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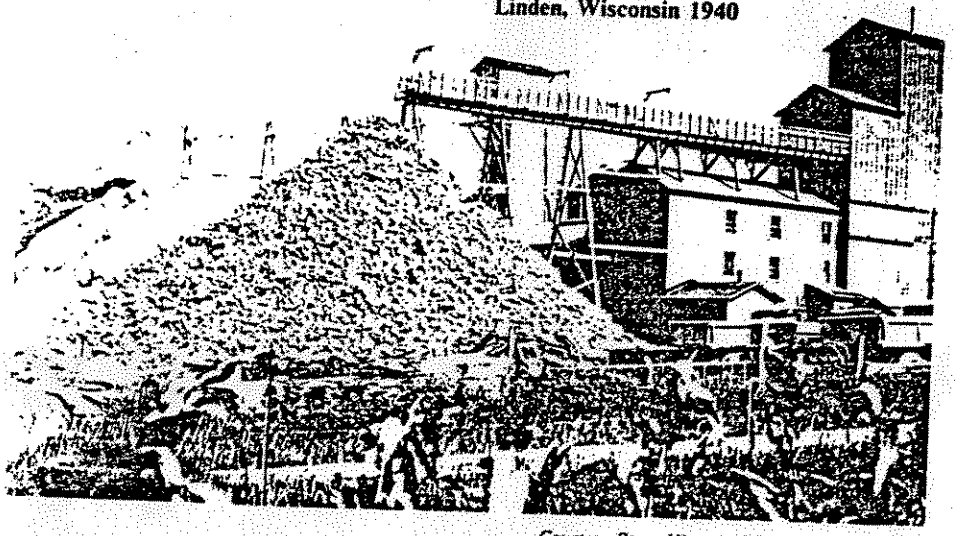
New Metal Mining In Wisconsin

By Peter Peshek
Wisconsin Public Intervenor

Courtesy State Historical Society of Wisconsin

Linden, Wisconsin 1940



Courtesy State Historical Society of Wisconsin

Black River Falls, Wisconsin 1981

Courtesy Department of Natural Resources

A Classic Environmental, Economic, and Political Dilemma

Metal mining has played a central role in the political, economic, and social history of the Upper Great Lakes Region. The results of mining have been uneven, ranging from prosperity and full employment, to serious environmental damage and high unemployment. The Upper Great Lakes Region now has the opportunity to develop an entirely new generation of copper, zinc, and nickel mines. Wisconsin is preparing itself for a new era of copper and zinc mining in northern Wisconsin. I will discuss the environmental issues associated with this proposed development.

A Historical Overview—Round I

In November of 1976 Kennecott Copper Corporation sought state 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 belief that it was premature to approve the permit applications. The town hired Kevin Lyons, a respected trial attorney, and solicited and received the support of the Natural Resources Defense Council and the Public Intervenor.

Within a short period of time, all three lawyers and their clients came to recognize 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. In time, the Wisconsin Department of Natural Resources (DNR) hearing examiner came to recognize these and other problems and dismissed the Kennecott mining operation. (In a case of this significance, one must distinguish between the legal-technical reason for dismissal and the broader underlying reasons causing this hearing examiner's decision.)

What the citizens of the Town of Grant found out in the fall of 1976 about Wisconsin's regulatory void, Kennecott had discovered in 1975. For a long time Kennecott did not know if the solid waste laws applied to mining. For example, 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.

Another confusion was about 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 Public Intervenor filed a declaratory ruling petition with DNR, asking whether a WPDES permit was necessary for a 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. What the industry and the environment community do not yet know is when a tailings pond leaks at a sufficient rate to be classified as a source of pollution requiring a WPDES permit.

Robert L. Russell, manager of the Crandon Project, Exxon Mineral Company, U.S.A., recently stated:

> It is also important to realize that in 1977, a state regulatory framework for permitting of mines did not exist, because of the fact that no new mines have been brought into production in Wisconsin in recent years or since the enactment of the several major national environmental laws. It is important to consider that a total state environmental regulatory framework had to somehow be developed and successfully promulgated into law and regulation. It was obvious that permitting would not be successful unless this could be done.
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> At the time, the state-wide public and political climate with regard to mining was anything but favorable. The Kennecott deposit near Ladysmith had attracted considerable attention across the state. Intervention in the permit proceedings by the state public intervenor and local groups provided visible evidence that the state not only did not have mining regulations in place, but also that the permit procedure mechanisms were either ill-defined or absent.
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> *Skillings' Mining Review*, 70, no. 27 (July 4, 1981)

It is easy with historical hindsight to recognize that Wisconsin was unprepared to grant mining permits in 1976. It was far more difficult to make that conclusion in 1976, particularly for a rural Wisconsin community that had had no major experience with Wisconsin's environmental laws before a mining company proposed to develop an ore body in its midst. It is to the absolute credit of the citizens of the Town of Grant that they recognized the political, policy, and legal vacuum that existed in 1976 and stood with great resolve against substantial legal and political odds to make their point in a forceful and effective manner.

It is also important to observe that industry has a right to clear and detailed guidelines, which establish the comprehensive regulatory framework under which they must operate. A Kennecott official wrote in May 1977:

> Wisconsin . . . possess[es] sufficient quantities of base metal mineralization to place it in a position to being a significant metal supplier. What remains to be seen, however, is whether it is prepared to provide a reasonable and stable regulatory environment.

Legislature Reaction—Round II

Immediately upon the adjournment of the Kennecott mining permit application hearings, there began a political process that would propel Wisconsin into the lead nationwide in an effort to regulate metallic mining operations. The Natural Resources Defense Council, under the guidance of Frank Tuerkheimer, subsequently 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 state legislature, which had thus far been principally concerned with taxation of mining operations, formed a working group to evaluate the need for additional regulation of the industry and to propose changes in the statutes.

On July 13, 1977, the Wisconsin Public Intervenor emphasized to this special legislative committee four of the policy problems facing Wisconsin:

1) The state of Wisconsin lacks legislative standards upon which to make judgments regarding the approval of disapproval of metallic mining operations.

2) There is a need for improvement in the process by which we conduct hearings relative to the aforementioned decision-making process.

3) The Wisconsin Environmental Protection Act (WEPA) must be made to work effectively in relation to the metallic mining industry.

4) DNR must be provided adequate resources if our environment is to be protected.

The emphasis on standards, WEPA, contested case hearings, and DNR was well founded in the Kennecott experience. An open process of decisionmaking and due process rights are required to protect the environment. Some Kennecott examples are in order.

At the close of mining Kennecott proposed to leave a 56-acre, 285-foot deep lake which would 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.

Kennecott alleged that the water would not be contaminated because the lake would become meromictic, a lake that does not turn over seasonally. Because the heavy metals and other environmentally dangerous materials would only occur in the lower levels of the meromictic lake, the theory was that there would be no potential danger to pollution of the Flambeau River.

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

In contrast to DNR staff's absolute declarations that the lake would become meromictic, University of Wisconsin consultants told Kennecott as early as 1973 that it could not be ascertained with certainty if the lake would be meromictic. Even more disturbing is an April 21, 1977, letter sent by Kennecott which said in part, "Our recent investigations indicate that the lake would not become meromictic."

Because of the public hearing process it became evident that if we could not ascertain whether the lake would become meromictic, we could not know whether the open pit lake would contaminate the Flambeau River. Thus it was obvious that the DNR Environmental Impact Statement was inadequate and misleading. It was the public hearing process, including a comprehensive discovery process, which helped focus on this most critical issue of whether the Flambeau River could become contaminated by the open pit lake.

These August 1981 mining rules and supplemental legislation will provide more information, more public participation opportunities, more environmental insurance programs, and more comprehensive standards for decisionmaking than provided for any other activity in the state.

Another example of the need for full disclosure of information to the public and to the regulator involves the question of baseline data gathering and verification. On April 19, 1976, one Kennecott employe wrote a memorandum to another Kennecott employe dealing with monitoring of water quality, which 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 [consultant laboratories'] inability to reproduce EPA standards on two occasions. . . [Consultant's laboratories] 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 [consultant] has not been following EPA recommendations during their sampling.

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

Under the able leadership of representatives Mary Lou Munts and Harvey Dueholm and senators Michele Radosevich and Henry Dorman, a substantial portion of the new regulatory scheme for metallic mining was developed in Chapter 421, Laws of 1979. The environmental concerns were adequately addressed. The new consensus legislation was developed, thanks in very large measure to the able efforts of Exxon's attorney James G. Derouin, Exxon's geologist Ed May, and many environmental representatives, particularly Peter Anderson of Wisconsin's Environmental Decade, Inc. This legislation was adopted by an almost unanimous vote of the Wisconsin Legislature.

However, due to lack of federal direction and the complexity of the problem, the state legislature in Chapter 421, Laws of 1979 did not make any final decisions about the location and regulation of waste containment areas associated with copper and zinc mines. That decision was delegated to DNR and the Metallic Mining Reclamation Council. They were to complete this work by May 21, 1980.

The Rules Process—Round III

Following the adoption of the enabling legislation, the development of detailed rules became necessary. The initial question was: who had the combination of money, expertise, and political sensitivity to the scope of environmental concerns to do a first draft of the rules? DNR clearly lacked all three prerequisites. The towns lacked the money. The strategy developed was for the most liberal of the mining companies, Exxon, to write the first draft, and the others involved would continually remind the company of their concerns and position.

Exxon's draft was creditable, as first drafts go. DNR immediately rejected it because it was organized as one chapter of rules, and, DNR argued, the package should be subdivided in the way that DNR was subdivided. Exxon and the towns' consultants opposed this approach on the basis that the ecosystem was not organized into the subdivisions existing in the department. DNR's position prevailed, and the environment lost on the issue.

At the time DNR's draft was produced, it was absolutely appalling. The towns, tribal communities, and their allies drew up their list of 133 desirable items not contained in the DNR draft. This "shopping list" would, in time, be incorporated in the rules draft, usually with the support of the mining companies and the opposition of DNR staff.

By August of 1981, the DNR, mining companies, towns, and their allies had agreed upon a rules draft. These rules and supplemental legislation will provide more information, more public participation opportunities, more environmental insurance programs, and more comprehensive standards for decisionmaking than provided for any other activity in the state, public or private, industrial or agricultural. A few of these programs are noteworthy.

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 Wisconsin or 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, but all are designed to give breaks to the industry and developer. This rules program will allow the citizen or the department to urge that rules be made tougher if the environment needs such protection.

The draft rules will require the mining companies to study and under some circumstances to market their waste in lieu of perpetually storing it in the north woods of Wisconsin. In short, mining need not create tailings piles of waste rock, for these materials can be utilized in the free marketplace. This policy initiative is yet unmatched for any other industry in Wisconsin.

Permits are required for an agricultural enterprise to divert water from

streams for irrigation; the only nonagriculture enterprise requiring permits to divert surface water will be mining companies. Although we do not currently regulate groundwater quantity use, a comprehensive regulatory program is embodied in the draft rules.

Chapter 421, Laws of 1979 and the DNR rulemaking process were not the only policy making arenas. Other efforts are described below.

When historians write of the fight in the late 1970s and early 1980s about mining in northern Wisconsin, they will probably concentrate on the fundamental shift in power that has occurred as a result of these pieces of legislation.

Other Legislation—Round IV

Other legislative initiatives required to protect mining and assist local citizens were adopted. When historians write of the fight in the late 1970s and early 1980s about mining in northern Wisconsin, they will probably concentrate on the fundamental shift in power that has occurred as a result of these various pieces of legislation. The legal, political, and economic powers of the mining companies and state agencies, vis-a-vis local units of government and citizens' environmental groups have been equalized.

Wisconsin has established a metallic Mining Investment and Local Impact Fund Board, which provides funds in at least four significant areas. (See article by Kohl and Bradbury for the description.)

It should be emphasized that we have no impact board in Wisconsin for any other industry. Even so, three mining companies and various local units of government, along with environmental advocates, are urging 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 organize effectively their communities, hire the necessary legal talent, and provide for consultants and studies so that the citizens in these towns can effectively participate in the decision on mining. These funds would be available for towns with as few as 400 people and tribal communities with as few as 185 people, to help them control their own destinies.

Wisconsin has adopted a long-term liability legislation package, which provides up to $150,000 per claim for a private injury to a person or property based on finding of strict liability. The claimant need only prove before a state agency that he or she was injured and that it was caused by mining; there need be no evidence that the company acted in negligence. The program also provides that, if Wisconsin does find liability, 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 from an environmental prospective that such a program exists for no industry other than mining.

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

Why So Much Success?

The Wisconsin Public Intervenor is often asked why so much has been accomplished in protecting Wisconsin's environment from mining activity. More specifically, the question is asked: Why is it that we seem to be able to develop creative environmental regulations for mining that may be absent for other industries or agricultural development? There are several reasons for the environment success.

The progressive political heritage of northern Wisconsin has been exemplified by the vigorous political leadership of the local community governments. The citizens in the Town of Grant, Town of Nashville, Town of Lincoln, the Sokaogon-Chippewa community and the Forest County Potawatomi community have actively sought to protect their own interests. The original work of the residents of the Town of Grant provided that catalyst for all of northern Wisconsin.

Representative Mary Lou Munts has provided particularly creative leadership in employing the consensus process to reach environmental decisions. Former legislators Harvey Ducholm, Henry Dorman, and Michele Radosevich, along with current state Senator Tim Cullen, have all worked to make the concensus system effective.

The environmental legal team of Kathleen Falk and Susan Steingass of Madison, Kevin Lyons of Milwaukee, and Donald Zuidmulder of Green Bay have also contributed to the success of the regulatory program, and initial work of Frank Tuerkheimer of Madison was most helpful.

The mining companies themselves were active in conceptualizing the environmental program and pushing for adoption. Exxon led the way, Kennecott, in time, began to participate, and finally Inland Steel joined in supporting these important environmental initiatives.

The conduct of the mining companies is easily explained. Wisconsin had not provided the mining companies with the certainty, direction, and regulations necessary to give corporate management the security necessary to make wise mining development decisions in Wisconsin. The consensus process helps provide this certainty to the mining companies. Therefore, the companies can, and do, accept programs and regulations which they would rather avoid for political and economic reasons. As long as the developers know the rules and can expect stability, they are willing to accept tough environmental legislation and rules that they probably could otherwise politically defeat.

Two days after Kennecott saw its mining permit application hearing adjourned in November 1976, a Kennecott official told his superiors 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."

For a few environmental activists in northern Wisconsin 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 to protect Wisconsin's environment.

The Environmental Movement

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

First, the results of a consensus approach tend to be logical. Ideas which survive the intense scrutiny of the negotiators generally prove to be sensible. The work product survives the scientific and legal analyses of all the competitors.

Second, the results of the political and legal process are often less certain than the results of a consensus process. In the legal process, particularly, a good advocate cannot always predict the outcome.

With consensus one can have a greater control over the outcome.

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 mining enterprises in northern Wisconsin can provide the major personnel and cash contributions. I estimate that Exxon has spent more than $400,000 participating in the development of administrative rules for the protection of the environment from metallic mining waste. And Kennecott has also spent a considerable sum. The expertise, both internal and external, that Exxon, Kennecott, and Inland Steel have brought to the process of writing appropriate regulations is not available to citizens or local and state government in Wisconsin. The consensus approach maximizes utilization of the companies' resources in helping to formulate public policy.

Fourth, the energy and resources needed for a political struggle are more limited for local governments and environmental groups than for corporations. A developer can expect that a prolonged political fight will wear down opponents. Therefore, environmentalists and local governments should secure their legitimate objectives without a fight whenever possible and save their limited energy and resources for conflicts which are inevitable.

The results of the political and legal process are often less certain than the results of a consensus process. In the legal process, particularly, a good advocate cannot always predict the outcome. With consensus one has greater control.

Fifth, a significant reason 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 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 political way to meet the legitimate needs of both industry and environment. It is an approach that should be encouraged, because it provides a vehicle for maximum citizen participation.

Although there are distinct advantages to the consensus approach to policy development, 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, as well as on the complexity and difficulty of the policy issues. While consensus should be the primary tool for policy resolution, all parties reserve the right to diverge from the consensus approach when that is the only way their 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 risks.

An outside observer might conclude that the environmental movement is being soft on the mining companies, since in the consensus movement they work closely with the mining companies. This perception is not accurate: None of the parties to the consensus approach has lost sight of its own needs. Private and public conversations and meetings are vigorous and even heated, although less of the antagonism is expressed to the media. The participants believe that a more sound public policy will be developed if everyone cooperates in an open and public process.

Another risk is that consensus, to a large measure, is dependent upon the individuals who represent various parties to the proceedings. If James Wimmer and Richard Olson from Kennecott, James Derouin from Exxon, or Jeffrey 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.

Individuals make a difference. Moderates within Kennecott succeeded in convincing management to participate in the consensus process. As a result, Wisconsin's environmentalists, local units of government, and Kennecott have all won.

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

The Remaining Agenda—Round VI

The program described above does not resolve all public policy issues regarding metallic mining. Indeed, those who have participated in the development of draft rules recognize that certain issues have been set aside for future discussion and resolution. Five issues have been clearly identified for future policy development: (1) appropriate rules to regulate acute and chronic toxicity from mining activity; (2) appropriate performance standards for mine shafts and pits to protect groundwater quality and quantity; (3) the role of the WPDES permit program for regulating mining waste; (4) agreement on a definition of "radioactivity" for mining wastes generated by copper and zinc mining; and (5) administrative rules to define and develop the policy concerns of sec. 107.05 of the *Wisconsin Statutes*.

The Permit Hearings—Round VII

Sometime between late 1984 and the end of 1986, the final permit hearing for a new metal mine will be conducted. The mining company's proposal will be measured against the standards for approval established by the state of Wisconsin. While no one knows if the permit will be approved or rejected, one can be reasonably sure that the permitting procedure will be comprehensive, fair, and vigorous. The hearings should be in the best tradition of progressive government.

Conclusion

The Citizens' Advisory Committee to the Wisconsin Public Intervenor and the Wisconsin Public Intervenor are pleased with the direction Wisconsin public policy has taken on mining in the last four years. Whether one is *promining*, *antimining*, or simply neutral on the issue, one should be encouraged by the tremendous progress that has been made. The consensus approach to policy development has played a significant role in that policy growth.□

Wisconsin's Environmental Regulation of Metal Mining

By Gordon H. Reinke
Chief of the Mine Reclamation Section
Department of Natural Resources

Contrary to popular belief, the Wisconsin Department of Natural Resources has been involved with regulation of the "new" metal mining for over a decade. Probably its first involvement was in the late 1960s when it issued a permit to Jackson County Iron Company (JCIC) for the diversion of water from the Black River for use as process water at their taconite (low-grade iron ore) mine and mill east of Black River Falls.

This permit was granted under a provision of Chapter 107, *Wisconsin Statutes* which was passed when the political climate was much different than now. The purpose of this provision was to ensure that a metallic mineral deposit would not be precluded from being mined because access to needed water was cut off by private landowners. At that time a strong effort was made by the state and the local area to enable the mining company to open and operate their mine, and Chapter 107 was a part of that effort.

As it turned out, JCIC never used the Chapter 107 permit. Enough water for processing the ore was obtained from the open pit mine itself, plus several high capacity wells which the DNR later approved. At this writing, the JCIC mine is the only operating metal mine in Wisconsin.

In the late 1960s and early 1970s DNR staff participated in the development of a mine reclamation statute. The early thrust of this effort was directed at reclamation of sand and gravel pits and quarries. However, the formal announcement by Kennecott in 1970 of their discovery of a small but rich copper deposit near Ladysmith changed the direction of this work. The end result, Chapter 318, Laws of 1973, known as the Metallic Mining Reclamation Act, specifically excluded sand and gravel pits and quarries.

Meanwhile, other environmental legislation was being passed in Wisconsin. Most notable was Wisconsin's Environmental Policy Act which became effective in April 1972. Passage of this act resulted in Kennecott's first formal contact with DNR on July 26, 1972. Because the "Ladysmith Experience" is the DNR's first and most complete experience involving a new northern Wisconsin massive-sulfide deposit under the new environmental laws, because it has led to the complex array of new laws and rules and revisions of existing laws and rules, and because it has become the subject of so many inaccuracies, it will be treated in detail later in this article. For now, let it suffice to say that many of the DNR staff were involved with this project from July 1972 to the permit hearing in November 1976.

The Metallic Mining Reclamation Act became effective in July 1974. The act created a five-member Mine Reclamation Council appointed by the governor to assist DNR in the development of administrative rules to implement the act. Council members were appointed in July 1975 and from that time assisted DNR staff in the drafting of these rules. The rules became effective November 1, 1976, as Chapter NR 130 (prospecting) and NR 131 (mining).

During this interval several other events of major significance to DNR and related to metal mining occurred. In 1975 Noranda Exploration presented DNR with a preliminary project proposal for their small zinc-copper discovery near Pelican Lake in Oneida County. In March 1976 DNR held a hearing in Ladysmith on its Environmental Impact Statement (EIS) for the Kennecott project. On May 9, 1976, the DNR's Mine Reclamation Section was established.

The most significant event, and the one which initiated the considerable controversy over metallic mineral mining which continues to this day and will probably be with us for some time, occurred on May 12, 1976 (three days after the writer innocently assumed his present position as chief of the Mine Reclamation Section). On that day, Exxon announced the discovery of their large massive sulfide zinc-copper discovery near Crandon in Forest County.

A hearing on the Kennecott permit application was held in November 1976. Following this hearing, there was intensive legislative activity relating to metallic mineral mining. Most important to the DNR were the extensive revision of the Metallic Mining Reclamation Act (Chapter 421, Laws of 1977, effective June 1978) and the revision of the solid waste statute (Chapter 377, Laws of 1977, effective May 1978).

As a result of Chapter 421, the DNR had to revise the existing administrative

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rules for mining. The new codes had to be presented to the legislature within 90 days after the effective date of Chapter 421. This was accomplished with the advice and assistance of the new Metallic Mining Council, created by Chapter 377 to replace the Mine Reclamation Council. The new council consisted of nine members appointed by the secretary of DNR for the purpose of advising and assisting DNR in the development of mining rules.

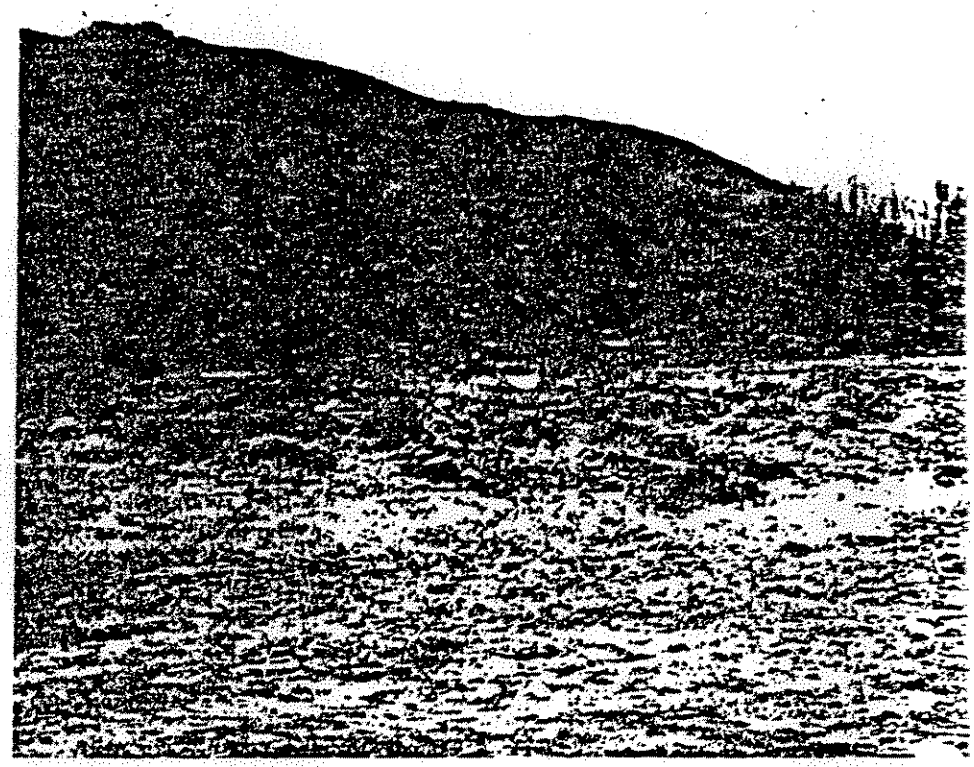
The second set of rules, which became effective February 1, 1979, and are still in effect at this writing, are NR 130 (exploration), NR 131 (prospecting), and NR 132 (mining). Besides creating the new council, Chapter 377 also stipulated that metallic mining wastes were solid wastes and as such must be licensed under the solid waste law. However, it recognized that these wastes had unique characteristics and directed DNR to prepare special administrative rules governing them, with the advice and comment of the new council.

The DNR working with many interested parties and with the council has prepared these rules, known as NR 182. As a result of legislative changes and the new provisions of NR 182, Chapters NR 131 and NR 132 have also been revised. These three codes have been the subject of three public hearings held in Ladysmith, Crandon, and Madison in September 1981; they will go to the Natural Resources Board in the near future for their final adoption and submission to the legislature.

From 1977 to the present, in addition to the many hours spent working with new legislation and rules development, DNR staff at both the district and headquarters level have spent thousands of hours monitoring Exxon's data-gathering activities in the Crandon area and reviewing and commenting on numerous company and consultant preliminary reports and other documents.

This lengthy chronicle of the past and present DNR involvement with mining has been made for several reasons. The primary reason is to give the reader a perspective of where we are and how we got there with regard to DNR regulation of mining. Time and space limitations do not permit a detailed discussion, but the point should also be made that in addition to complying with the specific mining laws and rules which have been developed as described above, mining operations must comply with all other applicable DNR regulations just as other industries must. Required permits and approvals governing water treatment and discharge, air contamination, surface water use, and all the other possible activities must be obtained by the companies in addition to the mining permit, solid waste license, and compliance with EIS procedures.

Taconite ore pile before reclamation



Courtesy Department of Natural Resources

Taconite ore pile four months after being hydroseeded

A second reason for the lengthy discussion was to establish the fact that DNR has had considerable experience and involvement in the new metal mining, dating back to the late 1960s. In conjunction with this, a criticism often leveled at DNR is that it does not have the staff or expertise to deal with mining. There will be additional staff requirements if and when permit applications are submitted. Such occurrence depends on world metal prices, taxes, and local acceptance, as well as other variables beyond DNR control. I believe that when such staff requirements develop they will be met. In addition, the mining staff does not operate in isolation from other environmental disciplines within the department. When a problem is encountered that crosses the administrative divisions within DNR, persons from other bureaus make their expertise available, in effect augmenting the mine reclamation section and Bureau of Environmental Impact.

Now, as promised earlier, a more detailed view of the "Ladysmith Experience." The first formal contact between Kennecott and DNR was made on July 26, 1972. On October 4, 1972, DNR notified Kennecott of permit and EIS requirements. This happened two years before the effective date of the original Metallic Mining Reclamation Act. On June 25, 1974, DNR received an Environmental Impact Report (EIR) on the project from Kennecott consisting of four volumes totaling over 800 pages. (The EIR provides information which is used in the EIS.) The DNR reviewed this document and requested additional information and eventually received an addendum of 186 pages.

The DNR prepared a Preliminary Environmental Report (PER) which was published in August 1975, and circulated *widely* for comment. At the end of the comment period, the DNR had received three letters from federal agencies, five from state agencies, and *none* from local agencies. We also received six review letters from citizens and corporations concerned with the project. This small number of letters from citizens was unusual, especially in light of subsequent citizen concern about the project.

After reviewing these comments, the DNR requested and the company supplied additional written material. The PER was subsequently redrafted and issued as the DNR's EIS which was circulated to the public on February 3, 1976. Over 200 notices of the availability of the EIS and of the public hearing to be held were sent to various units of government and to citizens concerned with the project.

The public hearing on the EIS was held in Ladysmith on March 4, 1976. Following the public hearing a 14-day period was set aside to receive written comments on the document. On June 15, 1976, the hearing examiner issued his opinion that the DNR's EIS had fulfilled the requirements of the Wisconsin Environmental Policy Act. It is interesting to note that although this EIS has been the subject of considerable criticism, at the time it was rated excellent by a University of Wisconsin survey of EIS's, with the sole criticism that it was perhaps "too technical."

During the summer of 1976 the company developed and eventually submitted applications for the mining permit, water discharge permit, and several surface water regulatory permits which were to be the subject of a contested-case public hearing. These applications were developed with the DNR, and consideration was given to all the concerns raised by the EIS review process. It should be pointed out that Chapter NR 151, the administrative code of solid waste management in effect at that time, exempted from license requirements those facilities which were exclusively for mine-tailings disposal. Requirements for the construction, operation, monitoring, and maintenance of the proposed tailings facility were to be covered under the mining permit but were to be determined by personnel from the DNR's solid waste section.

The hearing on the mining permit and the other required DNR permits was held on November 9 and 10, 1976, in Ladysmith. The new public intervenor became involved in the project a little over a month before the public hearing on the permits was held. The Town of Grant, where the ore body is actually located, hired a lawyer to represent their interests, also about one month before the hearing. The Natural Resources Defense Council was represented by attorney Frank Tuerkheimer.

These parties met with Kennecott's attorneys and DNR's legal counsel at a prehearing conference. At that conference a hearing procedure was established by the parties. It was agreed that the hearing would follow this format: About one week would be devoted to direct testimony by all witnesses. A special evening session would be held at which concerned citizens could express their views in an uncontested setting without being subject to cross-examination. The hearing examiner would give whatever value he chose to these citizen comments. At the end of direct testimony, the hearing would be recessed for about one month. Transcripts of that portion of the hearing would be prepared and furnished to all parties. The hearing would reconvene and cross-examination of the regular witnesses would take place. Upon completion of the cross-examination the hearing would be adjourned, and the hearing examiner would examine the hearing record and render his decision.

The hearing proceeded as planned for the first one and one-half days. However, on the afternoon of the second day, during the testimony of Kennecott's second witness, the attorney for the Town of Grant presented the examiner with a resolution just passed by the Rusk County Board (Resolution #229) which said in essence that the county would deny zoning to Kennecott until the state legislature passed legislation adequately protecting private property and revised the tax laws to provide an acceptable return of tax money to the local communities.

Since the law and rules provided that a complete application must include evidence satisfactory to the DNR that the project would comply with local zoning requirements and since Resolution #229 clearly was a denial of such zoning, the hearing examiner adjourned the hearing.

Only two witnesses for the company had testified. Several more company experts had been scheduled to testify on the hydrogeologic aspects of the pit and the tailings pond. No other witnesses received an opportunity to appear. In my opinion this lack of scientific testimony for all parties with subsequent cross-examination was unfortunate. DNR was prepared to offer testimony by a hydrogeologist from the solid waste section, an environmental engineer from the industrial waste water section, and a limnologist from the Inland Lake Renewal Office, among others.

Resolution #229, which led to the adjournment of the Kennecott hearing, is fairly well known. Not as well known, but perhaps equally significant is the fact that on February 8, 1977, three months after the hearing was adjourned, the Rusk County board passed Resolution #258. This resolution states:

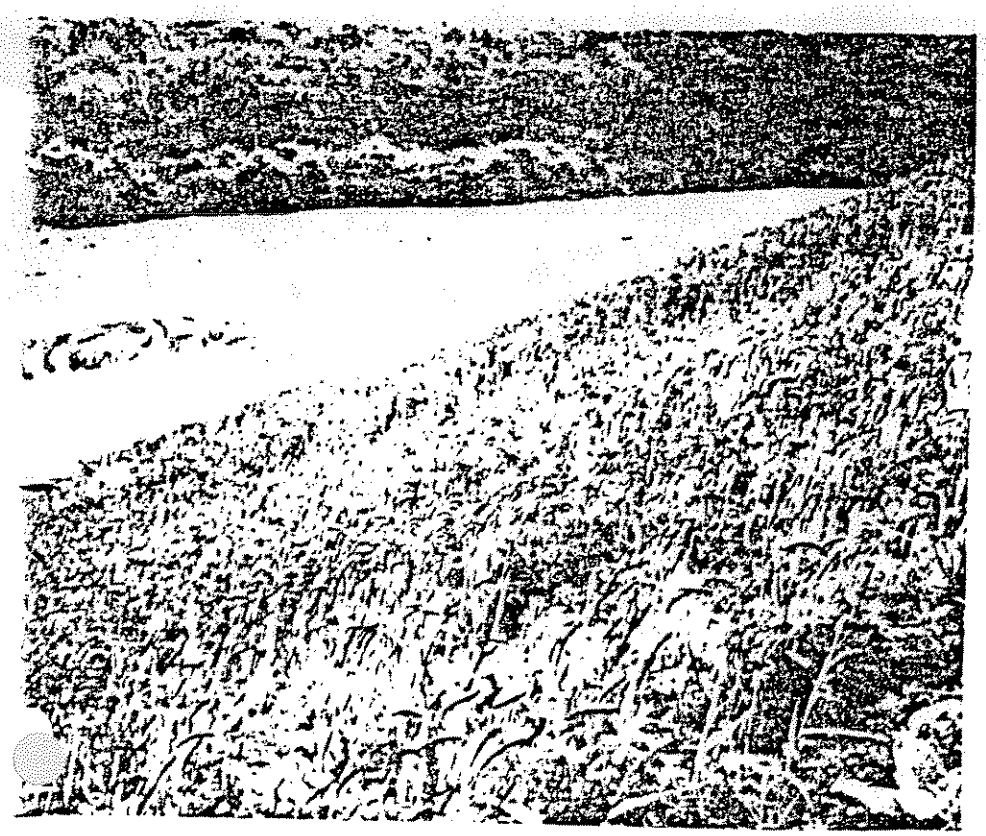
> NOW THEREFORE, BE IT RESOLVED that the Department of Natural Resources be advised that it is the desire of Rusk County that the mining permit and reclamation plan proceedings before it be permitted to continue; that it is the intent of Rusk County to grant necessary zoning approvals and mining permits to the Flambeau Mining Corporation provided Flambeau Mining Corporation complies with all requirements of law, [emphasis added] all on condition that the legislature enact legislation allocating a just and equitable share of the tax dollars derived from the proposed mining operation to the local units of governments in which said mining operation will be located; and on further condition that reasonable protection be provided to the property owners of the Town of Grant for the impact of the mining operation upon them.

Many important decisions regarding mine laws and rules have been made since that time, and a complete documentation

Courtesy Department of Natural Resources

JCIC class 3 ore pile being hydroseeded in May 1981

The same ore pile after summer's growth, August 1981



of the project and DNR's reaction to it would have been helpful to the decision makers. In addition, many misunderstandings about the project which still persist today might have been cleared up had the hearing been completed. **For example, when Kennecott first approached the DNR with a proposal, they wanted to place the process water remaining in the tailings pond at the end of the operation in the bottom of the abandoned open pit and fill the rest of the pit with water from the Flambeau River to create a lake. To justify this proposal, the company presented data showing that the lake would be meromictic—that is, it would not experience the normal seasonal turnover of water which would, of course, bring this contaminated water to the surface. At that time, when DNR informed the company that this proposed disposal of contaminated water was unacceptable, the company dropped the idea and did not propose it in their permit application. Once this idea was vetoed, the question of whether or not the lake would be meromictic became of much less significance and was certainly no longer a key issue. Testimony by DNR's limnologist and other witnesses would have done a great deal to establish the degree of importance of meromixis.** To this day, this issue has been treated by some as of much greater importance than it actually is in the view of DNR technical staff.

To conclude the "Ladysmith Experience," about one year after the aborted hearing the DNR dismissed Kennecott's application "without prejudice." If Kennecott decides to proceed with the project, they will have to submit new applications. A new EIS will have to be prepared by DNR, and a hearing will have to be held on the permits and the EIS.

I would like to conclude with what I perceive as DNR's role regarding metal mining in Wisconsin. We are neither pro-mining nor anti-mining. Our job is to determine that any mining operation in this state will be permitted to proceed only if it will be done in an environmentally sound manner as outlined by our laws and rules. Further, we must see to it that such operations do actually comply with permit requirements and the applicable laws and rules during the actual operation, and upon closure of the mine. This includes reclamation of the site and the return of the land to a useful condition as spelled out in the reclamation plan.

The people's elected representatives in the legislature determine that metallic mining as an industry is acceptable in Wisconsin, which they have done with the existing laws. Whether or not an individual operation is acceptable to a local area is up to the local citizens. These decisions will be made on a site-specific basis by the local citizens through their elected representatives and using local authority such as zoning regulation.□

The board was established to provide financial assistance to communities affected by mining-related impacts incurred prior to, during, and after mineral development in an effort to avoid the "boom-bust" mining syndrome. The board has granted nearly one-million dollars to municipalities for comprehensive planning, legal counsel, environmental studies, consultants, education, and capital improvements.

Wisconsin's Mining Investment and Local Impact Fund Board

By Elizabeth Kohl and Philip J. Bradbury

As a new entity in the governmental structure of Wisconsin, the board wields great influence in deciding how to alleviate mining-related impacts, is an important link in the relationship between state agencies and local governments, and complements the local fiscal structure in determining how mining tax monies will be distributed.

The discovery of an ore deposit is likely to be accompanied by the expectation of economic development, bringing new businesses, more jobs, and capital investments to an area. History has shown that adverse social and environmental impacts may also be the companions of mineral development. In 1977, the Wisconsin Legislature established the Mining Investment and Local Impact Fund Board to help local communities address mining-related impacts. This article provides an overview of the board's statutory authority, as well as the policies and decisions that have characterized it since its inception.

Wisconsin's approach

The nature of mineral development creates short and long term costs not commonly associated with other kinds of industrial activity. Often, the ore body is located in a rural area lacking the public and private services required to accommodate sudden growth. An influx in population places new demands on housing, schools, water and sewer facilities, roads, and businesses. Local governments are faced with far-reaching decisions involving where and when to build, and more importantly, how to pay for expensive improvements. Without other sources of revenue, these front-end costs can burden existing, local taxpayers.

Communities must also consider the long-term social, environmental, and economic costs of metallic mining. The development and extraction of a mineral deposit represents a temporary, commercial endeavor. During the operation of a mine, employment is relatively stable. When the mine closes, however, alternative job opportunities and local development projects will be needed to compensate for economic decline and social impact. In addition, the depletion of a valuable natural resource may permanently alter the quality of the environment.

Anticipating a new generation of mining in Wisconsin, the state legislature established the Mining Investment and Local Impact Fund Board (MILIFB):

> to provide funds to municipalities for costs associated with social, educational, environmental, and economic impacts of metalliferous mineral mining incurred prior to, during, and after the extraction of metalliferous minerals. Sec. 70.395(2) of the *Wisconsin Statutes*

This step should ease the strain on local communities as they prepare for mineral development and reduce the likelihood of "boom-bust" mining in Wisconsin.

The MILIFB is composed of five local government officials, two public members, and two state agency representatives. As a new entity in the governmental structure of Wisconsin, the board wields great influence in deciding how to alleviate mining-related impacts and has become an important link in the relationship between state agencies and local governments, as well as among local municipalities in the region where a deposit is located. In bringing together the interests of various communities, the board complements the local fiscal structure in determining how mining tax monies will be distributed. The board derives its revenues from the Investment and Local Impact Fund.

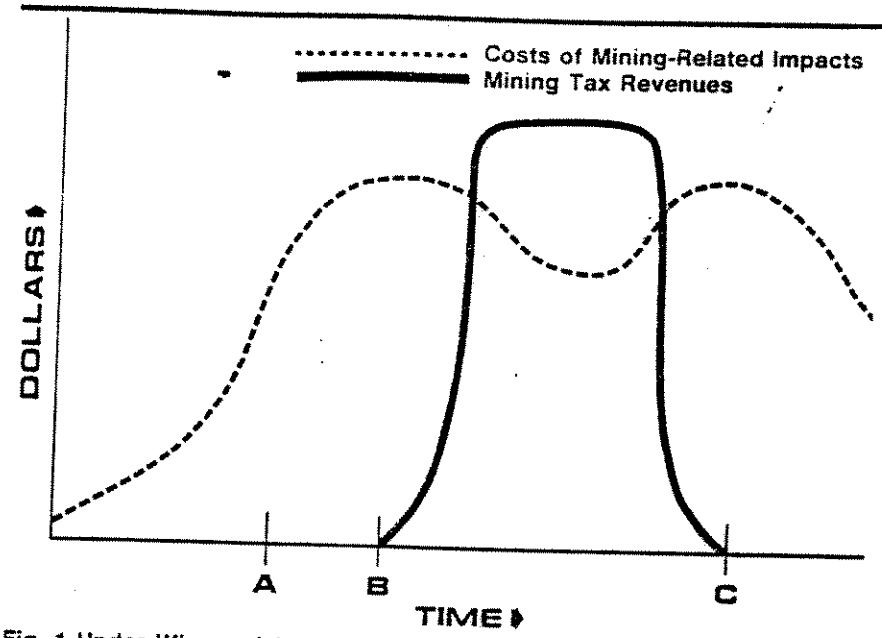


Fig. 1 Under Wisconsin's net proceeds tax on mining, the collection of tax receipts does not begin until the mine is in operation. Communities need revenue to pay for mining-related impacts before and after mineral extraction takes place. The MILIFB provides financial assistance to municipalities preparing for mineral development, as well as those localities where a mine has closed (A = mine construction, B = mine operation begins, and C = mine closes).

The Investment and Local Impact Fund

Currently the Investment and Local Impact Fund has three sources of revenue. Sixty percent of Wisconsin's net proceeds tax on mineral mining is deposited in the fund. Because the net proceeds tax is not collected until a mining company begins operation, this source of revenue has been limited, thus far. To cover front-end mining expenses, the state legislature has given the board a two million dollar loan. This loan, along with 20 percent of Wisconsin's occupational tax on iron ore concentrates, has enabled the board to make payments and grants to municipalities for mining impacts (Fig. 1).

The MILIFB awards three kinds of grants to communities from the impact fund. First, payments are made directly to those municipalities and counties where metallic minerals are being extracted. These "guaranteed payments" are determined by the amount of net proceeds tax a mining company pays for each active site, ranging from $75,000 for municipalities to $750,000 for counties. The funds are to be used by the communities for mining-related costs. Ordinarily, local property taxes would be used to finance such expenses. However, mineral deposits are exempt from property taxes, thereby cutting off a primary source of local government revenue. In January 1982 the first guaranteed payments will be made to Jackson County and the Town of Brockway—the location of Wisconsin's only active mine site.

The impact fund also provides revenue for discretionary payments and emergency grants. Each year, the MILIFB distributes grant monies to counties, townships, cities, villages, school districts, and tribal governments to alleviate mining-related costs. To date, this Discretionary Payment Program has focused on impacts associated with premining development and postmining problems. The board also has the authority to allocate emergency grants to communities for sudden and unforeseen problems related to mining.

Board policy

The *Wisconsin Statutes* provide guidelines for distributing mining tax revenues to municipalities. The Statutes outline the projects and purposes for which discretionary grants can be made. In addition, these funds must be apportioned according to geographical priorities based on the location of the extracted minerals. Within the context of these guidelines, the MILIFB has broad policy-making authority. Such flexibility allows the board to respond to a variety of mining-related impacts that communities face.

Several large mineral deposits have been discovered in northern Wisconsin and extensive exploration continues. The status of full-scale mineral development, however, remains uncertain. This uncertainty has been influential in guiding the policy of the MILIFB. Furthermore, because a relatively small amount of mining tax revenue has been generated, the fiscal policy of the board has been somewhat restrained. These factors also influence communities as they prepare for the potential impacts of mining and the kinds of projects that require funding. Several of the MILIFB's policies for the Discretionary Payment Program are summarized here:

(1) *To encourage cooperation among neighboring units of government:* In an effort to promote comprehensive solutions, reduce costs, and avoid duplication, the board has funded several projects which encompass the mutual concerns of adjacent communities. The board has encouraged the coordination of planning projects, environmental and technical studies, and the formation of joint impact committees.

(2) *To establish levels of funding assistance:* Each year, the board has set levels of funding assistance for communities in certain geographical areas. The levels reflect the proximity of a municipality to a mine site, the status of the mining operation, and the degree to which an impact is mining-related. In addition, the MILIFB has established uniform levels of assistance for project categories, including legal services, local impact committees, and comprehensive planning. This policy attempts to treat each community in a similar manner and assumes that need is not necessarily a function of size.

(3) *To require cost-sharing by local governments:* The MILIFB has initiated cost-sharing arrangements with communities for those projects which are partially mining-related and when certain benefits will accrue to the municipalities beyond those which address, specifically, a mining impact. This policy is designed to increase the accountability of the board and the local units of government. Although this method of distribution enables the MILIFB to assist more communities, the policy has been criticized by some who feel that all mining-related projects should be funded, in total, by the board.

(4) *To give priority to noncapital projects:* In those regions where the timetable for mineral development remains uncertain, the MILIFB has given priority to noncapital projects. The pending status of mining makes it difficult to determine when public services will be needed. The board has encouraged municipalities to apply grant monies to the identification of potential mining impacts and strategies to deal with these impacts. Consequently, the board has given priority to comprehensive planning, legal and technical studies, or those projects which prepare a community for mineral development. Capital intensive projects will be given a greater priority as mining companies finalize their development plans.

As mining progresses in the state and the membership on the board changes, revisions in these policies can be expected.

What's happened so far

The MILIFB has just completed the third Discretionary Payment Program. To date, a total of $880,000 has been awarded to thirty communities (Fig. 2). The majority of these funds have been allocated for premining impacts. These projects have included grants for (1) comprehensive planning to assess community needs for housing, transportation, public services, capital improvements, and recreation; (2) legal services for community representation in negotiations with mining companies and state agencies; (3) environmental and technical studies to acquire base-line data for planning projects and to review environmental impact reports; and (4) local impact committees to organize citizen input into the planning process, to gather information for public dissemination, and to serve as the focal point for mining concerns in the community. Although local impact committees have received a relatively small portion of impact funds, they have played an important role for citizen participation. In a few instances, funds were provided to repair roads damaged by mining activities and to expand existing government facilities.

Lingering problems associated with the early mines of northern and southwestern Wisconsin have received attention by the board as well. The MILIFB has provided funding to Lafayette County to assist landowners dealing with groundwater pollution near a recently abandoned zinc mine. The board awarded grant monies for Mineral Point to evaluate reclamation alternatives for mine-waste disposal sites. In Iron County, the board has funded fencing and filling activities to help Hurley and Montreal address safety problems where old mine shafts and tunnels have caved in.

Grant awards for 1982 covered many of the same activities funded in previous years. Changes in the development plans of the mining companies could, however, cause communities to reevaluate their needs. Similarly, the MILIFB may want to review their current policies in light of any changes and make necessary revisions. For example, a decision by one of the mining firms to cancel a project would reduce the need to provide funds to an area. On the other hand, a decision to go ahead with an operation could increase the funds for certain capital projects and expansion of public services.

Summary

The Mining Investment and Local Impact Fund Board was established to serve the needs of communities affected by mining-related impacts incurred prior to, during, and after mineral development. By providing financial assistance to municipalities, the board hopes to avoid the problems associated with "boom-bust" mining impacts. During these formative years, and not without controversy, the MILIFB has granted nearly one million dollars to municipalities for comprehensive planning, legal counsel, environmental studies, consultants, education, and capital improvements.

The future success of the MILIFB will depend on the board's ability to anticipate and address local needs, given its statutory responsibility and available funding. Its success will also be reflected in how well communities are able to deal with the adverse effects of mining and benefit from its many opportunities. To date, the board has achieved a responsible balance between the needs of individual communities and the broader interests of the state. In the years ahead, the board will be challenged to find innovative ways to maintain this balance☐

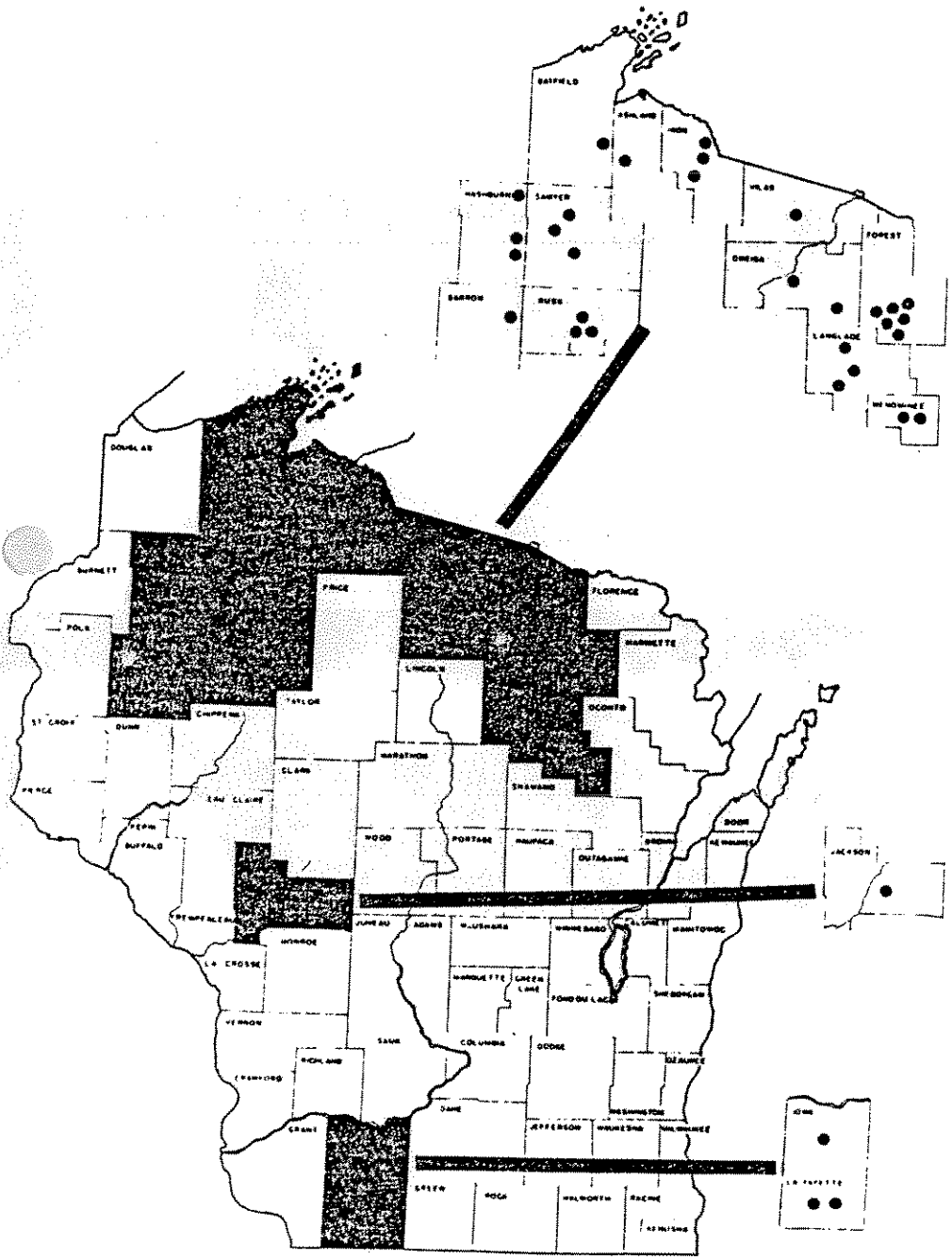


Fig. 2. Grant Recipients for Mining Impact Funds
June 1979 - October 1981

A PUBLIC RIGHTS ADVOCATE'S VIEW OF GOVERNMENT AND SCENIC BEAUTY AS A NATURAL RESOURCE

Presented by Wisconsin Public Intervenor Peter A. Peshek
October 24, 1981

INTRODUCTION

In this day and age of less government, fiscal conservatism and James Watts, it is often being viewed as sacrilegious for a public rights advocate to ask government to become further involved in the protection of a public natural resource. The national environmental ethic, and certainly the environmental ethic of the state of Wisconsin, is not being substantially altered by the current political call for less government. Regardless of how well, or how poorly, government reacts to environmental matters in the next few years, citizens will remain committed to a quality physical and social environment.

Therefore, it is appropriate to continue to advocate for public rights in the environment. The purpose of this paper is to describe the exciting efforts underway to get the state government of Wisconsin to protect scenic beauty. The efforts do not deal with buying park lands, scenic easements, planting flowers or planning. It is an attempt to require decisionmakers in the regulatory process to make consensus decisions regarding scenic beauty utilizing valid social and scientific data.

This paper will be divided into three segments. The first segment will describe the Public Intervenor Office of Wisconsin. It will also raise the issue of how developers react to

environmentalists. Part two will describe scenic beauty disputes in Wisconsin. Part three will offer some recommendations.

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 Public Intervenor was mandated by the 1967 Wisconsin Legislature when the Wisconsin Department of Natural Resources (DNR) was created. The office was established at the request of the Wisconsin Wildlife Federation and other traditional conservation forces.

The Public Intervenor was created during a struggle to reorganize state government. A commission created by the Legislature (Kellett Commission) recommended the merger of then existing 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 this bill was the creation of a Public Intervenor. The Public Intervenor would ensure a continued adversary process during state 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 (November 1975), at 85-86.

There are currently two assistant attorneys general designated as Wisconsin Public Intervenors: Thomas J. Dawson was appointed in September 1976. Peter A. Peshek was appointed in May 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 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 to the Public Intervenor 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 priorities of the Public Intervenor office, as established by the Citizens Advisory Committee on July 12, 1980, are:

High priority until completion
1. Wetlands
2. Mining

High priority
1. Groundwater
2. Pesticides
3. Aesthetics
4. Wisconsin Environmental Policy Act

Medium priority
Solid waste

Low priority
Forestry.

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

II. A CORPORATE LOOK AT ENVIRONMENTALISTS

I have just described the conceptual framework for the Wisconsin Public Intervenor office. It is equally interesting, and more revealing, to see how the opposition looks at the Wisconsin Public Intervenor.

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 Public Intervenor took discovery of a developer for a DNR permit. This developer has 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 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:

> 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?

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 public addressed and 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.

III. SCENIC BEAUTY--AN IGNORED PUBLIC RIGHT

A. Exxon--An Introductory Example

Exxon has discovered a world class zinc and copper ore body in northern Wisconsin. It will cost Exxon one billion one hundred million dollars to bring the mine into production if and when permits are granted for its operation by the state of Wisconsin. A very recent and very telling example of how scenic beauty, as a resource, was handled by the largest oil company in the world will give you a general overview of my perspective on government regulatory activities and scenic beauty.

The citizens of northern Wisconsin kept asking Exxon what its property would look like if mining were to be developed. What does a concentrator plant look like? What is a head frame and what will it look like? In order to answer some of these questions, Exxon commissioned a "bird's eye perspective" of the project.

About a year ago, the Public Intervenor and other lawyers, representing the local town governments and native American communities, quizzed Exxon about the perspective drawing. How tall will the head frame be? Exxon told us in excess of 250 feet. We asked where would the head frame be located? We were told on the highest point of land over the ore body. When asked why this location, we were told because of the construction design contemplated for the ore body. We asked if the visual impacts of selecting that location for the head frame had been considered, and the answer was negative.

We asked about the colors that had been selected in the landscape architecture drawing. They did not appear to be colors ordinarily seen in northern Wisconsin. We asked questions about vegetation, both in terms of its spacing, as well as in terms of the nature of the vegetation. Finally, we asked about the design and the overall visual appearance of the parking lots, concentrator, head frames and ancillary facilities. Frankly, the combination of color, vegetation, design, and overall impact did not appear to have a northern Wisconsin identity. From my subjective and biased point of view, the drawing looked like some landscape architect's rendition of a condominium development in San Diego.

As told to us eventually by Exxon, it appears that the landscape architect had not come to the site of the property before providing his visual image for the public. As a matter of fact, at least one employe suggested that the landscape architect had never been to northern Wisconsin in his entire life.

This incident is not critical onto itself. The factual and conceptual problems identified during that conversation with Exxon could be taken care of since there was time left in the planning

process. The decisions made during the planning process will be evaluated during the permitting process. Exxon has been the most liberal- minded mining company operating in the political arena of Wisconsin. Exxon's initial approach towards the aesthetics issues suggests that the professional dealing with aesthetics will have a very difficult time competing with the engineers, economists and lawyers of a developer. The location for a particular aspect of a project may have very little relationship to the scenic beauty resource. The Exxon example should be kept in mind as we talk about various advocacy efforts in Wisconsin.

B. Aesthetics As An Environmental Issue

Wisconsin has been and remains an environmentally progressive state. For example, the state passed mandatory shoreline zoning and mandatory floodplain zoning before most states. Wisconsin Supreme Court rulings have resulted in the protection of wetlands adjacent to navigable waters (Just v. Marinette, 56 Wis. 2d 7, 201 N.W.2d 761 (1972)). Other laws protect shoreline alterations, water quality, power plant and transmission siting, to name but a few of our environmental protection laws. Wisconsin has enacted the Wisconsin Environmental Policy Act (WEPA), modeled after the National Environmental Policy Act (NEPA). We have an effective Department of Natural Resources.

In essence, much of Wisconsin's environment is legally protected. Most of Wisconsin's environment has its advocates. Over the past few years, it has become evident that, even with all this protection, an important resource has been neglected in Wisconsin. This neglected resource is scenic beauty, aesthetics,

visual quality, whichever term you prefer. When we have intervened on behalf of Wisconsin's environment, many times the issue is really an aesthetic one, but due to the absence of knowledge, expertise, and experts, we have resorted to the use of surrogates for scenic beauty. These surrogates have been endangered species, environmental diversity and water quality. However, scenic beauty is a resource onto itself and cannot always be protected by using surrogate measures. For example, the Snail Darter, as an endangered species, could not protect the scenic beauty of Little Tennessee (Almy, 1980) from the dam builders of the Tennessee Valley Authority. As in the case of the Little T, the use of surrogates for scenic beauty proved to be ineffective. As the Wisconsin Public Intervenor, my environmental responsibilities are broader than just the protection of endangered species. But if scenic beauty is a resource where are its advocates?

C. Development Along Wisconsin Rivers, An Inconsistent Policy

If the public right to enjoy scenic beauty is to be preserved, consistent policies and procedures need to be established by the government regulatory agency. In the absence of such established policies, inconsistent decisions will be forthcoming. Two examples from Wisconsin illustrate this point.

A recent DNR case involving the Flambeau River is an example of current problems. In response to the argument that public rights in scenic beauty would be harmed, by permitting construction of a boatslip, a DNR hearing examiner stated, "Beauty is in the eye

of the beholder!" He went on to say that scenic beauty is a "nebulous concept," unsuited to objective measurement, and implied that denying a permit on the presently subjective and arbitrary definition of scenic beauty would be unconstitutional. See, FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND PERMIT, Application of Wilfred J. Barry (3-NW-1536.249, August 23, 1978), for a permit to enlarge a waterway adjacent to the South Fork of the Flambeau River, Price County, Wisconsin.

It is interesting to note that there was but a single government witness in that case. An employe specializing in biology, and responsible for Wisconsin's natural scientific areas program, argued that, given his thirty years of experience in protecting scientific areas in Wisconsin, it was his opinion that a boatslip should not be permitted on this unspoiled region of the Flambeau River. This witness had no formal training in aesthetics, scenic beauty management or policy.

In startling contrast is another DNR case just one year later. A DNR hearing examiner, invoking Wisconsin's Public Trust Doctrine, denied an application from a private citizen for a permit to build a bridge across the Pelican River, which bisects his land in Oneida County. The application was denied exclusively on scenic beauty grounds. In his FINDINGS OF FACT, the hearing examiner stated, "The rights of the public for purposes of actual physical navigation per se would not be impaired by a bridge," and "[t]he rights of the public for purposes of fishing would not be impaired," yet "the impairment of natural scenic beauty as an incident of navigation is an important impairment of navigation itself." Citing the case of Madison v. Tolzmann, 7 Wis. 2d 570,

574, 97 N.W.2d 513 (1958), and secs. 31.06, 144.025, 144.26 and 147.01, Wis. Stats., the hearing examiner concluded, "[T]he enjoyment of natural scenic beauty as an incident of navigation is a public right in navigable waters" and, thus, denied the application. See, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, Application of Lawrence T. Schmelling, 3-NC-78-604 (August 7, 1979), for a permit to construct a bridge across the Pelican River, Town of Pelican, Oneida County, Wisconsin.

In the Pelican River case, landscape architects, educated in aesthetic theory and trained in visual simulation procedures, testified on behalf of the public rights in that river. It is my opinion that such testimony did make a significant difference in the results of the hearing. It must also be emphasized that the public has a right to expect and depend upon a degree of consistency in the application of relevant law in cases where scenic beauty rights come into question. Clearly, two hearing examiners were coming from such a fundamental, different prospective, that such consistency cannot yet be reasonably expected by the public in Wisconsin.

D. The Public Trust Doctrine

A hearing examiner in the Pelican River Case made reference to what is called the Public Trust Doctrine. While this concept is not particular relevant to a good portion of the United States, policy considerations behind it are worth discussing, because of its potential applicability by analogy to situations throughout the United States.

The Wisconsin Supreme Court traced the origin of the Public Trust Doctrine as follows:

> After the Revolutionary War, the original thirteen states were impoverished and were confronted with the problem of paying the debts created by the war. States without western lands demanded that Virginia, and other states claiming such lands to the west, should cede the same to the Confederation to be sold to pay such debts. In 1783 the Virginia legislature authorized the ceding of the Northwest Territory to the Confederation, and the actual deed of conveyance was executed March 1, 1784. This cession was made upon two conditions: (1) The new states to be admitted as members of the Federal Union were to have the same rights to sovereignty as the original states; and (2) the navigable waters flowing into the Mississippi and the St. Lawrence rivers, and the carrying places between them, were to be forever free public highways. These conditions were incorporated into the Northwest Ordinance of 1787, which set up the machinery for the government of the Northwest Territory.
>
> Sec. 1, art. IX of the Wisconsin constitution, adopted by the territorial convention on February 17, 1848, and approved by the act of congress admitting Wisconsin into the Union, incorporated verbatim the wording of the Northwest Ordinance with respect to navigable waters, such section reading as follows:
>
> "The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state of territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost, or duty therefor."

> The late Adolph Kanneberg wrote an excellent article entitled "Wisconsin Law of Waters," which appeared in the 1946 Wisconsin Law Review, 345, 349. Mr. Kanneberg was a lawyer who specialized in the field of waters and watercourses and was a recognized authority on the subject not only in Wisconsin, but in the nation. He also served as a member of the Railroad Commission of this state for eight years. In his article Mr. Kanneberg stated:
>
> "The Ordinance of 1787 does not define the term 'navigable water.' There was no rule of the federal government for the guidance of the states with respect to that matter. The ordinance merely provided that navigable waters were to be public highways, and thus states like Wisconsin and Oregon, which had vast forests of pine timber which would float, found it to their interests to adopt the saw-log test of navigability, while other states adopted different tests of navigability. The Atlantic states generally adopted the salt-water test of navigability, that is to say, any stream up to the point to which the tide ebbs and flows is navigable. In North Carolina, for example, the Yadkin river which has a width of one hundred seventy-five yards is nonnavigable, whereas in Wisconsin any stream capable of floating a saw log during one or two weeks of the spring or other freshets is navigable."

Muench v. Public Service Comm., 261 Wis. 492, 499-500, 53 N.W.2d 514 (1951).

In short, the Public Trust Doctrine makes the state of Wisconsin the trustee for public rights in navigable waters. A 1946 Wis. L. Rev. article noted:

> Thus in Wisconsin when it is said that a water is navigable, it is merely a different way of saying that it is public-- public not only for navigation, but for hunting, fishing, recreation, and for any other lawful purpose.

Adolph Kanneberg, Wisconsin Law Of Waters, 1946 Wis. L. Rev. 345, 347.

The Public Trust Doctrine must be interpreted to meet modern times and current needs. It must be construed so that the public can "reap the full benefit" of its constitutional rights. The Wisconsin Supreme Court has observed:

> The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters, cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits.

Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816 (1914) (emphasis supplied).

The Wisconsin Supreme Court has found that "scenic beauty" is one of those public rights in navigable waters which must be protected under the Public Trust Doctrine. In 1951, the court sustained a citizen's right to challenge a dam license on the basis of public rights to scenic beauty. "The right of the citizens of the state to enjoy our navigable streams for recreational purposes, including the enjoyment of scenic beauty, is a legal right that is entitled to all the protection which is given financial rights," concluded the court. Muench, 261 Wis. at 511-12. The court has restated this right in many later decisions.

By analogy, it can be said that any land or water of the state, which is subject to regulation by a public agency, carries with it, as an incident of public use and administration, the mandate to protect and preserve scenic beauty. Scenic beauty is a public right.

E. Lowland Sand And Gravel Operations

The United States Department of the Interior, Bureau of Mines, has estimated that the Wisconsin sand and gravel industry ranks either fourth or fifth among the states producing sand and gravel. Sand and gravel make up over thirty percent of the mineral value being extracted in Wisconsin. There are approximately 320 mines in Wisconsin producing sand and gravel, and 405 stone producing quarries. Of the tens of thousands of acres of Wisconsin landscape that have been mined for sand and gravel, sand, gravel and stone, less than one-third of that acreage has been reclaimed.

Wisconsin currently does not have a state regulatory program for upland sand and gravel. For sand, gravel and stone mining near navigable waterways, the DNR has had regulatory jurisdiction since the mid-1960's. Initially, due to lack of staff, regulatory and enforcement capabilities, the great majority of excavations were not permitted, restored or reclaimed. During the 1970's, this problem began to diminish. In the fall of 1977, eight individuals representing the Objibeau Chapter of Trout Unlimited, Inc., the John Muir Chapter of the Sierra Club, the Wisconsin State Council of Trout Unlimited, and the Wisconsin Public Intervenor petitioned the DNR to adopt rules regulating lowland sand and gravel excavations.

The Wisconsin Public Intervenor argued for the adoption of such rules. The Public Intervenor Office pointed out that one Wisconsin river, namely the Big Rib River in Marathon County, had some thirty-four past or present sand and gravel mining sites in a forty mile section of the river. We argued that this was a very

significant impact on the Big Rib River and that there was no overall state regulatory program to protect the public rights in the river, particularly the aesthetics rights. In requesting the rules, the petitioners argued,

> The corner stones of the proposed rules will be to require the applicant to submit a comprehensive reclamation plan for the project area, to require bonding to insure that the reclamation plan is completed, and the establishment of the procedure to insure periodic inspection and relicensing to guarantee that the applicant is fulfilling the conditions of permits.

The Wisconsin Public Intervenor Office was successful, along with the other petitioners, in getting the adoption of these rules. Aesthetics, bonding and reclamation are critical parts of the rule.

The sand and gravel rules permit a mine permit application to be denied solely because of aesthetic concerns. A recent University of Wisconsin publication observed:

> The purpose of this chapter is to:
>
> (a) "minimize the adverse effects caused during and after such (excavation, dredging or grading) activities."
>
> (b) "to provide for the expeditious rehabilitation of effected land"
>
> (c) "to restrict excavation, dredging and grading where the adverse effects cannot be minimized or avoided." (emphasis added)
>
> One of the adverse effects, recognized explicitly in NR 340, is the degradation of scenic beauty.
>
> In Wisconsin, most sand and gravel operators have either ignored potential degradation of scenic beauty or limited their compliance with NR 340 to simple

> visual screening or post excavation grading and seeding as a response to the requirements for rehabilitation.
>
> However, in order to be in full compliance with NR 340, a permit application should first be reviewed to determine those potential adverse effects, including degradation of scenic beauty, which cannot be minimized or avoided. The permit application must pose the initial decision of whether or not the sand or gravel operations should be restricted. It is only after this decision has been made that scenic beauty rehabilitation proposals should be considered as a condition for the granting of the permit.

Interestingly, we are finding that we have not gone far enough guaranteeing reclamation and aesthetics protection in these rules. We are now in the process of combining work from the University of Wisconsin Department of Landscape Architecture, Wisconsin DNR, along with financial support from the Wisconsin Road Builders Association, to develop additional submittal manuals so that the applicant can do a better job complying with Wisconsin Administrative Code chapter NR 340, and protecting public rights in Wisconsin rivers.

It should be noted that environmentalists have been distinctly unsuccessful in getting state regulation for the upland sand and gravel industries. The principal reason for this inability to get such regulation is that there is a mix between the public and private sector in the ownership of such mines. About fifty percent of the mines are owned by towns and counties, and the remainder by the private sector. This combination makes it nearly impossible to obtain a state regulatory program through the Wisconsin Legislature. The other distinguishing factor is that there is no constitutional basis for requiring regulation of the upland sand and gravel industry, as there is for the lowland sand and gravel industry.

F. Copper And Zinc Mining Rules

Metallic mining has played a central role in the political, economic and social history of the Upper Great Lakes Region. The results of mining have been uneven, ranging from prosperity and full employment to serious environmental damage and high unemployment. Wisconsin is now preparing itself for a new era of copper and zinc mining in northern Wisconsin, with Kennecott Copper Corporation and Exxon Minerals Company, U.S.A. expected to be the first two companies to open mines.

The regulatory scheme to protect Wisconsin's environment from this new mining is being developed. The Wisconsin Public Intervenor Office and faculty from the University of Wisconsin raise the issue of scenic beauty during the development of these rules.

The University of Wisconsin Department of Landscape Architecture faculty lobbied for three different types of scenic beauty regulations. First, they argued that there should be a specific standard for location of mining sites, particularly the location of waste sites, factoring in scenic beauty. They were successful in obtaining such a standard.

Second, the University faculty urged the adoption of a rule which would require the submission of data to the regulator, showing how the company had studied the aesthetics issues surrounding its proposed development. The faculty specifically urged that the specific words "visual absorption capacity" be included in the rules. The regulatory agency staff, as well as the mining companies, vigorously opposed including those words in the rules. They continued to argue that they were not sure what this

concept meant and were unprepared to accept concepts that were not supported with sufficient emperical evidence and which, therefore, could expose the mining companies to too many problems in the future. Ultimately, a compromise was reached, and a comprehensive submittal document will be required dealing with the ability of the land and water to absorb the visual impacts of the proposed project. However, the "buzz words" or specific concept known as "visual absorption capacity" sought by the faculty were not included in the rules.

Third, the faculty of the University of Wisconsin urged that design criteria be established, which would require the developer to consider variety of aesthetic concerns in the final siting and design of the project. This portion of the rules turned out to read as follows:

> Major revisions to chapter NR 132 [Wis. Adm. Code] include:
>
> . . . .
>
> NR 132.17 Minimum design and operation requirements. ...
>
> (1) To the extent practicable, and consistent with protection of the environment and requirements of necessary department approvals:
>
> (a) Site elements should be placed where lease observable from off the premises in any season.
>
> (b) Site elements should be placed within the area of the overall site which is most visually compatible in respect to building shape.
>
> (c) Site elements should be painted and maintained in a manner which is visually compatible with the associated vegetational and earth conditions.

(d) Site elements which cannot be visually mitigated using the techniques in pars. (b) and (c) should be made as visually inconspicuous as is practical.

There were three political lessons that came from the inclusion of aesthetics in rules dealing with mining regulation. First, mining companies staff were more comfortable with the adoption of such rules than were the regulatory staff. Second, this is the only regulated industry in the state of Wisconsin which has such comprehensive rules dealing with aesthetics. Clearly, the concepts that are contained in the rules dealing with the mining industry should be expanded to cover all regulated industries in Wisconsin. Third, success was due, in large measure, to the dedication, training and political courage of Professor Bernard J. Niemann, Jr.,and Assistant Professors Wayne Tlusty and Richard Chenoweth. It took outstanding landscape architecture faculty who were willing to apply their teaching and research to the "real" world.

G. Conflict Between Aesthetics And Physical Environment

You will note that the site element standards found in the mining rules are prefaced with the introductory phrase that these standards are applied to the extent practicable "and consistent with protection of the environment." Using metal mining as an example, some interesting, hypothetical, policy issues are evident.

In Wisconsin, we tell the mining companies not to use wetlands to dispose of their mine wastes. It is in the wetlands that we find much of the leachate absorbing clay. Therefore, we push mining companies to higher ground as a place to locate their tailings

ponds. It immediately makes these waste sites more visible to the surrounding areas in northern Wisconsin. At the same time, the soils tend to be more porous on the highlands, and we run the risk of more groundwater pollution. Therefore, policy considerations tend to make the mining companies look for sites that are not on hillsides. However, we have setback requirements from our lakes and streams. This, in turn, forces the waste sites back up the hill. We have setback requirements, both because of water quality concerns and aesthetics.

The same kind of policy contradictions occur with the location of the head frame. In the matter of state policy, we wish to discourage both high grading of ore and unnecessary energy uses. Therefore, the engineers design their underground mining operation so as to obtain the most ore possible in the most energy efficient manner. However, that usually "requires the head frame to be located on the highest joint immediately above above the ore body. This then conflicts with section NR 132.17(1)(a) Wis. Adm. Code, which states, "Site elements should be placed where least observable from off the premises in any season."

There are a series of competing policies and value judgments which go into rulemaking. The art of drafting rules is a manner which requires the decisionmaker to factor in all of the natural resources at stake. Following a vigorous and public contested case hearing, the state regulatory agency will need to balance all of the competing policies and value systems.

H. A Different Kind Of Regulatory Dilemma--The Wisconsin River

The Wisconsin River flows throughout most of the state of Wisconsin. The last eighty-two miles of the river are located in the southwestern corner of Wisconsin, with the river ultimately flowing into the Mississippi River.

The Lower Wisconsin River has been proposed to be designated as a wild and scenic riverway. Wisconsin's regulatory agency is preparing a master plan on the river. An initial review of the master plan shows a near total disregard for aesthetics. Three examples of that policy void are worth mentioning.

First, the study was done without the collection of any user-related data. In the absence of information regarding social and visual carrying capacity, current utilization, users' reasons for being on the river, and such similar data, it is especially difficult to draft a plan. It is mere speculation on the part of the regulatory planning staff whether the current and prospective needs of the users of this resource are being met.

Second, the Wisconsin Public Intervenor funded original research and user surveys. Besides canoeing and a potential of forty-five other activities, the single other most important reason for those who were using the river was the enjoyment of the scenic beauty of the river. The users were on the river because of the long and beautiful viewsheds, and the bluffs and hills associated with the riverway.

The UW-Department of Landscape Architecture study also showed that almost all of the use of the last 82 miles of the river Wisconsin placed in the upper one-third. The preliminary findings tend to suggest that people are beginning to feel crowded by the

large numbers using the river. Airboats, buzzing airplanes, large caravans of canoes, and the like, were found to be detracting from the experience on the river. The master plan does not deal with these social carrying capacity problems, nor does it suggest what might be done from a regulatory perspective to spread out the use along the entire 82-mile stretch of the river. On the other hand, concentrated use in the upper one-third may be appropriate.

Third, the draft master plan calls for spending $10 million for land purpose within one thousand feet of the river's edge. However, data collected from the users, as well as from an application of the U.S. Forest Service VIEWIT computer program, would suggest would suggest that much of the reason for the use of the river currently deals with visual matters that are substantially outside of the one thousand foot corridor. It might well be that the $10 million or land purposes could be better spent for purchase of various physical features substantially outside of the current planned corridor.

These are but three examples of problems associated with planning for the Lower Wisconsin River. Ultimately, regulations will need to be developed regarding competing users. It is not inconceivable that airboats may need to be banned in certain parts of the river. Regulations may need to be drawn up in terms of the number of canoes that may be rented. Careful thought will need to be given to appropriate public accesses, both in terms of number and quality. Licensing and permitting patterns and programs will need to be developed, so as to help maintain the scenic and wild character of the Lower Wisconsin River.

While these issues are concerns for planners, they must also be concerns of the regulator. Given the current apathy of the regulatory staff, it is going to be very difficult to continue to get staff to consider the scenic beauty resource as part of the regulatory or planning process.

I. A Generic Scenic Beauty Protection Rule

It has become obvious to the Wisconsin Public Intervenor, the Citizens Advisory Committee to the Public Intervenor, and the UW faculty members working for the Office Of Wisconsin Public Intervenor, that Wisconsin needs a generic rule on aesthetics that would provide a general guidepost for DNR activities ranging from granting permits to siting hazardous waste sites, to approvals for streams straightenings which will benefit suburban shopping malls. Therefore, faculty from the UW Department of Landscape Architecture, the Wisconsin Public Intervenor and interested citizens throughout Wisconsin have petitioned the Wisconsin DNR for a generic aesthetic rule.

For several months following the filing of the petition, DNR staff formally and vigorously opposed the adoption of such a rule. The Public Intervenor and his UW faculty members have been required to spend approximately three hours with each of the citizen members of the Natural Resources Board. In addition, we have supplied further information to individual Board members and have answered their questions which dealt with specific concerns.

As a result of this type of lobbying and activity, a substantial amount of pressure was placed on DNR staff. Of the seven Natural Resources Board members, two provided us reasonably firm

commitments of support. Several others expressed a more generalized interest in our rules petition. We received a, generally, negative response from only one Board member. In time, staff was made aware of the Board's general support of the rules petition.

Subsequently, the Wisconsin Department of Natural Resources Secretary met with the UW Department of Landscape Architecture faculty members and the Public Intervenor to discuss the proposed rules petition. Following a two and one-half hour meeting, the department Secretary reversed staff's position and indicated general support for the rules petition. He directed staff to meet with the faculty members and achieve an amicable rules draft.

DNR staff and the UW faculty members subsequently met and came up with an agreed upon draft of the generic scenic beauty rule. This matter will go before the Natural Resources Board at its October 28, 1981 meeting.

There are two objective lessons to be drawn from this specific example. First, there is a great deal to be said for having a citizen board with policy overview responsibilities, which can provide a check and balance on staff. While the Public Intervenor and the UW Department of Landscape Architecture faculty were unable to get anywhere with staff of DNR, the outside questions being raised by the policy board permitted the Secretary of the Department of Natural Resources to cause staff to reevaluate their ultimate position. Second, because the concepts that were being raised by the UW faculty were generally foreign to DNR staff which were trained in other professional areas, there would be a natural hesitation to become involved in a new policy area. This is

particularly true in a time of significant budget restraints.

However, the end results of this effort to obtain a generic scenic beauty rule appears to be most favorable. It is a further indication of Wisconsin's increased understanding of the regulatory process involving aesthetics.

IV. CONCLUSIONS AND RECOMMENDATIONS

There are four conclusory statements that should be made. First, in Wisconsin, our regulatory agency is not staffed with people who have been trained in the public policy issues of aesthetics. There is both apathy and suspicion about aesthetics being a significant public policy resource requiring regulatory attention. Second, professional involvement in the regulatory process is both rigorous and often unpleasant. It takes a certain determination for an outsider to attempt to influence decisionmaking in a regulatory process. Third, sustained professional involvement by landscape architects with public rights advocates can lead to successful regulatory decisionmaking regarding scenic beauty. Fourth, there is still much to be done in Wisconsin to improve the regulatory process dealing with aesthetics. If the University of Wisconsin Department of Landscape Architecture faculty continues to be involved in the process, much should be accomplished within the next ten years.

I have three recommendations. First, the UW-Department of Landscape Architecture should publish articles dealing with their involvement in specific public policy cases, specifically articles on successful studies. Second, The American Society of Landscape Architects should develop priorities which emphasize public policy development. And three, universities should encourage involvement of faculty in public policymaking.

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THE ADOPTION OF ADMINISTRATIVE RULES TO REGULATE METALLIC MINING

The Wisconsin Public Intervenor's Reaction

Introduction

My name is Ronald J. Koshoshek. I live in Eau Claire, Wisconsin, and I am an Associate Professor of University of Wisconsin-Eau Claire. I also share in the management of a 240-acre dairy farm in Chippewa County.

It is my responsibility tonight to present the testimony of the Office of Wisconsin Public Intervenor regarding the adoption of Wisconsin Administrative Code proposed chapters NR 131, NR 132 and NR 182 by the Wisconsin Department of Natural Resources. I make this presentation in my capacity as a member of the Citizens Advisory Committee to the Public Intervenor. Over the years, I have had an opportunity to serve as a National Director on the Board of Trout Unlimited, a member of the Wisconsin Council of Trout Unlimited, Past President and current Chairman of the Objibeau Chapter of Trout Unlimited, and a consultant to townships and zoning boards on water resource matters. I have a deep and abiding interest in the quality of the environment in northern Wisconsin, particularly its water resources.

History of Problem

On August 22, 1976, the Citizens Advisory Committee to the Public Intervenor met in Mellen, Wisconsin. Two citizens from the Town of Grant appeared at that advisory committee meeting. They told the advisory committee that the Kennecott Copper Corporation was about to receive permits to mine in its township. The Town of Grant representatives also said, that from their limited research, it was clear

that the state of Wisconsin was not prepared to grant mining permits, and it was unclear how Wisconsin could have gotten itself in such a confused and muddled state of affairs that permit hearings could even have been considered.

The advisory comittee instructed staff to assist the Town of Grant and to help identify and develop major policy issues requiring resolution before metal mining could begin in Wisconsin.

Within two months it became evident that the state of Wisconsin was not prepared to grant mining permits to Kennecott. The state of Wisconsin did not have a regulatory theory to protect the environment from mining waste. When the Wisconsin Department of Natural Resources staff (DNR) was asked what regulatory theories were applicable to mining waste, they replied that there were no statutory theories in place but that they were generally going to use the solid waste principles to regulate metal mining. It was pointed out to staff that the proposed site for the Kennecott tailings pond violated two, if not three or four, of the locational criteria for siting of solid waste sites. DNR staff then replied that thee siting criteria of the solid waste law was not applicable to tailings ponds. When DNR was asked whether the ch. 147, Stats. (WPDES statutes) were applicable to the Kennecott tailings pond, citizens were told no, they were not. That did not explain with any clarity why the Inland Steel tailings pond in Jackson County was a WPDES licensed facility, however.

It is very easy today, with historical hindsight, to recognize that we were unprepared in 1976 to grant mining permits. It was far more difficult to make that conclusion in 1976, particularly if you were part of a rural Wisconsin town government which had no major experience with the environmental laws of Wisconsin prior to a mining company proposing to develop an ore body in your town. It is to the absolute credit of the citizens of the Town of Grant that they recognized the political, policy and legal void that existed in 1976 and stood with great resolve against substantial legal and political odds to make their point in a forceful and effective manner.

Public Intervenor's Overview of NR 131, NR 132, NR 182

The purpose of NR 131, NR 132 and NR 182 is to help fill the regulatory void which existed in 1976. The Public Intervenor and the Citizens Advisory Committee to the Public Intervenor endorse proposed NR 131, NR 132 and NR 182, subject to any final editing, and encourages their adoption by the Natural Resources Board. As a matter of public policy, the adoption of these rules is long overdue. We are attaching for the record, additional materials which outline some of the major initiatives in the rules drafts and companion legislation.

Our endorsement of the draft rules is made in the context of the following observations.

A. Environmental Trailer Bill

The rules package is incomplete in the absence of the passage of a companion environmental trailer bill. The environmental trailer bill is needed for two reasons. First, a serious question has been raised about the authority of DNR to adopt certain of the rules contained in NR 132 and NR 182. Second, there are several policy initiatives which are absent in the rules package that are contained in the environmental trailer bill. The regulatory void will not be filled if only the rules package passes or if only the environmental trailer bill passes.

B. Uranium Prospecting And Mining

NR 132, NR 132 and NR 182 are not intended to regulate uranium prospecting or mining, and these chapters do not fill the regulatory void as to that potential mining industry. Therefore, an effective political and legal moratorium on uranium prospecting of mining remains in Wisconsin. In the absence of an appropriate regulatory program, uranium mining cannot be considered by the

citizens of this state or its regulatory agencies.

C. Additional Issues

The adoption of these administrative rules will not resolve all public policy issues regarding metallic mining. Indeed, those who have participated in the development of draft rules recognize that certain issues have been set aside for future discussion and resolution. Five of those issues that have been clearly identified for future policy development should be noted:

1. A development of appropriate rules to regulate acute and chronic toxicity from mining activity;

2. The development of appropriate performance standards for mine shafts and pits to protect groundwater quality and quantity;

3. The role of the WPDES permit program for regulating mining waste;

4. The creation of a definition of "radioactivity" for mining wastes generated by copper and zinc mining; and

5. Creation of administrative rules to define and develop the policy concerns of sec. 107.05, Wis. Stats.

Local Citizens Aid Package

If Wisconsin is going to actively consider granting or denying mining permits in late 1984 and 1985, we must be sure that the local town governments and Native American communities have the monies available necessary to effectively participate in the mining permitting process. Therefore, it is going to be necessary for the Legislature to establish a premining block grant program to aid the Towns of Lincoln, Nashville and Grant, the Sokaogon-Chippewa Community, and Forest County Potawatomi Community, Inc. The adoption of such a program appears to be a fundamental prerequisite to considering mining permits.

Impact Fund Board Membership

The Wisconsin Mining Investment And Local Impact Board membership is not properly constituted. The Public Intervenor supports Senator Timothy Cullen's legislative proposal in Senate Bill 431, to expand the membership of the impact fund board.

Ongoing Environmental Pollution From Mining

Wisconsin continues to have its waters polluted from abandoned mining operations. Only recently, Eagle-Picher closed mines near Shullsburg, Wisconsin. As a result of closure, groundwater pollution has occurred and rural Wisconsin residents have suffered hundreds of thousands of dollars of damage. DNR has not chosen to sue the polluter but instead has required the victims to obtain new wells. If DNR fails to go after the polluter in this case, and in similar cases, citizens of northern Wisconsin will have little confidence that DNR will appropriately react if, and when, environmental pollution occurs during new mining operations in northern Wisconsin.

DNR Staffing Levels

The DNR is better equipped to deal with the regulation of metal mining in northern Wisconsin in 1981, as compared to 1976. The organization dilemmas and conceptual legal problems that have long existed within the department on the issue of regulating metal mining are beginning to be corrected. There remains significant manpower problems at DNR to effectively regulate metal mining. There is almost no socioeconomic analysis staffing in DNR. There is a shortage of geotechnical personnel in the field of metal mining at DNR. These staff deficiencies may prove to be significant barriers to metal mining development in northern Wisconsin.

Public Participation

We must remember that these rules hearings, and the subsequent proceedings for final adoption of NR 131, NR 132 and NR 182 are designed to maximize citizen participation. We encourage everyone with an interest in metal mining to provide the decisionmakers with specific ideas to protect Wisconsin's environment.

Fundamental Political, Legal And Economic Changes

When historians write of the fight in the late 1970's and early 1980's about mining in northern Wisconsin, they will probably concentrate on the fundamental shift in power that has occurred as a result of various pieces of legislation and the adoption of various Wisconsin Administrative Code chapters.

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 prove 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 agriculture. This program will equalize the legal, political and economic powers of the mining companies and state agencies, vis-a-vis local units of government and citizens environmental groups. We believe that this program has been, or will be, accomplished during this session of the Wisconsin Legislature. We take this opportunity to call upon all special interest groups, particularly the solid waste industry, the paper industry, the foundry industry, and the power industry to accept the basic social and political reforms that have been imposed upon the mining companies.

Conclusion

The Citizens Advisory Committee to the Wisconsin Public Intervenor is pleased with the direction the Wisconsin public policy has taken on mining within the last four years. Whether one is pro mining, anti mining, or neutral on the issue, one should be encouraged by the tremendous progress that has been made.

Submitted by Ronald J. Koshoshek, Member
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WISCONSIN'S STRATEGY FOR PREPARING FOR A NEW MINING INDUSTRY

Presented to Democratic Party of Dane County
Madison, Wisconsin
June 17, 1981

by Peter A. Peshek, Wisconsin Public Intervenor

Metal mining has had a central role in the political, economic and social history of the Upper Great Lakes Region. The results of mining have been uneven, ranging from prosperity and full employment, to serious environmental damage and high unemployment. The Upper Great Lakes Region now has the opportunity to develop an entirely new generation of copper, zinc and nickel mines. Wisconsin is preparing itself for a new era of copper and zinc mining in Northern Wisconsin. I have been asked to briefly discuss the environmental issues asociated with this proposed development.

A Historical Overview

In November of 1976, Kennecott Copper Corporation sought state 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 belief that it was premature to approve the permit applications.

There were three very valid reasons for the citizens' conclusions that Wisconsin was not yet ready to issue any new permits authorizing the mining of copper and zinc. First, Wisconsin did not, and still does not, have in place a regulatory scheme to protect the environment from the dangers of waste containment areas and tailings ponds associated with copper and zinc mines.

Two policy decisions must be made before the regulatory program will be in place: 1) Wisconsin Department of Natural Resources' (DNR) rules on mining must be adopted. These rules are complete except for a groundwater component; and 2)

An environmental trailer bill dealing with unresolved mining issues needs to be adopted by this session of the Wisconsin Legislature. In the absence of a well-recognized and well thought out comprehensive regulatory process, it would be inappropriate for the state of Wisconsin to grant permits for new zinc and copper mines.

Second, DNR was not, and still is not, staffed or financed today at a level to warrant public confidence that it can effectively regulate the new mining industry. However, substantial progress has been made in this area. To what extent the state's current fiscal crisis will impact on DNR staffing capacity to regulate mining is yet to be determined.

Third, Wisconsin did not have a long-term liability protection program for the Towns and Indian Tribes that will be impacted by the new mining activity. This major policy issue has now been resolved by Chapter 353, Laws of 1979.

Metal Mining And Environmental Damage

Metal mining-related activities can and do damage the environment. Examples of such damage exist in Wisconsin. The range of such damage is illustrated in the following three examples.

First, many Wisconsin citizens have traveled to Mineral Point to enjoy cornish meals and part of the Badger State's mining tradition. Flowing into Mineral Point is a beautiful small stream which would be classified under normal circumstances as a trout stream. Midway through the city of Mineral Point, this stream—Brewery Creek— becomes a sterile body of water with almost no aquatic life for its final seven miles. This stream has become polluted by mine waste and mine tailings left on the shores of the creek years ago. It has succumbed to yellow boy, the leachate poison that can be generated by mining waste.

Second, in the last year, near Darlington, Lafayette County, Wisconsin, dairy farmers began to see their young calves die and their milk production cut in half. Rural residents were no longer able to use their domestic well