

Beyond the Basics – An Update to the Nonferrous Metallic Mining Handbook

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DISCUSSION OVERVIEW

- *Background and Legislative Changes (Act 134)*
- *Metallic Mining Handbook Overview*
- *Frequent Questions Regarding Metallic Mining Regulation*
- *Options for Wisconsin Counties Association's Member Counties*

Section 1

Background Information and Legislative Changes – Act 134 and Beyond

Act 134 – Lifting of Wisconsin’s Metallic Mining “Moratorium”

- Enacted on 12-10-17,
effective 07-01-18.
- Amends provisions of
Wis. Stat. Ch. 293.
- Why the Changes?

Ultimate Question:

*The “5 W’s” and “how” much
can Wisconsin counties
regulate?*

Post-Act 134

- What has changed?

- *“10-Year Rule” repealed.*
- *Applicability of groundwater standards.*
- *Separate approval process for bulk sampling*
- *Mining permit application timeline.*
- *Withdrawal of groundwater/high capacity well approval.*
- *Hearing and review process.*
- *Exemption from Solid Waste Fees.*
- *Financial assurance requirements structure.*

- What has NOT changed?

- *“Who” and “Where”: Local authorities may still regulate (to an extent).*
- *“Who” and “When”: Local Impact Committees may discuss agreement.*
- *“What” and “How”: Ability to waive zoning regulations.*
- *What: Requiring other forms of financial assurance.*

Section 2

Overview of WCA's Nonferrous Metallic Mining Handbook

WCA's Metallic Mining Handbook

- Commenced drafting in January, 2018.
- Published May 1, 2018 after “pre-launch” meeting with northern counties.
- Available on WCA's website.
- Comprehensive guide for Wisconsin's counties to address and understand issues presented by nonferrous metallic mining.

WCA's Metallic Mining Handbook (con.)

The Handbook includes the following sections:

- General Reference Information.
- Procedural Limitations And Considerations.
- Environmental Regulatory Considerations.
- Considerations For Both Zoning Ordinances And Licensing Ordinances.
- Zoning Ordinances. Section VIII – Licensing Ordinances.
- Local Impact Committees.
- Local Agreements.
- Development Moratoria.

WCA's Metallic Mining Handbook - Contents

- Includes cross-references to other sections to ease analysis of complex issues.
- Includes “FAQs” that may also be used as a stand-alone document for distribution to the public.
- Several sections include information that will be helpful on zoning and planning issues beyond metallic mining.

Section 3

Environmental Regulation and Considerations

Regulation of Environmental Impacts of Metallic Mining

- State and Federal Regulations
- County may not regulate on issues that are preempted by Federal and State law.
 - *Lake Beulah Mgmt. Dist. v. E. Troy*, 2011 WI 55, 335 Wis. 2d 92, 799 N.W.2d 787, the Wisconsin Supreme Court established a four-factor test to determine whether a local regulation is preempted by state law:
 - **Has the state legislation expressly withdrawn the powers of municipalities to act?**
 - **Does the local regulation logically conflict with state legislation?**
 - **Does the local regulation defeat the purpose of the state legislation?**
 - **Does the local regulation violate the spirit of the state legislation?**

Regulation of Environmental Impacts of Metallic Mining (con.)

- Chapter 293 also recognizes the role of local units of government in WisDNR's review and approval processes for nonferrous metallic mining permits.
- Wisconsin Statute § 293.49(1)(a)6 conditions WisDNR's grant of a mining permit upon its finding that "the proposed mining operation conforms with all applicable zoning ordinances."

Regulation of Environmental Impacts of Metallic Mining (con.)

- Wisconsin Counties May Regulate:
 - Environmental considerations not preempted by State or Federal law.
 - Environmental considerations that are regulated by State or Federal law, so long as the County regulations are not more restrictive.
 - *However, what if there is a particular environmental issue requiring County regulation??*

Environmental Regulation and Local Agreements (con.)

- Wisconsin courts have not determined whether preemption standards apply to local agreements.
- To avoid potential legal challenges altogether, a county wishing to include more stringent environmental regulations than required by state or federal law should still meet the four prongs of the *Lake Beulah*.

Environmental Regulation and Local Agreements (con.)

When regulating an issue that may be preempted, the county should ask:

- Did the State Legislature expressly withdraw the powers of a county to act? No – Chapter 293 does not have an express prohibition against a county (or other local unit of government) from imposing environmental restrictions on nonferrous metallic mining operations.
- Does the county regulation conflict with Chapter 293 or other state legislation?
- Does the county regulation defeat the purpose of Chapter 293 or other state legislation?
- Does the county regulation violate the spirit of Chapter 293 or other state legislation?

Section 4

Local Committees

Local Committees

- Permitted pursuant to Wis. Stat. sec. 293.33.
- Useful tool to bring various units of government and stakeholder groups together.
- Findings do not have to be binding on County and the ultimate terms of a Local Agreement.

Section 5

Local Agreements

Local Agreements – General Background

- Permitted pursuant to Wis. Stat. sec. 293.41 under certain circumstances.
- Very unique regulatory tool because it permits modification or waiver of existing county zoning requirements.
- A county must still follow the general zoning statutes (Wis. Stat. § 59.69) when adopting any new zoning ordinances.

Required Elements of a Local Agreement

- Wis. Stat. sec. 293.41(2) sets forth specific elements that *must* be included in a Local Agreement.
- A county may wish to codify other elements that it wants required in a Local Agreement.
- Statutory approval process for a Local Agreement must be followed.

Requirements of a Local Agreement (con.)

Note: Even when using a Local Agreement as part of a zoning ordinance, the zoning ordinance should still include specific standards, points of inclusion, and other required provisions to be set forth in a Local Agreement.

Benefits of a Local Agreement

- Greater Flexibility.
- Recovery of Costs.
- Open Dialogue.
- Tailored Agreement.
- Streamlined Amendment Process.

Section 6

Options for Wisconsin Counties

Option 1 – Amend Existing Ordinances

- Several counties had retained vBR to review/comment on existing ordinances in light of July 1, 2018 deadline.
- Counties may choose to amend the existing zoning ordinances in place to address Act 134 changes.
 - Benefit: Less work and faster (maybe, given required elements that should be contained when referencing a Local Agreement?)
 - Risk: May not address required elements to pass muster under Act 134, other provisions of Wis. Stat. Ch. 293, *Nicolet Minerals*, etc.

Option 2 – New Zoning Code for Metallic Mining

- Option: Metallic mining as a “permitted use,” but heavily regulated to the extent that ordinance may be construed as a conditional use.
 - Why is this an important distinction?
- Option: Metallic mining as a conditional use.
- Option: WCA ordinance template.

Option 3 – New “Prohibited Use” Zoning Code

- Strategy: A county may buy itself more time in preparing a comprehensive ordinance by passing a zoning provision that explicitly prohibits metallic mining.
- Benefit – Quick and buys time post-effective date (in a legal way!)
- Drawback – Should not be a permanent fix (unless a county is sure it will not want metallic mining, even pursuant a Local Agreement.)

Option 4 – Do Nothing

- A county always has the option of not taking any action to change its ordinances.
- This may be an attractive option if a county does not anticipate any metallic mining applications, but there is a risk associated with having “nothing” if and when the mining operation knocks on the door.

Section 7

WCA's Ordinance Template

WCA Ordinance Template

- Why now?
 - WCA's original position: No model ordinance because each county's considerations are very different.
 - However, various legal considerations have arisen since publication of the Handbook.
 - By reviewing what some counties have elected to consider, WCA can maximize shared knowledge and resources.

WCA Ordinance Template – How it is Different

- “Dual Track” to Obtain Mining Permit:
 - Approval of a Conditional Use Permit = Mining Permit
 - Approval of a Local Agreement = Mining Permit
- Benefits of Dual Track:
 - Provides options for a county to regulate under either mechanism, thereby providing flexibility, choice, and avoid risk.

WCA Ordinance Template - Considerations

- A county should not adopt the ordinance template “as is.”
- A county must still customize the ordinance template to make it appropriately fit within its existing county ordinances.
 - Allows thorough consideration of issues particular to each county.
 - Allows discussion of issues, public input, and customization of each county’s ordinances to improve the chances of the ordinance passing “legal muster.”

WCA Ordinance Template

Benefits

Benefits:

- Comprehensive regulation that is in-line with Act 134, the Wisconsin Statutes and case law (and looking ahead to mitigate other litigation risks).
- While consistent with underlying legal requirements, should be “customized” to address each county’s particular considerations.
- Drafting time and approval process may be reduced because framework is complete.

WCA Ordinance Template

Benefits (con.)

- Eliminates duplicative provisions that are:
 - Likely preempted by State law.
 - Likely to be deemed outside a county's jurisdiction and therefore unenforceable.
 - Just plain confusing.

WCA Ordinance Template

Drawbacks

Drawbacks:

- Potentially longer approval process than a “prohibited use” option or a “do nothing” option.
- Not a “plug and play” option. A county should still engage in the process of considering what are particular issues to that county.
- A more detailed ordinance than counties are used to.

Closing Thought...

If counties make it impossible to obtain a metallic mining permit by adopting unreasonably restrictive ordinances or ordinances that are likely preempted by State law, the Legislature may step in and eliminate any local regulation and the ability to have a local agreement.