SELECT LOCAL GOVERNMENT TOPICS UPDATE FOR CITIZENS & LOCAL OFFICIALS IN SAND MINING COMMUNITIES

Citizen Update – July 14, 2016

The rapid expansion of the frac sand industry has been accompanied by new and intensified social, environmental and public health impacts, all of which have significantly outpaced any policies and regulations intended to address such impacts. Wisconsin does have an existing regulatory framework for frac sand mining, however, the laws and regulations have not been updated to address the negative externalities stemming from the dramatic increase in the number and the size of new industrial sand mining operations. Although many of the potential environmental impacts are regulated at the state level, local government units at the town and county level still hold a significant amount of authority related to when, where, and how frac sand operations can take place within their jurisdiction. Consequently, this industry is putting tremendous pressure on the resources and capabilities of local governments, many of which [by no fault of their own] do not have the necessary resources or information to properly assess and regulate such a complex and powerful industry.

A glaring lack of Wisconsin-specific data concerning the environmental and public health impacts of the frac sand mining industry, combined with an influx of inaccurate, incomplete and one-side information being provided by industry actors has inevitably created an environment ripe for manipulation and exploitation by the powerful and wealthy interests fueling the frac sand industry. This is only exacerbated by a substantial lack of minimum operational standards within town/county ordinances that are necessary to protect human and environmental health, and the pervasive practice of targeting un-zoned townships with few, if any, regulatory hurdles. Moreover, these tactics have been supplemented with attempts by mining companies and their teams of lawyers to strong-arm and intimidate local officials by providing false information or threatening legal action in order to prevent local officials from attempting to better regulate this industry. Thus, the purpose of this update is to remind citizens and local officials of the information and resources available to them to ensure they are able to make proactive and informed decisions about how to best handle the frac sand mining industry in their community.

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Explanation of Relevant Legal Terms

1. **Acquiring Authority** – A public or quasi-public entity vested with the constitutional or statutory power to acquire private property for a public use.
2. **Appraisal** – A written report, by a professional and disinterested person skilled in valuation, describing the property that is to be acquired and reaching a documented conclusion as to the fair market value of such property.
3. **Conditional use** – A special activity, operation or improvement that is conducted within a building or on a site, which is allowed by the regulations of the zoning district in which it is located, subject to obtaining a Conditional Use Permit that places certain conditions on the use of land.
4. **Constitutional mandate** – A constitutional mandate is authority given to citizens or governmental units by express language in the Wisconsin Constitution, which allows citizens or governmental units to do certain things or take certain courses of action. A constitutional mandate can only be restricted by other language in the constitution or an amendment to the constitution that revokes the mandate.
5. **Controlling authority** – The controlling authority is the source of law that will be relied upon in interpreting or judging disputes of law.
6. **Declaratory judgement action** – A declaratory judgment is a type of preventive justice, which informs parties of their rights in order to help them avoid violating a specific law. Declaratory judgment actions are unique in the fact that they may be sought after a legal controversy has arisen but before any harm has been done or any laws have been violated. Thus, declaratory judgments allow courts at an early stages of a controversy to resolve any uncertainty as to the legal obligations or rights associated with a potential future course of action.
7. **Determination of Necessity** – A finding, made by the acquiring authority or the court, that the authority has the right to acquire private land for a specific public use.
8. **Eminent Domain** – The power of the state to acquire private property for a public use.
9. **Home Rule Doctrine** – A stated principle of government policy, which is expressed at the state level as a constitutional or statutory grant and provides municipalities the ability to pass laws and govern themselves as they see fit so long as the actions of the municipality do not conflict with state or federal law.
10. **Jurisdictional Offer** – A written notice given by the acquiring authority to the owner of property and any mortgagee of record which informs the recipients of the proposed public use, what property is being acquired and the amount of compensation to be paid.
12. **Municipal Ordinance** – A regulatory tool enacted into law by local government units, which expresses the rules, regulations, or codes that control the actions of the citizens of a municipality.
13. **Police Power** – The power of a governmental body to impose laws and regulations which are reasonably related to the protection or promotion of a public good such as health, safety, or welfare.
14. **Preempt** – When a superior unit of government takes action to prevent an inferior unit of government from taking a specific course of action.
15. **Powers expressly granted** – Those powers that are explicitly and expressly included in the language of the constitution or a statute.
16. **Powers impliedly granted** – Those powers which can reasonably be assumed to flow from any expressly granted powers. Implied powers are generally include any powers that are indispensable to the object and purpose of the express grant of power from which the implied powers arise.

17. **Severability** – Severability provisions in statutes or ordinances make it so that if certain parts of the statute or ordinance are found to be illegal or otherwise unenforceable, the remainder of the statute or ordinance will still be enforceable.
Legal Background on the Authority and Process for Developing Nonmetallic Mining Licensing Ordinances at the Town Level

Background

As the “frac sand” industry continues to expand in Western Wisconsin, so does the concern that existing regulations are inadequate to effectively protect public health or the environment from the impacts posed by the frac sand industry. Although certain aspects of frac sand mining such as air quality controls and surface water pollution are regulated at the state level, regulations that dictate how and where frac sand mining may take place are carried out at the municipal level, by counties or towns.

The majority of counties, and many towns, in Western Wisconsin have general zoning ordinances in place, which can be applied to frac sand mining. However, due to the often general nature of county/town zoning ordinances, many citizens are left feeling like existing regulations are inadequate to address, or are unresponsive to, the specific wants, needs and concerns of their town or community. Additionally, it is common practice for frac sand mining companies to target towns that have not adopted county zoning, or enacted their own zoning, in an attempt to avoid additional regulations during both permitting and operation. It is critically important to stress the fact that, up to this point, the communities most in harm’s way have been those communities with an aversion to zoning or strict regulation of any kind on what an individual can do with his/her property. These communities are also being strategically targeted for nonmetallic mineral deposit registration, a process that allows property owners to circumvent future land use regulations that may try to restrict the allowance of frac sand mining.

While the desire for control of one’s property is understandable, citizens also need to understand that when dealing with a highly land and resource intensive, boom and bust industry such as frac sand mining, a lack of regulation is a fatal weakness that can permanently threaten the interests of all members of the community. One possible solution, which can be viewed as a compromise between zero regulation and town-wide comprehensive zoning, is the enactment of a nonmetallic mining licensing ordinance, which is a municipal-level regulatory tool that requires mining operators to obtain a license in order to operate a frac sand mine or processing facility and establishes minimum operational standards for all operations that are intended to be protective of public health and the environment. Hence, for those communities against comprehensive land use regulation, the true value of this type of industry-specific, non-zoning, ordinance stems from the factors that distinguish it from traditional zoning.

The primary advantage of a nonmetallic mining licensing ordinance over traditional zoning is that it only applies to the specific activity of nonmetallic mining. Therefore, such an ordinance is much less invasive than town-wide comprehensive zoning because it does not create districts in which designated land uses are permitted or prohibited, and does not directly control the location of any specific land use activity. In other words, adoption of a nonmetallic mining licensing ordinance allows towns to protect certain interests of their citizens, such as the aesthetic qualities and rural character of a town, without
imposing comprehensive land use regulations on the citizens of the town. A nonmetallic mining ordinance does not tell anyone what they can or cannot use their land for, but rather operates on a case-by-case basis to regulate how the frac sand mining industry must operate if the town decides that it wants to allow the activity within its borders. This establishes a regulatory environment in which (1) a town need not proclaim outright opposition to the industry, (2) frac sand mining is allowable under circumstances that are respectful of all members of a community, and (3) local government units remain accountable to citizens and uphold their responsibility to protect public health, safety and welfare.

The other major advantage of a nonmetallic mining licensing ordinance is the fact that it can be adopted as a simple ordinance by a majority vote of a town board and does not require approval from a county board, unlike a zoning ordinance. This is particularly relevant to scenarios in which citizens feel like county-level decision makers have been unresponsive to the concerns of their specific community and have chosen not to adopt stricter regulations for the frac sand mining industry. For these reasons, and numerous others, any town that wants to take action to better regulate frac sand mining should consider adopting a nonmetallic mining licensing ordinance. In order to address any confusion or concern about the ability of your town to adopt a nonmetallic mining licensing ordinance, the following sections provide a brief explanation of the legal authority, which provides towns the ability to develop, adopt, and enforce a nonmetallic mining licensing ordinance.

**Municipal Home Rule**

The prevailing contemporary understanding of the degree of local autonomy possessed by municipalities in the majority of states, including Wisconsin, is based on the premise that local government power is derived from the states, and not from some basic right or inherent power possessed by municipalities. In other words, municipalities are only able to exercise the powers expressly or impliedly granted to them by state law, including those powers incident to powers expressly granted and those powers indispensable to the object and purpose of local government.

Despite these general constraints on local autonomy, there has always existed a desire for recognition of local autonomy over matters that are primarily of municipal concern or are local in nature, and this led the majority of states, including Wisconsin, to develop and adopt some form of the “home rule doctrine”. The home rule doctrine is implemented through state constitutional mandate or statute, and gives local governments some form of “permanent” authority to act on matters of local concern without express authorization from state governments.

In Wisconsin local autonomy over matters of municipal concern was established in 1924 through ratification of the “home rule amendment” to the Wisconsin Constitution. Wisconsin’s home rule amendment provides that “cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village.” While this means that generally any exercise of municipal authority concerning a subject matter that is exclusively of local concern is immune from challenge by the state, if an exercise of municipal power conflicts with an exercise of state power, then there is the possibility that said municipal action may be preempted by state law. Thus, in Wisconsin, a local ordinance may be preempted by a state law if the court finds that: (1) the legislature has expressly withdrawn the power of municipalities to act upon the subject matter; (2) the ordinance logically conflicts with the state legislation; (3) the ordinance defeats the purpose of the state legislation; or (4) the ordinance goes against the spirit of the state legislation. This is important information to keep in mind, however, at this point in time, use of municipal ordinances for
the general regulation of frac sand mining is permitted in all cases due to the fact that there is no state level regulation in place to preempt local ordinances.

**Police Power**

The basic right of governments to make laws and regulations for the benefit of their communities is called the police power. The police power is generally defined as the power of a governmental body to impose laws and regulations which are reasonably related to the protection or promotion of a public good such as health, safety, or welfare. In addition to powers granted by the home rule amendment, Wisconsin grants villages, and thus towns that have adopted village powers, a broad range of authority under the police power to regulate local activities using municipal ordinances, such as licensing ordinances. The police power of a village board is governed by Wis. Stat. § 61.34 (1):

> Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable waters, and the public services, and shall have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.

All non-zoning municipal ordinances adopted at the village/town level are enacted under this explicit declaration of the police power.

**Authority of Town Boards**

In Wisconsin, unlike villages, towns are not given the general home rule grant of power or police power, which provide villages with the authority to enact municipal ordinances, such as nonmetallic mining licensing ordinances. Instead, towns can only exercise the limited powers expressly granted to towns under Wis. Stat. § 60.01(2). However, by passing a resolution at a formal town meeting, any town may grant its town board the authority to exercise “village powers”. Once a town’s electors have granted the town board village powers, then the town board may exercise the same powers as village boards, which includes the ability to enact municipal ordinances, such as nonmetallic mining licensing ordinances. The ability of towns that have adopted village powers to exercise the police power of village boards was recently reaffirmed by the Wisconsin Supreme Court:

> The Town of Cooks Valley adopted village powers in 2001, pursuant to Wis. Stat. § 60.10(2)(c). Thus, by virtue of the statutes and the Wisconsin Constitution, the Town possesses the full panoply of powers enjoyed by villages, including police power and the more specific zoning power.\(^{vi}\)

A number of towns have acted under their police power to enact nonmetallic mining licensing ordinances in order to regulate frac sand mining. In 2012, one such nonmetallic mining licensing ordinance was the subject of a legal action, which challenged the validity of the ordinance as a non-zoning ordinance. In *Zwiefelhofer v. Town of Cooks Valley*, the Supreme Court of Wisconsin not only
upheld the ordinance but it also reemphasized the validity of local autonomy under Wisconsin’s home rule amendment and the statutorily-defined police power:

*Chapter 61 grants a broad range of powers to villages. Its underpinning is the ‘home rule amendment,’ Wis. Const. Art. XI, § 3, adopted in 1924 to allow cities and villages greater control over their local affairs. Wisconsin Stat. § 61.34 lists the powers of the village board, and Wis. Stat. § 61.34 (5) states that ‘for the purpose of giving to villages the largest measure of self-government in accordance with the spirit of the home rule amendment it is hereby declared that this chapter shall be liberally construed in favor of the rights, powers and privileges of villages to promote the general welfare, peace, good order and prosperity of such villages and the inhabitants thereof.’*

The Supreme Court’s decision in the *Zwiefelhofer* case is the controlling legal authority on the question of whether or not towns can enact nonmetallic mining licensing ordinances to regulate frac sand mining and it will remain so until the court makes a contradictory ruling or the state legislature takes action on the matter.

**Overview of the Supreme Court’s Decision in Zwiefelhofer v. Town of Cooks Valley:**

To date, the primary legal authority on the use of nonmetallic mining licensing ordinances to regulate frac sand mining at the town level is the 2012 Wisconsin Supreme Court decision in the *Zwiefelhofer* case. Thus, the *Zwiefelhofer* decision is a good example of the type of legal analysis that one can expect a court to carry out when a nonmetallic mining licensing ordinance is challenged in court. The following is a brief summary of the analysis and decision.

In 2012, a declaratory judgment action was brought against the Town of Cooks Valley’s nonmetallic mining ordinance. The plaintiffs claimed that the Town’s ordinance was an invalid zoning ordinance because it did not have county board approval. Thus, the primary issue in the case was whether the Town of Cooks Valley’s ordinance should be considered a zoning ordinance, which requires county board approval, or a non-zoning ordinance.

In its determination of whether Cooks Valley’s ordinance is a zoning ordinance, the Court applied a functional approach that involved a fact-specific analysis and compared the traditional characteristics and purposes of zoning ordinances to the characteristics and purposes of Cooks Valley’s ordinance. This approach did not provide a bright-line rule or an all-encompassing definition of a zoning ordinance, but it did provide the basis for sort of analysis that should occur when making such a determination. Also, it is important to note that the Court emphasized the fact that Cooks Valley could have accomplished the goals of the ordinance by adopting a zoning ordinance, however, “simply because an ordinance could qualify as a zoning ordinance does not mean it must be adopted as a zoning ordinance.”

The Court went on to identify six separate characteristics of a traditional zoning ordinance, emphasizing the tendency of zoning ordinances to create districts within a town that maintain certain uses that are allowed as a right and others that are prohibited, and also to control where a use takes place, as opposed to how it takes place. Thus, the central purpose of zoning, according to the Court, is “the separation of incompatible land uses.”
After discussing the traditional characteristics of zoning, the Court distinguished the Cooks Valley ordinance in several ways. First, the court emphasized the fact that the Cooks Valley ordinance does not create any districts or designate any uses as permitted or restricted, but rather, applies universally to all the land in the town and does not permit anything as of right, nor prohibit anything outright. The other major distinguishing factor identified by the Court is the fact that the Cooks Valley ordinance does not directly control the location of any activity, but rather regulates the type of activity conducted wherever it is located within the town. Further stating,

*It may be that there are certain locations in the Town where a nonmetallic mine would not be allowed, even with conditions attached, but the Ordinance’s impact on the location of nonmetallic mines is an incidental consequence of the Ordinance’s general goal of ensuring that nonmetallic mines are in the best interests of the citizens of the Town, and will be consistent with the protection of public health, safety and the general welfare, no matter where they are located.*

After comparing the traditional characteristics and purposes of zoning to the characteristics and purpose of the Cooks Valley ordinance, the Court ruled that “Despite having some similarities to traditional zoning ordinances, the Ordinance is not to be classified as a zoning ordinance. The Ordinance is a non-zoning ordinance adopted under the Town’s police power. Accordingly, the ordinance did not need county board approval...”

**Enacting a Nonmetallic Mining Licensing Ordinance**

Under the village police power, a town board can adopt a nonmetallic mining licensing ordinance at any town board meeting in the same manner as any other official action that requires a simple majority vote to pass. Due to the fact that licensing ordinances are not zoning ordinances, they do not need to comply with the notice and hearing provisions applicable to zoning and do not need approval from the county.

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1. Clinton v Cedar Rapids and the Missouri River Railroad, 24 Iowa 455 (1868): “Dillon’s Rule” - "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control"; Ricketson v. Milwaukee, 105 Wis. 591, 81 N.W. 864 (1900): “…all the powers of the corporation are derived from the law and its charter”; Van Gilder v. Madison, 222 Wis. 58, 267 N.W. 25, 30 (1936): “In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit.”

2. State v. Kelly, 154 Wis. 482, 143 N.W. 153 (1913); City of Milwaukee v. Rauf, 164 Wis. 172, 159 N.W. 819 (1916).


5. Wis. Stat. § 60.10(2)(c).


7. Id. at ¶ 24.

8. See Halverson, 38 Wis. 2d at 9.
ix Id. at ¶ 38.
x Id. at ¶ 48.
xi Id. at ¶ 51.
xii Id. at ¶ 55.
xiii Id. at ¶ 10.
Citizen Petitions to Force Town Officials to Act

Background

The influx of frac sand mining and processing operations during the recent frac sand boom has put tremendous pressure on local government units, which are often responsible for making decisions on how and where frac sand mining may take place. Despite the continuous calls from communities for better regulation of the frac sand industry, many town boards have been unresponsive to citizen concerns and have refused to take any action that would impose stricter regulations on frac sand operations. Fortunately, under Wisconsin law, there is a potential avenue of relief for citizens dealing with unresponsive town officials and that is the use of “direct legislation” (or a citizen petition). Wis. Stat. § 9.20 allows citizens to petition local government or its officials to take action. The statute gives citizens a direct voice in local matters and provides a procedure by which voters may compel local government to pass or put before the public for a popular vote a proposed ordinance or resolution. Generally, citizens utilize this power when the electorate believes that their elected representatives are not acting in response to the public’s will. For communities in which the majority of citizens are in favor of imposing regulations on frac sand operations that will protect public health, safety and welfare, this tool can be used to bring about the adoption of a nonmetallic mining licensing ordinance.

Legal Basis

Wis. Stat.§ 9.20 governs citizen petitions for direct legislation. 9.20(1) states that a number of electors equal to at least 15% of the votes cast for governor at the last general election in their city or village may sign and file a petition with the city or village clerk requesting that an attached proposed ordinance or resolution be adopted by the council or village board or be referred to a vote of the electors. Under Wis. Stat. 9.20(4), the common council or village board shall, without alteration, pass the ordinance within 30 days or submit it to the electors at the next spring or general election. Due to the fact that a citizen petition must be directed at a common council or village board, this process is only available to towns that have adopted village powers.

Case Law

In Mount Horeb Community Alert v. Village Bd. of Mt. Horeb, 665 N.W.2d 229 (Wis. 2003), village residents sought a writ of mandamus to compel the village board to take action on their petition for direct legislation, which would have required the board to submit construction projects costing at least $1M to electors before beginning the project. The court established four limitations on a petition for direct legislation’s validity:

- 1) Petition must be legislative in nature rather than administrative or executive.
- 2) Petition cannot repeal an existing ordinance.

1 Donald Leo Bach, Vox Populi: Wisconsin’s Direct Legislation Statute, WISCONSIN LAWYER (May 2008).
• 3) Petition may not exceed the legislative powers conferred upon the governing body.
• 4) Petition may not modify statutorily prescribed procedures or standards.

The court granted the writ to force the board to take action on the petition because the petition satisfied the four limitations.
Nonmetallic Mineral Deposit Registration

Background

For municipalities concerned about maintaining local control of land use decisions and maintaining the ability to regulate frac sand mining operations in a manner protective of public safety, health and welfare, it is important to be aware of mechanisms under state law that can undermine or avoid local controls. One common method of avoiding the inconvenience of newly developed, restrictive local regulations, for instance, is for a property owner to pursue nonmetallic mineral deposit registration.

Wisconsin’s nonmetallic mineral deposit registration is a voluntary program, which allows any landowner with marketable nonmetallic mineral deposits on their property to register those deposits if local zoning rules allow nonmetallic mining as either a principal or conditional use in that district. A marketable nonmetallic mineral deposit is one which can be or is reasonably anticipated to be commercially feasible to mine and has significant economic or strategic value. The mining industry, as well as individual actors, have the incentive to pursue such registration because once registered a nonmetallic mineral deposit can be mined under the zoning permissions that existed at the time the deposit was registered, regardless of what regulations are actually in place at the time mining is initiated. In other words, registration prevents any future land use like the erection of permanent structures that would interfere with future mining of the deposit and makes the original right to mine the mineral deposit immune to the application of any zoning changes that would prohibit mining on the property.

Deposit registration is a relatively complicated and expensive process, requiring a property owner to provide a thorough evaluation of the property in question and the economic recoverability of the nonmetallic mineral deposit. The complexity and costs of this process inevitably provide an advantage to large mining companies, which have the necessary wealth and resources to undertake the necessary evaluations. In addition to on-going mineral deposit exploration by mining companies, the most recent State budget included an allocation of fifty thousand dollars to be used to map sand deposits with drones and it is likely that this will only assist the frac sand industry’s ability to identify marketable deposits. This should provide even more incentive for un-zoned towns to either adopt zoning or a nonmetallic mining licensing ordinance to ensure such regulations will apply to future frac sand mining operations.

Though the administrative code does not clearly provide opportunities for the general public to provide comment on a registration request, a county or municipal zoning authority may object to a request. Before recording a deed notice in the county’s registrar of deeds office—a required step in the process of nonmetallic mining deposit registration—the landowner must send notice and supporting documentation for the registration request to all affected zoning authorities. If the zoning authorities object to the registration, they must show within sixty (60) days of receiving the notice of registration
that: the deposit is not marketable or mining is disallowed on the parcel through a zoning ordinance.\(^1\)

However, as previously mentioned, the determination of whether a deposit is marketable can be a complex and expensive process and could place a considerable burden on a municipality, and many towns that overlay targeted sand deposits are currently un-zoned so it is possible that there are currently no restrictions on mining.

**Legal Basis**

NR sections 135.53 – 135.64 govern the nonmetallic mineral deposit registration program. NR 135.56 specifies a number of requirements that must be met to register a deposit. They are:

- Legal description delineating the land and a certification and delineation by a licensed professional geologist or a registered professional engineer that the land has a marketable nonmetallic mineral deposit.
- Certification must include geologist or engineer’s seal affixed to a certification statement.
- Person wishing to register land must provide evidence that nonmetallic mining is a permitted or conditional use for the land under zoning in effect.
- Certification by landowner that he/she will not undertake any action that would permanently interfere with present or future extraction of the nonmetallic mineral deposit for the duration of the registration.

Registration lasts for a period of 10 years and landowners can renew their registrations without a new determination of marketability by notifying the zoning authority and recording a deed notice renewing registration with the county registrar of deeds\(^2\).

**Case Law**

Relevant case law on nonmetallic mineral registration is fairly limited. *Town of Cedarburg v. Dawson*, 687 N.W.2d 841 (Wis. Ct. App. 2004) established that a parcel in one county is not capable of being registered as a marketable nonmetallic mineral deposit merely because it is contiguous to an existing quarry site in a different county. The court held that mining must be a permitted or conditional use for all registered parcels up for registration, contiguous or not.

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\(^1\) NR 135.58  
\(^2\) NR 135.59
Eminent Domain

Background

Eminent domain laws allow state or federal government authorities to acquire (or condemn) private property, with just compensation, for projects that benefit the public good. Eminent domain power was originally articulated in the 5th Amendment of the United States Constitution, which provides for takings of land only with just compensation, but States have enacted their own eminent domain laws to regulate the taking of land by State authorities for the public good.

In Wisconsin, the Legislature has delegated eminent domain power to numerous authorities including, but not limited to, any county, town, village, city, school district, or department of health services.¹ Common purposes of eminent domain in Wisconsin include acquiring land for highway projects, utility projects, schools, airports, government buildings, public parks and the redevelopment of blighted areas. Eminent domain has been a recurring theme in discussions about the frac sand mining industry, due to concerns about citizens losing their property to mining companies and questions about the ability of local government units to use eminent domain as a tool to prevent frac sand mining in certain areas.

Under Wisconsin law, certain Wisconsin corporations that are in the business of providing public services to Wisconsin citizens, such as railroad corporations and telecommunication corporations, do have the authority to exercise eminent domain²; however, frac sand mining companies do not have eminent domain power and thus may not obtain the property of private citizens without their consent.

The question about the ability of local government units to use eminent domain to prevent frac sand operations is a bit more complicated. Generally, municipalities maintain the right to acquire any parcel of private land for public use without the consent of private owners simply by following established condemnation procedures and by providing just compensation. This would include land intended to be mined for frac sand, and could be for any lawful purpose such as community growth or redevelopment. However, there are a few important things to remember. First, although municipalities have been granted the authority to make their own determination of necessity for any proposed taking of property³, it is likely that such a determination will need to stand up to a legal challenge in court, and thus, should be firmly grounded in a legitimate public interest. Second, as a part of the just compensation negotiations a property owner has the right to have their own certified appraisal considered during negotiations, which will likely determine the value of the land based on its highest and best use. This means even if no frac sand mining has occurred on the property, the appraiser could consider frac sand mining as the highest and best use and due to the lucrative nature of the frac sand

¹ Wis. Stat. § 32.02(1).
² Wis. Stat. § 32.02(3) & (4).
³ Wis. Stat. § 32.07(2).
mining industry this could significantly drive up the land value, and thus, significantly drive up the corresponding compensation to be paid by the municipality attempting to acquire the property.

Different standards do apply, however, when the property a municipality intends to use eminent domain to condemn contains a railway crossing or railway spur. This is due to the fact that the Interstate Commerce Commission Termination Act (ICCTA) gives the Surface Transportation Board (STB), a federal body, exclusive jurisdiction over railroad transportation. Therefore, the ICCTA preempts any state or local eminent domain proceedings if condemnation of railway property would prevent or unreasonably interfere with railroad operations. In other words, as long as the railroad meets the definition of a rail carrier (provides common carrier railroad transportation for compensation) and the eminent domain proceeding would interfere with operations, the proceeding will be preempted by ICCTA.

**Legal Basis**

In Wisconsin the eminent domain power is derived from Article IX, section 3 of the Wisconsin Constitution, and Wis. Stat. Chapter 32 establishes Wisconsin’s eminent domain laws. State authorities eligible to acquire and condemn private properties (listed in the statute) must conduct at least one appraisal of the property and must provide the owner with a full narrative of the appraisal when extending a jurisdictional offer. A jurisdictional offer on the property is made by the acquiring authority if negotiations with the landowner for a suitable price fail and it should include a statement of the nature of the project and the amount of compensation offered. If a landowner is unhappy with the authority’s decision to condemn his/her property or with the amount of compensation in the jurisdictional offer, the landowner can file an action in circuit court under Wis. Stat. § 32.06(5) or Wis. Stat. § 32.06(10), respectively. Finally, if acquisition of only a part of a property would leave its owner with an uneconomic remnant (property remaining is of such size, shape, or condition as to be of little value or of substantially impaired economic viability), the condemnor must offer to acquire the remnant concurrently.

**Case Law**

The majority of eminent domain case law in Wisconsin concerns unhappy landowners contesting the condemnation of their property or the amount of compensation offered, and results of these actions largely depend on case-specific conditions. *TFJ Nominee Trust v. State Dept. of Transp.*, 629 N.W.2d 57 (Wis. Ct. App. 2001) is relevant and helpful, though. In that case, the court held that determination of necessity of condemnation by the legislature or by its delegate is not completely immune from judicial review. The court went on to say that the role of courts in review is not to weigh evidence and decide if condemnation is necessary, but to decide if the condemning authority’s conclusion was based on reasonable grounds and not the result of fraud, bad faith, or a gross abuse of discretion.

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4 Wis. Stat. §§ 32.05(2) and 32.06(2).
There is existing case law that specifically involves eminent domain proceedings that would condemn property containing a railway crossing or spur. Each of the relevant cases resulted in preemption of the eminent domain proceedings by ICCTA.\(^5\)

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Select Frac Sand Mining Resources & Information

General

Wisconsin Towns Association resources regarding the frac sand industry in Wisconsin -- http://wisctowns.com/education/frac-sand

Midwest Environmental Advocates – Mining page -- http://midwestadvocates.org/issues-actions/issues/detail/mining


Big Picture


Open Government and Ethics Law for Local Government Officials


Local Government Regulation


Potential Environmental and Health Impacts


A professor at the University of Wisconsin-Eau Claire has produced a video on the health risks of silica exposure from sand mining:

- Video link: [http://desi.uwec.edu/PIERCECH/](http://desi.uwec.edu/PIERCECH/)
- Text Link: [http://people.uwec.edu/piercech/SilicaVideo1.doc](http://people.uwec.edu/piercech/SilicaVideo1.doc)

**Frac Sand Resources Provides by the Minnesota Environmental Quality Board**

**Examples of Local Government Ordinances, Permits, & Studies on Silica Sand Mining in Minnesota**
[https://www.eqb.state.mn.us/ordinances](https://www.eqb.state.mn.us/ordinances)

**Tools to Assist Local Governments in Planning for and Regulating Silica Sand Projects**
[https://www.eqb.state.mn.us/sites/default/files/documents/Tools%20for%20Local%20Govt%20approved%20March%202019_with_Errata.pdf](https://www.eqb.state.mn.us/sites/default/files/documents/Tools%20for%20Local%20Govt%20approved%20March%202019_with_Errata.pdf)

**Economic Impacts**

**The Economic Benefits and Costs of Industrial-Sand Mining in West Central Wisconsin: Phase One of Study – General Economic & Community Overview** – Thomas Michael Power

**Impacts on Farming**


**Non-metallic Mineral Deposit Registration Information**

The DNR has published a fact sheet on mining deposit registration:

**Photos**

Photos of the size and scale of frac sand mining in Wisconsin, Sam Rubright (Photographer), Ted Auch, PhD, Great Lakes Program Coordinator, The FracTracker Alliance (2013) -- [https://photos.google.com/share/AF1QipPmWAuRacFx1kdDxq7zAVfcel5mpNuh2-J93tv2t35BL7ymC4QLzKrzQNSEnEf0w?key=OEJuVGoUUDWnFaShkWQLF5Wnp3cFBpZjVVRzVn](https://photos.google.com/share/AF1QipPmWAuRacFx1kdDxq7zAVfcel5mpNuh2-J93tv2t35BL7ymC4QLzKrzQNSEnEf0w?key=OEJuVGoUUDWnFaShkWQLF5Wnp3cFBpZjVVRzVn)
If you’re concerned about the impact of industrial sand mining, ask your state legislators to work with the DNR to better regulate the frac sand mining industry. Citizens can also bring these issues directly to the DNR by sending emails and letters or by making phone calls to regional or state offices.

**Ask your state legislators to . . .**

1. **PROTECT LOCAL CONTROL OF FRAC SAND MINING**

Ask: Reject proposals to limit local authority to protect public health and quality of life. Local authority is already limited, and further restrictions interfere with residents’ ability to protect their property rights.

Why? Every community is affected by the frac sand industry in its own unique way because of differences in topography, natural resources, and existing land uses. Citizens and local governments are most familiar with local issues, and the desires of the community. Frac sand mining is inherently a local issue for each town, village, or city and as such should be primarily under the control of local government units. Local authority must be preserved for impacts beyond state regulation such as hours of operation, lighting, noise, trucking routes, preservation of the aesthetic character of rural areas, and the preservation of farmland. There have been several attempts by the Legislature over the last several years to limit local control of the frac sand mining industry, including a proposal (2013 SB 349) to create an absolute preemption of local licensing ordinances for non-metallic mining.

2. **ADEQUATELY FUND THE DNR**

Ask: Authorize funding for additional DNR staff to regulate and permit industrial sand facilities.

Why? The DNR as a whole, and particularly DNR staff that regulate the frac sand mining industry, is understaffed as a result of budget cuts. If this industry is going to continue to expand and remain a key industry in the state, then the DNR needs to have the resources to properly regulate it. The DNR needs funding for frac sand staff equivalent to the estimated 10.2 full time positions per every 54 mining operations that the Legislative Fiscal Bureau called for in 2013.

3. **REVISE THE STATUTES GOVERNING NONMETALLIC MINING RECLAMATION (Wis. Stats. Ch. 295)**

Ask: Amend Chapter 295 to (1) require a cash deposit to cover the full cost of reclamation that can be released conditioned upon compliance with the reclamation plan and rules.

Why? Under NR 135.40(4), the operator of a mine is required to provide financial assurance in the form of a bond or an alternative form such as a cash deposit or letter of credit. A bond is the most common form of financial assurance, but does not provide a “guarantee” because bonds can usually be cancelled with a 90-day notice. The only option to guarantee that a mining company will faithfully perform the reclamation is to require a cash deposit for the full reclamation cost. The Legislature should amend the
“Program Requirements” under Wis. Stat. § 295.12(3)(g) to require the DNR to amend the corresponding “financial assurance” provisions under NR 135.40(4). Wis. Stat. § 295.12(3)(g) should be amended to read as follows: “A requirement for the operator to provide a cash deposit conditioned on the faithful performance of all the requirements of rules promulgated under this section. The rules shall authorize a county, city, village or town to reduce the amount of financial assurance that an operator is required to provide based on nonmetallic mining reclamation that the operator performs while the nonmetallic mine continues to operate.”

4. ADDRESS THE GROWING NUMBER OF INACTIVE MINES

**Ask:** Amend Chapter 295 to clarify the requirements for intermittent mining to ensure adequate enforcement of environmental laws, including reclamation.

**Why?** Under Wisconsin law, intermittent mining is allowed as long as the possibility of intermittent cessation of operations is addressed in an operator’s reclamation permit, no environmental pollution or erosion of sediments is occurring, and financial assurance for reclamation is maintained. However, there aren’t clear rules for intermittent mining, such as what triggers an intermittent mining provision in a reclamation plan and how are such provisions being enforced. Due to the recent downturn in demand for frac sand, there are a number of mining operations that have been inactive for significant amounts of time and during that time citizens have noted that there has been no control of the fugitive dust blowing from sand piles and exposed sand pits at those operations. According to estimates by HIS, a global leader in analytics for industries such as frac sand, there are at least 19 dormant frac sand mines in the state currently.

5. REPEAL ACT 21

**Ask:** Repeal the provision in Act 21 that created Wis. Stat. § 227.10(2m).

**Why?** Act 21 may significantly restrict the DNR’s ability to impose permit conditions that protect the environment. This law created section 227.10(2m), which provides that DNR may only include conditions in permits that are explicitly required or explicitly permitted in statutes or rules. The DNR has interpreted this provision to narrowly restrict its authority to impose permit conditions that are necessary to protect our air and water.