Written testimony of James Parra, Midwest Environmental Advocates
Before the Senate Committee on Sporting Heritage, Mining and Forestry
September 7, 2017

Members of the Committee, thank you for the opportunity to speak to you today. My name is James Parra. I am an attorney at Midwest Environmental Advocates, a nonprofit environmental law center that serves the people and organizations in Wisconsin working for clean air, clean water and clean government.

Midwest Environmental Advocates is opposed to this legislation first and foremost because it would repeal a common sense environmental and public health protection that requires a mining company to actually show, not just say, that sulfide mining can be done safely. This type of protection makes particular sense for an industry like sulfide mining, which "carries with it potential for very serious environmental harm"[1] and an unreliable track record of predicting the likelihood of those harms.

Predictions about the impacts of sulfide mining on the environment and communities are notoriously unreliable. For example, a 2006 study examining "the reliability of pre-mining water quality predictions…in the United States" found that a majority of the mines studied caused pollution in surface and ground waters despite regulators often predicting that the potential for pollution was low. Perhaps most disturbingly, **90% of the mines for which regulators had predicted a low potential for acid mine drainage did in fact develop acid mine drainage**.[2] The "prove-it-first" law reduces some of the uncertainty around predicting the impacts of sulfide and provides assurances to the public that their health and environment can be protected.

Beyond just the repeal of the "prove-it-first" law, Midwest Environmental Advocates opposes SB 395 because it violates the State's responsibilities under the Public Trust Doctrine to protect public water resources from over pumping and depletion; exempts parts of the mining process from important environmental protections; and would further shift the burden and expense of protecting public health and the environment to the citizens of Wisconsin, while at the same time limiting the opportunities for public involvement. A summary of several of Midwest Environmental Advocates' concerns related to each of these points is included below:

- **SB 395 removes protections for both public and private water supplies and public rights in the waters of the State.** Under current law, the Wisconsin Department of Natural Resources (DNR) may not issue a groundwater pumping or mine dewatering permit to a mine operator if the pumping would "result in the unreasonable detriment

[1] Wisconsin Department of Natural Resources, "An Overview Of Mining Waste Management Issues in Wisconsin", p. ii (July, 1995)
[2] Kuipers, et al., "Comparison of Predicted and Actual Water Quality at Hardrock Mines", ES-9 (2006) (available at: https://www.earthworksaction.org/files/publications/ComparisonsReportFinal.pdf).

of public or private water supplies or the unreasonable detriment of public rights in the waters of the state." SB 395 would authorize DNR to issue the permit, even if the pumping would deplete water supplies and impact public resources, so long as the mining company provides a "replacement water supply of similar quality."

As far as Midwest Environmental Advocates is aware, this is the first time that the Legislature has considered allowing a Public Trust resource to be harmed under the condition that the harm may be mitigated through artificial supplementation of the water resource. Aside from questions about whether this proposal reflects sound science-based policy, this Committee should give strong consideration to whether such a proposal is consistent with the State's constitutional responsibilities to protect Public Trust resources.

- **SB 395 creates what amounts to a voluntary regulatory scheme for bulk sampling**. The bill requires DNR to adopt "minimum standards" for bulk sampling that "ensure that such activities…will be conducted in a manner consistent with the purposes and intent" the statute. However, there is no way for DNR to ensure that those minimum standards are met. DNR would not have the authority to deny a bulk sampling plan *for any reason* and there is no approval process to determine whether the minimum standards will be met.

  The Wisconsin Legislature enacted a similar bulk sampling regulatory scheme for iron mining in 2013. Gogebic Taconite, LLC was the first mine operator to submit a bulk sampling plan for review under the new law. In response to DNR's request for additional information about the mining company's bulk sampling plans, Gogebic pushed back citing the limited authority that DNR had to oversee bulk sampling and ensure that the environment is protected:

  > "The bulk sampling plan itself is not subject to the Department's approval, nor is there any bulk sampling permit or other approval required. The bulk sampling plan is simply an informational filing by an applicant to enable the Department to specify required permits or approvals…"[3]

  Without the authority to approve or deny bulk sampling plans, or even request more information from entities engaging in bulk sampling, DNR cannot ensure that our public resources are being protected.

- **SB 395 exempts bulk sampling from groundwater quantity and quality requirements.** The bill would eliminate DNR's authority under Wis. Stat. § 293.15(11) to adopt and apply rules establishing groundwater quantity or quality standards for bulk sampling.

[3] Correspondence from Timothy J Meyers, Engineer for Gogebic Taconite, LCC, to Wisconsin Department of Natural Resources, dated Jan, 8 2013 (available at: http://dnr.wi.gov/topic/Mines/documents/gogebic/GTACBulk SamplingResponse20140108.pdf)

DNR's authority to adopt such rules for prospecting and mining remains intact, however SB 395 does not extend that authority to bulk sampling. This means that no groundwater standards would apply to bulk sampling, including the standards in Wis. Admin. Code § NR 140. (NR 140 specifically states that it does not apply to activities regulated under Chapter 293).

- **SB 395 eliminates DNR's authority to issue an order to a bulk sampler requiring compliance with the State's mining laws**. Wis. Stat. §293.15(3) currently authorizes DNR to issue orders directing prospectors and miners to come into compliance with Chapter 293 of the statutes. While SB 395 amends other subsections of § 293.15 to include bulk sampling in the grants of authority to DNR, the bill does not make any changes to subsection (3). Thus, DNR's authority to issue orders would extend only to prospectors and miners, and not to persons conducting bulk sampling.

- **SB 395 eliminates the right to a contested case hearing on any decision related to bulk sampling, including decisions on wastewater, stormwater, and wetland fill permits.** By eliminating the right to a contested case hearing, SB 395 effectively prevents any review, whether administrative or judicial, of some permitting decisions. For example, a contested case hearing pursuant to Wis. Stat.§ 283.63 is the exclusive means of review of DNR's decision to issue a Wisconsin Pollution Discharge Elimination System (WPDES) permit. Eliminating the public's right to seek review of a WPDES permit would put the State's water permitting program in conflict with federal law. And on this point, the Committee should be made aware of the fact that the U.S. EPA is currently investigating claims that DNR does not have adequate authority to implement the WPDES program consistent with federal law, and is specifically looking at whether Wisconsin provides adequate opportunities for review of WPDES permits.

  For other permitting decisions, circuit court review may still be available; however circuit court review is not a new trial, but merely a review of the paper files regarding a permit application decision. The whole point of a contested case hearing is to have a decision made on the basis of sworn testimony and admissible documents, subject to cross-examination, rather than based on unsworn reports and records and people's 3 or 5-minute unsworn comments at a public informational hearing. Eliminating contested hearings would leave no opportunity for anyone to testify under oath, or for DNR or anyone else to cross-examine even a single witness and require them to defend their reports, opinions, or decisions regarding a permit.

The above points do not encompass the entirety of the concerns that Midwest Environmental Advocates has related to SB 395. We share the concerns raised by many of our partner organizations and private citizens, including those related to the loss of the master hearing and reduced protections for wetlands, among others.

For these reasons I strongly urge you not to support SB 395.

Sincerely,

James Parra
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