The Real Truth about Iron Mining Legislation: Deconstructing the Misleading and False Information from Wisconsin Manufacturers and Commerce about AB1/SB1

INTRODUCTION

Wisconsin Manufacturers and Commerce (WMC) released a "Questions and Answers" handout called "The Truth about Iron Mining Legislation" that accuses those opposed to AB 1/SB 1 of spreading "misinformation, distortions and false statements." In fact, a contrast of the non-partisan Wisconsin Legislative Council memo of February 1, 2013 to Senator Tom Tiffany and Representative Scott Suder and WMC's handout makes it crystal clear that the bill reduces environmental protections for iron mining. Wisconsin Manufacturers and Commerce's "Q & A" handout is designed to mislead legislators and the public and to disguise the fact that the legislation broadly reduces environmental regulations and grants sweeping exemptions for iron mining.

Midwest Environmental Advocates and the Sierra Club have thoroughly reviewed WMC's claims and compared them to the language in AB 1/SB 1 as amended on February 6, 2013. Virtually every claim made by WMC to support the bill is false, misleading or both. Our analysis responds to all 16 claims made by WMC. We have numbered the claims 1-16 and respond to them in the order they appear in the WMC document.

Before discussion of the individual misleading or false claims made by WMC, it's important to note that DNR is required to grant requests for exemptions from any requirements of the bill if the exemption will not cause "significant" adverse impacts or if the impacts can be "offset" or compensated for through mitigation somewhere else. The exemptions reverse the current standard barring exemptions if they endanger public health, safety, or welfare or the environment. (See 2/1/13 Wisconsin Legislative Council memo at pp. 15-16, hereafter "Memo") The bill retains the requirement that an exemption cannot violate other environmental laws, but this requirement is entirely negated by the provision of the bill that makes the new iron mining law the controlling law if it conflicts with other state environmental law. See Memo at p. 38, "Effects of Other Laws."

In other words, every protection WMC claims is in the bill has a built-in escape clause that takes discretion away from regulators and requires them to grant requested exemptions from an already reduced regulatory program for iron mining. Exemptions allowing adverse impacts are required to be allowed if mitigation takes place somewhere. Mitigation siting requirements have abundant loopholes allowing it to be conducted virtually anywhere unrelated to the mine site, though wetlands mitigation is slightly restricted by a requirement that it take place in the Ceded Territory of Wisconsin, and closer to the mine site if practical.

The bill also eliminates any public notice requirements or public hearings on exemption requests. See Memo at p. 16. In addition to the specific exemption provisions scattered throughout the bill, there is an omnibus exemption provision at pages 125-126 of the bill that requires DNR to approve exemption requests regarding any of the environmental requirements in the bill within 15 days of receiving the request. As amended, DNR is required to approve exemptions covering any and all environmental impacts at the mining site so long as they

are mitigated elsewhere, and "mining site" is defined in the bill to cover any area that is disturbed by mining, mining waste or by mining structures, equipment, materials or other things used in the mining.

1. ***WMC asks: "Does the bill lower or rollback Wisconsin's environmental standards?"***

Yes. WMC's question is misleading and designed to hide the truth. There are dozens of instances in the bill where iron mining would be exempted from an existing standard or the application of existing standards are limited or curtailed. In general, while the standards aren't changed, iron mining simply is not required to meet them. These are clearly rollbacks and reductions in environmental standards. Where standards aren't changed, this bill allows, and almost always requires DNR to grant a mining company an exemption, a "free pass" from its mining activities having to meet the standards.

Two changes relate to measuring the zone of allowable groundwater pollution resulting from a mining company. Under the bill, the mining company is allowed to start measuring the zone of allowable pollution from the outside edge of the berm or other structure holding back the waste, rather than from the outer edge of the waste itself under current law. Since the bill as amended also eliminates minimum waste site slope requirements, a mining company would be free to extend its allowed groundwater pollution zone by hundreds or even thousands of feet by constructing gently sloping waste site berms holding back waste piles that are hundreds of feet high. See Memo at p. 31.

In addition, the bill eliminates groundwater standards for water deeper than 1000 feet or the ultimate depth of the mine pit. Since the Penokee Hills loom about 1200 feet above Lake Superior, this provision allows for unlimited groundwater pollution at elevations significantly higher than Lake Superior, putting groundwater supplies, and eventually Lake Superior water quality, at risk.

2. ***WMC asks: "What does the bill do to protect water bodies like lakes and streams?"***

Wisconsin Manufacturers and Commerce hides the fact that the bill removes the current prohibition on filling or destroying a lakebed for a mine and suggests that only a "large puddle" might be filled under the bill. The truth is that the bill allows filling and/or destroying lakebeds and even specifies mitigation measures that may be required including "providing public access to, restoring, or enlarging up to 1.5 acres for each acre that is significantly impacted." See Memo at pp 27-8. While amendments have imposed limitations on filling more than two acres of any single lake, or filling individual segments of streams that drain more than two square miles, those activities would by definition be included within the "mining site", and exemptions from these limits must be allowed if those impacts are "mitigated" somewhere else. **As a result, there are no actual limits to the amount of lakebed acreage or streambed areas that can be destroyed this way in the bill.**

Current law for impacts to navigable waters is very restrictive in recognition that public rights under the Public Trust Doctrine in the Wisconsin Constitution must be protected. Each of the following impacts is regulated as a separate activity: placing structures and deposits in navigable waters, constructing bridges and culverts, enlarging and protecting waterways, changing stream courses, and removing material from the beds of navigable waters. These activities generally cannot cause environmental pollution, cannot cause detriments to the public's interests in them, and/or cannot cause material injury to other riparian owners.

The bill combines all of these activities into a single permit and changes the standard to "will not *significantly* …." harm, impair or degrade public rights or the rights of riparian owners. See Memo at pp. 27-8. The bill reduces the standard from prohibiting these activities (unless a showing of no harm can be made)to allowing the activities to cause harm as long as it's not "significant," a subjective term without definition. In addition, the bill requires the DNR to approve damages to navigable waters as long as certain mitigation measures are required. In essence, as long as a mining company is willing to do some environmentally beneficial work on a navigable water somewhere else (even simply improving public access to another waterbody), any damage that it wants to cause to any particular navigable water must be approved. There is no similar language in current law requiring the DNR to approve damage to navigable waters. See Memo at p. 28.

3. ***"Does the bill conform to Public Trust Doctrine requirements?"***

All impacts to navigable waters are subject to the Public Trust Doctrine. The bill appears to violate the Doctrine in multiple places by either destroying public resources or severely limiting public benefits and rights to these resources. Whether the bill is constitutional or not is a legal question that is clearly in dispute. We believe the Legislature's requirement that the DNR approve the destruction of navigable waters for any and all iron mining facilities and activities is a clear violation of the Doctrine.

4. ***"Would the bill allow an applicant to fill in a trout stream?"***

Statements by WMC on what a mining company may propose, including whether streams will be filled or not, are interesting but unreliable. Response #2 above demonstrates that fill in a navigable water is allowed. Amendments to the bill prohibit filling of trout streams. However, as noted in answer to question #2 above, those prohibitions are meaningless, because DNR must allow an exemption if a mining company promises to engage in mitigation somewhere. The bill also reduces standards for placing wastes in floodplains and shorelands and for water withdrawals from groundwater pumping, all of which can have detrimental secondary affects on streams. Moreover, the bill lifts the prohibition on putting mining wastes where there is a reasonable probability that the waste will result in a violation of surface water or groundwater quality standards. See Memo at pp 34-5 and answers to question #5 below.

5. ***"How does the bill protect water quality from mining waste?"***

The truth is that the requirement that mine wastes cannot be placed within 1000 feet of a lake or 300 feet of a stream is rendered useless under the bill. The bill states that these siting restrictions do not apply if the activities are permitted under the gutted portions of a wetlands certification, navigable water permit or water withdrawal permit in the bill. See Memo at pp 34-5.

6. ***"What does the bill do to ensure groundwater/drinking water is protected?"***

The bill doesn't change numerical groundwater standards but as noted in answer to question #1 above, it creates additional areas in which the standards and protections simply do not apply, allowing potentially large volumes of water to be contaminated without any limits. This puts groundwater and surface water supplies at risk.

7. ***"What happens if there are sulfides present at the mining site?"***

There are two issues with WMC's response to this question. First, multiple scientific sources including the U.S. and Wisconsin Geological Surveys and a new independent report from Lawrence University document potentially significant amounts of pyrite, a sulfide mineral, present in the deposit and overlying waste rock. Despite this evidence, the bill would change the definition of a sulfide ore body in current law to bar application of the "prove it first" Mining Moratorium law to this iron mining proposal.

Second, the required time frame used for predictive modeling of waste characterization is arbitrarily limited in the amended bill at 250 years. Sulfides in waste rock and tailings do not magically halt acid production at 250 years, and current modeling practices treat sulfides in mining wastes similarly to nuclear wastes with half-lives measured in thousands of years. An arbitrary time limit placed on modeling may ensure impoundments for wastes containing sulfides are inadequately designed for a useful protective lifetime beyond 250 years. See Memo at p 34.

8. ***Would the bill allow an applicant to pump groundwater that would drain lakes or rivers?***

While the bill contains language that seems to be protective of lakes and rivers, those protections are then withdrawn by very specific language (see bill at page 160, lines 8-12 and 163, lines 17 and following) that require DNR to allow "any high capacity well" that is needed to serve the mining facilities contiguous to the mineral deposit and that prohibit DNR from imposing conditions on the location or volume of water withdrawals that "interfere with the mining operation or bulk sampling or limit the amount of water needed for the mining operation or bulk sampling" (except to prevent impairment of a privately owned high-capacity well). **While a mining company may be required to take steps to provide replacement water if a residential or municipal water supply well is impacted, DNR is stripped of any power to directly prevent the mining company from impacting them or rendering them unusable in the first place.** See Memo at pp. 28-30.

9. ***"Does the bill exempt iron mining from the Great Lakes Compact regulations?"***

WMC gets this one correct. The legislature can't unilaterally revise the Compact – an agreement between multiple states and authorized by Congress.

10. "***How does the bill protect water quality for wetlands?"***

The bill includes a "legislative finding" that since wetlands can't be moved out of the way, it is probable that mining activities will have significant adverse impacts on wetlands, including waste siting, bulk sampling and mining itself. The DNR is required to rule that the discharge of materials into wetlands is in compliance with all applicable water quality standards and is required to issue a general permit authorizing wetlands destruction if mitigation takes place, which could be nearby, in another watershed, or anywhere in the Ceded Territory of Wisconsin. The bill makes it virtually impossible for the State to deny wetlands destruction for mining. See Memo at pp. 20-25.

11. "***Does the bill allow DNR the option of granting exemptions from certain requirements?"***

See discussion of exemptions in the introduction, the answers to questions #2 and #4, and the Memo at pp 15-16 and p. 38.

12. ***"What does the bill require for reclamation of the mining site?"***

The bill eliminates the comprehensive, long-term plan for reclamation contained in current law. (Memo at, pp. 12-13); It reduces waste site operators' inspection duties, eliminates numerous reporting requirements, and requires submission to DNR of only summary annual reports, containing statistical summaries of annual and cumulative project data, rather than timely reporting of actual data (p. 36). It replaces the current law's requirement that a mining waste facility owner provide proof of financial responsibility for the long-term care of the site, for at least 40 years, and indefinitely thereafter unless DNR determines that proof of further financial responsibility is no longer needed.

Instead, a mine operator's obligation to provide proof of financial responsibility for long-term care of a mining waste site ends automatically after 40 years, and the operator may apply to terminate that obligation after 20 years. (Memo at pp. 36-37) With respect to reclamation needs or damages resulting from problems during a mine's operation, the bill places a $1 million cap on the insurance coverage which DNR can require a mining company to provide (p. 18). The irrevocable trust that provides financial assurance under current law that a mining site will be reclaimed and any damage remediated is eliminated. Since there are hundreds of abandoned mining sites that are Superfund sites with taxpayers left holding the bag for cleanup costs, the reduction and elimination of financial securities places taxpayers at risk.

13. ***"What does the bill do to address long-term environmental protection at a mining site?***

The bill eliminates DNR's power under current law to require a mining permit applicant to furnish "other pertinent information" beyond the specific topics listed in the bill. This may lead to the DNR not having information needed to identify and protect against environmental impacts. (Memo at p. 11) It also eliminates the prohibition in current law on locating a waste site where DNR determines that there is a reasonable probability that the waste will result in a violation of surface water or groundwater quality standards. (p. 35). See also the answer to question #12, above.

14. ***"Does the bill require applicants to work closely with regulators before submitting a permit?"***

The bill requires consultation before submitting a permit, but as noted above, restricts in a number of ways the information that DNR is allowed to request of an applicant, and dramatically reduces the ability of the DNR to require information to be supplied by an applicant. It also eliminates the best opportunity under current law for the DNR to be able to evaluate and test the completeness, quality and sufficiency of the information submitted by an applicant before deciding whether and under what conditions, a mine should be permitted. That is the contested case type master hearing, in which DNR and the public have an opportunity to cross examine the mining company's experts under oath regarding their data, their reasoning, and their conclusions.

15. ***"Is the timeline in the bill sufficient to allow the Environmental Impact Statement to be done?"***

No. The United States Army Corps of Engineers previously informed Wisconsin Legislators and officials that preparing an Environmental Impact Statement for a complex mining project "generally takes from two to four years, or more, to complete." (ACOE Letter, August 1, 2011, page 10 of 11) The proposed Penokee Hills iron mine would be the largest taconite mine in the country, and is located at the headwaters of the state's most pristine watershed, and the largest and most complex wetland complex in the Lake Superior basin. The bill's schedule of a one-year application preparation period and a 420 to 480 day review period, would conflict with the timetable for federal environmental reviews, and would lead to delays, duplication of efforts, added expense, and the potential for conflicting decisions and conditions.

16. ***"Does the bill allow the DNR to grant a mining permit that would harm public health?"***

While the bill includes language that seems to prevent granting a mining permit that would harm public health, those conditions are eliminated by the various exemptions, discussed above, that allow and even require DNR to permit environmentally damaging, and dangerous activities, if the mining company agrees to "mitigate" the damage by doing beneficial work or activities elsewhere.

CONCLUSION

Review of the language in AB1/SB1 and the Wisconsin Legislative Council's official summary of the bill confirm that its passage would drastically and dramatically weaken legal protections for Wisconsin's water resources. In overwhelming numbers, citizens from every corner of the state have stated their opposition to weakening those protections. So have local elected officials and Native American tribes from the areas of northern Wisconsin that would be most immediately affected by the proposed changes in our laws. Their concerns are real, and they are well-founded.

It is Wisconsin Manufacturers and Commerce and Gogebic Taconite, the drafter of the bill and its intended beneficiary, which have been spreading misconceptions. Wisconsin citizens need to demand that the legislators who have been elected to represent them in the Wisconsin Senate and Wisconsin Assembly actually read the bill -- and determine for themselves before they vote on it -- whether it maintains Wisconsin's current environmental protections, or whether it is an unprecedented and scandalous giveaway of our state's most precious treasure, our clean and irreplaceable water.