THE PROPOSED NR 182:

--- COVERS ALL MINING WASTES

--- COMPLIES WITH STATUTORY MANDATES

--- MESHES COVERAGE WITH AIR, WATER, MINING AND RECLAMATION CODES FOR INTEGRATED ENVIRONMENTAL PROTECTION

--- MEETS OR EXCEEDS EPA REQUIREMENTS FOR STATE SOLID WASTE MANAGEMENT PLANS

--- ENCOURAGES PUBLIC PARTICIPATION IN DECISION-MAKING ON SITING, FACILITY DESIGN, AND METHODS OF OPERATION

--- ALLOWS TAILORING OF ENVIRONMENTAL PROTECTION REQUIREMENTS TO FIT LOCAL CONDITIONS AND TYPES OF WASTES

--- ENCOURAGES DEVELOPMENT AND APPLICATION OF NEW TECHNOLOGY

--- REQUIRES EXTENSIVE ENVIRONMENTAL MONITORING BEFORE, DURING, AND AFTER WASTE DISPOSAL TO EVALUATE PERFORMANCE AND PROVIDE PROPER BASES FOR ENFORCEMENT

HOW THE CONSENSUS GROUNDWATER PROTECTION STANDARD COMPARES WITH U.S. EPA REQUIREMENTS

	CONSENSUS STANDARD IS		
	LESS STRINGENT	EQUIVALENT	MORE STRINGENT
MAXIMUM CONTAMINANT LEVEL (40 CFR 257.3-4, EFF. 10/15/79)			X
COMPLIANCE BOUNDARY (40 CFR 257.3-4, EFF. 10/15/79)		X	
INTERVENTION BOUNDARY (NO FEDERAL REQUIREMENT)			X
MONITORING (40 CFR 265.91, EFF. 11/19/80)			X

TESTIMONY OF ROBERT L. RUSSELL
BEFORE THE WISCONSIN METALLIC MINING COUNCIL

OCTOBER 20, 1980

TESTIMONY OF ROBERT L. RUSSELL
BEFORE THE WISCONSIN METALLIC MINING COUNCIL

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IT IS MY PLEASURE TO HAVE THIS OPPORTUNITY TO APPEAR BEFORE YOU TODAY. MY NAME IS ROBERT L. RUSSELL. I AM MANAGER OF THE EXXON CRANDON PROJECT, RESIDENT OF THIS STATE, ALONG WITH THE OTHER 37 MEMBERS OF THE CRANDON PROJECT TEAM WHO ARE LOCATED AT EXXON OFFICES IN BOTH CRANDON AND RHINELANDER.

MY VIEWPOINT, AS MOST OF THE COUNCIL RECOGNIZES, IS THAT OF A PERSON RESPONSIBLE FOR EVALUATING, POTENTIALLY DEVELOPING, AND HOPEFULLY OPERATING, A MAJOR EXXON MINE IN NORTHERN WISCONSIN.

I THINK IT IS IMPORTANT TO START BY REVIEWING HOW WE GOT TO THE POINT WHERE WE ARE TODAY. MY INTRODUCTION TO THE WISCONSIN SCENE WAS IN LATE 1976, WHEN I ATTENDED THE KENNECOTT MINING PERMIT HEARINGS. AS I RECOLLECT, THE OPPOSITION BY BOTH LEGAL COUNSEL FOR THE TOWN OF GRANT AND THE PUBLIC INTERVENOR TO THE PERMITTING OF THE PROPOSED FLAMBEAU MINE DEPOSIT WAS VOCAL AND WELL PREPARED. BOTH IN HEARING AND WITHOUT, IT WAS ARGUED THAT THE STATE WAS NOT READY TO GRANT

PERMITS TO MINE UNTIL ALL AREAS OF ENVIRONMENTAL PROTECTION WERE COVERED BY LAW OR REGULATION. THAT THE ISSUE OF MINE REGULATIONS HAD NOT YET BEEN ADDRESSED SINCE THE PASSAGE OF THE MAJOR FEDERAL ENVIRONMENTAL LEGISLATION (NEPA, CLEAN AIR, CLEAN WATER ACTS, RCRA) WAS CLEAR.

IT IS PARADOXICAL THAT THE AUTHORS OF THE WISCONSIN MINERALS TAX LAW PASSED IN MID 1977, A LAW WHICH WAS SO STRONGLY OPPOSED BY THE MINING INDUSTRY, PROVIDED FOR THE FORMATION OF THE METALLIC MINING RECLAMATION ACT SUBCOMMITTEE. THIS PORTION OF THE LAW PROVIDED THE OPPORTUNITY FOR THE FIRST STEP IN THE RIGHT DIRECTION--THE DIRECTION OF CREATING AN ENVIRONMENTAL REGULATORY FRAMEWORK FOR THE STATE OF WISCONSIN.

SPEARHEADED BY REPRESENTATIVE MARY LOU MUNTS, THE RESULT WAS THE FIRST REAL CONSENSUS PRODUCT IN THE MINING AREA IN WISCONSIN--THE MINE RECLAMATION ACT OF 1977. IN 1978, MANY OF YOU PARTICIPATED IN THE DEVELOPMENT OF THE SOLID AND HAZARDOUS WASTE ACT WHICH WAS ENACTED IN MAY, 1978--AGAIN A CONSENSUS APPROACH, AND AGAIN WITH THE GUIDING HAND OF REPRESENTATIVE MUNTS.

WHILE BEING A GENERAL LAW, THE SOLID AND HAZARDOUS WASTE ACT DID ADDRESS MINING IN A VERY PARTICULAR WAY. IN S. 144.43 (1M) IT DID TWO THINGS--FIRST, IT RECOGNIZED THE SPECIAL REQUIREMENTS OF METALLIC MINING OPERATIONS AND THE SPECIAL ENVIRONMENTAL CONCERNS THAT WOULD ARISE FROM THE DISPOSAL OF METALLIC MINING WASTES

SECONDLY, IT ASKED FOR THE ADOPTION OF SPECIAL RULES TO BE DONE WITH THE ADVICE AND THE COMMENT OF A COMMITTEE OF 9--THE METALLIC MINING COUNCIL.

THUS, THE MECHANISM FOR GETTING THE REST OF THE JOB DONE WAS CREATED. THE COOPERATIVE CONSENSUS ATMOSPHERE WHICH PERMEATED THE DELIBERATIONS FOR THE MINE RECLAMATION ACT IN 1977 CONTINUED. THIS TO SUCH AN EXTENT THAT IT WAS POSSIBLE NOT ONLY TO HAVE A BALANCED METALLIC MINING COUNCIL, BUT ALSO FOR ALL AFFECTED GROUPS TO WORK TOGETHER ON THE HOST OF TOUGH TECHNICAL ISSUES WHICH HAD TO BE RESOLVED. IT HAS BEEN EXCEEDINGLY FORTUNATE THAT ALL OF THE PARTIES WHO COULD BE AFFECTED IN A MATERIAL WAY HAVE BEEN INVOLVED THROUGH THESE LAST TWO YEARS OF LABORIOUS AND PAINS-TAKING EFFORT.

IT IS APPROPRIATE TO ACKNOWLEDGE ALSO THE INTIMATE INVOLVEMENT OF THE DEPARTMENT DURING THE LAST TWO YEARS. THE DEPARTMENT HAS TRULY BEEN RESPONSIVE AND COMMUNICATIVE IN A MANNER WHICH WE IN EXXON FIND UNCOMMON AND REFRESHING WHEN COMPARED WITH OUR DEALINGS WITH OTHER STATE AND FEDERAL ENVIRONMENTAL REGULATORY BODIES. IT IS ACKNOWLEDGED THAT THE DEPARTMENT'S INPUT HAS BEEN CONSIDERABLE, AND FOR THE MOST PART IT HAS BEEN SENSITIVE TO THE NEEDS OF THE GROUPS INVOLVED IN THE CONSENSUS PROCESS. THE CONTRIBUTIONS BY THE MEMBERS OF THE METALLIC MINING COUNCIL TOWARD THE LANGUAGE WHICH HAS BEEN DEVELOPED SHOULD ALSO BE RECOGNIZED. THE WISDOM OF SECRETARY EARL'S SELECTIONS OF THE COUNCIL MEMBERS, NOT ONLY EXTENDS TO THE FACT THAT THE COUNCIL HAS BEEN BALANCED, BUT ALSO

TO THE FACT THAT IT CONTAINS THE INTELLECTS AND EXPERIENCE APPROPRIATE TO THE COMPLEXITIES AND SENSITIVITIES OF THE PROBLEMS. THE INPUT OF SPECIFIC COUNCIL MEMBERS IN ESTABLISHING WORKABLE REGULATORY PROCEDURES AND PROCESSES HAS BEEN INNOVATIVE AND REALISTIC. ALSO, IN THE TECHNICAL AREA, FOR EXAMPLE, THE INTRODUCTION OF THE UNIQUE FEATURE OF COMPLIANCE BOUNDARY AND INTERVENTION BOUNDARY WITHIN THE GROUNDWATER STANDARD, A KEY AND INNOVATIVE APPROACH, IS A PRODUCT OF A MEMBER OF YOUR COUNCIL.

EARLY IN THE PROCEEDINGS, I WAS AMAZED BY THE COUNCIL'S DILIGENCE AND PERSEVERANCE IN EDUCATING THEMSELVES PRIOR TO CONSIDERING THE SPECIFIC PROBLEMS. I AM ALSO PLEASED THAT THE OTHER MINING COMPANIES, PARTICULARLY KENNECOTT COPPER, CHOSE TO ACTIVELY PARTICIPATE IN THE PROCESS.

I THINK IT IS IMPORTANT HERE TODAY THAT WE REFLECT UPON THE CONSENSUS APPROACH, ESPECIALLY WITH REGARD TO HOW IT HAS BEEN APPLIED IN THIS PARTICULAR CIRCUMSTANCE. I THINK WE CAN SAY THAT THREE CATEGORIES OF PARTIES ARE INVOLVED--THE REGULATORY, THE REGULATED, AND THE AFFECTED. NOW, WHILE WE CAN'T CLAIM THAT CONSENSUS IS UNIQUE, IT IS SIGNIFICANT THAT ALL OF THE AFFECTED PARTIES (I.E., LOCAL UNITS OF GOVERNMENT, INDIAN TRIBES, AND THE CITIZEN [AS REPRESENTED BY THE PUBLIC INTERVENOR AND WISCONSIN'S ENVIRONMENTAL DECADE]) AND THE REGULATED <u>ARE</u> MATERIALLY AFFECTED BY THE REGULATIONS, BECAUSE IN THIS INSTANCE WE ARE DEALING WITH "<u>REAL WORLD</u>" SPECIFIC CASES--EXXON'S CRANDON PROJECT, KENNECOTT'S FLAMBEAU DEPOSIT, AND INLAND STEEL'S BLACK RIVER FALLS OPERATIONS.

FOR BOTH THE AFFECTED AND THE REGULATED, THERE IS A CERTAINTY THAT THEY WILL HAVE TO LIVE WITH THE TOTAL PACKAGE. IN THIS PARTICULAR CASE, NEITHER THE AFFECTED PARTIES OR THE REGULATED FIND THAT THEY CAN OR WANT TO LIVE IN A WORLD OF REGULATORY UNCERTAINTY. IT HAS, THUS, BEEN POSSIBLE FOR THEM TO ARRIVE AT A CONSENSUS-- A TOTAL REGULATORY PACKAGE WHICH EACH PARTY, AFTER NEGOTIATION AND DELIBERATION, AGREES TO IN WRITING.

FROM EXXON'S PERSPECTIVE, AFTER TWO YEARS OF EFFORT AND THE CONSIDERATION OF MANY DOZENS OF DRAFTS OF THE RULES, WE FOUND THAT WE COULD, IN CONSENSUS FASHION, SIGN AN AGREEMENT TO ABIDE BY THAT CONTAINED WITHIN WHAT HAS BEEN CALLED THE DEPARTMENT'S DRAFTS OF NR-131, 132 AND 182, AS AMENDED BY MATERIAL PRESENTED BY THE PUBLIC INTERVENOR. THIS COUNCIL SHOULD KNOW THAT EXXON IS SUPPORTING AND RECOMMENDING THAT POSITION TO YOU HERE TODAY. THE OTHER MINING COMPANIES TO BE REGULATED AND THE AFFECTED PARTIES AGREE THAT THEY CAN ALSO ABIDE BY THE DEPARTMENT'S DRAFTS AS AMENDED BY THE MATERIAL PRESENTED BY THE PUBLIC INTERVENOR. ALL OF THESE GROUPS, THE AFFECTED AND THE REGULATED, IN FACT, HAVE AGREED IN WRITING AFTER TWO YEARS OF INTENSIVE DELIBERATIONS THAT THEY CAN ABIDE BY THE ABOVE.

IN TERMS OF EXXON'S EXPECTATIONS OVER THE LAST TWO YEARS, WE HAD ALWAYS HOPED THE CONSENSUS OF AFFECTED AND REGULATED WOULD BECOME A REALITY. TOWARD THAT END, EXXON HAS EXPENDED A VERY REAL AND CONSIDERABLE EFFORT, AND APPLIED TECHNICAL AND LEGAL

TALENTS FROM MANY AREAS OF THE COMPANY. OUR MANAGEMENT HAS BEEN VERY SUPPORTIVE OF THIS EFFORT THROUGHOUT.

TURNING TO THE THIRD GROUP, THE REGULATOR, I THINK WE NEED TO BE FRANK ABOUT THE PERSPECTIVE. REALISTICALLY, I DON'T THINK THAT WE EVER EXPECTED THE DEPARTMENT OF NATURAL RESOURCES TO BE A SIGNATOR OF A CONSENSUS DOCUMENT. WE WERE HOPEFUL THAT THE DEPARTMENT WOULD FULLY PARTICIPATE THROUGHOUT THE PROCESS. THE FACT THAT THEY HAVE DONE JUST THAT HAS BEEN AN INESTIMABLE BENEFIT TO THE AFFECTED AND THE REGULATED, FOR WE NOW HAVE A BODY OF REGULATION WHERE, FOR THE MOST PART, ALL THREE (AFFECTED, REGULATED AND REGULATOR) CAN LAY THEIR HANDS UPON IT AND SAY THAT THEY SUBSCRIBE TO THE CONTENTS.

I WOULD HOPE, HOWEVER, THAT THE DEPARTMENT CAN APPRECIATE THE REASONS WHY NEITHER THE AFFECTED PARTIES NOR THE REGULATED WANT TO OR CAN LIVE WITH ANY UNCERTAINTIES. I THINK WE SHOULD TALK HERE ABOUT THE SUBSTANTIVE ISSUE, THAT IS, THE GROUNDWATER STANDARD, WHERE AFFECTED AND REGULATED AGREE, AND THE REGULATOR DOES NOT. IT IS AN AREA AND ISSUE WHICH HAS RECEIVED MORE ATTENTION THAN ALL OF THE OTHER ISSUES. TRUE, THERE HAS BEEN SOME UNDERSTANDING AND AGREEMENT WITH THE DEPARTMENT IN THIS AREA, BUT WE ARE AT THIS TIME APART FROM THE DEPARTMENT'S VIEWPOINT WITH REGARD TO SPECIFIC GROUNDWATER STANDARDS AND THE MODE OF COMPLIANCE.

EXXON HAS WORKED HARD WITH ALL PARTIES, INCLUDING THE DEPARTMENT

OF NATURAL RESOURCES, AND WE HAVE APPLIED OUR BEST AND INNOVATIVE TECHNICAL PEOPLE TO THE GROUNDWATER REGULATORY CHALLENGE. WE HAVE ALSO TRIED VERY HARD TO UNDERSTAND THE DEPARTMENT'S VERY PARTICULAR PROBLEM OF STATE-WIDE, INDUSTRY-WIDE APPLICATION OF THE GROUNDWATER REGULATION.

I MUST TELL YOU TWO THINGS AS FRANKLY AS I KNOW HOW. FIRST OF ALL, THE GROUNDWATER STANDARD AS CONTAINED WITHIN THE PROPOSED "SUPER AMENDMENT" PROPOSED BY THE PUBLIC INTERVENOR, AND WHICH EXXON SUPPORTS, IS NOT OURS, THAT IS--EXXON'S OR THE MINING INDUSTRY'S. IT IS A TOUGH, TOUGH REGULATION, BUT IT HAS SOME GOOD POINTS FROM OUR PERSEPCTIVE--IT IS SPECIFIC; IT PROVIDES ALL OF THE ASSURANCES NECESSARY TO THE AFFECTED; IT PROVIDES A REALISTIC FRAMEWORK FOR COMPLIANCE, AND WE CAN, AT CRANDON, DESIGN SOMEHOW, AT CONSIDERABLE COST, TO COMPLY WITH ITS FULL INTENT AND MEANING.

SECOND, I NEED TO BE FRANK WITH YOU ON ANOTHER POINT, AND THAT IS THAT WE FIND, AFTER DETAILED EXAMINATION AND CONSIDERATION, THAT IT IS NOT TECHNICALLY POSSIBLE OR FEASIBLE FOR US TO COMPLY WITH NR 105 AS PROPOSED.

WE NOW HAVE AN OBLIGATION TO COMMUNICATE TO THE METALLIC MINING COUNCIL THE SPECIFIC REASONS WHY WE FAVOR THE GROUNDWATER

AMENDMENT AS PROPOSED WITHIN THE "SUPER AMENDMENT" PACKAGE PRESENTED BY THE PUBLIC INTERVENOR, AS WELL AS THE SPECIFIC REASONS WHY WE DO NOT FEEL IT POSSIBLE, AT CRANDON, TO DESIGN TO COMPLY WITH THE DEPARTMENT'S PROPOSED NR 105 GROUNDWATER STANDARD.

TOWARD THAT END, I WOULD LIKE TO INTRODUCE MR. GERALD ORTLOFF, MANAGER OF ENVIRONMENTAL AND REGULATORY AFFAIRS FOR EXXON MINERALS COMPANY. MR. ORTLOFF IS A CHEMICAL ENGINEER AND A SCIENTIST WHO HAS WRESTLED WITH THE TECHNICAL AND REGULATORY ASPECTS OF ENVIRONMENTAL PROTECTION IN THE MINING AREA FOR MORE THAN A DECADE. ADDITIONALLY, HE HAS CONSIDERABLE KNOWLEDGE AND YEARS OF EXPERIENCE IN THE AREA OF FLUID FLOW IN GROUNDWATER HYDROLOGY, UNDERGROUND MEDIA. HE HAS A THOROUGH UNDERSTANDING OF NOT ONLY THE TECHNICAL ASPECTS OF THE PROBLEMS, BUT ALSO AN INTIMATE KNOWLEDGE OF THE REGULATORY FRAMEWORK IN MANY OTHER STATES, AND PARTICULARLY AT THE FEDERAL LEVEL. I WOULD EMPHASIZE TO YOU THAT MR. ORTLOFF HAS BEEN INVOLVED AS THE KEY INDIVIDUAL IN EXXON'S EFFORTS TO ARRIVE AT THE WISCONSIN MINING REGULATORY ENVIRONMENTAL FRAMEWORK. HE HAS PARTICIPATED IN AND REVIEWED VIRTUALLY EVERY WORD OF EVERY DRAFT. ACCORDINGLY, I AM SURE THAT YOU WILL FIND HIS SPECIFIC COMMENTS OF CONSIDERABLE VALUE IN YOUR DELIBERATIONS.

MR. ORTLOFF---

MINING PUBLIC POLICY SCORECARD
10/17/80

I. MINING RULES - NR 131, 132, 182, 105

A. Serious deficiencies in DNR drafts of NR 132 and 182.

1. Marketing of wastes requirement missing.

2. Availability of ch. 147 (Point Source Law) to regulate mining wastes not present

3. Design criteria list incomplete

4. Quality assurance, monitoring and verification programs incomplete

5. Groundwater rules do not contain adequate enforcement provisions, quanity protections or backfill options and viability of quality provisions is unclear

B. Issues mining companies have agreed to decide in future.

1. Accurate and chronic toxicity regulations

2. Uranium and radioactive waste regulations

3. Role of Point Source law in regulating mining wastes

II. FUTURE ISSUES NOT INVOLVING MINING RULES

A. Solvency of Waste Management Fund.

B. Quanity language being added to sec. 107.05, Stats.

C. Impact Fund Board block grants

D. Administrative Search Warrants for local communities

E. State Zoning Override not to include mining wastes

F. Repeal of Condemnation rights under sec. 32.02(5), Stats.

G. Administrative rules for strick liability legislation.

Peter A. Peshek
Wisconsin Public Intervenor

Kathleen M. Falk
Wisconsin's Environmental Decade, Inc

PAP

SEP 29 1980

ENVIRONMENTAL REGULATION IN THE 1980's

A PERSPECTIVE FROM THE PRIVATE SECTOR

Presented to National Association of Name Plate Manufacturers
By Attorney James G. Derouin
DeWitt, Sundby, Huggett & Schumacher, S.C.
Madison, Wisconsin
September 29, 1980

More and more, American society reminds me of the tombstone in England that had the inscription: "I told you I was sick." We live in an era of acronyms and buzz words. Some of the most popular buzz words apply to the topic of this gathering — government regulation. We hear of sunset laws and deregulation. The message with respect to environmental regulation, however, is clear — it will not decrease; in fact it will not even remain stable for, in the decade ahead, you can look forward to nothing but increased environmental regulation.

What is the recent history of the environmental regulatory movement in the United States?

SOLID WASTE

In 1965, and again in 1976, the Congress passed significant solid waste legislation — most recently by virtue of the Resource Conservation and Recovery Act (RCRA) which established stringent new regulations on the generation and transportation of hazardous solid waste and a nationwide program for perpetual care (i.e., "cradle to grave care") of both

solid and hazardous waste disposal sites. Although you may not know it, what you consider as "solid waste" may be considered to be hazardous waste under RCRA. That leads to the most likely problem which you may face if you do, in fact, generate hazardous waste — disposing of such wastes properly.

The problem can be stated as follows — if you generate hazardous waste, you should have already notified the EPA of that fact and can dispose of such wastes only in sites specifically licensed to handle such wastes. For industry as a whole, the most critical environmental issue of the 1980's will be to assure that adequate capacity exists for the disposal of hazardous wastes. Such capacity does not exist today and it will not exist in the near future. The key, then, is to avoid violating the law until adequate capacity does exist.

Why doesn't adequate capacity exist? For one reason, because technology has changed and many of the sites of yesteryear built for industrial wastes do not meet current regulatory requirements. Further, the siting of hazardous waste facilities is easier said than done — it is enormously expensive and politically controversial because we no longer allow such facilities to be placed in locations which yesterday were considered to be of little value and were geographically out of the way (e.g., wetlands and stone quarries). Today, in essence by regulatory fiat, we require that these facilities be located in land that is or could be valuable for another purpose and which is located in proximity to areas which have at least some residential uses. We also call the

wastes we want to put there "hazardous" and, as a result, conjure up the image of Love Canal. If a facility can be sited, escalating siting, construction, and operation and maintenance costs for such sites mean significantly higher future disposal costs. To site such a facility, many states are establishing state siting boards to assume the responsibility (i.e., political heat) for the siting decision. Such authorities are typically established to allow for four state representatives and three local representatives so that a facility is typically sited by a 4-3 vote. Regardless, the impact of RCRA is only beginning to be felt and, rest assured, such impact will steadily increase in the years ahead.

WATER

In 1972 and again in 1977, the Congress passed significant surface water legislation called "The Clean Water Act". Simply put, if you discharge to a surface body of water, it is mandatory that you have a permit from either the Environmental Protection Agency (a National Pollutant Discharge Elimination System permit) or a like permit from the appropriate state agency which has been authorized to issue such permit by the EPA. Such a permit contains restrictions (i.e., effluent limitations) for the specific discharge category in which your individual facility is classified. By mid-1977, you were supposed to have applied that level of technology known as best practicable treatment (BPT) to

your discharge. Within the next several years, you will be required to apply that level of technology known as best conventional treatment (BCT) to nontoxic constituents in your discharge and best available technology (BAT) to the toxic constituents, if any, in your discharge.

If you discharge into a publicly owned treatment works (POTW), you will be faced during the next few years with applying what is known as "pretreatment" to your discharges prior to sending them to the municipal treatment system. In effect, if the municipal treatment system is not able to treat all of the wastes which you discharge into it, you will be responsible for treating your discharge for those "incompatible" wastes prior to sending them to the municipal treatment system.

The decision of whether to discharge into a municipal treatment system or to build your own system is based on economics and geography. Many industries within the limits of a city do not have the luxury of having the space to build their own treatment facility even if they desire to do so. As a result, they must discharge into a municipal treatment system although they may still be required to install expensive and space-consuming pretreatment facilities. Municipal treatment systems are not inexpensive and, depending on the jurisdiction, may well charge not only a user fee for operation and maintenance costs, but also a capital revenue recovery charge to recoup the capital costs for the facility itself. Experience has shown that if either or both of these user fees are instituted, the charges placed on industry are often disproportionate to their use because every dollar which is contributed

by industrial users means that the charges to residential users will be reduced and there will be less pressure to increase property taxes to make up any difference. If one owns his own treatment facility, the above costs are internalized and, in addition, a depreciable asset is owned. On the other hand, you must then deal with the regulatory agency for purposes of obtaining a permit and this often proves to be an unhappy experience.

AIR

In 1970, and again in 1977, the Congress passed significant air quality legislation known as the "Clean Air Act". The Clean Air Act is most concerned with several constituents such as, among others, sulphur dioxide, nitrous oxides and, of great interest to you, volatile organic compounds (VOC) — of which hydrocarbons are one.

The Clean Air Act amendments of 1977 were the impetus for current regulatory concern over the emission of hydrocarbons. Pursuant to the Clean Air Act, each state is to develop a state implementation plan (SIP) which will result in the attainment and maintenance of primary (health-related) and secondary (welfare-related) ambient air quality standards for specific air pollutants. Among other purposes, the state implementation plan designates those areas within the state which are "attainment areas" (i.e., for each specific pollutant, those areas which meet the national ambient air quality standards) and "nonattainment

areas" (i.e., those areas which, for each pollutant, do not meet the national ambient air quality standards). As a general proposition, more stringent control technologies are required for a particular pollutant if the source of that pollutant is in a nonattainment area or is in an attainment area which will impact on a nonattainment area.

In any event, in 1971, the EPA established a national ambient air quality standard (both primary and secondary) for photochemical oxidents. Further, since hydrocarbons are a major precursor of photochemical oxidants, a primary and secondary ambient air quality standard was also established for hydrocarbons. The states then established similar standards for photochemical oxidants and hydrocarbons and, in order to provide for the attainment and maintenance of these standards, in some cases they also established emission limitations for the control of hydrocarbons.

Despite regulatory efforts, the national ambient air quality standard for photochemical oxidants was exceeded in many areas. Thus the Clean Air Act Amendments of 1977 called for even more stringent requirements to be imposed. Generally speaking, the regulatory focus was changed to a more inclusive category of substances known as volatile organic compounds (VOC) of which hydrocarbons are only one of the substances regulated. In addition, the new law requires each state to develop a plan which provides for the application of reasonably available control technology (RACT) to those sources for which the EPA publishes a Control Technique Guideline (CTG) in areas which are not in compliance with the primary

standard for photochemical oxidants. Such RACT regulations are to be implemented at varying times depending upon the publication date of the CTG for a particular category of industry. To date, the EPA has published RACT requirements for two separate phases. The first phase, known as RACT I, establishes requirements for fifteen industrial categories including the paper coating and vinyl coating subcategories. The second phase, known as RACT II, has nine categories including one relating to the surface coating of miscellaneous metal parts and products which is the potential regulatory scheme for hydrocarbon emissions from operations other than adhesive coating.

In February, 1979, the EPA changed the name of the ambient air quality standard for photochemical oxidants to ozone and raised the national primary and secondary ambient air quality standard. However, several areas of the country still exceed even this limitation and, generally, states are required to impose RACT upon industries which are located within these areas. The application of RACT, if you are not aware, is an expensive proposition.

Of the three areas of environmental law which I have indicated, the issue of air quality is, in my opinion, the most confusing and complicated. The EPA has not yet fully organized its program and, as a result, this disorganization is extended through the air quality programs in the states. The methodology by which areas are classified as attainment or nonattainment is highly technical, but the data produced is oftentimes very insubstantial to serve as a basis for the decision. Further, there

are a variety of issues that prevent precise and simple answers to the question of whether treatment is necessary and, if so, what kind. For example, questions arise as to whether a coating process, for example, really constitutes paper coating, vinyl coating or some other type of surface coating. A review of control technology guideline (CTG) documents is necessary to have any insight into this issue. Regardless of classification, other issues arise with respect to the possibilities of obtaining an alternate compliance program; utilization of phased emission reduction schedules; utilization of offsets; compliance schedule delays; delayed compliance orders; variances; and utilization of bubble computations. In short, the area turns out to be highly subjective, but, in some case, allows the fitting of a control technology plan to fit an individual facility. As things currently sit, if a permit is required, it may be that a facility will have to get a permit from both the EPA and from the appropriate state agency until such time as the EPA has approved an air program for that agency. As you might expect, advice may be conflicting from these two agencies. Further, if you are located in a nonattainment area, it may be necessary to collect one year or more of advance air monitoring data prior to applying for the permit. If an expansion is being planned at your facility, this poses obvious problems. It needs to also be pointed out that the monitoring and modelling of air quality is, as compared to the modelling and monitoring of water quality, more mysticism than true methodology.

In short, coming into compliance with air quality requirements will be confusing and can be very expensive depending upon the final program approved for your facility. Requirements also, it needs to be pointed out, can and do vary significantly from state to state — much more so than in the water program. The purpose behind passing national legislation is to have uniform programs throughout the country. Therefore states which unilaterally decide, without good cause, to exceed requirements of the Clean Air Act can significantly increase your costs of compliance without significantly improving the quality of your air.

A PERSPECTIVE

Having provided the above summary and after listening to the presentation from the EPA, there are other comments which I would like to share with you from the perspective of an attorney who represents people in the private sector with respect to environmental issues.

1. With respect to environmental laws and regulations, it is desirable for you as business people to have clean hands. You are dealing with issues that are perceived by the media and by the bureaucrats in government as being moral rather than legal issues. To many of these people, "profit" is a dirty word and rather than admiring the qualities that have made you successful, they oftentimes resent both you and the system that has allowed you to be successful because they view you as making your profits off of the utilization of natural resources that are owned by the public.

2. In order to comply with the "Clean Hands Doctrine", it is desirable for you to comply not only with the letter of the law, but also with the clear spirit of the law. If the law is clear, then comply with it and comply with it in a timely fashion. If the intent of the law is relatively clear, but there is a possibility of a loophole, make a considered judgment, but seriously consider ignoring the potential loophole if you conclude that, even if you were to fight on the issue, you would be required to take a certain action. Stated another way, even though you will not get any return on your investment in the traditional sense, making necessary environmental expenditures well and in a timely fashion may result in a return on your investment with respect to how the media and the bureaucracy perceives you.

3. Defend your position if you are right. If you have done what the law requires, and you have a legitimate disagreement with the bureaucracy, you should defend your position. The idea that you can "get along" with the bureaucracy, and that you should accept certain things in a permit or approval because you will build up goodwill, is oftentimes wishful thinking.

4. Don't be taken in by the "trust us" doctrine prevalent in bureaucratic operations. Personal assurances of individual federal or state employees are essentially worthless. Even written assurances often turn out to be essentially worthless. Rarely do contacts between engineers from the private sector and engineers within government turn out to be bad. However, rarely do contacts between attorneys in the

private sector and attorneys in the public sector turn out to be good. Another related corollary is that once government attorneys get their hands into your case, all assurances by technical people within the government to you are in jeopardy. As a result, at every turn of your relationship with the bureaucracy, it is desirable for you to make certain that you are defending your rights and preserving them regardless of what may appear to be a good working relationship.

5. Take violations and delays in compliance seriously. Very severe civil and, in some cases, criminal penalties are associated with the violation of environmental laws — whether they involve the violation of a permit or the taking of an action without a permit or the late taking of an action to come into compliance with a law. One of the great fads of our time is the desire to pursue "white collar crime". This term, incidentally, does not relate to going after organized crime which, in the latest edition of Forbes magazine, is identified as the biggest industry in the country. They are not talking about organized crime — they are talking about you, the people who make a profit off the natural resources of this country. Many zealous prosecutors exist around this country who want to make criminals out of you in order to make an example of you. From their moralistic orientation, this is understandable inasmuch as you are not indigent, you come from a relatively privileged class and you can hire all kinds of attorneys. These types of prosecutors are consistent with those types in our society who consistently denigrate the private sector and the traditional institutions in

this country that have led to its development. If you are unfortunate enough to have a serious violation of your permit or to be in some other situation which constitutes a serious violation of an environmental law and, if, futher, you are unable to settle that matter for what you perceive to be a reasonable amount, you can fully expect that the threat of a criminal prosection may be broached with you in an attempt to get you to settle for an excessive penalty. This is the way the real world operates.

6. Although somewhat philosophic in tone, we should really ask ourselves by what standard we should be judged. It was Harry Truman who said: "The hindsight of a sixth grader is better than the greatest foresight of the greatest statesman." Regardless of the obvious truth of this statement, the private sector oftentimes is judged by current knowledge rather than by what knowledge was at the time that a decision was taken. As result, if the private sector is going to be judged in the year 2050, for example, on what our level of knowledge is then, rather than what our level of knowledge is now, we are all in serious trouble. Although this issue is particularly true with respect to solid waste, it has application in other aspects of environmental law as well. It also highlights, however, that when making environmental judgments, be looking at "state of the art" technology and solutions rather than merely taking a simplistic way out that there is reason to know will not work.

7. With respect to legislation, I feel that you, in your respective states, and on the national level, should demand laws which are specific. I am not talking about laws that are as specific as the Occupational Safety and Health Act. On the other hand, the prevalent idea, even within some trade associations, that business and industry should support vague laws that are then left to interpretation and administration by perpetual public employees, disinterested in the viability of the private sector, is, to put it mildly, self-defeating. Further, environmental laws should not only have specific substantive provisions in them so that "success can be determined" by both the regulator and the regulated, but it should also have specific due process procedures for the establishment of environmental standards and the challenge of agency actions. Another buzz word of our times is "public participation." Oftentimes, however, this means participation by everyone other than the regulated entities. The term "due process" is typically interpreted to also mean that it applies to members of the public who are not regulated. As a result, it is certainly not a foregone conclusion that you are going to receive due process before an administrative agency. As a result, in the legislative process, not only should substantive issues be specifically spelled out, but also procedural issues.

8. You should practice preventive law. As a general and almost always true proposition, it will cost you less human and financial resources to deal with an issue ahead of time rather than letting it fester and deal with it after the fact. I know that lawyers are not

revered in our society and I am not here arguing that they should be. However, I can tell you with assurance that there are times when you will find them absolutely necessary; and the probabilities are high that they will cost you much less if you consult them for guidance ahead of time rather than waiting until their help is absolutely necessary in a crisis situation.

9. Get the expertise you need to make environmental judgments — whether that expertise be legal or technical. Environmental law has become so specialized that no one group or one person can have total knowledge of all of its areas. Another basic truism is that people who make tires, for example, know a great deal about making tires, but they may not know a great deal about air, water and solid waste pollution — nor on the methods of avoiding or controlling them. In other words, merely because you or someone on your payroll is an engineer does not automatically make that person an expert in environmental technology. The same, I might add, can be true with a vendor who is not well known to you or who does not have an established expertise in this area. In short, there are many times when you may be able to build the house that you want by working directly with the general contractor. On the other hand, there may well be those times when you will want to work with or through an architect to assure that the final work product is precisely what you want. That same analogy is applicable to obtaining the necessary expert skills that you need to assure yourself of compliance with environmental laws and regulations.

10. You should not be apathetic politically. If one believes the polls, many legislatives bodies in this country do not properly reflect the public mood. One of the major reasons for this is an apathetic public that sees a government that is largely unresponsive to it. One of the significant political occurrences of the 1970's was the reawakening of the political awareness of business and industry. There was a situation a few years back when many business leaders, under the denigrating attack of the establishment at that time, felt that there was really something to apologize for and that there really was something bad in earning a profit — and that the best thing to do was to keep quiet and uninvolved. The naivete of that judgment was only too evident in terms of some of the legislation and regulations that were then implemented in this country. In short, do you want a clean environment? The answer is yes. On the other hand, can we have an absolutely risk-free society? The answer is no. Is there a difference between a "protected" and a "perfect" environment? The answer is yes. Regardless, are we willing to pay the full cost for necessary and reasonable environmental controls? The answer is yes. In short, politically business and industry has a story to tell and, far too often, its problems in the past politically have resulted from its inability or unwillingness to tell it.

11. If one concurs and follows the above advice, and one has clean hands and is in compliance with environmental laws and regulations, one should not apologize for the making of a profit and for creating jobs that count in the private sector. Government doesn't have to invest

capital to create jobs — nor does it have to create capital to spend it. The private sector does. The private sector is the engine that moves this country economically. As a result, it should be proud of its position and role — but to most effectively communicate this, it should have clean hands and be in compliance with both the letter and the clear spirit of the laws that are judged to be of a moral nature in this country — i.e., those relating to the environment.

12. Finally, have a public affairs ability to tell your story. Too often we see experienced, superbly qualified businessmen who are terribly inarticulate in expressing their positions or the facts with respect to the operations of their companies or industry. It is extremely important to understand that total honesty in public affairs is not only desirable, but absolutely necessary. A credibility gap exists in the media and in the public with respect to what it is told by business and industry. Facts, but facts related in a way that the common person can understand them, are an absolute necessity. Talking in terms of parts per million or in terms of acronyms mean nothing to the person on the street. Further, although the man on the street may not be highly educated, this does not mean that he does does not have common sense. As a result, although he may not totally believe everything he hears or sees in the media, in the absence of any effective communication from business or industry, the constant repetition of false information eventually has to take its toll.

CONCLUSION

In concluding, I would like to say that my purpose here today was to give an overall review in very brief fashion of the major environmental laws affecting industry in general and you in particular. Not all laws were covered. That would be impossible to do short of having a conference that would last for an extended period of time. On the other hand, the law is a living entity — and must be explained, in my opinion, in terms of how it operates in the real world. Simply being told what the words are in a law is not extremely helpful if you do not understand the practicalities of what happens and is happening out in the real world as these laws and regulations are being issued, administered and enforced. I thank you for the courtesy of your attention.

BEFORE THE

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

METALLIC MINING COUNCIL

July 14, 1980

In the Matter of the Proposed Adoption
of Administrative Rules to Regulate
Metallic Mining Wastes

Once again we appreciate the Metallic Mining Council providing us this opportunity to discuss the public policy questions involved in the regulation of waste that will be generated by Wisconsin's potential future metallic mining industry. The overriding issue before you today is whether the DNR staff draft rules, for controlling the metallic mining industry, are of sufficient quality for this Council to recommend to the Natural Resources Board that the rules be sent out for public hearings? The clear-cut answer to this question depends on whether the Council believes the draft rules are complete, adequate and would provide the highest possible protection for Wisconsin's environment.

On May 29, 1979, I had the opportunity to provide this Council with a paper discussing public policy objectives that should be met by administrative rules to regulate metallic mining waste. In that paper, I described the following four objectives for the proposed administrative rules:

> The first objective is to provide industry with clear and detailed guidelines, which establish a total comprehensive regulatory framework under which they must operate....
>
> The second objective of administrative rules to control mining wastes should be very tough and complete protection of the environment from those mining wastes. ... Complete environmental protection from metallic mining waste is a paramount objective of the rules you will write.
>
> The third objective of the rule making process should be to maintain the consensus approach to problem solving which has been a landmark characteristic in much of the mining process for the last two and one-half years....
>
> [As a fourth objective, the rules must be] built around the twin concepts of clear standards and well established procedures for decision making. The need to establish decision making processes which are expeditious, fair and public cannot be overstated. [Rules must contain a] defined process by which industry, DNR staff, [local citizens] and environmentalists [may] fairly have their day in court.

THE DNR DRAFT RULES DO NOT MEET THE FOUR OBJECTIVES.

The DNR staff versions of NR 150, 131, 132 and 182 that are before you today represent a significant improvement over those which were first proposed. DNR staff who assisted in improving the regulations are to be complimented and recognized. The question remains, however, whether these improved rules are of sufficient quality to warrant support by the Metallic Mining Council.

The current proposals before you do not warrant public support. First, these rules do not provide industry with clear and detailed guidelines which establish a complete and comprehensive regulatory framework under which industry must operate. Second, the draft rules do not provide tough and complete protection of the environment from mining waste. Third, the draft rules are not a result of the consensus approach to problem solving. Fourth, these rules do not provide clear standards and well established procedures for decision making.

ENVIRONMENTAL SHORTCOMINGS OF CURRENT DNR PROPOSALS

The current DNR proposed set of rules is environmentally and legally inadequate for the following general reasons:

1. The draft rules fail to require, or provide incentives to, mining companies to market their mining wastes under appropriate administrative standards;

2. The draft rules fail to adequately regulate uranium and radioactive mining wastes;

3. The draft rules fail to provide certainty of environmental protection from the acute and chronic effects of toxic chemicals;

4. The draft rules fail to adequately incorporate Wisconsin's surface water regulatory program (Wisconsin Point Source Discharge Element System [WPSDES] permits) into the proposed regulatory scheme;

5. The draft rules fail to adequately protect Wisconsin's ground water from the effects of metal mining;

6. The draft rules fail to allow standards to be made more stringent on a site specific basis;

7. The draft rules fail to promote clear standards and well established procedures for decision making regarding the project feasibility report; and

8. The draft rules fail to provide adequate quality assurance, monitoring and verification programs for either the regulated or the regulator.

ALTERNATIVES TO STAFF DRAFTS

The Public Intervenor and the Town of Lincoln have provided you with master amendments to NR 132 and NR 182. The master amendment to NR 132 is as applicable to NR 131 and the amendment to NR 182.21 is applicable to both NR 131 and NR 132. In addition, you have been provided two draft resolutions which are part of the total master amendment package.

The two resolutions and the seventeen rules sections which have been created, or rewritten, result in large measure from a political process which developed since your last meeting. Kennecott Copper Corporation hosted approximately five weeks of discussions about NR 182. Exxon hosted two weeks of discussions regarding NR 132. Various DNR staff, local units of government, mining companies and environmentalists participated.

As mining companies in attendance did not always agree among themselves, so too did local units of government and the environmentalists differ on varying subjects. Still, the master amendment before you, in my opinion, more closely reflects the desired results of the parties who met during

these seven weeks of work than do the DNR drafts. As importantly, the master amendment better reflects community reaction to the rules drafting process than do the DNR drafts.

MONITORING AND VERIFICATION

The DNR staff work on monitoring and verification is especially inadequate. Monitoring and adequate verification are issues which are of great concern to local citizens because of the 1976 Ladysmith experiences.

The Public Intervenor believes that monitoring and verification rules must be comprehensive. They must adequately describe the responsibilities of both the DNR staff and the applicant. It is a reasonable public policy position for the seven-citizen Natural Resources Board to establish detailed guidelines for the role of DNR staff in both verification and monitoring. Quality assurance is not the sole responsibility of the applicant, nor is it a concept which should be done on a hit-and-miss basis at the whim and absolute discretion of a regulator. DNR staff no longer can hide behind the traditional twin principles of "trust us" and "give us discretion please."

The Public Intervenor's master amendment increases the opportunity for the scientific information to be examined by a variety of qualified experts representing a broad range of viewpoints. The goals of the company, the department, the local citizens, and the people of the state may clash. Good public policy requires several things that the department's version lack. We have provided new, strong sections to fill this void. For example, we have added a section on quality

assurance which requires that field collected data and analysis be verified not only by the department staff but by qualified experts as well. We require that the monitoring program be a part of the initial planning and be subject to examination by all interested parties at the master hearing. At the same hearing, we require that the applicant present the probabilities and consequences of various kinds of accidents (including worst case) which might affect the health, welfare and safety of people or impact the environment. Similarly, our amendment makes it possible for all parties at the hearing to review and comment on the contingency plans with which the applicant proposes to cope with these emergencies. Thus, the amendment calls for an integrated monitoring process, a multi-dimensional quality assurance process, and a detailed contingency plan--all open to the light of day, and with annual review throughout the life of the mine. We have also made the department responsible for monitoring and environmental warnings after the mine has closed, though the company must bear the expense of clean up. We have tried to make the department's duties and responsibilities explicit throughout.

GROUND WATER

Ground water standards must be just that; they must be clear, complete and concise standards. The rules should provide a minimal "fudge" factor for the mining company or DNR. The public has a right to know what will, or will not, be

a permitted activity. The rule must cover both water quality and water quantity. Effective, clear and prompt enforcement procedures must be laid out in the administrative rules to permit DNR to order an immediate shutdown of a mining operation that threatens Wisconsin's water supply.

The DNR staff ground water proposals warrants rejection. First, there are not standards in the proposal. For example, we do not know the distance from mining wastes that pollution may travel before the rule is deemed by DNR to be violated. We do not know what substances will constitute pollutants. Ground water quantity is not protected. Enforcement mechanisms are vague.

In our master amendment, we have provided a method which will realistically regulate ground water. It deals with ground water quality and quantity, recognizes most discharges as point sources, and sets up a monitoring program with contingency criteria. The numbers, distances and proposed standards are realistically flexible in the first instance. But once these standards are determined, they will result in reasonable expectations for enforcement.

There are many local citizens and environmentalists who seek a tougher ground water program than that which is provided in the master amendment. I urge you to listen carefully to their comments.

RECOMMENDED ACTIONS

I strongly urge you to take four actions today:

First and foremost, stress to DNR staff that they have responsibility to meet the needs of both local citizens and mining companies. In meeting the concerns of local citizens in particular, DNR will need to write rules differently than they have in the past. Staff must be more willing to open up the process to public participation, ensure due process rights, clearly articulate staff responsibility, and limit their discretion to a more modest scale.

Second, the master amendment of the Town of Lincoln and the Public Intervenor should be sent to public hearing with the DNR drafts. The substantial differences in the regulatory approach warrants this action.

Third, give preliminary support to the two resolutions submitted to you by the Town of Lincoln and the Public Intervenor. Final approval may be reserved to an appropriate future date.

Fourth, reenforce your earlier position calling for the creation of separate rules for uranium mining and radioactive wastes. Specifically, tell staff you support section NR 182.02(9) of the master amendment.

CONCLUSION

Wisconsin is fairly close to filling the regulatory void for mining which existed in 1976. We have made progress by working together. To complete the rules process however, some movement remains necessary on the part of at least one major mining company. In addition, DNR staff must support the concepts contained in the master amendment. Staff must also quickly develop a ground water protection program. The environmental movement must continue the dialogue with DNR and the mining companies. However, everyone involved must recognize that those who represent local citizens and the environment have already compromised as far as they reasonably can.

Peter A. Peshek
Wisconsin Public Intervenor

2:15 pm

DeWitt, Sundby, Huggett & Schumacher, s.c. PJS

Madison, Wisconsin

TO: Robert L. Russell

FROM: James G. Dertouin

DATE: April 3, 1980

PAGES: 12

PHONE: (608) 255-8891

OPERATOR: Andrea Kirchmeier

Being telecopied to you is the orator script copy of my speech, Community Perspective", to be delivered tonight in Crandon.

JGD/ajk

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MINING IN WISCONSIN

"A COMMUNITY PERSPECTIVE"
APRIL 3, 1980

JAMES DEROUIN
RETAINED WISCONSIN COUNSEL
EXXON MINERALS COMPANY, U.S.A.

IT IS MY PLEASURE TO BE HERE THIS EVENING TO TALK ABOUT THE RULE MAKING PROCESS IN GENERAL AND HOW THIS PROCESS HAS WORKED AND IS WORKING WITH RESPECT TO POSSIBLE MINING IN WISCONSIN. I WILL ALSO REFER TO THE ROLE WHICH THE METALLIC MINING COUNCIL OF THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES IS PLAYING IN THE DEVELOPMENT OF THESE RULES.

IN STARTING, A FEW DEFINITIONS MIGHT BE HELPFUL. A "BILL" IS A PIECE OF LEGISLATION INTRODUCED BY ONE OF THE 132 LEGISLATORS IN THE WISCONSIN LEGISLATURE. A "LAW" IS A BILL WHICH HAS BEEN PASSED IN THE EXACT SAME FORM BY BOTH THE WISCONSIN ASSEMBLY AND WISCONSIN SENATE AND HAS BEEN SIGNED BY THE GOVERNOR. YOU SHOULD UNDERSTAND THAT MANY LAWS ARE RATHER VAGUE AND THAT GREAT DISCRETION IS GIVEN TO ADMINISTRATIVE AGENCIES TO ADMINISTER THESE LAWS. IN DOING SO, THESE ADMINISTRATIVE AGENCIES ISSUE "ADMINISTRATIVE RULES" WHICH ARE PUBLISHED IN A VOLUME OF LOOSE LEAF BINDERS REFERRED TO AS THE WISCONSIN ADMINISTRATIVE CODE. THESE ADMINISTRATIVE RULES ARE GIVEN THE EFFECT OF LAW IN WISCONSIN REGARDLESS OF THE FACT THAT THEY HAVE NOT BEEN PASSED BY THE LEGISLATURE NOR SIGNED BY THE GOVERNOR. AS A PRACTICAL MATTER, THEREFORE, WISCONSIN ADMINISTRATIVE AGENCIES, A PART OF THE EXECUTIVE BRANCH OF GOVERNMENT, CREATE MORE LAWS

IN WISCONSIN THAN DOES THE LEGISLATURE. FURTHER, COURTS GIVE GREAT CREDIBILITY TO ADMINISTRATIVE AGENCIES IN THE RULE MAKING PROCESS BECAUSE COURTS HOLD THAT ADMINISTRATIVE AGENCIES HAVE WIDE DISCRETION TO INTERPRET AND ADMINISTER THE LAWS FOR WHICH THEY ARE RESPONSIBLE AND THAT SUCH AGENCIES ARE "EXPERTS" WHOSE OPINION IN THE ISSUANCE OF RULES IS GIVEN GREAT CREDIBILITY IN INTERPRETING THE REAL MEANING AND INTENT OF THE LAWS WHICH THEY ADMINISTER. AS A RESULT, ANY PARTY THAT IS INTERESTED IN A PARTICULAR LAW SHOULD BE EQUALLY AS INTERESTED IN THE ADMINISTRATIVE RULES WHICH ARE ISSUED AS A RESULT OF THAT LAW.

BEFORE SPEAKING ABOUT THE RULE MAKING PROCESS RELATING TO MINING, I MIGHT POINT OUT THAT THERE ARE THREE BASIC ALTERNATIVES WITH RESPECT TO THE PASSAGE OF LEGISLATION AND THE ISSUANCE OF ADMINISTRATIVE RULES — NAMELY:

1. A LAW OR A RULE CAN BE CREATED AS A RESULT OF CONFRONTATION BETWEEN INTERESTED PARTIES. IN SUCH CASES, THE LAW OR RULE WILL REPRESENT THE WORK PRODUCT OF THOSE PARTIES WHICH POSSESS THE GREATEST POLITICAL POWER AT THE TIME OF THE CREATION OF THE LAW OR RULE. ALTHOUGH THIS ALTERNATIVE MAY PROVIDE SHORT TERM BENEFITS, THE DEVISIVENESS WHICH IT CREATES DOES NOT RESOLVE THE UNDERLYING ISSUES AND ONLY PERPETUATES THEIR FINAL RESOLUTION UNTIL SOME TIME IN THE FUTURE.

2. A LAW OR RULE CAN BE DEFEATED AS A RESULT OF CONFLICT BETWEEN THE VARIOUS PARTIES IN INTEREST. THE NET RESULT OF THIS ALTERNATIVE, THAT NO ACTION IS TAKEN, REPRESENTS THE FACT THAT THOSE PARTIES OPPOSED TO THE TAKING OF SOME SPECIFIC ACTION POSSESS GREATER POLITICAL POWER AT A CERTAIN POINT IN TIME. THIS, LIKEWISE, REPRESENTS ONLY A SHORT TERM SITUATION IN WHICH CONTINUED AGITATION WILL LEAD TO THE FINAL RESOLUTION OF ISSUES AT SOME POINT IN THE FUTURE.

3. A LAW OR RULE CAN BE CREATED AS A RESULT OF A MUTUAL UNDERSTANDING REACHED FROM NEGOTIATIONS BETWEEN ALL PARTIES INTERESTED IN THE ISSUES. THIS ALTERNATIVE NOT ONLY HAS HISTORICAL PRECEDENCE IN WISCONSIN, IT ALSO LEADS, IN MY OPINION, TO THE MOST FAIR AND LONG TERM RESULT.

IT SHOULD BE NOTED, BEFORE PROCEEDING FURTHER, THAT THERE IS A TRADITION IN WISCONSIN THAT WE ARE INNOVATORS IN LEGISLATION AND THAT MUCH OF THE MOST PROGRESSIVE LEGISLATION PASSED IN WISCONSIN HAS RESULTED FROM DIVERSE PARTIES AGREEING TO THE LEGISLATION. FOR EXAMPLE, SINCE UNEMPLOYMENT COMPENSATION WAS ENACTED IN WISCONSIN, AND WE WERE THE FIRST STATE TO ENACT SUCH A LAW MORE THAN FOUR DECADES AGO, ONLY ONCE HAS THERE BEEN AN AMENDMENT TO THE LAW THAT WAS NOT AN "AGREED" AMENDMENT BETWEEN

BUSINESS AND LABOR. ANOTHER HISTORIC EXAMPLE OF THIS APPROACH TO PROBLEM SOLVING IN WISCONSIN IS THE CHARGE OF THE UNIVERSITY OF WISCONSIN TO "SIFT AND WINNOW" FROM AMONG COMPETING AND ALTERNATIVE OPTIONS TO ARRIVE AT THE BEST SOLUTION TO A GIVEN PROBLEM.

IN THE ENVIRONMENTAL ERA, THERE HAS BEEN NO ENVIRONMENTAL LAW ENACTED SINCE 1973 THAT HAS NOT BEEN THE RESULT OF NEGOTIATIONS BETWEEN DIVERSE GROUPS AND WHICH HAS NOT BEEN "AGREED" LEGISLATION BETWEEN BUSINESS, AGRICULTURE, ENVIRONMENTAL GROUPS, LOCAL GOVERNMENTS AND THE DEPARTMENT OF NATURAL RESOURCES. THE RESULTS OF THIS PROCESS INCLUDE:

1. THE CREATION OF THE WISCONSIN WATER PERMIT PROGRAM IN 1973;

2. THE CREATION OF THE WISCONSIN SOLID WASTE RECYCLING AUTHORITY IN 1975;

3. THE ENACTMENT OF THE POLYCHLORINATED BIPHENYL ACT IN 1976;

4. THE REWRITING OF THE METALLIC MINING RECLAMATION ACT AND COMPANION ENVIRONMENTAL LEGISLATION IN 1978;

5. THE REWRITING OF THE SOLID WASTE ACT IN 1978;

6. THE REWRITING OF THE CLEAN AIR ACT IN 1979;

7. THE REWRITING OF THE CLEAN AIR ACT IN 1980;

8. THE REWRITING OF PORTIONS OF THE SOLID WASTE ACT IN 1980;

9. THE REWRITING OF PORTIONS OF THE METALLIC MINING RECLAMATION ACT IN 1980;

10. THE REWRITING OF THE WATER PERMIT PROGRAM IN 1980; AND

11. THE ENACTMENT OF LONG TERM MINING LIABILITY LEGISLATION IN 1980.

THE SIGNIFICANT FACT WITH RESPECT TO THE ABOVE LEGISLATION IS THAT IT IS EXCELLENT ENVIRONMENTAL LEGISLATION, BUT IT IS ALSO FAIR AND BALANCED LEGISLATION. IT SHOULD ALSO BE EMPHASIZED AGAIN, HOWEVER, THAT NONE OF IT WOULD HAVE PASSED EXCEPT FOR THE FACT THAT THE VARIOUS PARTIES TO THE PROCESS — BUSINESS, AGRICULTURE, THE ENVIRONMENTAL MOVEMENT, LOCAL GOVERNMENTS AND THE DEPARTMENT OF NATURAL RESOURCES — REACHED A COMMON UNDERSTANDING WITH RESPECT TO IT.

NOW, ONCE A BILL HAS BECOME A LAW, HOW IS A RULE CREATED? THE ADMINISTRATIVE AGENCY, IN OUR CASE THE DEPARTMENT OF NATURAL RESOURCES, IS CHARGED WITH THE PRIMARY, ALTHOUGH NOT NECESSARILY ALWAYS THE TOTAL, RESPONSIBILITY FOR THE DRAFTING OF RULES WHICH IT WILL USE TO ADMINISTER A PARTICULAR LAW. BEFORE IT CAN HOLD HEARINGS ON THESE RULES, IT MUST FIRST RECEIVE THE PERMISSION OF THE NATURAL RESOURCES BOARD. AFTER HOLDING HEARINGS ON THE RULES AND MAKING ANY CHANGES TO THEM WHICH IT DESIRES, IT MUST THEN REPORT BACK TO THE NATURAL RESOURCES BOARD. UPON RECEIVING APPROVAL OF THE NATURAL RESOURCES BOARD, THE PROPOSED RULES ARE SENT TO THE LEGISLATURE FOR A THOROUGH REVIEW BY VARIOUS LEGISLATIVE COMMITTEES. CERTAIN OF THESE LEGISLATIVE COMMITTEES HAVE THE AUTHORITY TO SUSPEND RULES FOR A PERIOD OF TIME. ALTHOUGH MANY OBSERVERS HAVE CRITICIZED THIS LEGISLATIVE OVERSIGHT OF PROPOSED AGENCY RULES, IT SHOULD BE NOTED THAT THIS SITUATION HAS ARISEN AS A RESULT OF ABUSES BY VARIOUS AGENCIES OF THEIR RULE MAKING POWERS AND, AS A RESULT, THE LEGISLATURE HAS NOW INSERTED ITSELF INTO THE RULE MAKING PROCESS.

WITH RESPECT TO MINING RULES, IT WAS VERY APPARENT AT THE TIME THAT THE METALLIC MINING RECLAMATION ACT AND THE SOLID WASTE ACT WERE PASSED IN 1978 THAT A NUMBER OF ISSUES STILL NEEDED SPECIFIC RESOLUTION AND THAT THE BEST WAY OF RESOLVING THESE ISSUES WAS TO ESTABLISH A STRUCTURE BALANCED BETWEEN ENVIRONMENTAL, BUSINESS, LOCAL GOVERNMENTAL AND ACADEMIC INTERESTS TO STRIVE FOR "AGREED" RESOLUTIONS. AS A RESULT, A NINE PERSON METALLIC MINING COUNCIL ADVISORY TO THE DEPARTMENT OF NATURAL

RESOURCES WAS CREATED TO REPRESENT A "VARIETY AND BALANCE OF ECONOMIC, SCIENTIFIC AND ENVIRONMENTAL VIEWPOINTS." A NUMBER OF OTHER COUNCILS ADVISORY TO THE DEPARTMENT OF NATURAL RESOURCES EXIST, ALTHOUGH THE METALLIC MINING COUNCIL WAS SPECIFICALLY PATTERNED AFTER THE VERY SUCCESSFUL POLYCHLORINATED BIPHENYL ADVISORY COUNCIL CREATED IN 1976. AMONG THE MEMBERS OF THE METALLIC MINING COUNCIL ARE ATTORNEY KEVIN LYONS WHO REPRESENTS THE TOWN OF NASHVILLE ON MINING MATTERS AND WAS PRINCIPALLY RESPONSIBLE FOR DRAFTING THE MINING PROVISIONS TO BE INSERTED IN THE NEW FOREST COUNTY ZONING ORDINANCE; KATHY FALK, THE ATTORNEY FOR WISCONSIN'S ENVIRONMENTAL DECADE; THE STATE GEOLOGIST, MEREDITH OSTROM; PROFESSOR JAMES HOFFMAN OF THE UNIVERSITY OF WISCONSIN-OSHKOSH; PROFESSOR JOHN BORDVSKY, UNIVERSITY OF WISCONSIN-STEVENS POINT; AND FORMER STATE REPRESENTATIVE HARVEY DUHOLM. IN ADDITION, THERE ARE TWO INDUSTRY REPRESENTATIVES ON THE METALLIC MINING COUNCIL. IT IS APPARENT, THEREFORE, THAT THE METALLIC MINING COUNCIL REPRESENTS A BROAD SPECTRUM OF INTERESTS IN WISCONSIN AND THAT PERSONS REPRESENTING BOTH THE ENVIRONMENTAL MOVEMENT AND LOCAL GOVERNMENT IN WISCONSIN HAVE VERY SIGNIFICANT INFLUENCE ON THE FINAL RESULTS OF THE METALLIC MINING COUNCIL.

I, AS A MEMBER OF THE METALLIC MINING COUNCIL, LOOK TO THESE PEOPLE TO COMMUNICATE THE CONCERNS AND POSITIONS OF THE PEOPLE WHOM THEY REPRESENT SO THAT THOSE ISSUES CAN BE ADDRESSED. I ALSO PARTICIPATED IN THE DRAFTING OF MUCH OF THE LEGISLATION REFERRED TO EARLIER INCLUDING THAT RELATING TO MINING AND SOLID WASTE. WHEN THOSE LAWS WERE BEING DRAFTED,

WE GAVE VERY CAREFUL CONSIDERATION, AND RESPONDED AS CAREFULLY AND AS FULLY AS WE KNEW HOW, TO THE MANY SUGGESTIONS MADE ON BEHALF OF ENVIRONMENTAL AND LOCAL GOVERNMENTAL GROUPS WHO PARTICIPATED IN THAT PROCESS. FOR EXAMPLE, LOCAL GOVERNMENTS FELT STRONGLY ABOUT CERTAIN CHANGES TO THE BONDING PROCESS IN WISCONSIN. CHANGES IN THAT PROCESS WERE MADE. THEY LIKEWISE WERE HIGHLY INTERESTED IN THE LAWS RELATING TO GROUNDWATER. THESE SUGGESTIONS AND CONCERNS DIRECTLY LED TO THE AMENDING OF WISCONSIN STATUTE 107.05 WHICH WAS CHANGED TO SPECIFICALLY PROVIDE AS FOLLOWS: "NO WITHDRAWAL OF GROUNDWATER OR DEWATERING OF MINES, WITH OR WITHOUT A PERMIT, MAY BE MADE TO THE DETRIMENT OF PUBLIC OR PRIVATE WATER SUPPLIES." THAT SAME LAW SPECIFICALLY PROVIDES THAT IF A MINING OPERATION IS THE PRINCIPLE CAUSE OF DAMAGE TO A WATER SUPPLY, THE OPERATOR MUST PROVIDE WATER TO THOSE PERSONS WHO HAVE BEEN DAMAGED AND MUST PAY ANY DAMAGES UP TO $25,000 WHICH THE PERSON HAS SUFFERED. PLEASE NOTE THAT THESE SPECIFIC PROVISIONS ARE IN ADDITION TO THE PROTECTIONS ARISING UNDER THE UNIQUE LONG TERM LIABILITY LAW PASSED THIS SPRING OR ANY OTHER OF THE MORE TRADITIONAL LAWS SUCH AS THOSE RELATED TO NEGLIGENCE AND THE LIKE. FURTHER, THESE CHANGES WERE IMPLEMENTED AT THE SPECIFIC SUGGESTION OF TOWN GOVERNMENTS IN WISCONSIN. THERE ARE OTHER EXAMPLES — E.G., RESOLUTION OF THE WETLANDS' ISSUE AND OF ISSUES RELATING TO THE MASTER HEARING FOR MINING PERMITS, TO NAME ONLY TWO. THE POINT I WISH TO MAKE VERY CLEARLY HERE IS THAT PEOPLE SUCH AS YOURSELVES HAVE HAD AN IMPACT DATING BACK INTO 1977 AND 1978 ON ENVIRONMENTAL LEGISLATION RELATING TO MINING AND YOU ARE CURRENTLY HAVING AN IMPACT ON THE RULES THAT ARE BEING CREATED

AS A RESULT OF THOSE LAWS. EVEN THOUGH YOU MAY PERCEIVE THAT THE SYSTEM GOES ON REGARDLESS OF ANY OF YOUR COMMENTS, THE FACT IS THAT, THROUGH YOUR REPRESENTATIVES, INCLUDING YOUR ATTORNEYS, WE RECEIVE VERY PERIODIC INFORMATION ABOUT WHAT YOUR CONCERNS ARE AND, IN MY OPINION, THE RECORD CLEARLY DEMONSTRATES THAT THOSE CONCERNS HAVE BEEN TAKEN INTO ACCOUNT. WHEN THE LAWS PREVIOUSLY LISTED WERE ENACTED, AND AS THE RULES TO IMPLEMENT THEM ARE BEING DRAFTED, LINCOLN, NASHVILLE AND OTHER LOCAL GROUPS IN FOREST AND OTHER COUNTIES ARE CONSTANTLY ON OUR MINDS BECAUSE IT IS THOSE PEOPLE ON THE LOCAL LEVEL WHOM WE WANT TO BEND OVER BACKWARDS TO INCLUDE IN THE PROCESS. WE WANT THEM TO FEEL FREE TO RAISE THEIR LEGITIMATE ISSUES AND FEEL THAT WE HAVE RESPONDED REASONABLY TO THEM. THAT IS THE WAY THE LEGISLATION WAS NEGOTIATED AND ENACTED AND, IN MY OPINION, WITH YOUR CONTINUED COOPERATION AND INVOLVEMENT, THAT WILL BE THE WAY THAT THE RULES WILL BE DRAFTED AND ISSUED.

IN CLOSING, IT SHOULD BE UNDERSTOOD THAT THE METALLIC MINING COUNCIL WAS CHARGED WITH THE RESPONSIBILITY OF ADVISING THE DEPARTMENT OF NATURAL RESOURCES ON RULES RELATING TO MINING BY NO LATER THAN MAY, 1980. ALTHOUGH THE METALLIC MINING COUNCIL WILL STAY IN EXISTENCE AFTER THAT DATE, ITS FIRST RESPONSIBLITIES WILL BE DISCHARGED BY THAT TIME. THE METALLIC MINING COUNCIL DOES NOT HAVE A VETO POWER OVER THE DEPARTMENT OF NATURAL RESOURCES. HOWEVER, TO THE EXTENT THAT THE ACADEMIC, INDUSTRIAL, ENVIRONMENTAL AND LOCAL GOVERNMENTAL INTERESTS ON THE METALLIC MINING COUNCIL CAN COME TO A MUTUAL AGREEMENT ON MINING RULES, AND AS LONG AS

THOSE RULES ARE ACCEPTABLE TO THE DEPARTMENT OF NATURAL RESOURCES AND PROVIDE FOR ITS LEGITIMATE INTERESTS, THE LONG TERM BENEFIT TO ALL PARTIES IS, IN MY OPINION, VERY CLEAR. PARTICIPATION LITERALLY COSTS YOU NOTHING AND YET THE BENEFITS WHICH IT RETURNS TO YOU ARE OVERWHELMING. THE TRADITIONAL METHOD OF CREATING RULES, AS YOU PERCEIVED FROM WHAT I HAVE SAID BEFORE, LEFT ALL RESPONSIBILITY FOR THE DRAFTING OF THESE RULES TO THE DEPARTMENT OF NATURAL RESOURCES. ALTHOUGH COMMENTS AND SUGGESTIONS COULD BE MADE TO THE DEPARTMENT AT THE HEARING ON THE PROPOSED RULES, AS A PRACTICAL MATTER THE ABILITY FOR YOU, ENVIRONMENTAL GROUPS, INDUSTRIAL INTERESTS, AND LOCAL UNITS OF GOVERNMENT TO INFLUENCE THE DEPARTMENT OF NATURAL RESOURCES WAS LIMITED. AS A RESULT, THE VEHICLE OF THE METALLIC MINING COUNCIL OFFERS NOTHING EXCEPT ADVANTAGES FOR EVERY SINGLE PARTY WHO PARTICIPATES. FURTHER, THE TRACK RECORD OF HAVING RESPONDED TO THE LEGITIMATE CONCERNS OF LOCAL UNITS OF GOVERNMENT — THE LINCOLNS, THE NASHVILLES, AND THE NATIVE AMERICAN COMMUNITIES, FOR EXAMPLE — IS VERY CLEAR AND, THEREFORE, GIVES EVERY INCENTIVE FOR CONTINUED PARTICIPATION.

I PERSONALLY CAN THINK OF NO SET OF CIRCUMSTANCES UNDER WHICH ANY PARTY INTERESTED IN THE RULE DRAFTING PROCESS BENEFITS BY NOT PARTICIPATING. WHEREAS I AM AWARE THAT, IN SOME QUARTERS, PARTICULARLY IN MADISON, THIS DIALOGUE IS LOOKED UPON WITH SUSPICION, I POINT OUT AGAIN THAT THIS PROCESS IS ENTIRELY COMPATIBLE WITH THE TRADITIONS OF THIS STATE AND IT HAS PRODUCED RESULTS. AS A RESULT, WE DISMANTLE THIS SUCCESSFUL PROCESS

ONLY TO OUR MUTUAL DISADVANTAGE. SIMPLY PUT, HE WHO THINKS THAT LITIGATION IS CHEAPER AND QUICKER AND WILL PRODUCE A BETTER RESULT IS BADLY MISLEADING HIMSELF. HE WHO THINKS THAT THE ONLY ROLE THAT AN ATTORNEY OR OTHER ADVOCATE SHOULD PLAY IS TO DEMEAN, BEFUDDLE, CONFUSE AND CONFOUND THE PERSON SITTING ON THE OPPOSITE SIDE OF THE TABLE IS NOT SERVING HIS CLIENT WELL WHETHER HE REPRESENTS A COMPANY, A LOCAL UNIT OF GOVERNMENT, AN ENVIRONMENTAL GROUP OR SOME OTHER THIRD PARTY. YOU SHOULD NOTE THAT AN ATTORNEY, BY EDUCATION AND TRAINING, IS TAUGHT TO BE AN ADVOCATE FOR A POSITION RATHER THAN A MEDIATOR. I SUBMIT THAT MILITANT ADVOCACY, HOWEVER, EXCEPT WHEN CONFRONTED BY INTRANSIGENCE ON THE PART OF OTHERS, IS NOT CONDUCIVE TO THE RESOLUTION OF DIFFERENCES OF OPINION NOR IN THE BEST INTERESTS OF THE CLIENT — NO MATTER WHO THE CLIENT MAY BE.

LET ME SAY THAT I WELL REALIZE THAT THERE MAY BE THOSE ISSUES THAT MAY APPEAR TO BE IRRESOLVABLE. IT IS ALSO TRUE THAT THERE ARE ALWAYS SOME WHO FIND SOLVING PROBLEMS HARDER THAN CREATING THEM AND WHO HAVE PRECONCEIVED BIASES. BUT I URGE YOU, AS LOCAL CITIZENS, TO STAY INVOLVED IN THIS PROCESS AS YOU HAVE IN THE PAST — A SUCCESSFUL PROCESS YOU HELPED TO CREATE — TO EXERCISE YOUR OWN JUDGMENT THROUGH YOUR OWN PEOPLE AND ATTORNEYS AND TO TURN ASIDE ANY OUTSIDE INFLUENCE WHOSE INTERESTS AND OBJECTIVES ARE NOT THE SAME AS YOURS. I THANK YOU FOR YOUR POSITIVE INVOLVEMENT UP TO THIS POINT AND URGE YOU TO CONTINUE YOUR POSITIVE PARTICIPATION IN THE FUTURE.