated in rulemaking and bill writing utilizing the consensus process.

However, past accomplishments do not solve today's environmental problems. The industrial community must support the following:

1. Groundwater Protection Legislation. The industrial community has failed to offer a specific program on this issue. It's time for them to come to the bargaining table with specific suggestions.

2. Citizen Lawsuit Legislation. Citizens should have the right to bring lawsuits to enforce environmental laws and end pollution.

3. State Permit Program for Wetlands. Wetlands are underprotected because the agri-business community has blocked needed legislation. However, one of the reasons wetlands remain in danger in this state is that the industrial community has not provided its support for legislation creating a state permit program for wetlands protection.

4. Citizen Participation Funding Legislation. Wisconsin has made significant gains in ensuring that citizens can effectively participate in environmental decisionmaking. We need to expand or create additional programs to ensure funding for citizens who want to participate in the government decisionmaking process. One obvious area requiring such additional legislation is the hazardous and solid waste siting approval process.

5. Comprehensive Pesticide Regulation. The chemical companies must support appropriate regulation, research, monitoring, and victim compensation programs.

CLOSING COMMENT ABOUT ENVIRONMENTALISTS

The environmental community must develop specific proposals to protect Wisconsin's environment. There are many different environmental groups. Specific proposals should be developed by a variety of groups in thorough public debate. It is not enough for the environmental community to be reactors and critics of other people's proposals.

For a few environmental activists I would offer this paraphrase of the Kennecott official's thoughts: Getting into bed with moderate industrialists might rub raw with many of our supporters, but in this day and age of less government, fiscal conservatism and Jim Watts, I cannot recommend a better course of action for adoption of legislation and administrative rules which will protect Wisconsin's environment.

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TESTIMONY OF WISCONSIN PUBLIC INTERVENOR PETER A. PESHEK

Presented to Special Committee on Groundwater Management
The Honorable Mary Lou Munts, Chairperson Presiding
Ruth Gilfry, Human Resource Center
Stevens Point, Wisconsin
Wednesday, July 21, 1982

INTRODUCTION

The Wisconsin Legislative Council's Special Committee on Groundwater Management is today seeking information on groundwater pollution problems and suggestions for improvement of state groundwater laws and policies. This Committee first met on April 26, 1982. Substantial information has been compiled since that first meeting.

Therefore, it is an appropriate time for the Public Intervenor to attempt to place in perspective: (1) the early efforts of the Groundwater Committee; and (2) what must be done in the immediate future in order to ensure comprehensive protection of Wisconsin's groundwater.

WISCONSIN'S POLICY GOAL FOR GROUNDWATER PROTECTION

A central directive that the Special Committee has received includes formulating a statutory goal statement clarifying the state's groundwater management policy. We believe the State of Wisconsin already has a clearly defined and reasonable policy goal towards groundwater management in this state. Section 144.025(1), Stats., states the existing state policy goal "to protect, maintain and improve the quality and management of the

waters of the state, ground and surface, public and private." Our Legislature reinforced this policy when it enacted Section 147.01(1), Stats., which declares:

> It is the policy of this state to restore and maintain the chemical, physical and biological integrity of its waters to protect public health, safeguard fish and aquatic life and scenic and ecological values, to enhance the domestic, municipal, recreational, industrial, agricultural and other uses of water. In order to achieve this policy, the legislature declares that:
>
> (a) It is the goal of the State of Wisconsin to eliminate the discharge of pollutants into the waters of the state by 1985[.]

Under sec. 147.015(13), Stats.: "Waters of the state" include "surface or ground water, natural or artificial, public or private within the state or under its jurisdiction."

We believe this policy goal has been and should be the cornerstone for groundwater protection in the State of Wisconsin. We believe that any legislative action should be consistent with the language of secs. 144.025(1) and 147.01(11), Stats. We also believe that every state agency should have the responsibility to follow the policy articulated in these sections.

STATUTORY AUTHORITY AND REGULATORY PROGRAMS

Despite the well-established and clear policy goal in secs. 144.025(1) and 147.01(a), Stats., it is safe to say that what the Public Intervenor told this Committee on April 21, 1982, is still very true:

(1) Groundwater pollution problems in this state are widespread;

(2) Sources of groundwater pollution are many and, without question, involve municipal, industrial, agribusiness and agricultural activities; and

(3) The state has done a horrible job dealing effectively with the rural Wisconsin victim of groundwater pollution.

This Committee's emphasis should, therefore, be directed towards the establishment of effective regulatory programs to prevent, and when necessary, abate groundwater pollution. In environmental affairs, the Legislature seldom has gone into great detail when establishing "standards" for impermissible environmental pollution. This has been an issue which generally has been delegated to the various appropriate state agencies.

This Special Committee on Groundwater Management will need to ascertain both the need for and the advisability of intruding into historic agency turf to establish groundwater standards in order to meet the policy goals found in secs. 144.025 and 147.01, Stats.

IMPACT OF SPECIAL COMMITTEE DELIBERATIONS ON CURRENT PROBLEMS

There are numerous current groundwater problems. Two of the most obvious center on the question of appropriate regulation of animal waste and protection of Wisconsin's groundwater from pesticides. Both of these issues are currently pending before state agencies.

We strongly believe that prompt agency action is required in both areas. A very substantial delay is and will continue to occur if the agencies are allowed to use the political excuse that the Special Groundwater Committee will solve all of our environmental problems on groundwater.

The groundwater issue is complex. It needs to be discussed in many forms involving many issues. To centralize all groundwater decisionmaking in the hands of this Committee, is doing the environment and the citizens of this state a disservice.

GROUNDWATER DAMAGE PROGRAM

This Committee needs to work on appropriate regulatory programs and the role of each state agency in those regulatory programs. This Committee must also work to develop groundwater damage programs for the victims of such pollution. Substantial effort should be devoted to this most important task. Once again we call this Committee's attention to 1981 Assembly Bill 958 which can serve at least as a discussion point for groundwater damage programs before the Departments of Natural Resources, Health and Social Services, Industry, Labor and Human Relations and Agriculture, Trade and Consumer Protection.

THE ROLE OF SPECIAL INTEREST GROUPS IN GROUNDWATER PROTECTION POLICY FORMULATION

There are several blocks of special interest groups which should provide this Special Committee with draft groundwater protection programs which are detailed, well thought out and progressive. I would like to speak briefly about both the agri-business community, the Wisconsin industrial community and the environmental community.

The following five factors must be considered by the agri-business community. First, the fight over the protection of groundwater often pits rural citizens against rural citizens in Wisconsin. The debate is not between rural folks on the one hand, and urban dwellers on another. It is a debate between victims of groundwater pollution--those who live in rural Wisconsin, who make their living in rural Wisconsin; many of whom are farmers, people who have lived in the country most, if not all, of their lives--on one hand, and a portion of the agri-business community on the other hand--those who also have much of their economic and social base in the countryside. It is a debate about the quality of life that will exist in rural Wisconsin. It is a debate about whether certain rural Wisconsin interests should be allowed to inconvenience, on some occasions injure, and otherwise create nuisances which harm other rural neighbors.

Second, the debate over groundwater protection has developed, in part, because traditional methods for resolution of

rural Wisconsin environmental and social problems have failed. Neighbors cannot agree with neighbors. The victims of groundwater pollution have found it necessary to ask state government to become involved to protect them from their neighbors' activities. These problems have increased in recent years because of economic consolidation and growth, as well as the technological revolution occurring in the Wisconsin agri-business community.

Third, all of rural Wisconsin would be unified if the industrial sector of this state were causing widespread groundwater pollution in the countryside. Rural Wisconsin would not tolerate a huge steel mill polluting square miles of groundwater. Much of the recent debate on environmental regulation in this state has centered on whether Wisconsin municipalities should be treated differently than the industrial community when it comes to pollution of the State's waters. On the whole, the State's response has been that the municipal and industrial communities should be treated equally. The question that needs to be answered regarding the adoption of many of our groundwater regulations programs is whether the agribusiness community, which by definition is often an industrial discharger of pollutants, should be treated differently than either the municipal or industrial sectors. As a matter of philosophical fairness, there appears to be little justification distinguishing between municipal, industrial or agribusiness polluters. They all injure public rights in the groundwater.

Fourth, many times in recent years, Wisconsin has had to deal with the question of whether little polluters should be treated differently than big polluters. Should the State only attack those who are rich and pollute, and ignore those who are less than rich and pollute? On the whole, this State has refused to distinguish the big polluter from the little polluter. This distinction should be the subject of public debate on regulation of groundwater.

Finally, victims of groundwater pollution in Wisconsin during the next few years will generally be citizens of rural Wisconsin. The environmental problems that we are going to have to address within the next few years will generally come from rural Wisconsin.

The leadership of the agribusiness community is not well prepared to deal with these realities. There is no clear and well-defined moderate agribusiness community leadership prepared to address environmental problems in rural Wisconsin in the 1980's to find solutions to both prevent pollution and to assist victims when it does occur. I urge the traditional agri-businesses and farm organizations to step up front and constructively participate in the development of groundwater protection programs.

The industrial community is more familiar and comfortable with government programs to protect the environment. However, the industrial community has been conspicuously silent about groundwater protection since the first meeting of this Committee. The industrial community has not presented the

Committee with the usual number of detailed proposals. It is time for everyone to pitch in and help.

The environmental community must also develop proposals to protect Wisconsin's groundwaters. There are many different environmental groups. Specific proposals should be developed by a variety of groups in thorough public debate. It is not enough for the environmental community to be reactors and critics of other people's proposals.

CONCLUSION

The Special Committee is off to a good start towards protection of Wisconsin's groundwater. Much remains to be done. However, our state agencies continue to proceed too slowly in carrying out their duties to protect groundwater.

Submitted by
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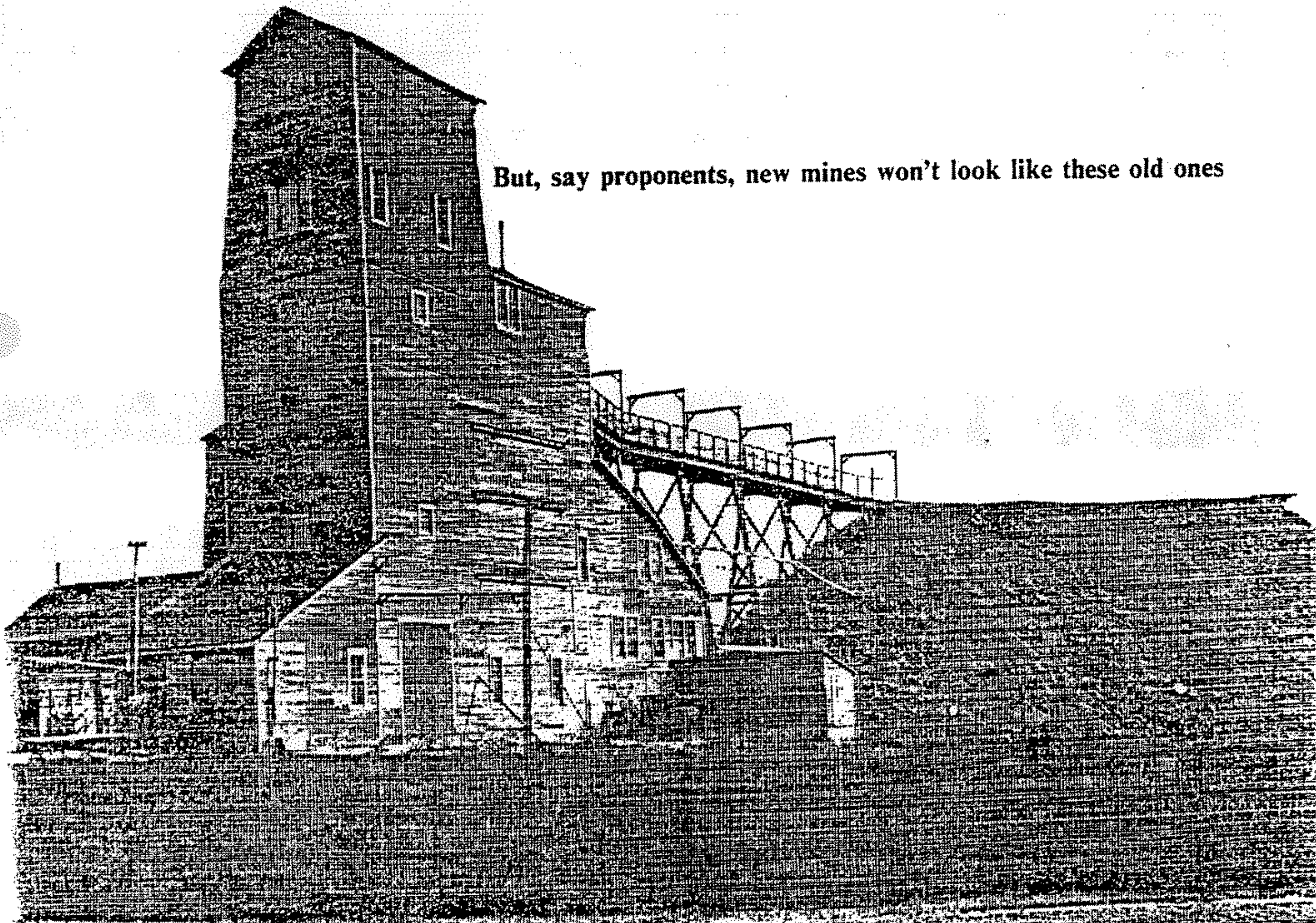
New Mining Era Comes to Wisconsin

But, say proponents, new mines won't look like these old ones



Headframe of a southwestern Wisconsin zinc-lead mine about 1930