

DATE: November 7, 2012

TO: Mark E. Cupp, Executive Director

FROM: Tim Andryk and Cheryl Heilman, DNR Bureau of Legal Services

SUBJECT: Request for Technical Assistance/Legal Advice on the Lower Wisconsin State Riverway Board's (LWSRB) authority regarding nonmetallic mining

You have asked us for advice on state riverway law as it pertains to nonmetallic mining. We paraphrase the questions presented in your October 31, 2012, memo below, and provide a short explanation of our analysis.

1. Do the current statutes on nonmetallic mining, ss. 30.44(3e) and 30.45(5) & (5m), Stats., render the language in s. RB 2.07, Wis. Adm. Code, obsolete?

Yes. The statutes were amended to create the standards in ss. 30.44(3e) and 30.45(5m), Stats. in 1995 Wisconsin Act 211. The regulations in RB 2.07 were adopted before the law was changed. RB 2.07, Wis. Adm. Code, is obsolete and should be repealed. The standards in the current statutes are what control the Board's decision when the Board considers any nonmetallic mining permit applications.

2. Under what circumstances would the LWSRB be authorized to deny a non-metallic mining permit application if the "not visible from the river" performance standard is met?

Section 30.43, Stats., states that the Board has the authority to review applications for permits and issue permits for activities that comply with their applicable performance standards. The only performance standards the Board is authorized to consider are those in the statute, ss. 30.44(3e) and 30.45(5m), Stats. If a proposed mining operation meets these "not visible from the river" standards, the Board may not deny a permit for other reasons. The Board may, however, under section 30.44(7), Stats., impose a condition on a permit if a condition is necessary to assure compliance with the performance standards.

3. Does the LWSRB have the authority to regulate noise, dust, or truck traffic?

No, although, the Board could ask for voluntary measures to be implemented by the applicant.

4. Assuming that lighting equipment for a mine is not visible from the river, would stray light resulting in the site being visible from the river at night constitute a violation of the "not visible" standard?

Section 30.43(1), Stats., states that the Board "shall" review applications for permits and issue permits for activities that comply with their applicable performance standards. The performance standards for nonmetallic mining operations are not directed at the visibility of light. They are focused instead on the visibility of structures, stockpiled materials, and excavation sites. The "not visible from the river" performance standard in s. 30.44(3e), Stats., states:

- (a) A person shall apply for and receive a permit before beginning or expanding nonmetallic mining on land in the riverway that is not visible from the river when the leaves are on the

deciduous trees.

(b) A person may not be issued a permit for an activity in par. (a) unless the following performance standards are met:

1. *Any structure and any stockpiled materials or soil* associated with the nonmetallic mining activity *may not be visible* from the river when the leaves are on the deciduous trees.
2. *The excavation* for the nonmetallic mining activity *may not be visible* from the river when the leaves are on the deciduous trees.

s. 30.44(3e), Stats. (emphasis added).

The performance standards do not address illumination that is visible from the river at night when the leaves are on the deciduous trees. While we appreciate that illumination could make a mining site more conspicuous at night, stray light may also be visible from other activities in the riverway. The performance standards prohibit the visibility of structures, stockpiled materials or soil, and excavation, not light. For this reason, it does not appear that the Board would be authorized to deny an application that otherwise meets the performance standards solely because illumination or “stray light” is visible from the river. However, if the Board found that a condition on lighting was necessary in order to ensure compliance with the performance condition that structures, stockpiles, and excavation operations not be “visible from the river,” the Board could condition a permit to limit the direction of or minimize the amount of stray light. Under s. 30.44(7), Stats., the Board is authorized to impose conditions on a permit if those conditions are necessary to ensure compliance with a performance standard.

5. Members of the public have suggested that the Board’s mission to protect and preserve the scenic beauty and natural character of the Riverway should authorize the Board to deny a permit based on perceived incompatibility with Riverway goals and objectives. Does the Board have the authority to consider factors other than the scenic beauty standards in the current performance standards?

No. The Legislature has set the performance standards that must be met and has stated that the Board “shall” issue permits for activities that comply with the performance standards. s. 30.43(1), Stats. Additional legislation would be required to empower the Board to deny permits for reasons other than those established in the current law.

6. Does the Board have the authority to adopt a moratorium on the issuance of permits?

No. Counties and local units of government (which have in some cases adopted moratoriums) have statutory authority to regulate for the common good, which the Board does not have. However, there is no set time frame under which the Board must act on a permit application. The Board may take such time as is necessary to reasonably evaluate whether the performance standards will be met and a permit should be issued, denied, or issued with conditions.