

Frac Sand Mining in the Lower Wisconsin State Riverway

“The Riverway Board has a frac sand mining permit application before it. It is not the Board’s place to decide whether or not hydraulic fracturing is a plus for domestic energy production or a serious threat to our environment. However, given that mining for industrial frac sand will continue in Wisconsin as long as the demand for this product exists, the question before the Riverway Board is whether industrial scale frac sand mining activity is appropriate in and along the Lower Wisconsin State Riverway.”

This paper reviews the mission of the Riverway Board and the potential problems that may result from allowing frac sand mining in and near the Riverway. This is followed by historical background on mining and quarrying regulation in the Riverway and a discussion of Riverway Statutes and Codes. Conclusions and recommendations for moving forward are presented.

I. Mission of the Riverway Board and Factors for Consideration

“RB 1.01 Mission. The mission of the lower Wisconsin state riverway board is to protect and preserve the scenic beauty and natural values of the lower Wisconsin state riverway through administration of a permit program to control land use and development. However, in concert with the program to control land use and development, due consideration shall be given to the rights of landowners and the freedom to exercise the rights associated with land ownership. The challenge facing the lower Wisconsin state riverway board is to maintain the fragile and delicate balance between protection and preservation of the scenic beauty and natural values of the lower Wisconsin state riverway and the preservation of the rights of landowners and residents within the boundaries of the lower Wisconsin state riverway.”

Aesthetic Impacts. RB 1.01 says the mission of the Board is to protect and preserve the scenic beauty and natural values of the Riverway. The current law and code do not do enough to address aesthetics outside of the realm of scenic or visual beauty. Noise and light pollution can have as much negative impact on natural values and aesthetics as visual distractions and other eyesores. The board has previously advocated for enforcement of state law regarding noise levels from watercraft in recognition of the adverse impacts that extreme noise has on the Riverway experience for visitors and the quality of life for residents.

Landowner Rights. The Board must balance preservation with landowner rights. In the current mining permit application, a few landowners stand to make a profit from the lease of their property for mining, while others will likely see their property values decrease. If frac sand mining is prohibited in the Riverway, we do have an alternative proposition that can be offered to the landowners. The State can purchase their lands, or, if the landowners desire to retain ownership, the State can purchase scenic easements prohibiting development of the property.

If the board approves the Pattison Sand permit and subsequent frac sand mining permits, the fragile and delicate balance is not likely to be maintained. The profit of a few will trump

the public interest and nullify more than 30 years of effort to protect and preserve this extraordinary Riverway landscape for all the people.

Cultural Resources Jeopardized. The Riverway is in the heart of the Driftless Area, well known for its hundreds of effigy mounds sites. Such sites are considered burial sites and are protected from disturbance by Wisconsin law. Many of the sites are known and have been previously mapped and recorded. It is likely that many other sites remain undiscovered. The Phase 1 archaeological surveys conducted on behalf of Pattison Sand uncovered several previously unknown sites that could qualify for the National Register of Historic Places. In the Riverway, the bluff tops facing water bodies and the river terraces have a high density of archaeological sites. Mining of any kind is incompatible with preservation of these sites.

Economic Impact and Employment Implications. The creation and promotion of the Riverway has been a major factor in the increase of the tourism economy in the Riverway communities, generating jobs and boosting local economies. Mining may benefit the mining companies and a few landowners and create a few jobs over time. This will not balance the decrease in property values in the area or the loss of income to canoe liveries, motels, restaurants, outfitters, resorts, etc. and the consequent loss of jobs.

The Riverway Board and its Executive Director and staff played a pivotal role in the establishment of Scenic Highway 60, another effort to promote tourism and foster economic growth in Riverway communities. If industrial frac sand mines proliferate, the Scenic elements along the highway will be compromised and the scenic highway designation lost.

Species and Ecosystem Impacts. Removal of the bluff tops and the overburden above the sandstone layer will also remove the biological community including species that are endangered, threatened or of special concern. Reclamation plans do not restore the biodiversity at mining sites. Species impacts are noted in the report submitted to the WDNR by Pattison's consultant. WDNR response has not been reported to date. Eagles are also likely to be impacted by the mine, and they are protected from such disturbance by federal law.

Credibility and Public Support. Over the years, through fair application of the Riverway law and code and promotion of the recreational, cultural and economic value of the Riverway, ever increasing public support has been developed for the project in general and the performance standards in particular.

Allowing industrial frac sand operations to develop along the Riverway may cause some of those landowners who have abided by the performance standards to question their support for things like colorization standards and vegetative screening standards. Some of the commercial loggers who have not wholeheartedly supported the forestry standards of the Riverway law may find another reason to flaunt those standards.

Fate of the Riverway May Hang in the Balance

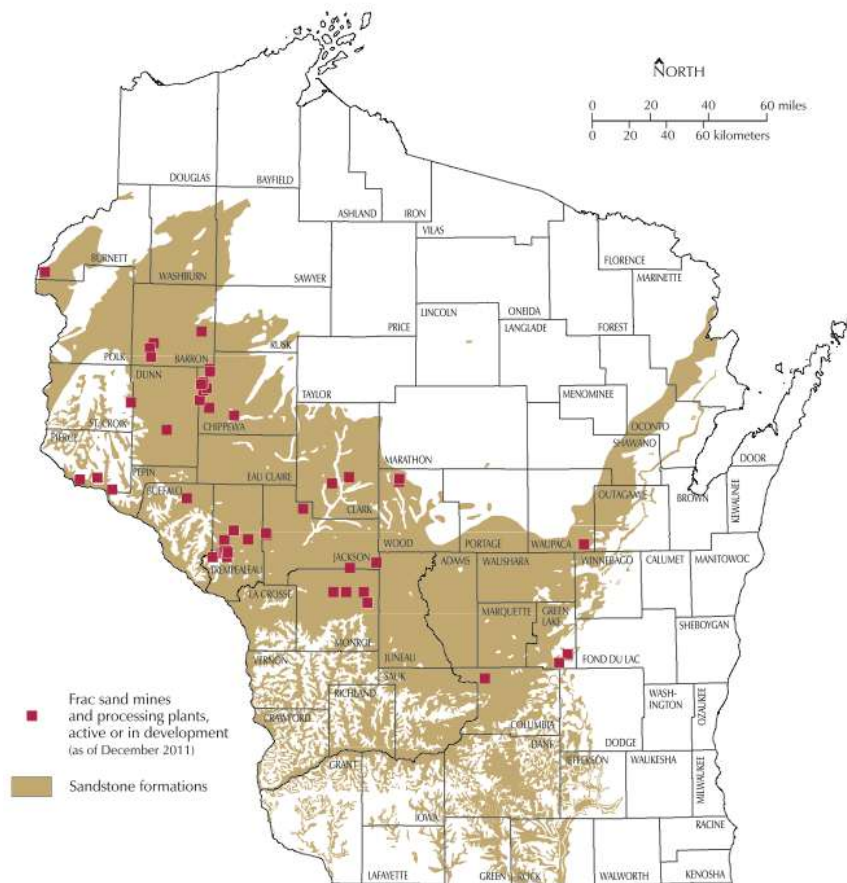
Permitting the establishment of frac sand mines such as the proposed Bridgeport Mine by Pattison Sand has the potential of undoing all the effort that has gone into establishing the Lower Wisconsin State Riverway.

The proposed mine is not equivalent to the past and current sand pits operated in and near the Riverway. For the most part, those operations dig up the loose alluvial sand at the bottom of the valley. The type of mine proposed by Pattison Sand involves bluff-top removal of overburden and sandstone. Removing bluff-tops will forever mar the scenic beauty of the Riverway. The stone will be blasted loose and mechanically crushed and sorted. There is no comparison between this type of bluff-top mining and digging for loose sand in the valley bottom. It is difficult to envision any type of screening that will render the removal of bluff tops in and adjacent to the Riverway visually inconspicuous.

The sandstone formation Pattison proposes to mine is present in the bluffs along each side of the river in the entire Riverway. If the Riverway Board approves the Pattison permit, it will be very difficult, if not impossible, to prevent the spread of industrial frac sand mining throughout the Riverway. If this is allowed to happen, the Riverway will be steadily transformed into an industrial zone, and all of the time and taxpayer money expended to preserve this resource (\$30,000,000 to date for land acquisition and scenic easement purchases alone) will have been in vain.

Frac sand in Wisconsin

Wisconsin Geological and Natural History Survey
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II. Historical Background on Mining, Quarrying and the Riverway Law

During the 10-year process that led to the creation of the Riverway, many issues were debated, particularly what types of activities would be counter to the Riverway goals and purposes, and the degree to which certain activities would be regulated. Mining and quarrying (now called non-metallic mining) were discussed. At the end of the process it was decided that allowing more mines or quarries in the Riverway would have a detrimental effect. Through the years there have been changes to the law, through state statutes (passed by the legislature) and through Administrative Code (created by the Riverway Board and authorized by statutes).

The following is a list, in chronological order, of the various administrative codes and statutes covering mining and non-metallic mining in the Lower Wisconsin State Riverway.

1) The statute creating the Riverway (1989) included the following prohibition: 30.45(5) **“In the Riverway...No person may begin a mining or quarrying activity or expand a mining or quarrying activity.”**

2) In late 1991, the Riverway Law was given a fine-tuning. Several sections were amended and a few were repealed, but the prohibition on mining and quarrying remained intact.

3) In 1993, the Riverway Board created administrative codes RB 1 (Lower Wisconsin State Riverway Mission Goals, Objectives and Definitions) and RB 2 (Lower Wisconsin State Riverway Permit Exclusions, Exemptions and Procedures). As part of these codes, RB 2.07 maintained the general prohibition on mining and quarrying, but allowed an opportunity for mines or quarries that were active in the Riverway prior to its creation to continue such activity “if the activity is visually inconspicuous” and affidavits are filed to establish that the mining/quarrying was active on October 31, 1989 and the location of such mines or quarries. Mining and quarrying continued to be generally prohibited except for the “grandfathered” activities and locations. The “grandfathered” quarries or mines were required to meet the “visually inconspicuous” standard.

4) In 1995, Wisconsin Act 211, changed nomenclature for “quarrying” to “non-metallic mining”. The general prohibition on mining was maintained, but “nonmetallic” mining was given a different treatment in new sections.

- 30.44(3e) “Nonmetallic Mining (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 minerals 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.”

- 30.45 (5m): “No person may begin or expand a non-metallic mining activity on land that is visible from the river when the leaves are on the deciduous trees.”

5) In June of 1996 RB 1 and RB 2 were reregistered with the original language on mining and quarrying included as in 3) above.

Conflict?

As the list above shows, there is confusion and perhaps contradiction between Act 211 and RB 2.07. Act 211 seems to say that the general prohibition on quarrying was lifted and any person can start or expand a nonmetallic mine in the Riverway as long as they meet the visually inconspicuous performance standard during “leaf-on” conditions. However, RB 2.07, which was republished later than Act 211, says that non-metallic mining is only allowed in the Riverway on parcels where it existed before 1989.

An alternative interpretation could be made that 30.44(3e) and 30.45 (5m) were added to govern the issuance of permits for the “grandfathered” activities and locations allowed by RB 2.07 and to establish in the Statute the same “visually inconspicuous” standard specified in the Administrative Code. As “quarrying” became “nonmetallic mining”, intended or not, the general prohibition was gone.

RB 2.07 is Currently in Effect

After consultation with staff at the Legislative Reference Bureau on this issue we have learned:

- Code has the same power and force of law as Statute.
- Code is not established, amended or repealed by a casual process. The formal process is called “promulgation” and involves public hearings, and hearings before several committees of the Legislature before any change in code can become official.

RB 2.07 is still included in the Wisconsin Administrative Code, published in the Wisconsin Administrative Register and maintained by the Legislative Reference Bureau. (“The Wisconsin Administrative Register” is the official publication of legal record in Wisconsin for regulatory actions.” – Legislative Reference Bureau.) A rule listed in the administrative code cannot just be declared “obsolete” or “sunsetting”. Since RB 2.07 has never been amended or repealed by promulgation as described by the Legislative Reference Bureau above, RB 2.07 is currently in effect, prohibiting new mining and non-metallic mining in the Riverway.

Questions of Intent

Intent is not always spelled out in the statutes and code in ways that provide specific guidance for every issue that may arise for the Riverway Board. However, the history cited above shows that mining and quarrying were always considered to be activities that ran counter to the overall goals and purpose of the Riverway.

It is safe to assume that industrial scale frac sand mining with the associated alterations of the landscape topography, noise impacts, light pollution and increased heavy truck traffic was not the kind of thing envisioned by the Legislature or the Riverway Board when the general prohibitions on mining and quarrying were loosened. Riverway Board Executive Director Mark Cupp's recollection is that the intent of Ch. 30.44(3e) was to provide local governments along the Riverway the opportunity to continue to operate small sand pits to excavate material for winter pavement deicing and road maintenance purposes.

III. Recommendations

In our view, mining activity on the scale proposed by Pattison Sand and what may follow are clearly incompatible with the stated purpose of the Riverway and mission of the Riverway Board. If an inadvertent and unintended loophole that opens the door to industrial scale frac sand mining exists in the statute, the Riverway Board has a responsibility to communicate with legislators and work together to quickly find a statutory remedy before the entire Riverway project is rendered moot by a proliferation of frac sand mining and its related activities.

We believe our focus at this time as the Riverway Board should be on whether or not industrial frac sand mining is an appropriate activity in the Riverway. If we believe it is not, we need to be willing to pursue any and all regulatory and legislative remedies necessary to prevent such mining from beginning and spreading throughout the Riverway.

Under 30.435 (7) "The board may: Report to the legislature on the effectiveness of ss. 30.44 to 30.48." We believe that as a starting point the board should contact all state legislators with territory in the Riverway and convene a meeting to lay out the current challenge posed by the frac sand industry. The goal will be to clearly explain the threat and work with the legislators to develop effective legislation to meet that challenge. If we wait until the political climate is more "favorable" before we pursue a remedy, we may wait a long time. The character of the Riverway may be irrevocably altered while we wait.

Also, we maintain the Riverway Board should not take any action on the Pattison Sand mine permit application until the RB 2.07 rule has been dealt with in a proper and legal manner.

Further, we propose that the public interest will be better served if RB 2.07 is left intact. Instead, we believe the board should pursue amendments to the Riverway law (Wis. Stats. Ch. 30) to unequivocally prohibit the development of industrial frac sand mines in the Riverway.

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