

# SUMMARY OF DECISION ITEMS

**December 13, 2012**

**APPLICANT:** Pattison Sand Company/Kyle Pattison  
Landowners: Lee and Joan Pulda  
Earl and Amber Pulda  
Rodney and Sandra Marfilius  
Alan and Kathy Flansburgh

**SITE LOCATION:** Town of Bridgeport, Grant County; between STH 60 and the Wisconsin River

**ACTIVITY:** non-metallic mining

**FIELD INSPECTION RESULTS/FINDINGS:** Fields inspections have been conducted by Mark E. Cupp, Executive Director, both on-site and on-river during the summer of 2012. The Operations Committee also conducted an on-river field inspection. Mike Finlay, DNR Forester, was present with Cupp for an on-site and an on-river field inspection. Brian Hefty, DNR Riverway Manager, and Mike LaBissonaire, DNR Real Estate Specialist, were present with Cupp for an on-site field inspection. Bill Carlson, DNR Forestry Supervisor, was present for an on-site field inspection. Landowners present for on-site field inspections included Lee Pulda, Earl Pulda and Alan Flansburgh. Kyle Pattison, Pattison Sand Company, and members of his team were present for an on-site field inspection with Cupp and have conducted independent field inspections both on-site and on-river. Riverway Board members conducted a field inspection with Cupp and Pattison at the site on October 11, 2012. **Cupp also paddled the Millville to Bridgeport segment on November 29, 2012.**

The field inspections revealed that portions of the affected properties are visible from the Wisconsin River. Portions of the properties slated for mining activities are located within the Riverway boundary. Discussions with mining company officials have resulted in elimination of major areas of aesthetic concern (both within the boundary and without).

The LWSRB's authority for issuance of a permit is found in s. 30.43(1), Stats., which states:

***The board shall review applications for permits...and issue permits for activities that comply with their applicable performance standards.***

In addition, under board powers in s. 30.435(1), Stats.,

***The board may impose conditions (on permits).***

The board's authority to impose conditions on permits is further detailed in s. 30.44(7), Stats.,

***The board may impose on a permit a condition that is necessary to assure compliance with the performance standards (for the activity) or to assure that the activity is completed within a reasonable time.***

Section 30.44(3e), Stats, details the regulations on non-metallic mining, which states:

***A person shall apply for 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.***

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*A person may not be issued a permit for nonmetallic mining 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.*

Additional permits will be required from the Department of Natural Resources and from the Town of Bridgeport. DNR permits will focus on air quality and storm water. An endangered species and archeological review may be required. The Bridgeport permit will focus on the reclamation plan and CUP.

At the November 8<sup>th</sup> LWSRB, responses by legal counsel to questions raised by the board were reviewed.

**Do the current statutes on nonmetallic mining. 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.

**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.

**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.

**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 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.

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

*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. *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.

**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.

**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.

**STRATEGIC PLAN REVIEW:**

**III. MISSION STATEMENT:**

The mission of the Lower Wisconsin State Riverway Board is to protect and preserve the scenic beauty and natural character of the Lower Wisconsin State Riverway through administration of a program to control land use and development. 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 character of the Lower Wisconsin State Riverway and protection and preservation of the rights of landowners and local residents within the boundaries of the Lower Wisconsin State Riverway.

**IV. GOALS AND OBJECTIVES:**

1. To effectively administer the applicable sections of the Wisconsin Statutes and chapters of the Wisconsin Administrative Code in regard to the Lower Wisconsin State Riverway, henceforth, the "Riverway";
5. To recommend to the Legislature and/or Governor modifications to the Wisconsin Statutes or Wisconsin Administrative Code in order to enhance the effectiveness of the performance standards, procedures, prohibitions, or other regulations governing activities within the Riverway.
10. To advise and/or assist landowners within the Riverway in regard to compliance with the Riverway rules and regulations for development or use of land;

**V. STRATEGIES FOR IMPLEMENTATION OF GOALS & OBJECTIVES:**

1. To effectively administer the law, the LWSRB shall pursue literal interpretations of the applicable statutes and administrative codes. Legal counsel;...shall be consulted in cases in which application of the law is vague or subject to different interpretations.
4. Through biennial reports, appearances at public/legislative hearings, and direct contact with individual legislators and appropriate committee chairpersons, the LWSRB shall assure that the Wisconsin Legislature is informed of the effectiveness of all aspects of the Riverway law.
5. The LWSRB shall develop recommendations for changes to the statutes or administrative rules where deficiencies are identified in the existing performance standards, procedures, prohibitions, or other regulations governing activities within the Riverway. The LWSRB shall direct the Executive Director to provide the recommendations to the Governor and appropriate members of the Wisconsin Legislature.

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10. A major aspect of the duties and responsibilities of the LWSRB shall be to provide information and technical assistance to Riverway landowners regarding the impact of the Riverway law on the operations or activities of landowners. The LWSRB shall provide advice and assistance to landowners through the Executive Director or through discourse at LWSRB meetings. All reasonable efforts shall be taken to assure a landowner may accomplish his/her goals and objectives within the constraints of the Riverway law.

**EXECUTIVE DIRECTOR RECOMMENDATION:** Executive Director recommendation is to approve issuance of a permit with the following conditions:

- The excavation and any structure, equipment or stockpiled material may not be visible from the Wisconsin River during leaf-on conditions;
- The initial permit shall be for a period of 5 years with an annual review of the activity by the LWSRB;
- Extensions to the initial permit may be issued for periods up to 5 years;
- The landowner or his/her agent shall provide a written report and map or aerial photograph showing active mining areas and reclaimed areas;
- The LWSRB shall review any modifications to the plans, as submitted, for compliance with the applicable performance standards;
- The landowner shall notify the LWSRB upon initiation of the project; and,
- The activity shall comply with all other federal, state and local regulations.

In addition, the board should include the following requests in a cover letter to Pattison Sand Company (recognizing the board has no authority to require these actions under law):

- Hours of operation should be limited to 6:00 a.m. to 6:00 p.m. Monday through Friday;
- Noise levels related to beepers on heavy equipment shall be reduced to the minimum db levels allowed under federal or state safety guidelines;
- If night operations occur, lighting should be dark sky compliant with lighting focused down and not out or up to minimize diffused lighting and reduce visibility of the site at night; and,
- Measures shall be taken to control dust and movement of particulates beyond the minimum standards of state/federal law to minimize adverse impacts on the Riverway.

In addition, the board should authorize the Executive Director to send correspondence to Riverway municipalities again encouraging review, modification and/or adoption of local ordinances that establish a sufficient regulatory framework to protect public health, safety and welfare and quality of life for Riverway residents and visitors. The LWSRB may wish to request legislative action to further restrict non-metallic mining in the Riverway.

**OPERATIONS COMMITTEE RECOMMENDATION: Not available.**

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**APPLICANT:** Larry Sawyer  
**CONSULTANT:** JC Gates  
**SITE LOCATION:** section 5, Town of Roxbury, Dane County  
**ACTIVITY:** timber harvest

**FIELD INSPECTION RESULTS/FINDINGS:** Field inspection was conducted by Mark E. Cupp, Executive Director, on December 10, 2012. Mr. Gates and Nick Morehouse, DNR Riverway Forester also were present for the field inspection. Due to poor visibility, the various zones were not delineated. A selective harvest of merchantable hardwoods is planned. A diameter limit of 16 inches dbh or greater is intended for most trees. Some oak wilt pockets may be addressed. Diseased, storm damaged or other trees in poor health will be taken to improve the quality of the woodlot. No new roads will be constructed. The harvest will occur during the times when the leaves are off the deciduous trees and the ground is frozen or dry. An additional field inspection will be conducted when the trees are marked and weather conditions allow.

**EXECUTIVE DIRECTOR RECOMMENDATION:** Executive Director recommendation is for issuance of a timber permit for the activity with the following conditions:

- The harvest shall comply with the basal area limits for the residual stand in the Bluff Zone and Riverview Zone, as detailed in Chapter NR 37, Wisconsin Administrative Code;
- In the Bluff Zone and Riverview Zone, all trees selected for harvest shall be appropriately marked and reviewed by the LWSRB for compliance with the applicable performance standards prior to initiation of the harvest;
- In the Bluff Zone and Riverview Zone, the harvest shall be limited to the times when the ground is frozen or dry and the leaves are off the deciduous trees;
- The LWSRB shall review the location and design of all new logging roads, if any, in the Bluff Zone and Riverview Zone;
- The new logging roads, if any, shall comply with the applicable performance standards regarding grade and erosion control and shall be re-seeded upon completion of the harvest;
- The LWSRB shall review the location and design of all small regeneration cuts, if any, in the Riverview Zone to assure compliance with the applicable performance standards;
- If necessary, the various zones shall be delineated prior to initiation of the harvest;
- The landowner or his/her agent shall notify the LWSRB within 10 working days upon completion of the harvest and, if necessary, the LWSRB shall conduct a post-harvest field inspection; and,
- The LWSRB shall review modification of the plans, as submitted, for compliance with the applicable performance standards.

**OPERATIONS COMMITTEE RECOMMENDATION:** Not available.