Written Testimony of
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Representing the Wisconsin Mining Association

Senate
Informational Hearing
Select Committee on Mining
September 25, 2012

1. Introductory Comments

Good morning Senator Cullen and members of Wisconsin’s Senate Select Committee on Mining. Thank you for allowing me to speak to this committee on the topic of mining regulation as the legislature focuses on ensuring that Wisconsin’s regulatory framework promotes consistency and predictability for mineral development here in the great State of Wisconsin. I am appearing before this committee on behalf of the Wisconsin Mining Association (WMA). The WMA’s goal is to promote those businesses that support the mining industry globally and those businesses that seek to develop jobs and economic development here in Wisconsin through the mining of metallic and industrial minerals that are so vital to our economy and livelihood.

The WMA has asked me to speak to you today on this issue given my professional background and the experience that I, and the company I work for, have on this important matter. I am a licensed Professional Hydrologist here in the state of Wisconsin. I have been appointed to the Examining Board for Professional Geologists, Hydrologists and Soil Scientists through appointments by Governors Thompson, McCallum, and Doyle where I served as Chair of the Hydrology Section and Chair of the Examining Board. For over 20 years I have worked at Foth Infrastructure & Environment, a subsidiary of Foth & Van Dyke in Green Bay. We are an employee owned Wisconsin based engineering consulting firm comprised of a wide variety of engineers and geo-environmental scientists, many of them educated with advanced degrees earned through the University of Wisconsin System.

My role at Foth is Director of Mining Sector Services and for over 20 years I have had the great pleasure of being involved in the environmental permitting, development and reclamation of metallic mining projects here in the Great Lakes Region and internationally. I and my colleagues at Foth have been involved in the permitting, construction, operations and reclamation of the very successful Flambeau Mine, the only metallic mine permitted and reclaimed under Wisconsin’s current statutory and regulatory framework. Our company was involved in the permitting effort for the Eagle Mine project in Michigan’s Upper Peninsula, the first non-ferrous project permitted under Michigan’s new mining law. Ore from that mine will be processed at a converted iron mine site that will be used for milling the ore and management of mill tailings. This site was also permitted under Michigan’s non-ferrous mining law. Our company has been involved in the ongoing engineering and permitting of Aquila Resources’ Back Forty Project, also located in Michigan’s Upper Peninsula. Aquila Resources is currently
conducting exploration at several sites in Wisconsin. Our firm is also involved in base metal mining projects in the State of Minnesota. Our firm works on projects in western United States and Canada and has worked on metallic mine sites in Asia and South America.

My testimony that I am providing to you today is my own. I am not here today representing any client that I am currently working for or have worked for or may work for. In short my testimony has not been vetted by any mining company.

2. Mining Is Vital to Our Economy

Mining of metallic minerals is a foundational industry upon which our economy and civilization is built. I drove here today from the Green Bay area. As you know, the Wisconsin DOT is currently embarked on a 7 year reconstruction project of Highway 41 between Osh Kosh and Green Bay. This project and the jobs it provides could not be completed without the mining and processing of industrial minerals, iron and non-ferrous metallic minerals. The cars we drive in could not be built without mining. This is even true for the production of hybrid and battery powered green vehicles. Our entire transportation system could not exist without mining. Our power generation and distribution system would not exist and could not be maintained without mining regardless of whether our electricity is derived from coal, natural gas, nuclear, wind, solar, or geothermal.

When I woke up this morning and I took a vitamin and mineral supplement along with my breakfast. This tablet, and vitamin and mineral supplements added to our food, are a basic product of our pharmaceutical industry and is vital to the nutritional health of our citizens and virtually every person on this planet. The pharmaceutical industry that we rely on for so many health care products and lifesaving medicines would not exist without mining. Our agricultural system could not produce the food required to feed the human population on this planet without mining. Our homes, places of business, schools and universities, cities, healthcare system, manufacturing industry would not exist and could not be maintained without mining industrial and metallic minerals.

Simply put, if we are to maintain our civilization, grow our economy, create jobs and improve the quality of life of our citizens and impoverished populations in less fortunate countries, a moral responsibility that I believe we all have, we cannot do so without mining.

3. Wisconsin’s Regulatory Climate and Metallic Mining

Currently the metallic mining industry is one the more vibrant industries in the global economy. This is driven by the need for metals such as aluminum, copper, iron, nickel, zinc and precious metals to support the domestic needs of developed counties in North America and Europe and the needs of developing counties in South America, Asia and Africa. Does this affect our economy and job prospects for our non-college educated and college educated job seekers? The answer is yes. Let me site one example. Just last
week a news report was released noting that the average salary of engineering graduates from the South Dakota School of Mines and Technology were greater than for Harvard graduates. Quoting from the article: “Those leaving the college of 2,300 students this year got paid a median salary of $56,700, according to PayScale Inc., which tracks employee compensation data from surveys. At Harvard, where tuition fees are almost four times higher, they got $54,100. Those scheduled to leave the campus in Rapid City, S.D., in May are already getting offers, at a time when about one in 10 recent U.S. College graduates is out of work.”

Wisconsin history is steeped in mining from the lead district of southwestern Wisconsin to the iron mines of the north. Our state flag has a miner on it. Yet today, despite the economic downturn and the jobs that mining could provide to citizens of this state, a state know for a wealth of metallic resources, there is no metallic mining activity in the state and fleeting interest.

In the Michigan’s Upper Peninsula, the Michigan Department of Environmental Quality has issued three nonferrous mining permits in the last 5 years for new copper and nickel projects. A fourth polymetallic project (zinc, copper and gold) was nearing the point of filing permit applications when it was put on hold due to capital constraints. Michigan is also home to several large operating iron mines. To the northwest in the state of Minnesota, the iron mining industry remains vibrant and permits for new mining operations are progressing. The permitting of new copper/nickel and platinum and palladium group metal mines is also progressing in Minnesota. Exploration work on mineral deposits in Michigan and Minnesota is so active it is hard to find drill rigs to support the exploration needs of the industry in those two states.

We owe it to citizens of this state to ask why are Michigan and Minnesota are able to attract mining investment leading to the permitting of new metallic mine projects when mining investment in Wisconsin is dormant? It is not due to geology? The answer is no, all three states enjoy similar geologic histories that gave rise to the occurrence of mineralized resources suitable for mining. Certainly the citizens of Michigan and Minnesota value their natural environment, clean water and clean air as much as Wisconsin citizens.

Based on my experience in the industry, I would submit that the basic reason there is no investment in this state from the metallic mining industry is due to regulatory uncertainty of the permitting process and ambiguous rules embedded in Wisconsin’s current statutory and regulatory framework for the development of metallic resources. I want to emphasize that it is the open ended review process and ambiguous rules that drive investment away from the state. In fact I would say that there is much to like about Wisconsin’s mining statute and rules. The requirement for rigorous baseline environmental studies, environmental impact analysis, sound engineering plans, environmental monitoring, reclamation, post reclamation monitoring, compliance with groundwater quality standards, surface water quality standards and air quality standards, and financial assurance are not hindrances to investment in this state by the mining industry.
Objective environmental protection standards do not need to be relaxed to attract mining investment in the state. However, the environmental review process and ambiguous rules and statutes should be examined. Specifically, we recommend that the state legislature address the following:

- The so-called moratorium on the issuance of permits for mining in sulfide ore bodies.
- Ambiguous rules related to waste characterization and performance-based design of mine waste storage facilities.
- The ambiguous manner in which NR 140 groundwater quality protection standards are applied to mining projects.
- Ambiguity in quantifying the dollar value of the Irrevocable Trust Agreement.
- A statutorily defined environmental review timeline mandating a decision point so that companies are reasonably assured they will get to a decision point once they enter into the permitting process.
- The timing of the Contested Case/Master Hearing.
- Regulation of prospecting.

4. Ambiguous Rules and Requirements

I would now like to focus on those ambiguous rules that create significant uncertainty in the permitting process that the legislature may want to address as you consider new legislation.

**Moratorium on Issuance of Permits for Mining of Sulfide Ore Bodies**

In 1997 the State of Wisconsin amended its mining statute to include a moratorium on issuance of mining permits for so-called sulfide ore bodies. It should be noted that this in essence applies to many metallic resources, notably copper/nickel/zinc and precious metals, which due to geologic chemistry occur in mineable economic quantities as mineral assemblages of metallic sulfides. Ostensibly this statute was passed in light of legacy issues related to historic mining operations whereby residual sulfide minerals in tailings, waste rock and mine workings can oxidize, in essence simple weathering or rusting, leading to the generation of acidic drainage that leaches metals from the rock and can impair nearby water resources. Like many industries that generate waste that needs to be managed properly to prevent environmental impairment, this is a waste management issue that requires engineering and science to resolve, not prohibition of the industry.

The law is vague and prone to endless litigation on what type of a site would be acceptable to the state or a judge for demonstration of the requirements written into the moratorium law. For example, would the state allow a mine site in the desert of Nevada to meet the demonstration requirements of the law? Would a site in a mountainous environment above the water table where there are no nearby streams or lakes be acceptable? If sites in these settings were used as examples by an applicant, opponents would claim that sites are not applicable since they are in different hydrologic environments than what exists here in Wisconsin, and thus much litigation would ensue.
The industry looks at this provision of state law and the potential for drawn out litigation as if it were a sign at the boarder of Wisconsin saying “Not Open for Your Business”. Mine somewhere else but we will continue to use the products of your mining operations in our manufacturing industry.

The legislature should consider rescinding this provision of state law. There would be no relaxation in environmental protection if the state were to make this one change. Moreover, this law should be rescinded based on the success of the Flambeau Mine Project, which fulfills the requirements of the moratorium and was done right here in Wisconsin.

Let me provide to you with some pertinent history of this project.

**Brief Overview of the Flambeau Mine**

**Location:** The reclaimed Flambeau Mine is located in Rusk County, Wisconsin, approximately 1.5 miles south of Ladysmith.

**Size:** The total reclaimed site is approximately 181 acres. The open pit covered about 35 acres of the site.

**Ore Deposit:** The Flambeau Mine ore body contained copper sulfides with trace amounts of gold and silver. During its four-year operating life, 1993 – 1997, the environmentally responsible Flambeau Mine produced 181,000 tons of copper, 334,000 ounces of gold and 3.3 million ounces of silver.

**Project Phases:** Discovered in 1969, the Flambeau Deposit was mined between 1993 and 1997.

- **Permitting** 1989 – 1991
- **Construction/Pre-production** 1991 – 1993
- **Operations** 1993 – 1997
- **Backfilling Complete** Fall of 1997
- **Reclamation** 1998 - Present

**Environmental Protection:** The Flambeau Mine is the first and only metallic mine permitted under Wisconsin's stringent and comprehensive modern mining laws. The mine conducted more than 1000 analyses on water samples and treated more than 600 million gallons of water in a state-of-the-art water treatment plant.

The Flambeau River, which flows right next to the site (140 ft. from the open pit), attracts tourists, paddlers, fishermen and is a crown jewel of Wisconsin’s waterways. The River has been fully protected at every stage of the Flambeau Mine Project. Long-term monitoring both upstream and downstream proves the River is clean and healthy.

Safe and clean drinking water is critically important to Wisconsin citizens. Before and during mining, the Company made a guarantee to citizens in the Local Agreement that wells would be safe. Testing shows conclusively groundwater quality surrounding the backfilled site is as good as it was before mining.
Employment: During construction and operations, 85% of the workforce was local residents.

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Economics: The Flambeau Mine paid more than $27.7 million in taxes and fees to local and state governments. This is in addition to salaries paid to employees and local expenditures for goods and services. More than 100,000 people visited the Mine during its operation.

Reclamation: Reclamation began in 1997. The open pit was backfilled and the site returned to its original contours. Trees and prairie grasses were planted to provide habitat for wildlife. Today, the site is home to hundreds of species of plants and animals. Over 10 acres of wetlands, and nine acres of equestrian and hiking trails, were created. At the request of local governments, 32 acres of the site were set aside for Industrial use and leased to the Ladysmith Industrial Development Corporation. Reclamation of all but those 32 acres has been completed.

Court Ruling Confirms Flambeau Mining Company’s Strong Commitment to the Environment

Background: In January 2011, anti-mining advocates filed a federal lawsuit against Flambeau Mining Company alleging that a biofilter (storm water pond) constructed and operated to manage storm water at the 32 acre outlet was in violation of the Clean Water Act. The suit alleged that Flambeau Mining Company did not have a federal WPDES permit for the biofilter and impaired water quality. This lawsuit would not have been filed but for the fact that Flambeau Mining Company set aside the 32-acre outlet at the request of local government and for the benefit of local government.

Decision: On July 24, 2012, U.S. District Court Judge Barbara Crabb issued her ruling in the lawsuit. The Judge’s ruling praised the company’s environmental record, commitment to its neighboring community and exemplary efforts to protect water quality in the Flambeau River and more. She also questioned the motives of the plaintiffs in bringing the lawsuit. She found that the company protected the environment and preserved water quality, and issued a pro forma fine of $275. She believes that a fine was required under the Clean Water Act because she ruled the company should have had a permit under federal law for storm water management at its site, rather than the state permit that the company was issued. The company contended that the state-issued permit, acquired through consultation with the WDNR, qualified as the required permit. The written opinion from Judge Barbara Crabb is clear that there was no pollution or impairment of water quality in the Flambeau River as the plaintiff’s alleged.

Essence of Decision

The essence of the Judge’s decision is best summed up in these key quotes:

1. “Plaintiffs cannot make a plausible argument that the quality of the water in the river is affected by the discharges from the biofilter. They can continue to enjoy the river for fishing, recreation and wildlife viewing without any concern for the river’s water quality resulting from biofilter discharges, not only because the biofilter is being replaced but because it never threatened the river’s water quality during the period at issue in this suit.” (Decision, Page 36)
2. "Although plaintiffs seem to be motivated by an admirable concern for the environment, it remains unclear to me why they would have expended so much time and energy litigating against a company that seems every bit as committed as they (the plaintiffs) are to the protection of the environment and preservation of water quality." (Decision, Page 37)

3. "I will enter judgment for plaintiffs on liability, but I will impose only a pro forma penalty on defendant, not only because the discharges of pollutants were so slight, but because of defendant’s exemplary efforts to protect the environment during its mining operations and reclamation effort. These efforts deserve commendation, not penalties." (Decision, Pages 3 & 4)

Other key excerpts from Judge Crabb’s ruling:

4. "Plaintiffs have failed to show that any violation was serious in nature." (Decision, Page 32)

5. "It would have been less expensive for defendant to have refused the city’s request to keep the outlet and the buildings, removed them and dug up the outlet. It incurred the extra costs only because it wanted to help out a city that was struggling economically." (Decision, Page 33)

6. "...I will take into account the extensive efforts that defendant made to protect the environment of the Flambeau Mine site, both during the mining operation and afterwards during the reclamation effort. It would not advance the goals of the Clean Water Act to impose anything but a pro forma penalty on a company that was compliant with the Act and with the directives of the state’s Department of Natural Resources and acted in all respects as a good neighbor." (Decision, Page 34-35)

7. "Moreover, plaintiffs have not proven that they have suffered irreparable injury from any biofilter discharge. At no time has a discharge contained a concentration of copper close to the level formerly allowed under the permit." (Decision, Page 36)

8. "The evidence shows that the Flambeau River has a higher level of copper upstream of the mouth of Stream C than downstream, indicating that any discharge that makes its way to Stream C is not impairing the water in the river. The evidence also shows that the level of copper in Stream C, which is generally higher than that of any biofilter discharge, is not toxic to the species most likely to be affected, which are the biota in the stream. (Decision, Page 36)

The Flambeau Mine was one of the state’s most contentious projects. It received extensive regulatory over site, was operated in a water rich environment on the banks of the Flambeau River, was reclaimed, was and is protective of the Flambeau River and is a great success. It is an engineering achievement and should be celebrated by the state by rescinding the moratorium. What the state was seeking when it passed the moratorium has been met right here in Wisconsin and the proof is sitting in boxes of expert witness reports and testimony several blocks from here in Federal Court. Rescinding the moratorium will signal that state is open for investment from this important industry and will not diminish environmental protection one bit. It should be noted that efforts to pass
similar moratorium legislation in Michigan and Minnesota have repeatedly been rejected in those states.

**Ambiguous Rules Related to Waste Characterization and Performance Based Design of Mine Waste Storage Facilities**

NR 182.08(2) contains provisions on the characterization on how waste rock, tailings and exposed wall rock in open pits and underground mines will affect water quality during operations and after reclamation. This is referred to as waste characterization. Waste characterization is an entirely prudent requirement for new mine projects. However the current rules were written in the early 1980’s, are subject to interpretation on methods and procedures and have proven to be an area for open ended debate. Since the 1980’s a new generation of testing protocols and methodologies have been developed and often times standardized in ASTM Standards. To eliminate protracted debates on this topic the state should consider revising these rules to reflect standardized testing that is widely used in the industry and widely accepted in other regulatory jurisdictions like Michigan and Minnesota and other states where mining is occurring.

Tailings facilities, waste rock storage facilities and backfilled mines are regulated as mine waste storage facilities under NR 182. Unlike solid waste facilities regulated under NR 500 and, which are permitted based on a “prescriptive based design approach”, mine waste facilities are permitted through a more rigorous “performance based design approach”. This involves the integration of engineering models, geoscientific models and hydrologic models to guide the process of designing, monitoring and reclamation of new facilities. The state should consider revising ambiguous language in their rules on how these models are used.

NR 182.08(2)(e)(9) embodies the current ambiguous language on how these performance based design tools are applied. This section of the code states that:

The applicant shall submit information based on predictive modeling to demonstrate there is a reasonable certainty that the facility will not result in a violation of the groundwater quality standards, specified in ch. NR 140, beyond the design management zone.

Put 10 engineers and geoscientists in a room and you will come up with 10 different opinions as to what is meant by “reasonable certainty” and what tools are acceptable for use in the demonstration. Put 10 lawyers in the room and you will get 100 opinions as to what this provision means.

This provision is silent as to what type of a planning horizon needs to be examined. Does the analysis need to consider the next 100 years, 200 hundred years, 500 years or ten thousand years? The legislature should consider modifying this section of the code to reflect that the modeling is to be done for a planning horizon of say 250 years (the next 10 generations) and that the models are to be used to guide engineering decision making on the design, permitting and monitoring of the facilities. It is precisely this section of
NR 182 that has led to models being used to look at compliance ten thousand years into the future, a dubious application not supported by science and engineering.

**NR 140 Groundwater Quality Protection Standards**

In 1998 the current mining law was amended to include the application of NR 140 groundwater quality protection standards to mine sites. The application of these standards to aquifers and geologic formations that retain fresh water (i.e. non saline water) is entirely appropriate. However, in considering the application of these standards, the amended law did not take into account that often time mines (underground and open pits) can penetrate depths into the Precambrian bedrock that contain saline water that naturally exceeds NR 140 standards, will never be used as a source of water and does not interact with the surface environment. The state should consider in any new legislation that the application of NR 140 groundwater quality standards does not extend to the middle of the earth and only applies to those depths that contain meteoric water and are not applicable to formations that contain saline water and hydraulic characteristics unsuitable for the production of appreciable quantities of water. The goal is to have the statute and rules reflect the practical application of NR 140 for the purposes for which it is intended.

**Irrevocable Trust Agreement**

NR 132.085 contains new requirements as of 2000 for an Irrevocable Trust Agreement, in essence a third layer of financial assurance above and beyond the reclamation bond and long term care bond that are currently required. The concept is to provide a source of contingency funds that are in place in the event of unforeseen failures of engineered systems and releases or spills of hazardous substance into the environment that require remedial action. Other jurisdictions such as Michigan have addressed the need for contingency funding as a percentage (20%) of the estimated costs of reclamation which is added to the overall financial assurance requirement. Streamlining this provision of the rules will meet the financial assurance interests of the state and the process interest of the mining industry.

5. **Permitting Process**

I would now like to speak briefly about process issues related to environmental review and issuance of permits. Specifically I would like to speak to the issue of timelines leading to a decision point, the contested case hearing and prospecting.

**Timelines for Environmental Review**

On the issue of timelines much discussion has taken place on this topic in recent debates here in the State Capital. Let us recognize that the process that mining companies go through that leads to a decision to design and permit a new mine requires an enormous amount of capital investment over many years. Bringing into production a new mine can easily cost over a billion dollars from the point of exploration to the point of first
production. Thus the goal of any permitting process should be to promote well designed projects that will protect the environment and which is also efficient with respect to reaching a decision point. An examination of Wisconsin’s current laws and rules contains no timelines with respect to when the WDNR is required to reach a decision point on whether or not to issue permits for a new project.

Our neighboring state of Michigan passed a new nonferrous mining law in 2004. Rules were promulgated in early 2006. The timeline for permitting a new project in Michigan takes about four years. This four year timeline includes: 1) two years of mandatory baseline studies; 2) one year for the applicant to prepare the reports and materials necessary for the applications; and 3) approximately 9 months to one year for the state to complete their review, hold public hearings and issue final permits. The states timeline for review of the application is specified in the statute. A synopsis of the timeline in that law is as follows:

- Upon filing the Mining Permit Application (MPA) the state has 14 days to determine completeness. That is: does the permit application contain the required application forms, fee, and environmental impact assessment, a mining/reclamation/environmental protection plan, financial assurance, a list of other applicable applications and corporate organization report.
- 42 days later the Department holds a public meeting on the application.
- 28 day public comment period.
- 28 day period to reach a proposed decision (can be tolled by applicant to address comments).
- Public hearing on the proposed permits.
- 28 day public comment period (can be tolled by applicant to address comments).
- Final permits issued.
- Optional contested case hearing on final permits.

Michigan has successfully employed this process on three projects since 2006 and is thus experiencing the benefits of jobs, economic development and environmental protection.

With respect the Michigan’s law regulating iron mining I would like to cite the timeline in the permitting process for those projects:

Upon receipt of an application for a permit, the department shall have up to 60 days to review the application to determine if the application is accurate and complete. If the application is determined to be inaccurate or incomplete, then the department shall provide the person making the application for a permit, within the 60-day period, with a notice that the application is inaccurate or incomplete and what changes or additional information shall be submitted. Upon receipt of the requested information, the department shall have up to an additional 30 days to review the information to determine if the application is accurate and complete. Upon completion of the review process, the department shall approve or deny a metallic mineral mining permit application in writing within 60 days after the application is determined by the department to be administratively complete. A determination of administrative completeness shall not be construed to mean that additional information may not be required from the applicant as a result of new circumstances that come to the attention of
the department. If a metallic mineral permit is denied, the reasons shall be stated in a written report to the applicant.

I cite these two statutes in Michigan as examples of how a neighboring jurisdiction has addressed timelines leading to a decision point. In addition both timelines allow for a pause in the process to address comments that arise out of agency review or public comment.

I believe that Wisconsin can and should follow Michigan's lead and include language in their mining law that addresses timelines leading to a decision point and is done so in a manner that is consistent with Wisconsin's underlying environmental review process and potential federal involvement.

**Contested Case Hearing/Master Hearing**

Another topic that has received attention in the recent debate on mining law reform is the Master Hearing or Contested Case Hearing. Currently the Master Hearing occurs at the end of the review process after the WDNR has issued a Final EIS and Draft Permits. Our neighboring states operate slightly differently. In Michigan for example the State completes its review process with the issuance of Final Permits. It is only after the Final Permits are issued that parties are able to challenge the issuance of the permits. A similar model exists in Minnesota, contested case hearings and other legal challenges occur after the EIS is finalized and Final Permits are issued. I believe that Wisconsin should consider following a similar protocol whereby, the Master Hearing is optional and only occurs after Final Permits are issued.

**Exploration and Prospecting**

Finally, I would like to speak briefly about the regulation of exploration and prospecting. Currently exploration, drilling holes in the ground and collecting samples of cored rock that are analyzed for the occurrence of economic minerals and metallic content is regulated under NR 130. Prospecting however is regulated under NR 131 and entails a process that is almost as costly as filing for a mining permit. The purpose of prospecting is twofold:

- Exploration of the bulk characteristics of a large rock mass for purposes of developing a safe mining operation.
- Collection of a large bulk sample of ore for purposes of metallurgical testing and is important in designing milling operations.

Similar to Michigan, Wisconsin should consider, with limitations, allowing prospecting to occur under NR 130.
6. Summary

In summary the WMA would like to thank you for allowing us to speak to this committee on the important matter of reforming Wisconsin’s mining statute. We respectfully request that you consider our recommendations in future legislation.

Thank you

Stephen V. Donohue
Wisconsin Mining Association