Docket #0087 Date Filed: 9/14/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: EMERGE ENERGY SERVICES LP, *et al.*, Debtors.[1]	Chapter 11 Case No. 19-11563 (KBO) Jointly Administered
SUPERIOR SILICA SANDS LLC, a Texas limited liability company, Plaintiff, vs. IRON MOUNTAIN TRAP ROCK COMPANY, a Missouri corporation, and FRED WEBER, INC., a Delaware corporation. Defendants.	Adv. Proc. No. 20-51052 (TMH)

SUPERIOR SILICA SANDS LLC'S OMNIBUS OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY BRIEF IN SUPPORT OF ITS SUPPLEMENTAL MOTION FOR PARTIAL SUMMARY JUDGMENT ON THIRD CLAIM FOR RELIEF FOR BREACH OF CONTRACT

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[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Emerge Energy Services LP (2937), Emerge Energy Services GP LLC (4683), Emerge Energy Services Operating LLC (2511), Superior Silica Sands LLC (9889), and Emerge Energy Services Finance Corporation (9875). The Debtors' address is 5600 Clearfork Main Street, Suite 400, Fort Worth, Texas 76109.

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Superior[2] hereby files this combined Reply Brief in support of its Breach of Contract MSJ, and in Opposition to Defendants' cross-motion for summary judgment (the "Cross-Motion").[3]

I. ARGUMENT

A. Defendants Have Been Performing "Final Reclamation" Throughout Operations

There is an issue of context that must be addressed as the outset, as Defendants' Opposition brief and Cross-Motion both misrepresent the nature of "interim" and "final" reclamation.

The definitions of "interim" and "final" reclamation are found in the "Non-Metallic Mining Reclamation Plan" dated December 21, 2012 [Exhibit 71][4] (the "2012 Reclamation Plan"), which is incorporated into the Services Agreement. Section 8.0, entitled "Interim Reclamation," sets out the phased-reclamation concept discussed by Defendants, making the simple point that actively mined acreage will be reclaimed when mining has moved on. Section 9.0 *et seq.*, entitled "Final Reclamation," sets out several pages of requirements for "final reclamation," including reclamation "while" the mine is operating, and after "mining commences" in a particular area, and "as reclamation progresses." *Id.*, §§ 9.1, 9.3. It explains that "final" reclamation includes "Slope fill and grading for long term slope stability" at the required 3:1 ratio (§ 9.2), "Topsoil redistribution and site preparation for seeding" (§ 9.3), and "Seeding and Mulching" (§ 9.5.2), among others. Nowhere in the 2012 Reclamation Plan is there *any* language that separates "final reclamation" from "all reclamation" described in Section 5.1(e) of the Services Agreement. Instead, the 2012 Reclamation Plan confirms that "final" reclamation was due as each phase of

[2] Capitalized terms not defined herein carry the meaning assigned in the Breach of Contract MSJ.

[3] The parties stipulated to timing for their responses in a Stipulation and Proposed Order [Dkt. Nos. 67 and 67-1]. Although the Proposed Order was not entered, Defendants filed their Opposition and Cross-Motion according to the terms of the Proposed Order, as does Superior.

[4] Numbered exhibits refer to those submitted by Defendants (*see* Dkt. No. 83), while lettered exhibits refer to those attached to the declarations of Scott Waughtal (Dkt. Nos. 63, 64, 74), including the Omnibus Declaration of Scott Waughtal filed herewith.

mining was completed, and as acreage was removed from active mining. For this reason, when Superior refers to "final" reclamation that could not be performed until mining ended at the Quarry, it means the reclamation that could not be performed on *actively mined land* until the Quarry was no longer operational, which is distinct from "final" reclamation carried out on an "interim" basis.

This is how Defendants mined the Quarry for eight years, as shown in the Nonmetallic Mining Reclamation Permit Annual Report for each Operational Year in which there were fully mined areas for reclamation. The 2017 Annual Report explained that 29.3 acres were already reclaimed, and that reclamation in 2017 had included "top soiling and seeding approximately 12 acres." *See Omnibus Declaration of Scott Waughtal* ("Omnibus Waughtal Decl."), Exhibit QQ, p. 5. The 2018 Annual Report explained that 2018 reclamation had included "regrading, top soiling and seeding 9 acres" of land, and "rough grading" another 34.6 acres. *Id.*, Exhibit RR, p. 5. And it explained that reclamation for 2019 "will consist of final shaping, topsoil and seeding of 34.6 acres that was started in 2018," and the "mud ponds that consist of 14.2 acres will also be completed in 2019." *Id.* The report displayed these areas on Appendix D to the report. *Id*.[5]

Both parties have already submitted the Appendix D map into evidence, but as part of "Exhibit D" to a proposed and draft "Termination Agreement." *Id.,* Exhibit M, pp. 110-11. That "Exhibit D" explains on its face that the reclamation the Defendants were *offering* to complete as part of a settlement was reclamation they were already *required* to perform in 2019, which was final reclamation for completed acreage, including the mud ponds and 34.6 additional acres. That final reclamation includes "leveling and reshaping of the ground" in an area that was already "generally in final formation," using dozers to haul soil "to shape this hillside to the required 3:1

[5] *See also Reorganized Debtor Superior Silica Sands LLC's Responsive Statement of Uncontroverted Facts in Opposition to Defendants' Cross-Motion for Summary Judgment* filed herewith (the "Response SUF") at ¶¶ 168-69.

slope or less," to "backfill the mud ponds," and then to ensure that the area would "be covered with soil and seeded," leaving aside any areas that would be used by Superior in "future mining operations at the site." And in the case of work to "reclaim the mud ponds," Defendants would "backfill these ponds and provide cover over the mud," which had been "approved as the method to reclaim these ponds," "recontour the existing outside berms to tie in to the undisturbed land" to "less than a 3:1 slope, as required in the Reclamation permit," and then perform the "last step" which is to "place soils across this area and seed the area." *Id.* (the "2019 Required Reclamation").

Thus, when both parties in this litigation state that "final" reclamation could not begin until the Quarry shut down, either they are referencing the "final" reclamation that can only be performed on actively mined acreage after the Quarry is closed, or they are making a false statement. Like a chef that cleans the kitchen while cooking so there is less to clean up after the meal, Defendants performed both "interim" and "final" reclamation in phases, by re-sloping the land, applying topsoil, and seeding the areas in multiple years. In other words, Defendants have been performing "all reclamation" from the execution of the Services Agreement.

Defendants argue a parade of horribles, suggesting that many years after leaving the Quarry they might learn that they are expected to perform "final" reclamation for another Contractor's mining. It is a baseless fear. If Superior had operated the Quarry for twenty years, using two contractors under successive ten-year contracts, the first Contractor would not suddenly face a "final" clean-up bill for twenty years of operations, ten years after their contract finished. Rather, as long as the first Contractor had completed "all reclamation" on fully mined acreage before leaving, the second Contractor would take over the actively mined areas, and the not-yet-mined areas, and that Contractor's future mining would supersede the work of the first Contractor.

This is the procedure contemplated in the draft Termination Agreement that Weber

proposed during negotiations in 2019. If the parties had signed such an agreement, and if Superior had found a replacement Contractor instead of filing bankruptcy and closing the Quarry, this litigation would only be addressing Defendants' failure to perform the 2019 Required Reclamation (both interim and final). But the parties did not terminate the Services Agreement, and the Quarry has closed. Defendants are the "Contractor" that is liable under the Services Agreement to complete "all reclamation," including the 2019 Required Reclamation they have already failed to complete, and any remaining "final" reclamation required upon closure of the Quarry.

Rather than acknowledge this context – which has been Superior's position in this case – Defendants repeatedly and very misleadingly claim that Superior has "judicially admitted" that "all" or "any" reclamation was a *future* obligation, arising post-rejection, that cannot be enforced. Opp. at pp. 2, 13, 16. This claim egregiously misrepresents the Request for Admission ("RFA") in which this "admission" was allegedly made, as the RFA does not ask about "all" final reclamation, but only "final reclamation" without any definition of the term. And Superior's response expressly explains the context woven throughout this brief – that:

> **If** Defendants' mining activity at the Property had concluded in 2019, its **remaining reclamation obligations** under the SSS Permits and Reclamation Plan – **which Plaintiff presumes is the meaning of "final reclamation" for the purposes of this Request for Admission** – **would have been due and required at that time.** But as Defendants had not completed their "mining activity" under the Wet Sand Services Agreement prior to rejection of the Wet Sand Services Agreement in Plaintiff's chapter 11 case in 2019, Plaintiff admits that any "final reclamation" was not required **to be completed** at the Property in 2019. Plaintiff denies all other implications that may be intended by this Request for Admission.

Exhibit 57, p. 15, RFA 42 (emphasis added). Defendants' repeated misrepresentation of this RFA response as a "judicial admission" contrary to its plain language is highly inappropriate.

When a proper context of "final reclamation" is applied to the facts, the Breach of Contract MSJ is remarkably simple. Both parties agree that the Services Agreement is unambiguous and may be interpreted by its plain meaning. Both parties agree that the same controlling Third Circuit

case law, and its progeny, determine the implications of contract rejection. And while that same case law holds that a prepetition breach is not actually required for enforcement of Defendants' ongoing reclamation obligations, Defendants materially breached and repudiated the Services Agreement prior to the Petition Date based on their own uncontroverted evidence and admissions.

B. The Services Agreement Obligates Defendants to Perform Final Reclamation

1. A Plain Meaning Interpretation Is Limited to the Plain Meaning of Existing Terms

Both parties agree that the Services Agreement is unambiguous, and agree that it may be interpreted solely by reference to its terms. But Defendants' interpretation of the Services Agreement relies on incorrect contexts, misleading parol evidence, and non-existent terms.

Section 5.1(e) of the Services Agreement provides in relevant part that:

> (e) Reclamation. **Contractor shall be responsible for all reclamation required pursuant to Contractor's mining activity hereunder.** Contractor specifically acknowledges that the SSS Permits **may require** construction of property berms and **reclamation of fully mined areas during the Term**.

Superior SUF ¶¶ 19-20 (emphasis added).

Defendants insist that the phrase "mining activity hereunder" is a "limiting" phrase. But it limits nothing in this litigation. All reclamation at issue in this case relates to mining carried out by Defendants "hereunder" the Services Agreement and its expressly incorporated documents.

Defendants then argue that the second and third sentences of this paragraph somehow limit reclamation on "fully mined areas" to only "interim" reclamation. Opp. at p. 25. But when a proper understanding of "final" reclamation is applied, the second sentence merely confirms that "all" reclamation cannot be postponed until the Term of the contract is complete, and that there will be "reclamation of fully mined areas during the Term"—the same "final" reclamation Defendants have done on fully mined areas since commencing operations.

If the second and third sentences were meant to reduce "all reclamation" to interim

reclamation (despite the reference to "fully mined areas"), then the "all reclamation" first sentence in Section 5.1(e) becomes superfluous. Under Wisconsin law, a contract must be interpreted to give "reasonable meaning to each provision ... without rendering any portion superfluous." *Sonday v. Dave Kohel Agency, Inc.*, 2006 WI 92, P21, 293 Wis. 2d 458, 718 N.W.2d 631 (2006).

In order to avoid making the first sentence of Section 5.1(e) superfluous, Defendants' interpretation would require the addition of new language so that the phrase "all reclamation required pursuant to Contractor's mining activity hereunder" would be read to state "all [interim but not final] reclamation required [in each Operational Year] pursuant to Contractor's mining activity hereunder [during such Operational Years]." Any argument of interpretation that requires insertion of a non-existent phrase is not a permissible plain meaning argument. *See Folkman v. Quamme*, 2003 WI 116, P42, 264 Wis. 2d 617, 665 N.W.2d 857 (2003) (refusing to "add the words" to a contract phrase to give it the argued meaning, as a court "may not judicially revise policy language in this manner") (emphasis in original); *EP-Direct, Inc. v. Fellman*, 2008 WI App 1, P16, 306 Wis. 2d 850, 743 N.W.2d 167 (Ct. App. 2007) (to ascertain a contract's plain meaning, the court "may look only to the disputed language itself, and its context within" the contract).

The plain meaning of the Services Agreement can be readily ascertained by changing one fact in the present case. If Superior had terminated the Services Agreement based on Defendants' breaches and had closed the Quarry in 2018, without filing bankruptcy, the time for Defendants to perform all *remaining* "final reclamation" on all acreage no longer being mined would have become ripe, including incomplete and outstanding reclamation obligations. The fact that the Quarry was closed post-petition and post-rejection does not change this outcome. There was no replacement Contractor that took over Defendants' mining "hereunder" the Services Agreement.

The Services Agreement, and Section 5.1(e) in particular, are susceptible to only one plain

meaning as to liability for "all reclamation." It is that the same "Contractor" that has accepted liability for "all reclamation" is responsible for both "interim" and "final" reclamation, whether that arises in each Operational Year as areas are fully mined, or remains due when all mining ends.

2. Section 1.4 of the Services Agreement Is Not Relevant to Reclamation

Defendants' "plain meaning" argument attempts to turn Section 1.4 of the Services Agreement into a reclamation provision, but it is a misleading argument. Opp. at pp. 28-29. Article I covers initial construction and the parties' respective property interests at the Quarry. Section 1.4 addresses property rights upon expiration or termination. It is not part of Article 5, which outlines Defendants' reclamation obligations at the Quarry, and has no bearing on the reclamation responsibilities outlined in Article 5, or in the incorporated Reclamation Plans.

3. If the Services Agreement Is Ambiguous, Defendants' Own Evidence Demonstrates the Agreement's Meaning

If this Court finds that the Services Agreement is ambiguous, and that parol evidence is required to permit a proper interpretation, Defendants' own "evidence," and the portions of that evidence that they omitted, demonstrate the plain meaning argued by Superior.

Defendants filed near-identical declarations of Paul Robinson and Doug Weible that provide exceedingly vague "testimony" that cannot suffice as evidence, such as descriptions of discussions "with Superior" without any reference to the people involved or the timing. But these two declarations stand out for the more critical reason that documents produced in this litigation (some already exhibits to these competing motions) flatly contradict both declarants' testimony concerning "final reclamation." Both declarations discuss a draft agreement for an Oklahoma quarry (the "Oklahoma Draft Agreements") that the parties negotiated as a possible replacement for the Auburn Quarry. Although such drafts and communications might be deemed settlement communications under Fed. R. Evid. 408, Defendants have plainly waived this protection.

Defendants claim that the unexecuted Oklahoma Draft Agreements and proposed Termination Agreement reflect "an agreement" between the parties providing that Defendants "would perform limited additional *interim* reclamation at the Quarry—***not final reclamation***." Opp. at p. 31 (emphasis in original). This statement is false. The Oklahoma Draft Agreements and draft Termination Agreement confirm that Defendants and their declarants understood that their obligation under Section 5.1(e) for "all reclamation" included all "final" reclamation, and were attempting to negotiate their way out of future liability for "final" reclamation.

The draft of these agreements cited by Defendants—Exhibit M—is the *third* draft version of the Oklahoma Draft Agreement. All three versions, together, tell a very different story. The Draft Oklahoma Agreements used the instant Services Agreement as their template. Thus, if Messrs. Robinson and Weible truly believed that Section 5.1 did not obligate the "Contractor" to carry out "all reclamation," including all "final reclamation," and if Superior had never raised this issue before (as declarants claim), there would have been no need to amend Section 5.1. Yet, on January 16, 2019, Mr. Robinson emailed to Superior a first draft of the Draft Oklahoma Agreement, in which Defendants completely rewrote Section 5.1's reclamation paragraph to state that the Contractor would only have responsibility for extremely limited "contemporaneous reclamation activities consisting only of backfilling pits with waste mud from the Wash Plant," while Superior would be responsible for "all reclamation required in connection with the final close of the Quarry Site, and Contractor shall have no responsibility therefor." *See* Omnibus Waughtal Decl., Exhibit SS, at p. 6, § 5.1(d) (SSS003112), Response SUF ¶ 176. Mr. Robinson's actions in January 2019 are completely at odds with his current testimony, particularly as Mr. Robinson's proposed draft was contemporaneous to the 2018 Annual Report, dated January 31,

2019, detailing the interim *and* final reclamation Defendants had already performed in 2018, and committed to perform in 2019. *See*, Exhibit RR, p. 5, Response SUF ¶ 170.

A month later, on February 15, 2019, Superior emailed a responsive version and redline of the Oklahoma Draft Agreement to Mr. Robinson, in which Superior restored the Contractor's liability to provide that "Contractor will conduct contemporaneous reclamation activities in accordance with all laws and permits and Mine Plan and final reclamation and closure of the Quarry Site in accordance with all laws and permits shall be Contractor's obligation and responsibility." *Id.*, Exhibit TT, at § 5.1(d), SSS314209, Response SUF ¶ 177. Superior's revised version also attaches a proposed Termination Agreement, which – although it mistakenly uses the term "remediation" for reclamation – provides that Defendants would "remain fully obligated under" the Services Agreement for "all remediation" including "final remediation of open areas as of January 1, 2019." *Id*., SSS314234, Response SUF ¶ 178. Thus, the Defendants' statement that Superior "never contended" that Defendants were liable for all remaining final reclamation until after emerging from bankruptcy (Opp. at p. 3) is untrue, and the declarants' testimony claiming that Superior did not assert that the Contractor was liable for final reclamation is belied by these documents, and by Defendants' actual practices.

On March 21, 2019, Mr. Robinson sent Superior a further version, with a *first draft* of Defendants' separate Termination Agreement, restoring Weber's liability for "contemporaneous reclamation" only, and placing all liability for "final reclamation" on Superior. Exhibit M at pp. 9, 57. The draft Termination Agreement included "Exhibit D" describing Weber's 2019 Required Reclamation from the 2018 Annual Report. *Id.*, at pp. 110-11.

Understandably, no versions of the Oklahoma Draft Agreements or Termination Agreement were ever executed. But the parties' revised drafts demonstrate on their face that the

Defendants understood that their liability for "all reclamation" included "final reclamation" during *and after* operations, and that changes to the language of the Services Agreement would be required to insulate them from future liability in an otherwise substantially identical contract.

Defendants then describe an email that Superior's CEO sent to Chippewa County describing the attached 2019 Required Reclamation as an "agreement" (Defendants' term) that proves that Defendants were not obligated to perform reclamation "of the entire site." Opp. at p. 32. This, too, is false. Mr. Shearer's email with its exhibits shows that Superior sent the County the 2019 Required Reclamation pages—the "Exhibit D"—marked "Draft," and that Mr. Shearer did not describe the attachment as an "agreement," but merely as an "attachment confirming the commitment from Weber to reclaim the mine work that they have done thus far." *See* Exhibits 49 and 50.[6] In other words, in the course of trying to convince the County to provide Superior with an extension of its bond, Mr. Shearer needed to reassure the County that Defendants were committed to abide by their already existing legal obligations to carry out all interim and final reclamation already required from their mining activities in 2018.

Continuing an unfortunate pattern with "evidence," Defendants then attempt to reframe a December 2020 insurance presentation as proof of their position because it states that Defendants "must partially reclaim as it mined …" the Quarry. Opp. at p. 32. This is a truthful statement, as interim and final reclamation were required for completed acreage "as [Defendants] mined" the Quarry, as shown by each Annual Report. It is meaningless that an insurance presentation, drafted by an unidentified person, did not give more detail about this dispute. Such a practice of "using out-of-context phrases to build [a] case is not enough" to meet evidentiary requirements for

[6] Defendants separated Mr. Shearer's email (Exhibit 50) from its "Exhibit D" attachment (Exhibit 49), but their consecutive Bates labels show that Exhibit 49 is the attachment to Exhibit 50.

summary judgment. *See Watts-Robinson v. Brittain*, No. 5:17-cv-00024-FDW-DSC, 2019 U.S. Dist. LEXIS 1734 at *18 (W.D.N.C. Jan. 4, 2019); *Willis v. Anthem Blue Cross & Blue Shield*, 193 F. Supp. 2d 436, 444 (D. Conn. 2001) (denying summary judgment as "[a] contractual promise cannot be created by plucking phrases out of context") (citation omitted).

Superior contends that the Services Agreement is unambiguous. If this Court finds otherwise, Superior requests an extension of time pursuant to F.R.C.P. 56(d) to permit Superior to take the depositions of witnesses whose testimony has expressed views about final reclamation contrary to the evidence, among others. *See* Declaration of David J. Richardson filed herewith.

C. <u>The Third Circuit Preserves Accrued, Non-Reciprocal Obligations Despite Rejection</u>

1. Defendants' Argument Erases the Concept of a Non-Executory Obligation

Superior and Defendants both cite to controlling case law as support for their arguments, including *Delightful Music Ltd. v. Taylor (In re Taylor)*, 913 F.2d 102, 106 (3d Cir. 1990). Yet both parties argue opposite results. The difference in their arguments is quite simple. Superior argues that when an executory contract is rejected, reciprocal and outstanding obligations (*i.e.*, executory) are no longer enforceable, but any accrued and outstanding non-reciprocal obligations (*i.e.*, *no longer* executory) may be enforced. Defendants blur this distinction, and argue that an accrued obligation cannot be enforced post-rejection, because the entire contract has been rejected.

Defendants' interpretation of 11 U.S.C. § 365 would erase the Third Circuit's critical holding in *Taylor* that enforced the debtor's right to receive royalties to be earned from prepetition work. Defendants overlook that the <u>contract</u> in *Taylor* was executory, but the royalties obligation was *no longer* executory. The debtor's rejection prevented enforcement of unfulfilled reciprocal obligations, but not accrued and non-reciprocal obligations:

> The real question is the status of the **reciprocal rights and obligations** of the contracting parties arising after the petition was filed. As to these, the 'assume or reject' dichotomy means simply that if the trustee wishes to obtain for the estate the

> future benefits of **the executory portion of the contract**, the trustee must also assume the burdens of that contract, as an expense of bankruptcy administration (*i.e.*, having priority over all pre-bankruptcy claims of creditors). (emphasis added)

In re Taylor, 913 F.2d at 106. Thus, the right to receive royalties "passe[d] to the trustee/debtor-in-possession … regardless of whether the trustee later affirms or rejects the contract." *Id.*

The meaning of the Third Circuit's holding in *Taylor* has been confirmed in subsequent case law, and is consistent with earlier case law, holding that a one-sided prepetition obligation that is not a reciprocal and executory portion of the contract survives rejection and remains enforceable. *See Empire State Bldg. Co., L.L.C. v. New York Skyline, Inc. (In re New York Skyline, Inc.)*, 432 B.R. 66, 80 (Bankr. S.D.N.Y. 2010) (quoting *Taylor*, holding that "[t]he decision [to reject a contract] is forward looking, and does not affect the rights and obligations that have already accrued; 'the issue of affirmance or rejection relates only to those aspects of the contract which remained unfulfilled as of the date the petition was filed.'"); *Thompson-Mendez v. St. Charles at Olde Court P'ship, LLC (In re Thompson-Mendez)*, 321 B.R. 814, 819 (Bankr. D. Md. 2005) (rejection "did not divest the estate from the breaching party's rights under the terms of the contract and applicable state law," thus, contractor's estate had right to payment for prepetition work performed); *In re Tomer*, 128 B.R. 746, 756 (Bankr. S.D. Ill. 1991) (following *Taylor*, holding that "executed portions of the contracts remain intact, and property rights acquired under the contracts prior to filing bec[o]me property of the estate despite the [debtor's] rejection of unperformed obligations of the contracts."). Including in this very adversary proceeding. *See Superior Silica Sands LLC v. Iron Mountain Trap Rock Co. (In re Emerge Energy Servs. LP)*, No. 19-11563(KBO), 2021 Bankr. LEXIS 2361, at *17 (Bankr. D. Del. Aug. 26, 2021) (following *Taylor*, *New York Skyline*, and *In re Tomer*).

In *Music Royalty Consulting, Inc. v. Reservoir Media Mgmt.*, No. 18 Civ. 9480 (CM), 2022 U.S. Dist. LEXIS 79392 (S.D.N.Y. April 20, 2022), remarkably similar to *Taylor*, the debtor had

delivered songs to a music publisher prior to the petition date under a publishing agreement. The debtor then filed bankruptcy, rejected the publishing agreement, and assigned his rights to receive future royalties. The court confirmed the enforceability of the obligation to pay future royalties:

> [the debtor's] past performance pursuant to the Publishing Agreement vested its right (and, following the assignment, its assignee's right) to receive the writer's share of royalties for those 300 songs; no further performance on its part (or on its assignee's part) was required. **As long as those songs are generating royalties — royalties that are being collected by Reservoir — Reservoir is contractually obligated to pay the writer's share of those royalties to their rightful owner**, which happens to be MRCI, as Tuff Jew's assignee.

Music Royalty, 2022 U.S. Dist. LEXIS 79392, at *35 (emphasis added).

This concept applies equally to enforcement of a debtor's accrued, non-reciprocal obligations to the non-rejecting contract party. *See, e.g., Sir Speedy, Inc., v. Morse*, 256 B.R. 657, 660 (Bankr. D. Mass. 2000) (right to enforce non-compete clause survived debtor's rejection of contract); *In re Klein*, 218 B.R. 787, 790-91 (Bankr. W.D. Penn. 1998) (same); *In re Steaks To Go, Inc.*, 226 B.R. 35, 38 (Bankr. E.D. Mo. 1998) (same). Courts often describe the survivability of these obligations as resting on their post-termination nature. *See, e.g., In re Steaks to Go*, 226 B.R. at 38 ("a covenant not to compete addresses the parties' actions after the executory contract has terminated, expired or not been renewed"). An agreement not to compete, or to transfer a liquor license is, by its nature, an agreement that is meant to follow a cessation of the parties' contractual relationship. For the same reason, an agreement to carry out "all reclamation" arising from already-completed mining is an agreement to complete all reclamation – "interim" or "final" – that remains to be done when actively mined acreage is deemed completely mined.

Defendants argue that the general rule that rejection bars enforcement of reciprocal and executory obligations wipes out the exception recognized by all of the above-cited cases. The Third Circuit in *Taylor*, and other courts, have confirmed that this is not the law. *See Music Royalty*, 2022 U.S. Dist. LEXIS 79392, at *35 ("As long as those songs are generating royalties

— royalties that are being collected by Reservoir — Reservoir is contractually obligated to pay the writer's share of those royalties to their rightful owner …"); *In re Tomer*, 128 B.R. at 756 ("property rights acquired under the contracts prior to filing became property of the estate despite the trustee's rejection of unperformed obligations of the contracts"), *see also In re Univ. Med. Ctr.*, 973 F.2d 1065, 1075 (3d Cir. 1992) (rejection cuts off any ability to enforce "the *remaining executory portions* of the contract") (emphasis added); *Leasing Serv. Corp. v. First Tenn. Bank Nat'l Ass'n*, 826 F.2d 434, 437 (6th Cir. 1987) (vested security interest remained enforceable post-rejection as it "was non-executory and therefore not subject to the rejection power of the trustee.").

Both parties have cited to *Lauter v. Citgo Pet. Corp.*, No. H-17-2028, 2018 U.S. Dist. LEXIS 21065 (S.D. Tex. Feb. 8, 2018). Defendants argue that it proves their interpretation of *Taylor* because the Court would not permit the debtor to sue for breach of post-petition fuel delivery obligations under a rejected contract. Opp. at pp. 18-19. But Defendants fail to understand that the obligation to deliver fuel in *Lauter* was an *executory* obligation, as the debtor had a corresponding obligation to pay for it. If Defendants' interpretation of *Lauter* were correct, it would mean that the debtors in *Taylor* and *Music Royalty* would have a right to receive future royalties derived from prepetition recordings, but no ability to sue for breach of that obligation. Defendant's argument would make a mockery of the holdings of *Taylor*, *Music Royalty*, and all other cases that have preserved a debtor's property interest in an accrued contract right.

While Defendants breached the Services Agreement prepetition (addressed below), no breach is required under *Taylor* for enforcement of an accrued obligation. There was no discussion of any breach in *Taylor*. Rather, like related cases, the royalty obligation was simply an ongoing property right that was preserved for enforcement. *See also In re Thompson-Mendez*, 321 B.R. at 819 (enforceable obligation not alleged as prepetition breach); *In re Tomer*, 128 B.R. at 756

(same). *See also Superior Silica Sands LLC*, 2021 Bankr. LEXIS 2361, at *17 (contract rejection "does not affect the rights and obligations that have already accrued"). If the publishers in *Taylor* and *Music Royalty* had paid all royalties due through the date of rejection, but then refused to pay further royalties, the debtors would still have had the same breach of contract rights to enforce the obligation.

Superior is not trying to force Defendants to mine the Quarry in the future in return for payment. Those reciprocal and executory terms of the Services Agreement were rejected. Rather, this lawsuit is about an obligation to complete "all reclamation" that accrued the moment Defendants, as the "Contractor," began to mine the Quarry. There is no corresponding executory obligation of Superior that would erase the Contractor's obligations upon contract rejection.

2. Defendants' Exhibits and Opposition Brief Demonstrate that Their Breach of Contract Is a Matter of Undisputed Fact

Defendants insist that the evidence does not prove a breach of contract beginning in 2016. But in so arguing, Defendants have presented and argued uncontested evidence demonstrating that they materially breached and repudiated the Services Agreement before the Petition Date.

As briefed above, the parties' negotiations in 2019 did not result in any executed Draft Oklahoma Agreement or Termination Agreement. Yet on July 12, 2019, Defendants' General Manager, Justin Higginbotham, sent Superior an email that Defendants have put into evidence, copied to Paul Robinson, stating that Weber (defined as FWI) would remove "the **last of our equipment** from our Chippewa Sand site **due to inactivity of contract discussions**," including:

> [a]ll office materials and electronics; all hand tools, welders and equipment repair tools in shop; all diesel pumps and accessories used for site dewatering and pumping; shipping container with equipment spare parts; pit slurry system and feeder; miscellaneous remaining FWI equipment.

Exhibit 53 (the "Higginbotham Notice") (emphasis added). Mr. Higginbotham went on to explain that, once Defendants had removed the "last of" their equipment:

> FWI will no longer have any personnel onsite or maintain any responsibilities for management of the site until contract negotiations can be finalized.

Id. Though Mr. Higginbotham professed that Weber was "still committed to conducting the previously discussed reclamation," he confirmed that Defendants' abandonment arose from stalled "contract negotiations" for agreements that would terminate Defendants' future operational obligations, not lead to their resumption. Defendants' repudiation of their obligations under the Services Agreement was complete and absolute. *Id.*, SAMF ¶ 168; Response SUF ¶¶ 172-74.

Weber did not wait to remove its equipment. The reference to the "last of our equipment" demonstrates that Defendants had already begun to remove equipment. And Defendants continued their removal post-petition. One day after the Petition Date, on July 16, 2019, Defendants were "pulling all the pumps and hoses today from Auburn." Response SUF ¶¶ 175.

By abandoning the Quarry in this manner, Defendants materially breached the Services Agreement and repudiated their obligations to maintain the mine in operational status.[7] Section 5.1(a) of the Services Agreement requires that "During the Operational Period, **Contractor shall … operate and maintain the Plant and Equipment** in accordance with the terms of the Mine Plan, this Agreement, applicable law, **the SSS Permits**, and Prudent Mining & Wash Plan Operation Practice …" Exhibit A, § 5.1, Superior SUF ¶¶ 19-20. Section 5.1(b) of the Services Agreement, entitled "Good Working Order," requires that:

> **Contractor shall maintain the Plant and Equipment in a condition such that it is capable of operation** to produce Product Sand and shall promptly inform SSS of any inability to operate in accordance with such contracted operating characteristics. (emphasis added)

[7] This is not an argument that relies on "new evidence," as the Higginbotham Notice was put into evidence by Defendants, and as this argument merely focuses the Defendants' prepetition default on uncontroverted evidence. Further, Defendants have an opportunity to reply. *See Alston v. Forsyth*, No. 10-1180, 379 F. App'x 126, 129 (3d Cir. May 13, 2010) (troubled by new evidence submitted with reply, where opposing party had no right of sur-reply).

Response SUF ¶ 164. Section 5.3(a) obligated Defendants "throughout the Operational Period, [to] maintain the Stock Pile Area and manage all Product Sand thereon." *Id.*, ¶ 165. And Section 8.2 obligated Defendants to "have available adequate personnel with the requisite skills and adequate equipment to perform its obligations under this Agreement …" *Id.*, ¶ 167.

Defendants had a limited right under Section 1.3(a) of the Services Agreement to remove the equipment described in the Higginbotham Notice, but **only** "**upon a termination of this Agreement pursuant to Section 11.2 hereof."** *Id.*, ¶ 163 (emphasis added).

Defendants will insist that Superior had failed to pay-in-full the October 31, 2018 Invoice (the "2018 Invoice"). But a breach is not a "default" without written notice. Exhibit A, § 11.2. And termination requires a *further* written notice of termination, which Defendants never provided. *Id.*, § 11.3. Had they done so, there would have been no contract for Superior to reject.

Whether or not Defendants breached in 2016, their 2019 abandonment of the Quarry and repudiation of their obligations was a material breach of contract. "The Restatement of Contracts makes clear that when a party repudiates a contract, that repudiation is a material breach." *Key v. William Ryan Homes, Inc.*, 2016 WI App 34, P14, 369 Wis. 2d 72, 879 N.W.2d 809 (Ct. App. 2016) (quoting Restatement (second) of Contracts § 253(1) (1981) for premise that "[w]here an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.") (the "Restatement of Contracts"). The material nature of a repudiation may be decided as a matter of law on summary judgment "in clear cases." *Id.*, 2016 WI App 34 at P15.

The suggestion in the Higginbotham Notice that "inactivity of contract discussions" was the reason for abandonment does not save Defendants from their repudiation. "It is a well-settled principle of law that a repudiation of the terms of a contract, and demand for performance

substantially different from that provided for in such contract, constitutes an anticipatory breach …" *Morn v. Schalk*, 14 Wis. 2d 307, 316, 111 N.W.2d 80 (1961).[8] Defendants were obligated to continually maintain the operational status of the Quarry, maintain necessary equipment, and keep required employees onsite. Exhibit A, §§ 5.1(a), 5.1(b), 5.3(a), 8.2. They materially breached the agreement when they removed all remaining equipment and employees, and rendered the Quarry incapable of operation, subject to contract negotiations over a draft Termination Agreement. This (as addressed more fully below) is why there were no "Operational Years" post-petition, as Defendants rendered the Quarry non-operational, and repudiated the same contract under which they seek future take-or-pay payment for having performed no work.

The Seventh Circuit, applying similar facts, has confirmed that a prior breach by the non-repudiating party, for which no formal notice of breach was given, does not justify a repudiation of the contract, which, itself, is the "material" breach. In *Arlington LF, LLC v. Arlington Hospitality, Inc.*, 637 F.3d 706 (7th Cir. 2011) (Illinois law), the Seventh Circuit affirmed the District Court's ruling in which the District Court held that "LF" repudiated the contract because:

> a breach by Arlington could only be effective *after* LF gave it notice and opportunity to cure. Because LF had not yet done so as of the time it repudiated the agreement on September 29, reasoned the district court, LF's repudiation of those statements caused the first breach. It was only after October 20, when Arlington did not pay the fees *after* finally being given the requisite notice, that any breach cognizable under the Interim Order could have occurred. But by then, LF had already 'walked away.'

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[8] Defendants may attempt to interpret the Higginbotham Notice as something other than a demand to renegotiate the Services Agreement in return for already-promised performance, yet that is the interpretation Defendants' counsel put forward at Mr. Waughtal's deposition, obtaining Mr. Waughtal's agreement. *See* Omnibus Waughtal Decl., Exhibit VV, pp. 181-182:

> "Q. what he's telling Superior is that they're not going to continue to maintain the site *without guarantees for future production* or without being allowed to produce the currently contracted volume from the Chippewa Sand location –
> A. Right."

The Services Agreement does not contain any guarantees of production, and rather than a "contracted volume" for production, there is a take-or-pay clause that applies when production is below a certain tonnage.

Arlington, 637 F.3d at 712. The Seventh Circuit rejected the claim that the non-repudiating party needed to give notice or object to the repudiation, stating that such an argument "would allow a party to announce repudiation of its contractual duty and then be held blameless unless the other party objected and attempted to change [the] repudiating party's mind. Such is not the law." *Id*., at 716 (citation omitted). Once Defendants removed employees and equipment, and ceased to maintain the Quarry, Superior "no longer had what it had bargained for." *Id*., at 717. *See also Caisse Nationale de Credit Agricole v. CBI Indus.*, 90 F.3d 1264, 1275 (7th Cir. 1996) (NY law) (finding no obligation to give notice where party repudiates agreement because repudiation waives any right to rely on a contract term).[9] Defendants materially breached the entire Services Agreement, including their obligation for "all reclamation."

3. Defendants' "Performance" Argument Is an Invention, Not Supported by Case Law

Finally, Defendants' claim that reclamation is an unenforceable "performance" obligation is an invented concept that is not addressed in any of the cases cited by Defendants. The Services Agreement is not a personal services contract, and there is no requirement that Defendants carry out final reclamation with their own employees. Defendants could have hired the same contractor hired by Superior to carry out the work, and simply paid the bills – indeed, those are the primary damages sought in this action. Defendants' "performance" concern is a baseless invention.

Because there will always be remaining "final reclamation" to be performed when the contract expires or terminates, the survivability of that obligation is "inherent in the right such that it survives." *Uniloc 2017 LLC v. Google LLC*, 52 F.4th 1352, 1358 (Fed. Cir. 2022). But contrary to Defendants' claim (Opp. at p. 21), the court in *Uniloc* did *not* hold that a "performance" obligation is one that does not, by its nature, survive termination. The court's conclusion that a

[9] There is a dearth of Wisconsin case law addressing these issues outside of a statutory structure for consumer transactions. But these principles are consistent across jurisdictions.

license did not survive termination had *nothing* to do with *performance*, but was based on the license not being a right that by its "nature" would survive termination. Nor did the court limit survivability to remedies for a breach of contract or contract resolution mechanism, as Defendants argue, but instead held that surviving clauses "include" those two examples. 52 F.4th at 1358.

Equally misplaced is Defendants' citation to *Meineke Car Care Ctrs., Inc. v. L.A.C. 1603 LLC*. No. 3:08-cv-73, 2008 WL 1840779 (W.D.N.C. Apr. 23, 2008). The District Court's ruling on cessation of a provision for future royalties in return for future sales of Meineke products was repeated in a summary judgment ruling, but then reversed on appeal by the Fourth Circuit. *See Meineke Car Care Ctrs., Inc. v. RLB Holdings, LLC*, No. 3:08-cv-240-RJC, 2009 U.S. Dist. LEXIS 70920, at *16 (W.D.N.C. Aug. 7, 2009) (provision for payment of royalties did not survive termination), *rev'd*, 423 F. App'x 274 (4th Cir. Apr. 14, 2011).

And in *Med. Shoppe Int'l, Inc. v. TLC Pharm., Inc.*, No. 4:09CV00683 AGF, 2010 U.S. Dist. LEXIS 69166 (E.D. Mo. July 12, 2010), like *Uniloc*, the court's holding was not based on any "performance," but on the finding that future license fees for a terminated license was not a term that "by its nature" survived contract termination. *Id.*, at * 5.

Defendants argue that it is relevant that Section 6.6 regarding tax obligations states that it survives termination, but Section 5.1 does not. But if that were determinative, Section 14.10 and its general provision for survival of terms "that by their nature should survive" would have no meaning in the contract. Exhibit A, § 14.10. Under principles of contract interpretation, Section 14.10 must be given meaning, and that meaning is to cover contract terms that do not already contain separate survival language. *See Layne Christensen Co. v. Bro-Tech Corp.*, 836 F. Supp. 2d 1203, 1230 (D. Kan. 2011) (rejecting argument that specific survival language in certain

sections erased broader section providing for survival of terms that "by their nature should survive termination," and contract's injunction term was "such that one would expect it to survive").

Under Defendants' argument, the Contractor's obligation for "all reclamation" is of such "nature" that it is not meant to survive the contract that created the same environmental mess requiring clean-up. The argument is not supported by any cited case law.

4. Concentrations of Arsenic in the Mud Ponds Is Not a Pre-Existing Condition

Defendants attempt to erase their liability to reclaim the Mud Ponds by arguing that elevated arsenic levels have transformed "reclamation" of the ponds into a "remediation" issue under Section 4.3(a) of the Services Agreement.

Section 4.3(a) does not carry the meaning argued by Defendants. It does not obligate Superior to remediate *changes* to environmental conditions, but only "for any pre-existing (as of the Mobilization Date) non-compliance of the Quarry Site with applicable laws, rules and regulations pertaining to the control and regulation of hazardous materials and substances or protection of the environment." Exhibit A, § 4.3(a) (emphasis added), Superior SUF ¶ 16.

Defendants were obligated from the outset to reclaim the mud ponds, whether or not future tests would reveal concentrations of Arsenic, as reflected by the mud pond reclamation described in Defendants' 2019 Required Reclamation. *See* Exhibit M, p. 110. The mud ponds did not shift from "reclamation" to "remediation" simply because the Defendants failed to perform their duties.

D. Superior Has Submitted Sufficient Evidence of Damages

1. Scott Waughtal's Testimony Fully Supports the Actual and Estimated Damages

Superior's reclamation work is ongoing. Phase I is now more than two-thirds complete, meaning that most Phase I damages are now actual paid costs. In his Supplemental Declaration, Mr. Waughtal updated the estimates that are now actual costs paid as a result of Defendants' request for a four-month delay. Actual costs for Phase I have been 10.5% higher than Mr.

Waughtal's original estimate. Supp. Waughtal Decl. ¶ 7. The primary change arises from the need to replace blasting of the rock wall with a process to break up the stone as a result of landowner demands and litigation. Superior has now spent $1,452,985 to address the high wall, and projects a further $304,500 to complete the work, compared to an original estimated cost of $1,596,800. *Id*., at ¶ 15., and Exhibit GG.

Superior continues to seek governmental approval for a way to reduce the Phase II damages, but the present cost for Phase II is based on the "only approved solution" by the Wisconsin Dept. of Natural Resources. Original Waughtal Decl. ¶ 36. If Superior is successful in obtaining approval for a less-expensive method of disposal, its damages will be reduced for Phase II. *Id.*

Defendants object to projected topsoil expenses – one of the last steps in final reclamation – claiming that Superior's reclamation contractor, Doug Nesja, doesn't know if "any" topsoil will be required for purchase. Opp. at p. 44. Mr. Nesja actually testified that the mine site "appears to be shorthanded" on topsoil, and that he "put it in Superior's hands to finalize" any purchases of additional topsoil. Omnibus Waughtal Decl., Exhibit WW, p. 26:6-11. And Scott Waughtal testified as to the exact amount that "I don't think we're going to know until you spread the 9 inches and see what's left." *Id.*, Exhibit VV, p. 134:8-12.

Defendants' suggestion that Superior should have already purchased topsoil is misguided. Topsoil is purchased when it is time for application to reduce the considerable expenses involved with moving large tonnages of earth. The manner in which Superior is carrying out Defendants' reclamation obligations is conservative, and is focused on reducing and mitigating such damages.

2. Superior Is Statutorily Entitled to 100% of Bond Premiums

Defendants appear to misunderstand Mr. Waughtal's testimony pertaining to bond premiums and his 65% completion estimate. It is a *concession*, and one that is not required under

Wisconsin law. Superior has been forced to keep its reclamation bond in place while it carries out Defendants' reclamation obligations. Under Wisconsin law, Superior may recover 100% of the premiums for any bond maintained during litigation as a result of Defendants' breach of contract:

> 814.05. Bond premium as costs. Any party entitled to recover costs or disbursements in an action or special proceeding may include in such disbursements the lawful premium paid to an authorized insurer for a suretyship obligation.

See Appendix 1, Wis. Stat. § 814.05.

Contrary to Superior's creative argument, Mr. Waughtal's use of the word "consequence" to describe these costs does not transform the bond premiums into "consequential damages." Opp., p. 45. Under Wisconsin law, and despite the reference to "costs" in the statute, such bond premiums are "compensatory" damages. *DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 573 n.5, 547 N.W.2d 592 (1996) (bond premiums were "compensatory damages" where plaintiff was compelled by defendant to pursue legal action to obtain full benefits of insurance contract).

While Superior will continue to request only 65% of its bond premium costs, if the Court determines that Superior's evidence is insufficient to support such an estimate, Superior requests the full amount of its bond premiums as compensatory damages pursuant to Wis. Stat. § 814.05.

3. Superior Is Entitled To Recovery of Its Attorney's Fees

Contrary to Defendants' argument, Section 4.3(c) of the Services Agreement, which entitles Superior to "reasonable attorney's fees and expenses … arising out of … conditions for which" Defendants are responsible under Section 4.3(b) (Superior SUF ¶ 18), is a broad and general right of recovery. Section 4.3(b) broadly provides that the Contractor:

> shall in performing **its obligations under this Agreement** comply with the SSS Permits and all applicable laws, rules and regulations pertaining to the control and regulation of hazardous materials and substances or protection of the environment.

Superior SUF ¶ 17. While Defendants focus on the "hazardous" materials aspect of Section 4.3(b), it plainly obligates the Defendants to comply with all permits, law, rules, and regulations pertaining to "protection of the environment" when performing "its obligations under this Agreement." *Id*.

One of the stated purposes of Wisconsin statute NR 135, Nonmetallic Mining Reclamation, is "prevention of environmental pollution," and it obligates responsible parties to comply with all laws "related to environmental protection." *See* Appendix 2, NR 135, §§ 135.01(a), 135.06(5). By failing to fulfill its obligations to carry out all reclamation at the Quarry, Defendants have failed to comply with applicable Permits, laws, regulations and rules pertaining to "protection of the environment," and their liability to Superior includes attorney's fees.

Defendants also attack Superior's request for fees incurred in connection with the Glaser Actions. While Superior thoroughly contests Defendants' reliance on an email that speculates as to the source of the "slime" that undermined Anthony Glaser's home, litigation over this issue would exceed Superior's incurred attorney's fees. Thus, Superior will concede $53,969.10 in fees requested for the Anthony Glaser Action to avoid wasteful litigation.

Defendants' remaining argument—that Superior "makes no attempt to allocate fees and expenses" between the two Glaser Actions—is incorrect. The Richardson Declaration filed with the Breach of Contract MSJ allocates $53,969.10 for the Anthony Glaser Action, and $58,324.18 for the Gerald Glaser Action, while explaining that overlapping time related to motions to transfer venue to this Court appear in the instant litigation. *See* Dkt. No. 65 at ¶ 11. This is not a failure to allocate, but a recognition that work to consolidate all three actions, where the same Defendants are liable for all damages, will be the same work whether there is one Glaser Action or two. All updated BakerHostetler fees arise solely in this action, while all Foley & Lardner fees arise solely in the Gerald Glaser Action, and are requested for recovery. Supp. Waughtal Decl. ¶¶ 13-14.

E. IMTR's Claim for Post-Petition "Take-or-Pay" Payments Cannot Be Enforced by Setoff or Recoupment

1. Defendants Have a Limited Setoff Right in the Amount of $1,179,506.80

Defendants' Cross-Motion asks this Court to allow IMTR to setoff or recoup its claim for nearly $34 million, including $32 million in post-petition "take-or-pay" fees. Superior does not dispute that Defendants have a permissible setoff in the amount of $1,179,506.80, which is the outstanding principal balance of the 2018 Invoice, without interest.

But Defendants do not have a right to setoff interest, as Article VII.B of the debtors' confirmed chapter 11 plan, entitled "No Postpetition Interest on Claims," provides that "postpetition interest shall not accrue or be paid on any Claims and no Holder of a Claim shall be entitled to interest accruing on or after the Petition Date on any Claim." *See* Exhibit 59, p. 42, Response SUF ¶ 171. Where a plan erases interest or sets an allowed interest rate, a creditor may not set off their claim in a differing amount, as a post-petition "interest rate is determined by the terms of the Plan. A confirmed plan becomes a legally binding agreement and a creditor's rights are governed exclusively by the terms of that plan." *In re NVF Co.*, 309 B.R. 698 (Bankr. D. Del. 2004) (allowing creditor to setoff claim at interest rate in confirmed plan, not statutory rate) (citations omitted); *Asbestosis Claimants v. Am. S.S. Owners Mut. Protection & Indem. Ass'n (In re Prudential Lines)*, 170 B.R. 222, 243 (S.D.N.Y. 1994) (denying creditor's request to set off its claim with interest where confirmed plan did not provide interest on claims). Superior thoroughly contests all other claims of setoff or recoupment by Defendant.

2. Defendants Cannot Assert Setoff or Recoupment Rights Under a Repudiated Services Agreement

The right of a "Contractor" to receive take-or-pay payments under Section 6.1 of the Services Agreement is a right that is provided "as consideration for all of Contractor's obligations under this Agreement." Response SUF ¶ 166. As addressed above, Defendants were obligated

under multiple sections of the Services Agreement to maintain the Quarry in an operations-ready mode, with equipment and personnel, in the event that Superior would place an order for sand.

Thus, when Defendants removed the "last of" their equipment, removed all employees, and abandoned their obligations to maintain the operational status of the Quarry, they repudiated the Services Agreement without giving written notice of a default and without following required termination procedures. Yet Defendants insist that they should be paid for future "Operational Years." But as Defendants abandoned the consideration for take-or-pay fees, they have no right to seek payment for non-existent operations. *Arlington*, 637 F.3d at 716 (citing Restatement of Contracts, § 253, stating that "repudiation immediately discharged all of [the non-repudiating party's] remaining duties under the lending agreement."); *William Ryan Homes*, 2016 WI App 34 at P14 (quoting Restatement of Contracts, § 253(1), "Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.").

Defendants will argue that they properly abandoned the site because Superior had not made full payment of the 2018 Invoice. But Defendants did not provide written notice of a default, and did not provide written notice of termination, both of which would have been required before Defendants could properly abandon the Quarry. Response SUF ¶ 168, SAMF ¶ 40. Under Defendants' theory, the Services Agreement contains an incentive for the Contractor to repudiate the contract, as it will obtain a cost-free, multi-year and multi-million-dollar payment.

Defendants will also argue that they properly abandoned the site because Superior was not ordering sand during a downturn in the oil industry, as described in the Higginbotham Notice. But this is precisely the bargain that the parties agreed to, as Defendants agreed to maintain the Quarry in an operations-ready mode even if Superior never ordered a single grain of sand in an Operational

Year. *See Superfos Invs. v. Firstmiss Fertilizer*, 821 F. Supp. 432, 435 (S.D. Miss. 1993) (conducting wide survey of law from various jurisdictions, stating that take-or-pay "**payment is intended to compensate** the producer for the costs associated with production **and to ensure a steady source of income so that he may continue production**.") (emphasis added). Defendants' abandonment "due to inactivity of contract discussions" was not a promise to return if the parties executed the Termination Agreement, but a demand for execution of the Termination Agreement or amendments to the Services Agreement. Response SUF ¶ 172.

Defendants' repudiation of their obligations to maintain the Quarry in operational mode with equipment and personnel, while demanding a changed or terminated contract, was a breach of contract that erased any future "Operational Years," and erased any obligation to make take-or-pay payments. And as a result, Defendants have no right to payment that could be set off or recouped against Superior's damages. *See* Restatement of Contracts, § 253(2) ("Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.").[10]

Moreover, the take-or-pay fees that Defendants seek for allowance and setoff would be impermissible penalties even if Defendants had not abandoned their duties prepetition. Take-or-pay contracts are only enforceable to the extent they are "alternative performance contracts," where the party has the option to purchase the subject goods or pay for them instead. *Superfos*, 821 F. Supp. at 434. To qualify as an "alternative performance" contract, courts require that the buyer have an ability to "make up" unpurchased amounts in subsequent years. *Id*. at 436-37 (citing cases,

[10] Nor is Defendants' $2 dollar/ton argument even relevant, as it pertains solely to reclamation carried out during an "Operational Year," and all post-mining final reclamation happens subsequent to the last "Operational Year."

describing make-up period as "a determinative factor"). The Services Agreement does not contain any make-up terms. Rather, as Defendants' demands confirm, it simply lays out a fee that is due if Superior does not order a certain minimum tonnage of sand in an Operational Year (assuming the Contractor has not repudiated the contract). Such language is an unenforceable penalty.

Under Wisconsin law, whether a stipulated sum is liquidated damages or a penalty is a "question of law," and courts look to "the reasonableness of the amount provided for, including the relation which the sum stipulated bears to the extent of the injury, and whether it violates the fundamental rule of compensation …" *McConnell v. L. C. L. Transit Co.*, 42 Wis. 2d 429, 438 (1969) (quoting 25 C. J. S., Damages, p. 1051, sec. 108). Defendants ask for allowance of a $32 million claim for walking away from the Quarry – before the Petition date, and before the Services Agreement was rejected – without having given proper notice, and without showing a readiness to perform in future "Operational Years." The demand for $32 million is an unreasonable penalty that bears no relation to Defendants' operating costs, particularly as Defendants abandoned their operational obligations, and therefore had no operating costs. Where a claim for liquidated damages is a penalty under state law, it must be disallowed under 11 U.S.C. § 502(b)(1). *See In re Charles St. African Methodist Episcopal Church of Boston*, 481 B.R. 1, 10-11 (Bankr. D. Mass. 2012) (disallowing default interest as unenforceable penalty); *Vanderbilt Plaza, Ltd. v. Travelers Ins. Co. (In re Vanderbilt Plaza, Ltd.)*, No. 386-04826, 1988 Bankr. LEXIS 2735, at *1 (Bankr. M.D. Tenn. June 1, 1988) (portion of proof of claim that was penalty under state law was "disallowed by reason of 11 U.S.C. § 502(b)(1)").

Defendants cannot assert a properly disallowed penalty as the basis for setoff. *In re Zezas*, No. 21-16570, 2023 Bankr. LEXIS 1327, at *9 (Bankr. D.N.J. May 18, 2023) ("Obviously, a claim that is disallowed would preclude setoff."). Nor can Defendants rely on recoupment. Because

Defendants repudiated their obligations under the Services Agreement, Superior was relieved of its obligations under the contract, and the take-or-pay claim cannot be enforced as a recoupment right. *Caradigm U.S., LLC v. Pruitthealth, Inc.*, No. 1:15-cv-2504-SCJ, 2018 U.S. Dist. LEXIS 244393, at *26 (N.D. Ga. May 16, 2018) (Georgia law) (denying right of recoupment to defendant who repudiated contract, finding not "a single case" where such recoupment was permitted); *Toppert v. Bunge Corp.*, 60 Ill. App. 3d 607, 612 (Ct. App. 1978) (U.C.C.) (repudiation of contract deprived defendant of any "right of recoupment or set-off due to its own actions in failing to abide by its contractual obligations.").

Further, recoupment is an equitable defense that is not available in bankruptcy to recoup a debtor's prepetition claim against unrelated post-petition payment obligations, even when they arise under the same agreement. In *In re University Medical Center*, the Third Circuit denied the HHS recoupment rights against prepetition overpayments as the amounts owed post-petition "were due for services completely distinct from those reimbursed through the 1985 payments." 973 F.2d at 1081. Here, Defendants seek to recoup take-or-pay payments for post-petition years that were not even operational against reclamation obligations incurred from their actual prepetition mining activities in 2018 and earlier. The Third Circuit contrasted such incongruities to a recording company that could recoup post-petition royalties against a prepetition advance, because the advance "envisioned the album," whereas HHS "would have made the same estimated payments to UMC in 1985 regardless of the number of Medicare patients UMC expected to serve in the future." *Id*. It is not enough that these claims arise under a single contract. *See Malinowski v. N.Y. State DOL (In re Malinowski)*, 156 F.3d 131, 135 (2d Cir. 1998) ("not all cases in which claim[s] and counterclaim[s] arise from the same contract are appropriate for recoupment"). Reclamation obligations that arose upon the commencement of mining cannot be recouped against

take-or-pay demands for post-repudiation, post-rejection years where Defendants abandoned any obligation to conduct maintenance of the Quarry, let alone actual mining.

Defendants have no recoupment or setoff rights beyond the $1,179,506.80 principle amount of their claim for payment of the 2018 Invoice. For all of the reasons argued above, Superior requests that the Court deny Defendants' Cross-Motion, and enter judgment in Superior's favor, disallowing Defendants' unenforceable claim for take-or-pay damages.

II. CONCLUSION

For all of the reasons argued herein, Superior respectfully requests that this Court grant its Breach of Contract MSJ, deny Defendants' Cross-Motion, enter judgment in favor of Superior and against Defendants for breach of contract, and award Superior its damages, including attorney's fees and costs, as outlined herein, and subject to further evidence to address updated amounts.

Dated: September 14, 2023

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Wis. Stat. § 814.05

This document is current through Act 33 of the 2023-2024 Legislative Session

LexisNexis® Wisconsin Annotated Statutes > Civil Procedure (Chs. 801 — 847) > Chapter 814. Court Costs, Fees, and Surcharges (Subchs. I — III) > Subchapter I Costs in Civil Actions and Special Proceedings (§§ 814.01 — 814.52)

814.05. Bond premium as costs.

Any party entitled to recover costs or disbursements in an action or special proceeding may include in such disbursements the lawful premium paid to an authorized insurer for a suretyship obligation.

History

1977 c. 339.

Annotations

Notes to Decisions

Civil Procedure: Remedies: Costs & Attorney Fees: Costs: General Overview

Civil Procedure: Remedies: Judgment Interest: General Overview

Estate, Gift & Trust Law: Estate Administration: Claims Against Estates: General Overview

Family Law: Marital Termination & Spousal Support: Costs & Attorney Fees

Civil Procedure: Remedies: Costs & Attorney Fees: Costs: General Overview

Where a former employer unsuccessfully argued that the determination of the value of a former employee's shares under a post-employment stock redemption plan was not subject to arbitration, and, therefore, that the arbitrators exceeded their authority when they determined the value of the shares, the former employee was not entitled to costs provided by Wis. Stat. § 814.025, which imposed costs as provided by *Wis. Stat. § 814.04*, or to frivolous appellate costs under *Wis. Stat. § 809.25*, because the former employer in good faith had sought a modification of arbitration law to impose a limitation upon arbitrators' authority to evaluate variable factors in a formula set forth in an agreement that had a reasonable basis in law. *Grambow v. Associated Dental Servs., 199 Wis. 2d 522, 546 N.W.2d 578, 1996 Wisc. App. LEXIS 11 (Wis. Ct. App. 1996)*.

A lawful premium necessarily paid to a surety corporation for executing an undertaking in order to stay execution of a judgment upon appeal to the Supreme Court of Wisconsin was a proper item of costs. *Giemza v. Allied American Mut. Fire Ins. Co., 10 Wis. 2d 555, 106 N.W.2d 609, 1960 Wisc. LEXIS 518 (Wis. 1960)*.

Civil Procedure: Remedies: Judgment Interest: General Overview

Trial court erred when it held that the legislature did not specifically increase the interest rate from the entry of judgment until execution; thus, a claim by the executors of an estate accrued at the rate of seven percent from the effective date of former Wis. Stat. § 271.04(4) and Wis. Stat. § 272.05(8), which were later renumbered to *Wis. Stat. § 814.04(4)* and *Wis. Stat. § 815.05(8)*. *Ferris v. First Nat'l Bank & Trust Co., 96 Wis. 2d 476, 292 N.W.2d 357, 1980 Wisc. App. LEXIS 3144 (Wis. Ct. App. 1980)*.

In a damages case, judgment interest was improperly added to the final award from the commencement of the action; the only interest that could be added by the court clerk without a court order was from the time of the entry of the verdict. *Malliet v. Super Product Co., 218 Wis. 145, 259 N.W. 106, 1935 Wisc. LEXIS 121 (Wis. 1935)*.

Estate, Gift & Trust Law: Estate Administration: Claims Against Estates: General Overview

Trial court erred when it held that the legislature did not specifically increase the interest rate from the entry of judgment until execution; thus, a claim by the executors of an estate accrued at the rate of seven percent from the effective date of former Wis. Stat. § 271.04(4) and Wis. Stat. § 272.05(8), which were later renumbered to *Wis. Stat. § 814.04(4)* and *Wis. Stat. § 815.05(8)*. *Ferris v. First Nat'l Bank & Trust Co., 96 Wis. 2d 476, 292 N.W.2d 357, 1980 Wisc. App. LEXIS 3144 (Wis. Ct. App. 1980)*.

Family Law: Marital Termination & Spousal Support: Costs & Attorney Fees

Court considered the proper standards for determining whether to award attorney fees and for determining whether the attorney fees were reasonable, where it considered the former wife's ability to pay, her employment status and education, and the nature of the filings she had brought before the court, before ordering that she pay a total of $1,000 toward the former husband's attorney fees. *In re Marriage of Schiller, 397 Wis. 2d 243, 2021 WI App 27, 959 N.W.2d 88, 2021 Wisc. App. LEXIS 139 (Wis. Ct. App. 2021)*.

State Notes

Legislative Council Note, 1977: This provision is currently the 2nd sentence of s. 204.11. It has nothing to do with the law of insurance but deals solely with the proper taxing of costs in legal proceedings. As such it belongs in ch. 814 and is transferred there without change of meaning. The language is very slightly edited. Bill 258-S

Among the "necessary disbursements and fees allowed by law" are those authorized under fee-shifting statutes. Numerous statutes contain fee-shifting provisions, including those relating to consumer protection, frivolous lawsuits, and privacy rights. *Kolupar v. Wilde Pontiac Cadillac, Inc. 2007 WI 98, 303 Wis. 2d 258, 735 N.W.2d 93, 05-0935*.

End of Document

Chapter NR 135

NONMETALLIC MINING RECLAMATION

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Subchapter I — General Provisions

NR 135.01 Purpose and scope. (1) PURPOSE. The purpose of this chapter is to require reclamation of nonmetallic mining sites. The rule is promulgated pursuant to ch. 295, subch. I, Stats. The goals of reclamation are:

(a) To rehabilitate sites where nonmetallic mining takes place after the effective date of an applicable reclamation ordinance, in order to promote the removal or reuse of nonmetallic mining refuse, removal of roads no longer in use, grading of the nonmetallic mining site, replacement of topsoil, stabilization of soil conditions, establishment of vegetative cover, control of surface water flow and groundwater withdrawal, prevention of environmental pollution, development and reclamation of existing nonmetallic mining sites, and development and restoration of plant, fish and wildlife habitat if needed to comply with an approved reclamation plan.

(b) To assure nonmetallic mining operations after the effective date of an applicable reclamation ordinance are conducted in a manner that promotes successful reclamation consistent with the standards established in this chapter, minimizes the cost of nonmetallic mining reclamation, encourages the development and reclamation of existing nonmetallic mining sites and, to the extent practicable, minimizes areas disturbed by nonmetallic mining at any time and provides for contemporaneous nonmetallic mining reclamation.

(2) SCOPE. To accomplish these goals, this chapter establishes standards for reclaiming nonmetallic sites, sets out nonmetallic mining reclamation permit requirements, defines procedures and requirements applicable to mines subject to this chapter, defines procedures for administering nonmetallic mining reclamation programs, including the exercise of the department's authority for inspection, review and enforcement, and establishes a procedure for landowners to register marketable nonmetallic mineral deposits in order to preserve these resources.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.02 Applicability. This chapter applies to nonmetallic mining sites as follows:

(1) APPLICABILITY. This chapter applies to all nonmetallic mining sites, except as exempted in sub. (3). This chapter does not apply to nonmetallic mining sites where nonmetallic mining permanently ceased before August 1, 2001.

(2) PUBLIC NONMETALLIC MINING. Except as exempted in sub. (3), this chapter applies to nonmetallic mining conducted by or on behalf of the state of Wisconsin, by or on behalf of a county, municipality, or for the benefit or use of the state or any state agency, board, commission or department, except that the financial assurance requirements of s. NR 135.40 do not apply to nonmetallic mining conducted by the state, a state agency, board, commission or department, county or a municipality.

(3) EXEMPT ACTIVITIES. Except as provided in sub. (4), this chapter does not apply to any of the following activities:

(a) Nonmetallic mining at a site or that portion of a site that is subject to permit and reclamation requirements of the department under s. 30.19, 30.195 or 30.20, Stats., and complies with ch. NR 340.

(b) Excavations subject to the permit and reclamation requirements of s. 30.30 or 30.31, Stats.

(c) Excavations or grading by a person solely for domestic or farm use at that person's residence or farm.

(d) Excavations or grading conducted for the construction, reconstruction, maintenance or repair of a highway, railroad, airport facility, or any other transportation facility where the excavation or grading is entirely within the property boundaries of the transportation facility.

(e) Grading conducted for preparing a construction site or restoring land following a flood or natural disaster.

(f) Excavations for building construction purposes conducted on the building site.

(g) Nonmetallic mining at nonmetallic mining sites where less than one acre of total affected acreage occurs over the life of the mine.

(h) Any mining operation, the reclamation of which is required in a permit obtained under ch. 293, Stats., or under subch. III of ch. 295, Stats.

(i) Any activities required to prepare, operate or close a solid waste disposal facility under ch. 289, Stats., or a hazardous waste disposal facility under ch. 291, Stats., that are conducted on the property where the facility is located, but an applicable nonmetallic mining reclamation ordinance and the standards established in this chapter apply to activities related to solid waste or hazardous waste disposal that are conducted at a nonmetallic mining site that is not on the property where the solid waste or hazardous waste disposal facility is located, such as activities to obtain nonmetallic minerals to be used for lining, capping, covering or constructing berms, dikes or roads.

(j) 1. Nonmetallic mining conducted to obtain stone, soil, sand or gravel for construction, reconstruction, maintenance or repair of a highway, railroad, airport, or any other transportation facility or part thereof, if the nonmetallic mining is subject to the requirements of the department of transportation concerning the restoration of the nonmetallic mining site.

Note: The requirements of the department of transportation concerning the restoration of nonmetallic mining sites, other than commercial sources, are found in sections 104.9 and 208 of the standard specifications.

2. The exemption provided in this paragraph only applies to a nonmetallic mining operation with limited purpose and duration where the department of transportation actively imposes reclamation requirements and the operator reclaims the nonmetallic mining site in accordance with these requirements. The duration of the exemption shall be specific to the length of the department of transportation contract for construction of a specific transportation project.

3. If a nonmetallic mining site covered under subds. 1. and 2. is used to concurrently supply materials for projects unrelated to the department of transportation project, the exemption in this paragraph still applies, provided that the site is fully reclaimed under department of transportation contract and supervision.

(k) Dredging for navigational purposes, to construct or maintain farm drainage ditches and for the remediation of environmental contamination and the disposal of spoils from these activities.

(L) Removal of material from the bed of Lake Michigan or Lake Superior by a public utility pursuant to a permit under s. 30.21, Stats.

(4) APPLICABILITY OF RECLAMATION STANDARDS. Notwithstanding sub. (3) (a) and (b), the reclamation standards in subch. II shall apply to the following:

(a) Nonmetallic mining at a site or a portion of a site that is subject to permit and reclamation requirements of the department under s. 30.19, 30.195 or 30.20, Stats., and complies with ch. NR 340.

(b) Excavations subject to the permit and reclamation requirements of s. 30.30 or 30.31, Stats.

Note: The permit procedures and requirements of this chapter other than reclamation standards in subch. II would not apply to activities described in this subsection, as they are already regulated by other permits or approvals. However, subch. II reclamation standards would apply to them.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (1), (2) and (3) (g) Register November 2006 No. 611, eff. 12–1–06; CR 13–057: am. (3) (h) Register July 2015 No. 715, eff. 8–1–15.

NR 135.03 Definitions. In this chapter and in s. 91.46 (6), Stats., and subch. I of ch. 295, Stats.:

(1) "Alternative requirement" means an alternative to the reclamation standards of this chapter provided through a written authorization granted by the regulatory authority pursuant to s. NR 135.26.

(2) "Applicable reclamation ordinance" means a nonmetallic mining reclamation ordinance that applies to a particular nonmetallic mining site and complies with the requirements of this chapter and subch. I of ch. 295, Stats., unless the department is the regulatory authority as defined in sub. (20) (c). If the department is the regulatory authority, "applicable reclamation ordinance" means the relevant and applicable provisions of this chapter.

(2m) "Borrow site" means an area outside of a transportation project site from which stone, soil, sand or gravel is excavated for use at the project site, except the term does not include commercial sources.

(3) "Contemporaneous reclamation" means the sequential or progressive reclamation of portions of the nonmetallic mining site affected by mining operations that is performed in advance of final site reclamation, but which may or may not be final reclamation, performed to minimize the area exposed to erosion, at any one time, by nonmetallic mining activities.

(4) "Department" means the department of natural resources.

(6) "Environmental pollution" has the meaning in s. 295.11 (2), Stats.

(8) "Financial assurance" means a commitment of funds or resources by an operator to a regulatory authority that satisfies the requirements in s. NR 135.40 and is sufficient to pay for reclamation activities required by this chapter.

(8m) "Highwall" means a vertical or nearly vertical face in solid rock or a slope of consolidated or unconsolidated material that is steeper than 3:1.

(9) "Landowner" means the person who has title to land in fee simple or who holds a land contract for the land. A landowner is not a person who owns nonmetallic mineral rights to land, if a different person possesses title to that land in fee simple or holds a land contract for that land.

(9m) "Licensed professional geologist" means a person who is licensed as a professional geologist pursuant to ch. 470, Stats.

(10) "Municipality" means any city, town or village.

(11) "Nonmetallic mineral" means a product, commodity or material consisting principally of naturally occurring, organic or inorganic, nonmetallic, nonrenewable material. Nonmetallic minerals include, but are not limited to, stone, sand, gravel, asbestos, beryl, diamond, clay, coal, feldspar, peat, talc and topsoil.

(13) "Nonmetallic mining" or "mining" means all of following:

(a) Operations or activities at a nonmetallic mining site for the extraction from the earth of mineral aggregates or nonmetallic minerals for sale or use by the operator. Nonmetallic mining includes use of mining equipment or techniques to remove materials from the in–place nonmetallic mineral deposit, including drilling and blasting, as well as associated activities such as excavation, grading and dredging. Nonmetallic mining does not include removal from the earth of products or commodities that contain only minor or incidental amounts of nonmetallic minerals, such as commercial sod, agricultural crops, ornamental or garden plants, forest products, Christmas trees or plant nursery stock.

(b) Processes carried out at a nonmetallic mining site that are related to the preparation or processing of the mineral aggregates or nonmetallic minerals obtained from the nonmetallic mining

site. These processes include, but are not limited to stockpiling of materials, blending mineral aggregates or nonmetallic minerals with other mineral aggregates or nonmetallic minerals, blasting, grading, crushing, screening, scalping and dewatering.

(14) "Nonmetallic mining reclamation" or "reclamation" means the rehabilitation of a nonmetallic mining site to achieve a land use specified in an approved nonmetallic mining reclamation plan, including removal or reuse of nonmetallic mining refuse, grading of the nonmetallic mining site, removal, storage and replacement of topsoil, stabilization of soil conditions, reestablishment of vegetative cover, control of surface water and groundwater, prevention of environmental pollution and if practicable the restoration of plant, fish and wildlife habitat.

(15) "Nonmetallic mining refuse" means waste soil, rock and mineral, as well as other natural site material resulting from nonmetallic mining. Nonmetallic mining refuse does not include marketable by–products resulting directly from or displaced by the nonmetallic mining.

(16) "Nonmetallic mining site" or "site" means all contiguous areas of present or proposed mining, subject to the qualifications in par. (b).

(a) Nonmetallic mining sites means the following:

1. The location where nonmetallic mining is proposed or conducted.

2. Storage and processing areas that are in or contiguous to areas excavated for nonmetallic mining.

3. Areas where nonmetallic mining refuse is deposited.

4. Areas affected by activities such as the construction or improvement of private roads or haulage ways for nonmetallic mining.

5. Areas where grading or regrading is necessary.

6. Areas where nonmetallic mining reclamation activities are carried out or structures needed for nonmetallic mining reclamation, such as topsoil stockpile areas, revegetation test plots, or channels for surface water diversion, are located.

(b) "Nonmetallic mine site" does not include any of the following areas:

1. Those portions of sites listed in par. (a) not used for nonmetallic mining or purposes related to nonmetallic mining after 8 months following December 1, 2000.

2. Separate, previously mined areas that are not used for nonmetallic mineral extraction after 8 months following December 1, 2000 and are not contiguous to mine sites, including separate areas that are connected to active mine sites by public or private roads.

3. Areas previously mined but used after 8 months following December 1, 2000 for a non–mining activity, such as stockpiles of materials used for an industrial process unrelated to nonmetallic mining.

(17) "Operator" means any person who is engaged in, or who has applied for a permit to engage in, nonmetallic mining, whether individually, jointly or through subsidiaries, agents, employees, contractors or subcontractors.

(17m) "Person" means an individual, owner, operator, corporation, limited liability company, partnership, association, county, municipality, interstate agency, state agency or federal agency.

(19) "Registered professional engineer" means a person who is registered as a professional engineer pursuant to s. 443.04, Stats.

(20) "Regulatory authority" means either of the following:

(a) The county in which the nonmetallic mining site is located, that has an applicable reclamation ordinance under s. 295.13, Stats., except where a municipality has adopted an applicable reclamation ordinance pursuant to par. (b).

(b) The municipality in which the nonmetallic mining site is located and which has adopted an applicable reclamation ordinance under s. 295.14, Stats.

(c) The department, in cases where a county mining reclamation program is no longer in effect under s. 295.14, Stats., but only if there is no applicable reclamation ordinance enacted by the municipality in which the nonmetallic mining site is located.

(21) "Replacement of topsoil" means the replacement or redistribution of topsoil or topsoil substitute material to all areas where topsoil was actually removed or affected by nonmetallic mining for the purposes of providing adequate vegetative cover and stabilization of soil conditions needed to achieve the approved post–mining land use and as required by the reclamation plan approved pursuant to an applicable reclamation ordinance.

(22) "Solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded or salvageable materials, including solid, liquid, semisolid or contained gaseous materials resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solids or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under ch. 283, Stats., or source material, special nuclear material or by–product material, as defined in s. 254.31 (1), Stats.

Note: The definition of "solid waste" in s. 289.01 (33), Stats., was amended by 2017 Wis. Acts 284 and 285 to exclude "slag generated by the production or processing of iron or steel and that is managed as an item of value in a controlled manner and is not discarded," and to exclude "post–use plastics or nonrecycled feedstock that are processed at a pyrolysis or gasification facility; that are held at a pyrolysis or gasification facility, prior to processing at the facility where they are being held, to ensure that production is not interrupted; or that are held off site before delivery to a pyrolysis or gasification facility with the intent that they will be processed at a pyrolysis or gasification facility."

(23) "Topsoil" means the surface layer of soil which is generally more fertile than the underlying soil layers, which is the natural medium for plant growth and which can provide the plant growth, soil stability and other attributes necessary to meet the success standards approved in the reclamation plan.

(24) "Topsoil substitute material" means soil or other unconsolidated material either used alone or mixed with other beneficial materials and which can provide the plant growth, site stability and other attributes necessary to meet the success standards approved in the reclamation plan.

(25) (a) "Unreclaimed acre" or "unreclaimed acres" means those unreclaimed areas in which nonmetallic mining has occurred after 8 months following December 1, 2000 and areas where nonmetallic mining reclamation has been completed but is not yet certified as reclaimed under s. NR 135.40 (7). However the term does not include any areas described in par. (b).

(b) "Unreclaimed acre" or "unreclaimed acres" does not include:

1. Those areas where reclamation has been completed and certified as reclaimed under s. NR 135.40 (7).

2. Those areas previously affected by nonmetallic mining but which are not used for nonmetallic mining after 8 months following December 1, 2000.

3. Those portions of nonmetallic mining sites which are included in an approved nonmetallic mining reclamation plan but are not yet affected by nonmetallic mining.

4. Areas previously mined but used after 8 months following December 1, 2000 for a non–mining activity, such as stockpiling of materials used for an industrial activity such as an asphalt plant, concrete batch plant, block and tile operation or other industry that uses products produced from nonmetallic mining.

5. For purposes of fees under s. NR 135.39, those areas within a nonmetallic mining site which the regulatory authority has

determined to have been successfully reclaimed on an interim basis in accordance with s. NR 135.41.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: r. (7) and (18), cr. (8m), (9m) and (17m), am. (19), r. and recr. (20) Register November 2006 No. 611, eff. 12–1–06; correction in (intro.) made under s. 13.92 (4) (b) 7., Stats., Register August 2011 No. 668.

Subchapter II — Standards

NR 135.05 Applicability of standards. The standards of this subchapter apply as follows:

(1) The standards of this subchapter do not apply to any portion of a nonmetallic mining site that meets the criteria in ss. NR 135.02 (3) and 135.03 (16) (b), except as provided in s. NR 135.02 (4).

(2) The standards of this subchapter apply to nonmetallic mining that occurs beginning 9 months following December 1, 2000, including those lands previously affected by nonmetallic mining on which nonmetallic mining occurs after this date, except as provided in sub. (1).

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.06 General standards. (1) REFUSE AND OTHER SOLID WASTES. Nonmetallic mining refuse shall be reused in accordance with a reclamation plan. Other solid wastes shall be disposed of in accordance with applicable rules of the department adopted pursuant to chs. 289 and 291, Stats.

(2) AREA DISTURBED AND CONTEMPORANEOUS RECLAMATION. Nonmetallic mining reclamation shall be conducted, to the extent practicable, to minimize the area disturbed by nonmetallic mining and to provide for nonmetallic mining reclamation of portions of the nonmetallic mining site while nonmetallic mining continues on other portions of the nonmetallic mining site.

(3) PUBLIC HEALTH, SAFETY AND WELFARE. All nonmetallic mining sites shall be reclaimed in a manner so as to comply with federal, state and local regulations governing public health, safety and welfare.

(4) HABITAT RESTORATION. When the land use required by the reclamation plan approved pursuant to an applicable reclamation ordinance requires plant, fish or wildlife habitat, it shall be restored, to the extent practicable, to a condition at least as suitable as that which existed before the lands were affected by nonmetallic mining operations.

(5) COMPLIANCE WITH ENVIRONMENTAL REGULATIONS. Reclamation of nonmetallic mining sites shall comply with any other applicable federal, state and local laws including those related to environmental protection, zoning and land use control.

Note: Other applicable environmental, zoning or land use regulations may include chs. NR 103, 115, 116, 117, 205, 216, 269, 105, 106, 140, 150, 151, 340, 500–555, and 812, chs. 30 and 91, Stats., and Section 404 of the Clean Water Act (33 USC 1344), which may be applicable to all or part of either an existing or proposed nonmetallic mining project.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.07 Surface water and wetlands protection. Nonmetallic mining reclamation shall be conducted and completed in a manner that assures compliance with water quality standards for surface waters and wetlands contained in chs. NR 102 through 105. Before disturbing the surface of a nonmetallic mining site and removing topsoil, all necessary measures for diversion and drainage of runoff from the site to prevent pollution of waters of the state shall be installed in accordance with the reclamation plans approved pursuant to an applicable reclamation ordinance. Diverted or channelized runoff resulting from reclamation may not adversely affect neighboring properties.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.08 Groundwater protection. (1) GROUNDWATER QUANTITY. A nonmetallic mining site shall be reclaimed in a manner that does not cause a permanent lowering of the water table that results in adverse effects on surface waters or a significant reduction in the quantity of groundwater reasonably available for future users of groundwater.

(2) GROUNDWATER QUALITY. Nonmetallic mining reclamation shall be conducted in a manner which does not cause groundwater quality standards in ch. NR 140 to be exceeded at a point of standards application.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.09 Topsoil management. (1) REMOVAL. Topsoil and topsoil substitute material shall be provided as specified in the reclamation plan in order to achieve reclamation to the approved post–mining land use. Removal of on–site topsoil and topsoil substitute material removal, when specified in the reclamation plan, shall be performed prior to any mining activity associated with any specific phase of the mining operation.

(2) VOLUME. The operator shall obtain the volume of soil required to perform final reclamation by removal of on–site topsoil or topsoil substitute material or by obtaining topsoil or substitute material as needed to make up the volume of topsoil as specified in the reclamation plan.

Note: Existing resources that may be used to identify the soil present on a site include the County Soil Surveys and information obtained from a soil scientist or the University of Wisconsin Soil Science Extension Agent or other available resources. Topsoil or topsoil substitute material shall be removed from areas to be affected by mining operations to the depth indicated in the reclamation plan or as determined in the field by a soil scientist, project engineer or other qualified professional.

(3) STORAGE. Once removed, topsoil or topsoil substitute material shall, as required by the reclamation plan, either be used in contemporaneous reclamation or stored in an environmentally acceptable manner. The location of stockpiled topsoil or topsoil substitute material shall be chosen to protect the material from erosion or further disturbance or contamination. Runoff water shall be diverted around all locations in which topsoil or topsoil substitute material is stockpiled.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (1) Register November 2006 No. 611, eff. 12–1–06.

NR 135.10 Final grading and slopes. (1) All areas affected by mining shall be addressed in the approved reclamation plan, pursuant to s. NR 135.19, to provide that a stable and safe condition consistent with the post–mining land use is achieved. The reclamation plan may designate highwalls or other unmined and undisturbed natural solid bedrock as stable and safe and not in need of reclamation or designate other areas affected by mining including slopes comprised of unconsolidated materials that exceed a 3:1 slope, whether or not graded, as stable and safe. For slopes designated as stable under this subsection, the regulatory authority may require that either: a site–specific engineering analysis be performed by a registered professional engineer to demonstrate that an acceptable slope stability factor is attainable at a steeper slope, or the operator perform a field test plot demonstration to demonstrate that a stable and safe condition will be achieved and that the post–mining land use specified in the reclamation plan will not be adversely affected.

(2) Final reclaimed slopes covered by topsoil or topsoil substitute material may not be steeper than a 3:1 horizontal to vertical incline, unless found acceptable through one or more of the following: alternative requirements are approved under s. NR 135.26; steeper slopes are shown to be stable through a field plot demonstration approved as part of an approved reclamation plan; or stable slopes can be demonstrated based on site–specific engineering analysis performed by a registered professional engineer. All areas in the nonmetallic mine site where topsoil or topsoil substitute material is to be reapplied shall be graded or otherwise prepared prior to topsoil or topsoil substitute material redistribution to provide the optimum adherence between the topsoil or topsoil substitute material and the underlying material.

(3) When the approved post–mining land use includes a body of water, the approved final grade at the edge of a body of water shall extend vertically 6 feet below the lowest seasonal water level. A slope no steeper than 3:1 shall be created at a designated

location or locations, depending on the size of the water body to allow for a safe exit.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: r. and recr. Register November 2006 No. 611, eff. 12–1–06.

NR 135.11 Topsoil redistribution for reclamation. Topsoil or topsoil substitute material shall be redistributed in accordance with the approved reclamation plan in a manner which minimizes compaction and prevents erosion. Topsoil or topsoil substitute material shall be uniformly redistributed except where uniform redistribution is undesirable or impractical. Topsoil or topsoil substitute material redistribution may not be performed during or immediately after a precipitation event until the soils have sufficiently dried.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.12 Revegetation and site stabilization. Except for permanent roads or similar surfaces identified in the reclamation plan, all surfaces affected by nonmetallic mining shall be reclaimed and stabilized by revegetation or other means. Revegetation and site stabilization shall be in accordance with the approved reclamation plan and shall be performed as soon as practicable after mining activity has permanently ceased in any part of the mine site.

Note: Field test plot demonstrations are highly recommended to ensure that reclamation success standards are met and financial assurance is released as quickly as possible. When field test plots are employed they should be approved as part of the reclamation plan under s. NR 135.19.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.13 Assessing completion of successful reclamation. (1) The criteria for assessing when reclamation is complete and, therefore, when the financial assurance may be released shall be specified in the reclamation plan. Criteria to evaluate reclamation success shall be quantifiable.

(2) Compliance with the revegetation success standards in the approved reclamation plan shall be determined by:

(a) On–site inspections by the regulatory authority or its agent;

(b) Reports presenting results obtained during reclamation evaluations including summarized data on revegetation, photo documentation or other evidence that the criteria approved in the reclamation plan to ascertain success have been met; or

(c) A combination of inspections and reports.

(3) In those cases where the post mining land use specified in the reclamation plan requires a return of the mining site to a pre–mining condition, the operator shall obtain baseline data on the existing plant community for use in the evaluation of reclamation success pursuant to this section.

(4) Revegetation success may be determined by:

(a) Comparison to an appropriate reference area;

(b) Comparison to baseline data acquired at the mining site prior to its being affected by mining; or

(c) Comparison to an approved alternate technical standard.

(5) Revegetation using a variety of plants indigenous to the area is favored.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.14 Intermittent mining. Intermittent mining may be conducted provided that the possibility of intermittent cessation of operations is addressed in an operator's reclamation permit, no environmental pollution or erosion of sediments is occurring, and financial assurance for reclamation pursuant to s. NR 135.40 is maintained covering all remaining portions of the site that have been affected by nonmetallic mining and that have not been reclaimed.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.15 Maintenance. During the period of the site reclamation, after the operator has stated that reclamation is complete but prior to release of financial assurance, the operator shall perform any maintenance necessary to prevent erosion, sedimentation or environmental pollution, comply with the standards of this subchapter, or to meet the goals specified in the reclamation plan.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

Subchapter III — Permitting

NR 135.16 Reclamation permit required. No person may engage in nonmetallic mining or in nonmetallic mining reclamation without obtaining a nonmetallic mining reclamation permit issued pursuant to the applicable reclamation ordinance and this chapter, unless the activity is specifically exempted in s. NR 135.02 (1), (3) or 135.03 (16) (b).

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. Register November 2006 No. 611, eff. 12–1–06.

NR 135.17 Regulatory authority to issue reclamation permits. (1) COUNTIES REQUIRED TO ISSUE PERMITS. (a) Subject to subs. (2) and (3), nonmetallic mining reclamation permits can be issued or otherwise acted on pursuant to this subchapter only by a county that has adopted and administers a nonmetallic mining reclamation ordinance, as required by s. NR 135.32.

(b) If the department finds pursuant to sub. (3) (b) that a municipal regulatory authority's program is not in compliance with this chapter, the county in which the municipality is located shall issue or otherwise act on permits pursuant to this subchapter.

(2) MUNICIPALITIES PERMITTED TO ISSUE PERMITS. (a) A municipality may issue or otherwise act on nonmetallic mining reclamation permits pursuant to this subchapter if it has adopted and administers a nonmetallic mining reclamation ordinance pursuant to this chapter. Nonmetallic mining subject to regulation by these municipal regulatory authorities are not subject to county or department permitting pursuant to this subchapter.

(b) If the department finds under sub. (3) (b) that a county's program is not in compliance with this chapter, any municipality within the county that has enacted an applicable reclamation ordinance by the time of this finding may continue to issue and otherwise act on permits pursuant to this subchapter.

(3) DEPARTMENT TO ISSUE PERMITS IN CERTAIN CONDITIONS. The department shall issue or otherwise act on nonmetallic mining reclamation permits pursuant to this subchapter under either of the following conditions:

(a) Neither the county nor the municipality in which the nonmetallic mining site is located has enacted or has in effect an applicable reclamation ordinance pursuant to this chapter.

(b) The department finds, after a hearing under subch. V, that a regulatory authority's nonmetallic mining reclamation program does not comply with this chapter, except as follows:

1. If the department finds a municipal regulatory authority's program is not in compliance with this chapter, the county in which the municipality is located shall issue or otherwise act on permits pursuant to this subchapter if the county has enacted an applicable reclamation ordinance.

2. If the department finds a county's program is not in compliance with this chapter, any municipality within the county that has enacted an applicable reclamation ordinance by the time of this finding shall continue to issue and otherwise act on permits pursuant to this subchapter.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (3) (a) Register November 2006 No. 611, eff. 12–1–06.

NR 135.18 Reclamation permit application. (1) APPLICATION REQUIRED. (a) The operator of any nonmetallic mine shall apply for and obtain a reclamation permit before beginning mining operations.

(b) The operator shall submit all of the following when making an application in accordance with this subsection:

1. The information required by sub. (2).

2. The first year's annual fee, as required by s. NR 135.39.

3. A reclamation plan conforming to s. NR 135.19.

4. A certification that the operator will provide, as a condition of the reclamation permit, financial assurance as required by s. NR 135.40 upon granting of the reclamation permit and before mining begins.

(c) To avoid duplication, the permit application and submittals required by par. (b) may, by reference, incorporate existing plans or materials that meet the requirements of this chapter.

(2) APPLICATION CONTENTS. All applications for reclamation permits under this chapter shall include all of the following:

(a) A brief description of the general location and nature of the nonmetallic mine.

(b) A legal description of the property on which the nonmetallic mine is located or proposed, including the parcel identification number.

(c) The names, addresses and telephone numbers of all persons or organizations who are owners or lessors of the property on which the nonmetallic mining site is located.

(d) The name, address and telephone number of the person or organization who is the operator.

(e) A certification by the operator of his or her intent to comply with the statewide nonmetallic mining reclamation standards established by subch. II.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: r. and recr. Register November 2006 No. 611, eff. 12–1–06.

NR 135.19 Reclamation plan. (1) PLAN REQUIRED. An operator who conducts or plans to conduct nonmetallic mining shall submit to the regulatory authority a reclamation plan that meets the requirements of this section and complies with the standards of subch. II.

(2) SITE INFORMATION. The reclamation plan shall include information sufficient to describe the existing natural and physical conditions of the site, including, but not limited to:

(a) Maps of the nonmetallic mining site including the general location, property boundaries, the areal extent, geologic composition and depth of the nonmetallic mineral deposit, the distribution, thickness and type of topsoil, the location of surface waters and the existing drainage patterns, the approximate elevation of ground water as determined by existing hydrogeologic information. In specific instances where the existing hydrogeologic information is insufficient for purposes of the reclamation plan, the applicant may supplement the information with the opinion of a licensed professional geologist or hydrologist.

(am) Topsoil or topsoil substitute material, if required to support revegetation needed for reclaiming the site to approved post–mining land use, can be identified using county soil surveys or other available information including that obtained from a soil scientist or the University of Wisconsin soil science extension agent or other available information resources.

(b) Information available to the mine operator on biological resources, plant communities, and wildlife use at and adjacent to the proposed or operating mine site.

(c) Existing topography as shown on contour maps of the site at intervals specified by the regulatory authority.

(d) Location of manmade features on or near the site.

(e) For proposed nonmetallic mine sites that include previously mined areas, a plan view drawing showing the location and extent of land previously affected by nonmetallic mining, including the location of stockpiles, wash ponds and sediment basins.

Note: Some of or all of the information required above may be shown on the same submittal, i.e., the site map required by par. (a) may also show topography required by par. (c).

(3) POST–MINING LAND USE. (a) The reclamation plan shall specify a proposed post–mining land use for the nonmetallic mine site. The proposed post–mining land use shall be consistent with local land use plans and local zoning at the time the plan is submitted, unless a change to the land use plan or zoning is proposed. The proposed post–mining land use shall also be consistent with any applicable state, local or federal laws in effect at the time the plan is submitted.

Note: A proposed post–mining land use is necessary to determine the type and degree of reclamation needed to correspond with that land use. The post mining land use will be key in determining the reclamation plan. Final slopes, drainage patterns, site hydrology, seed mixes and the degree of removal of mining–related structures, drainage structures, and sediment control structures will be dictated by the approved post–mining land use.

(b) Land used for nonmetallic mineral extraction in areas zoned under a farmland preservation zoning ordinance pursuant to subch. III of ch. 91, Stats., shall be restored to agricultural use.

Note: Section 91.46 (6), Stats., contains this requirement. Section 91.01 (2), Stats., defines the term "agricultural use."

(4) RECLAMATION MEASURES. The reclamation plan shall include a description of the proposed reclamation, including methods and procedures to be used and a proposed schedule and sequence for the completion of reclamation activities for various stages of reclamation of the nonmetallic mining site. The following shall be included:

(a) A description of the proposed earthwork and reclamation, including final slope angles, high wall reduction, benching, terracing and other structural slope stabilization measures and if necessary a site–specific engineering analysis performed by a registered professional engineer as provided by s. NR 135.10 (1) and (2).

(b) The methods of topsoil or topsoil substitute material removal, storage, stabilization and conservation that will be used during reclamation.

(c) A plan or map which shows anticipated topography of the reclaimed site and any water impoundments or artificial lakes needed to support the anticipated future land use of the site.

(d) A plan or map which shows surface structures, roads and related facilities after the cessation of mining.

(e) The estimated cost of reclamation for each stage of the project or the entire site if reclamation staging is not planned.

(f) A revegetation plan which shall include timing and methods of seed bed preparation, rates and kinds of soil amendments, seed application timing, methods and rates, mulching, netting and any other techniques needed to accomplish soil and slope stabilization.

(g) Quantifiable standards for revegetation adequate to show that a sustainable stand of vegetation has been established which will support the approved post–mining land use. Standards for revegetation may be based on the percent vegetative cover, productivity, plant density, diversity or other applicable measures.

(h) A plan and, if necessary, a narrative showing erosion control measures to be employed during reclamation activities. These shall address how reclamation activities will be conducted to minimize erosion and pollution of surface and groundwater.

(i) A description of any areas which will be reclaimed on an interim basis sufficient to qualify for the waiver pursuant to s. NR 135.41 and which will be subsequently disturbed prior to final reclamation. Descriptions shall include an identification of the proposed areas involved, methods of reclamation to comply with the standards in subch. II and timing of interim and final reclamation.

(j) A description of how the reclamation plan addresses the long–term safety of the reclaimed mining site. The description shall include a discussion of site–specific safety measures to be implemented at the site and include measures that address public safety with regard to adjacent land uses.

Note: Safety measures include visual warnings, physical barriers, slope modifications such as reclamation blasting, scaling of the rock face, creation of benches. Other measures may be employed if found to be equivalent by a registered professional engineer.

Note: Some of the information required by this subsection may be combined; i.e., a single map may show anticipated post–mining topography required by par. (c) as well as structures and roads as required by par. (d).

(5) CRITERIA FOR SUCCESSFUL RECLAMATION. The reclamation plan shall contain criteria for assuring successful reclamation in accordance with s. NR 135.13.

(6) CERTIFICATION OF RECLAMATION PLAN. The operator shall provide a signed certification that reclamation will be carried out in accordance with the reclamation plan. If the operator does not own the land, the landowner or lessor, if different from the operator or owner, shall also provide signed certification that they concur with the reclamation plan and will allow its implementation.

(7) APPROVAL. The regulatory authority shall approve, approve conditionally or deny the reclamation plan in writing in accordance with s. NR 135.21 (1) Conditional approvals shall be issued according to s. NR 135.21 (2), and denials of permit applications shall be made according to s. NR 135.22.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (1), (2) (a), (e), (4) (a) and (7), cr. (4) (j), renum. (6) (a) to be (6) and am., r. (6) (b) Register November 2006 No. 611, eff. 12–1–06; correction in (3) (b) made under s. 13.92 (4) (b) 7., Stats., Register August 2011 No. 668.

NR 135.20 Public notice and right of hearing. (1) PUBLIC NOTICE. (a) A regulatory authority that has received an application to issue a reclamation permit shall publish a public notice of the application no later than 30 days after receipt of a complete application or request.

(b) The notice shall briefly describe the mining and reclamation planned at the nonmetallic mining site. The notice shall be published as a class 1 notice pursuant to s. 985.07 (1), Stats., in the official newspaper of the regulatory authority, or if the department is the regulatory authority in the official newspaper of the county in which the nonmetallic mining site is located. The notice shall mention the opportunity for public hearing pursuant to this section and shall give the locations at which the public may review the application request and all supporting materials including the reclamation plan.

(c) Unless the department is the regulatory authority, copies of the notice shall be forwarded by the regulatory authority to the county or applicable municipal zoning board, the county and applicable local planning organization, the county land conservation officer, and owners of land within 300 feet of the boundaries of the parcel or parcels of land on which the site is located. If the department is the regulatory authority, copies of the notice shall be forwarded to all counties and municipalities in which the site is located.

(2) LOCAL HEARING. A county or municipal regulatory authority shall provide for opportunity for a public informational hearing on an application or request to issue a nonmetallic mining reclamation permit as follows:

(a) If there is a zoning–related hearing on the nonmetallic mine site, the regulatory authority shall provide the opportunity at this hearing to present testimony on reclamation–related matters. This opportunity shall fulfill the requirement for public hearing for a nonmetallic mining reclamation permit required by this section. The regulatory authority shall consider the reclamation–related testimony in the zoning–related hearing in deciding on a permit application pursuant to this chapter.

(b) 1. If there is no opportunity for a zoning–related hearing on the nonmetallic mine site as described in par. (a), opportunity for public hearing required by this section shall be provided as follows. Any person residing within, owning property within, or whose principal place of business is within 300 feet of the boundary of the parcel or parcels of land in which the nonmetallic mining site is located or proposed may request a public informational hearing. The regulatory authority shall hold a public hearing if requested by any of these persons within 30 days of the actual date of public notice under sub. (1). This public informational hearing shall be held no sooner than 30 days nor later than 60 days after being requested. The hearing shall be conducted as an informational hearing for the purpose of explaining and receiving comment from affected persons on the nature, feasibility and effects of the proposed reclamation. Procedures for the public informational hearing shall be described in the applicable reclamation ordinance.

2. The subject matter and testimony at this informational hearing, if it is held separately from any zoning–related hearing where the opportunity exists for testimony on reclamation pursuant to par. (a), shall be limited to reclamation of the nonmetallic mine site.

(3) HEARING ON RECLAMATION PERMIT APPLICATIONS TO THE DEPARTMENT. (a) Where the department is the regulatory authority, it shall provide an opportunity for public informational hearing on an application to issue a nonmetallic mining reclamation permit.

(b) Any person who resides within, owns property within or whose principal place of business is within 300 feet of the nonmetallic mining site may request a public informational hearing. The department shall hold a public hearing if requested by any of these persons within 30 days of the actual date of public notice under sub. (1), which shall be held no sooner than 30 days and no later than 60 days after being requested and shall be conducted as an informational hearing for the purpose of explaining and receiving comment from affected persons on the nature, feasibility, effects and other relevant aspects of the proposed nonmetallic mining and reclamation. The informational hearing shall be conducted using the procedures for a noncontested case hearing pursuant to ch. NR 2.

(c) The subject matter and testimony at this informational hearing shall be limited to reclamation of the nonmetallic mine site.

Note: Informational hearings are limited to reclamation of the nonmetallic mining site. Regulatory authority staff conducting the hearings should make it clear that the hearings may not cover non–reclamation matters because they are beyond the scope of ch. NR 135 reclamation. Non–reclamation matters are those related to zoning or subject to other local authority. These matters may include but are not limited to: traffic, setbacks, blasting, dewatering, hours of operation, noise or dust control or the question of whether to use the land for mining.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (1), (2) (intro.) and (3) (a), r. (4) Register November 2006 No. 611, eff. 12–1–06.

NR 135.21 Reclamation permit issuance. (1) PERMIT ISSUANCE. Unless denied pursuant to s. NR 135.22, the regulatory authority shall approve in writing an application submitted pursuant to s. NR 135.18 (1) to issue a nonmetallic mining reclamation permit for a proposed nonmetallic mine. The regulatory authority may issue a reclamation permit subject to conditions in sub. (2) if appropriate. The permit decision shall be made no sooner than 30 nor later than 90 days following receipt of the complete reclamation permit application and reclamation plan that meets the requirements of s. NR 135.19 pursuant to this subchapter, unless a public hearing is held pursuant to s. NR 135.20. If a public hearing is held, the regulatory authority shall issue the reclamation permit, subject to conditions pursuant to sub. (2) if appropriate, or shall deny the permit as provided in s. NR 135.22, no later than 60 days after completing the public hearing.

(2) CONDITIONS. The regulatory authority may issue a reclamation permit or approve a reclamation plan subject to general or site–specific conditions if needed to assure compliance with the nonmetallic mining reclamation requirements of this chapter. The approvals may not include conditions that are not related to reclamation. One required condition of the issued permit shall be that the new mine obtain financial assurance pursuant to s. NR 135.40 prior to beginning mining.

Note: It is not appropriate for the regulatory authority to impose conditions on a reclamation permit, or the approval of a reclamation plan that address matters not directly related to nonmetallic mining reclamation. These matters may include but are not limited to: traffic, setbacks, blasting, dewatering, hours of operation, noise or dust control or the question of whether to use the land for mining.

(3) COOPERATIVE ISSUANCE BY MULTIPLE AUTHORITIES. If more than one regulatory authority has jurisdiction over a single nonmetallic mining site, the regulatory authorities shall cooperatively issue a single reclamation permit for the nonmetallic mining site.

Any unresolvable issues may be referred to the department under s. NR 135.52.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: r. (1), renum. (2) to (4) to be (1) to (3) and am. Register November 2006 No. 611, eff. 12–1–06.

NR 135.22 Denial of application for reclamation permit. (1) An application to issue a nonmetallic mining reclamation permit shall be denied, within the time frame for permit issuance specified in s. NR 135.21, if the regulatory authority finds any of the following:

(a) The applicant has, after being given an opportunity to make corrections, failed to provide an adequate permit application, reclamation plan, financial assurance or any other submittal required by this chapter or the applicable reclamation ordinance to the regulatory authority.

(b) The proposed nonmetallic mining site cannot be reclaimed in compliance with the reclamation standards contained in the applicable reclamation ordinance, this chapter or subch. I of ch. 295, Stats.

(c) 1. The applicant, or its agent, principal or predecessor has, during the course of nonmetallic mining in Wisconsin within 10 years of the permit application or modification request being considered shown a pattern of serious violations of this chapter or of federal, state or local environmental laws related to nonmetallic mining reclamation.

2. The following may be considered in making this determination of a pattern of serious violations:

a. Results of judicial or administrative proceedings involving the operator or its agent, principal or predecessor.

b. Suspensions or revocations of nonmetallic mining reclamation permits pursuant to this chapter.

c. Forfeitures of financial assurance.

(d) A denial under this subsection shall be in writing and shall contain documentation of reasons for denial.

(2) A regulatory authority's decision to deny an application to issue a reclamation permit may be reviewed under s. NR 135.30.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.23 Automatic permitting and expedited permit review. (1) AUTOMATIC PERMITTING OF BORROW SITES FOR LOCAL TRANSPORTATION PROJECTS. (a) The regulatory authority shall automatically issue an expedited permit under this subsection if the borrow site:

1. Will be opened and reclaimed under contract with a municipality within a period not exceeding 36 months;

2. Is a nonmetallic mine which is intended to provide stone, soil, sand or gravel for the construction, reconstruction, maintenance or repair of a highway, railroad, airport facility or other transportation facility under contract with a municipality;

3. Is regulated and will be reclaimed under contract with a municipality in accordance with the requirements of the department of transportation concerning the restoration of nonmetallic mining sites;

4. Is not a commercial source;

5. Will be constructed, operated and reclaimed in accordance with applicable zoning requirements, if any, and;

6. Is not otherwise exempt from the requirements of this chapter under s. NR 135.02 (3).

(b) The applicant shall notify the regulatory authority of the terms and conditions of the contract with respect to reclamation of the proposed borrow site.

(c) The applicant shall provide evidence to the regulatory authority to show that the borrow site and its reclamation will comply with applicable zoning requirements, if any.

(d) The regulatory authority shall accept the contractual provisions incorporating requirements of the department of transportation in lieu of a reclamation plan under s. NR 135.19.

(e) The regulatory authority shall accept the contractual provisions in lieu of the financial assurance requirements in s. NR 135.40.

(f) The public notice and hearing provisions of s. NR 135.20 do not apply to nonmetallic mining sites that are issued automatic permits under this subsection.

Note: Local public notice and hearing requirements, if any, regarding zoning decisions still apply.

(g) The annual fees under s. NR 135.39 shall apply, however, the regulatory authority may not charge a plan review fee or an expedited plan review fee. Notwithstanding s. NR 135.39 (4) (b) and (c), the total annual fee including the department share shall not exceed the amount in Table 3 of s. NR 135.39.

(h) The regulatory authority shall issue the automatic permit within 7 days of the receipt of a complete application.

(i) If the borrow site is used to concurrently supply materials for other than the local transportation project, the automatic permitting in this subsection still applies provided the site will reclaimed under a contractual obligation with the municipality in accordance with the department of transportation requirements.

(j) Notwithstanding s. NR 135.36, the operator of a borrow site under this subsection is required to submit only the information in an annual report necessary to identify the borrow site and to determine the applicable annual fee.

(2) EXPEDITED PERMITTING. (a) An applicant may request expedited permit review by proceeding in accordance with par. (b) or (c).

(b) An applicant may submit a request for expedited review with payment of the fee required under s. NR 135.39 (4). This request shall state the need for expedited review and the date by which the expedited review is requested.

(c) An applicant may submit a request for an expedited review if the applicant requires a reclamation permit to perform services under contract with a municipality. This request for expedited review shall state the need for expedited review and shall include a copy of the applicable sections of the contract and the date by which the expedited review is requested.

(d) Following receipt of a request under this subsection, the regulatory authority shall inform the applicant of the estimated date for decision on issuance of the permit. If the applicant then elects not to proceed with the expedited review, the fee paid pursuant to par. (b) shall be returned.

(e) The expedited review process may not waive the requirements of this subchapter for public notice and hearing. This section does not impose an obligation upon the regulatory authority to act upon a permit application under this section by a specific date.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.24 Permit modification. (1) BY THE REGULATORY AUTHORITY. If a regulatory authority finds that, because of changing conditions, the nonmetallic mining site no longer is in compliance with this chapter or the applicable reclamation ordinance, it shall issue an order modifying the permit in accordance with s. NR 135.43. This modifying order may require the operator to amend or submit new application information, reclamation plan, proof of financial assurance or other information needed to ensure compliance with this chapter or the applicable reclamation ordinance.

(2) BY THE OPERATOR. If an operator desires to modify a nonmetallic mining reclamation permit or reclamation plan, the operator shall submit an application to modify the permit or plan to the regulatory authority. The application shall be subject to the requirements of this subchapter. The regulatory authority that

issued the permit shall take action on the application to modify it in accordance with the standards and procedures contained in this subchapter.

(3) REVIEW. All actions by the regulatory authority pursuant to this section may be reviewed under s. NR 135.30.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.25 Permit suspension and revocation. **(1)** GROUNDS. A regulatory authority may suspend or revoke a nonmetallic mining permit issued pursuant to this chapter if it finds that the operator has done any of the following:

(a) Failed to submit a satisfactory reclamation plan within the time frames specified in this subchapter.

(b) Failed to submit or maintain financial assurance as required by this chapter.

(c) Failed on a repetitive and significant basis to follow the approved reclamation plan.

(2) SUSPENSION. If the regulatory authority makes any of the findings in sub. (1), it may suspend a nonmetallic mining reclamation permit for up to 30 days. During the time of suspension, the operator may not conduct nonmetallic mining at the site, except for reclamation or measures to protect human health and the environment as ordered by the regulatory authority pursuant to s. NR 135.43.

(3) REVOCATION. If a regulatory authority makes any of the findings in sub. (1), it may revoke a nonmetallic mining reclamation permit. Upon permit revocation, the operator shall forfeit the financial assurance it has provided pursuant to s. NR 135.40 to the regulatory authority. The regulatory authority may use forfeited financial assurance to reclaim the site to the extent needed to comply with this chapter and the applicable reclamation ordinance.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.26 Approval of alternate requirements. **(1)** CRITERIA. A regulatory authority may approve an alternate requirement to the reclamation standards established in this chapter if the operator demonstrates and the regulatory authority finds that all of the following criteria are met:

(a) The nonmetallic mining site, the surrounding property or the mining plan or reclamation plan has a unique characteristic which requires an alternate requirement.

(b) Unnecessary hardship which is peculiar to the nonmetallic mining site or plan will result unless the alternate requirement is approved.

(c) Reclamation in accordance with the proposed alternate requirement will achieve the planned post–mining land use and long term site stability in a manner that will not cause environmental pollution or threaten public health, safety or welfare.

(2) PROCEDURES. (a) An operator who requests an alternate requirement shall submit the request in writing as required in the applicable reclamation ordinance.

(b) If the regulatory authority is a county or municipality, the alternate requirement shall be approved or disapproved as provided in the applicable reclamation ordinance. Approval or disapproval shall be in writing and shall contain documentation of the reasons why the alternate requirement was or was not approved.

(c) If the department is the regulatory authority, the request shall be submitted to the department's bureau of waste management, which shall have authority to approve these requests. Approval or disapproval shall be in writing and shall contain documentation of the reasons why the alternate requirement was or was not approved.

(d) A request for an alternate requirement may be incorporated as part of an application to issue or modify a nonmetallic mining reclamation permit.

(e) An applicable reclamation ordinance may provide opportunity for public informational hearing pursuant to this subchapter prior to the regulatory authority's action on a request for an alternate requirement.

(3) DEPARTMENT REVIEW. (a) The regulatory authority shall submit written notice to the department at least 10 days prior to public hearing pursuant to sub. (2) (e) on the proposed alternate requirement.

(b) If the department determines that the proposed alternate requirement does not comply with the intent of this chapter or the applicable reclamation ordinance, the department may notify the regulatory authority of this determination either prior to or during the public hearing.

(c) The regulatory authority shall submit each written decision on an alternate requirement to the department within 10 days of issuance.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.27 Permit duration. A nonmetallic mining reclamation permit issued pursuant to this chapter shall last through the mine's operation and reclamation as described in the approved reclamation plan. If changes occur in the area to be mined, the nature of planned reclamation, or other aspects of mining require that the approved reclamation plan be amended, the operator shall apply for a permit modification pursuant to s. NR 135.24 (2). If the mine operator is not the landowner, the permit duration cannot exceed the duration of the lease unless the lease is renewed or the permit is transferred to a subsequent lessee or the landowner pursuant to s. NR 135.28.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.28 Permit transfer. **(1)** A nonmetallic mining permit may be transferred to a new operator upon submittal to the regulatory authority of proof of financial assurance and a certification in writing by the new permit holder that all conditions of the permit will be complied with.

(2) The transfer is not valid until financial assurance has been submitted by the new operator and accepted by the regulatory authority and the regulatory authority makes a written finding that all conditions of the permit will be complied with. The previous operator shall maintain financial assurance until the new operator has received approval and provided the financial assurance under this section.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.29 Change of regulatory authority. If there is a change of regulatory authority for a nonmetallic mining site, the site's nonmetallic mining permit shall remain in effect and be enforceable until the permit is modified by the new regulatory authority.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.30 Review of permit decision. **(1)** COUNTY OR MUNICIPAL PERMIT DECISION. Notwithstanding ss. 68.001, 68.03 (8) and (9), 68.06 and 68.10 (1) (b), Stats., any person who meets the requirements of s. 227.42 (1), Stats., may obtain a contested case hearing under s. 68.11, Stats., on a county or municipal regulatory authority's decision to issue, deny or modify a nonmetallic mining reclamation permit.

(2) DEPARTMENT PERMIT DECISION. Any person who meets the requirements of s. 227.42 (1), Stats., may seek review of a department decision to issue, deny or modify a nonmetallic mining reclamation permit, where the department administers a nonmetallic mining reclamation program pursuant to s. NR 135.17 (3). This hearing shall be held as a contested case hearing pursuant to ss. 227.42 and 227.43, Stats. The hearing shall be conducted within the county where the nonmetallic mining site is located. Deci-

sions from these hearings are reviewable in court pursuant to ss. 227.52 to 227.59, Stats.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

Subchapter IV — Administration and Enforcement

NR 135.32 Regulatory authorities for administration of a nonmetallic mining reclamation program. **(1)** COUNTIES REQUIRED TO ADMINISTER NONMETALLIC MINING RECLAMATION PROGRAMS. Each county shall enact and administer a nonmetallic reclamation ordinance that complies with this chapter, except as provided in subs. (2), (3) and (4). Counties shall administer them in conformance with this chapter. Within 6 months of the effective date of revisions to this chapter, counties shall amend their ordinances to ensure compliance with this chapter.

(2) MUNICIPALITIES PERMITTED TO ADMINISTER A NONMETALLIC MINING RECLAMATION PROGRAM. A municipality may administer and enforce a nonmetallic mining reclamation program pursuant to this subchapter if it has adopted and administers a reclamation ordinance that complies with this chapter. Municipalities shall administer these ordinances in conformance with this chapter. Nonmetallic mining subject to municipal administration and enforcement is not subject to county or department administration and enforcement pursuant to this subchapter. Within 6 months of the effective date of revisions to this chapter, municipalities that continue to administer nonmetallic mining reclamation programs shall amend their ordinances to ensure compliance with this chapter.

(3) DEPARTMENT TO ADMINISTER A NONMETALLIC MINING RECLAMATION PROGRAM UNDER CERTAIN CONDITIONS. The department shall administer and enforce a nonmetallic mining reclamation program pursuant to this subchapter only under either of the following conditions:

(a) The county in which a nonmetallic mining site is located has not enacted an applicable reclamation ordinance, and no applicable reclamation ordinance has been adopted by the municipality in which the site is located.

(b) The department finds, after a hearing pursuant to subch. V, that a county or municipality's nonmetallic mining reclamation program does not comply with this chapter, except as follows:

1. If the department finds a municipality's program does not comply with this chapter, the county in which the site is located shall administer and enforce a nonmetallic mining reclamation program if it enacts an applicable reclamation ordinance.

2. If the department finds a county's program does not comply with this chapter, any municipality that has enacted an applicable reclamation ordinance by the time of this finding may continue to administer and enforce its nonmetallic mining reclamation program.

(4) If all cities, villages and towns that contain nonmetallic mines in a county with a population of 700,000 or more administer and enforce a nonmetallic mining reclamation program pursuant to this chapter by the first day of the fourth month following December 1, 2000, that county may elect not to adopt an applicable nonmetallic mining reclamation ordinance and not to administer and enforce a nonmetallic mining reclamation program.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (1) and (2) Register November 2006 No. 611, eff. 12–1–06.

NR 135.35 Model nonmetallic mining reclamation ordinances. The department shall prepare and publish one or more model reclamation ordinances for counties and municipalities to use in complying with the requirements of this chapter.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.36 Operator reporting requirements. **(1)** An operator shall submit an annual report for every nonmetallic mining site with a reclamation permit to the regulatory authority. The annual report shall include all of the following:

(a) The name and mailing address of the operator.

(b) The location of the nonmetallic mining site, including legal description, tax key number or parcel identification number if available.

(d) The identification number of the applicable nonmetallic mining permit, if assigned by the regulatory authority.

(e) The acreage currently affected by nonmetallic mining extraction and not yet reclaimed.

(f) The amount of acreage that has been reclaimed to date, on a permanent basis and the amount reclaimed on an interim basis.

(g) A plan, map or diagram accurately showing the acreage described in pars. (e) and (f).

(h) The following certification, signed by the operator:

"I certify that this information is true and accurate, and that the nonmetallic mining site described herein complies with all conditions of the applicable nonmetallic mining permit and Chapter NR 135, Wisconsin Administrative Code."

(2) The annual report shall cover activities on unreclaimed acreage for the previous calendar year and be submitted by January 31.

(3) Annual reports shall be submitted by an operator for all active and intermittent mining sites to the regulatory authority for each calendar year until nonmetallic mining reclamation at the site is certified as complete pursuant to s. NR 135.38 or at the time of release of financial assurance pursuant to s. NR 135.40 (7).

(4) A regulatory authority may, at its discretion, obtain the information required in sub. (1) for a calendar year by written documentation of its inspections of a nonmetallic mining site. If the regulatory authority obtains and documents the required information, the annual report need not be submitted by the operator. If the regulatory authority determines that the operator need not submit an annual report pursuant to this subsection, the regulatory authority shall advise the operator in writing at least 30 days before the end of the applicable calendar year. In that case, the regulatory authority shall require the operator to submit the certification required in sub. (1) (h).

(5) A regulatory authority shall retain annual reports required by sub. (1) or equivalent records as provided in sub. (4) for 10 years after they are submitted, and shall make them available upon request to the department for inspection or audit activities the department conducts pursuant to subch. V.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (2) Register November 2006 No. 611, eff. 12–1–06.

NR 135.37 Regulatory authority's annual report to the department. Unless the department is the regulatory authority, the regulatory authority shall submit an annual program report to the department by March 31 for the previous calendar year. The regulatory authority's annual report shall include the following:

(1) The total number of nonmetallic mining permits in effect.

(2) The number of new permits issued within the jurisdiction of the regulatory authority.

(3) The number of acres approved for nonmetallic mining and the number of acres newly approved in the previous year.

(4) The number of acres being mined or unreclaimed acres.

(5) The number of acres that have been reclaimed and have had financial assurance released pursuant to this subchapter.

(6) The number of acres that are reclaimed and awaiting release from the financial assurance requirements of this subchapter.

(7) The number and nature of alternative requirements granted, permit modifications, violations, public hearings,

enforcement actions, penalties that have been assessed and bond or financial assurance forfeitures.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (intro.) and (4) Register November 2006 No. 611, eff. 12–1–06.

NR 135.38 Operator reporting of completed reclamation. An operator shall file a notice of completed reclamation with the regulatory authority when the operator deems reclamation activities to be completed for a portion of the nonmetallic mine site or for the entire site. The notice of completed reclamation shall be filed as provided by the applicable reclamation ordinance.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.39 Fees. (1) AREAS SUBJECT TO FEES. (a) Fees shall be assessed pursuant to this section for all unreclaimed acres of a nonmetallic mine site, as defined in s. NR 135.03 (25), except the following:

1. Areas that are defined in s. NR 135.03 (16) (b) as not subject to this chapter. Fees may not be assessed on acreage where nonmetallic mining is proposed and approved but where no nonmetallic mining has yet taken place.

Note: Fees are assessed only on active areas see definition on "unreclaimed acre" under s. NR 135.03 (25) (b).

2. Areas that have been determined by the regulatory authority to qualify for fee waiver because of successful interim reclamation pursuant to s. NR 135.41.

(b) If reclamation has already occurred on portions of a nonmetallic mine site, the fees for such portions may be submitted with a request that they be held by the regulatory authority pending certification of completed reclamation pursuant to s. NR 135.40 (7). Upon such certification, the regulatory authority shall refund that portion of the annual fee applying to the reclaimed areas. If the regulatory authority fails to make a determination under s. NR 135.40 (7) (c) within 60 days of the request, the regulatory authority shall refund that portion of the annual fee that applies to the reclaimed areas.

(c) The amount collected shall equal the department's share as described in sub. (3), the regulatory authority's share described in sub. (4) and, if applicable, the reclamation plan review fee described in sub. (5). The department's share of the annual fees described in sub. (3) shall be transferred to the department by March 31, for the previous year by the regulatory authority.

(2) COLLECTION. (a) The regulatory authority shall collect annual fees from the operator based on the unreclaimed acreage of each nonmetallic mining site described in sub. (1). Annual fees shall be collected for the previous calendar year.

(b) Fees shall be paid to the regulatory authority on or before January 31 for the previous calendar year, unless otherwise specified by s. NR 135.18 (1) or by the regulatory authority in the applicable reclamation ordinance.

(c) The amount collected shall equal the department's share as described in sub. (3), the regulatory authority's share described in sub. (4) and, if applicable, the reclamation plan review fee described in sub. (5). The regulatory authority shall transfer the department's share of the annual fees described in sub. (3) to the department by March 31.

(3) DEPARTMENT SHARE. (a) The department's statewide share of the annual fees collected pursuant to this section shall be equal to the department's statewide cost to inspect, enforce, consult with and audit the regulatory authority under this chapter, unless the department is the regulatory authority and collects a fee under sub. (4) (c). If the department is the regulatory authority, the fee in Table 1 may not be collected.

(b) The department's share of the annual fee under this subsection submitted to a regulatory authority shall be assessed based on unreclaimed acreage as specified in Table 1.

Note: The fees in Table 2 include the department's statewide costs, as well as the department's estimated expenses as the regulatory authority.

Table 1
Department Share of Annual Fees Collected by County and Municipal Regulatory Authorities

Mine Size in Unreclaimed Acres, Rounded to the Nearest Whole Acre	Annual Fee
1 to 5 acres, does not include mines < 1 acre	$ 35
6 to 10 acres	$70
11 to 15 acres	$105
16 to 25 acres	$140
26 to 50 acres	$160
51 acres or larger	$175

(4) REGULATORY AUTHORITY'S SHARE. (a) The fee under this subsection shall be collected as established in the regulatory authority's applicable reclamation ordinance.

(b) The regulatory authority's share of the annual fees shall as closely as possible equal its expenses to administer its reclamation program, including but not limited to, the examination and approval of nonmetallic mining reclamation plans and its costs of ensuring compliance with this chapter, inspecting the reclamation of nonmetallic mining sites and administering their nonmetallic mining reclamation program. These costs shall be limited as follows:

1. Fees collected by the regulatory authority under this section shall be used only for reasonable expenses associated with the administration of this chapter.

2. If a county or municipal regulatory authority's fees are greater than those established in par. (c), the county or municipality shall make available for public inspection written documentation of its estimated program costs and the need for fees exceeding those in par. (c) prior to adopting them.

(c) If the department is the regulatory authority, the department shall collect a fee based on unreclaimed acreage in Table 2.

Table 2
Annual Fees Due Where The Department is the Regulatory Authority

Mine Size in Unreclaimed Acres, Rounded to the Nearest Whole Acre	Annual Fee
1 to 5 acres, does not include mines < 1 acre	$175
6 to 10 acres	$350
11 to 15 acres	$525
16 to 25 acres	$700
26 to 50 acres	$810
51 acres or larger	$870

(d) If the department collects a fee under this subsection, it may not collect a fee for its statewide costs under sub. (3).

(5) RECLAMATION PLAN REVIEW FEE. (a) The regulatory authority may establish a reclamation plan review fee in its applicable reclamation ordinance that may be collected in addition to any annual fee collected pursuant to subs. (3) and (4).

(b) If the department is the regulatory authority, the reclamation plan review fee for reclamation plans submitted for review shall be as in Table 3.

Table 3
Plan Review Fee for Reclamation Plans Submitted Where the Department is the Regulatory Authority

Proposed Mine Site Size Rounded to the Nearest Whole Acre	One–Time Plan Review Fee
1 to 25 acres	$1045
26 to 50 acres	$1400
51 or more acres	$1750

(6) REDUCTION OF ANNUAL FEES FOR CERTAIN MINES. (a) A regulatory authority, as part of its applicable reclamation ordinance, may establish reduced annual fees for nonmetallic mines in which nonmetallic mining has not taken place in the previous calendar year.

(b) The department's share pursuant to sub. (3) of fees for nonmetallic mines in which no nonmetallic mining has taken place during a calendar year shall be $15.

(c) If the department is the regulatory authority, its fee under sub. (4) (c) for mines in which mining has not taken place in the previous calendar year shall be $100.

(7) REPORT TO NATURAL RESOURCES BOARD. Within 36 months after December 1, 2000, and within each 5–year period thereafter, the department shall submit to the natural resources board a report on whether the nonmetallic mining reclamation revenue, expenditures and fees established by this section and by other regulatory authorities are reasonable. The report shall be prepared in consultation with the nonmetallic mining advisory committee established under s. NR 135.51.

Note: The department intends to continue to consult and seek the advice of representatives of persons affected by the fees established by the department and other regulatory authorities for the purpose of preparing the report to the natural resources board required by this subsection.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (1) (a) 1., (2) to (5) and (7), r. (1) (b), renum. (1) (c) to be (1) (b), cr. (1) (c) Register November 2006 No. 611, eff. 12–1–06.

NR 135.40 Financial assurance. (1) NOTIFICATION. The regulatory authority shall provide written notification to the operator of the amount of financial assurance required under sub. (3).

(2) FILING. Following approval of the nonmetallic reclamation permit, and as a condition of the permit, the operator shall file a financial assurance with the regulatory authority. The financial assurance shall provide that the operator shall faithfully perform all requirements in this chapter, an applicable reclamation ordinance and the reclamation plan. Financial assurance shall be payable exclusively to the regulatory authority that has jurisdiction and who issues the approval for the reclamation plan. In cases where the regulatory authority changes from one jurisdiction to another all financial assurance shall be made payable to the regulatory authority that currently has primary regulatory responsibility in that jurisdiction.

(3) AMOUNT AND DURATION OF FINANCIAL ASSURANCE. The amount of financial assurance shall equal as closely as possible the cost to the regulatory authority of hiring a contractor to complete either final reclamation or progressive reclamation according to the approved reclamation plan. The amount of financial assurance shall be reviewed periodically by the regulatory authority to assure it equals outstanding reclamation costs. Any financial assurance filed with the regulatory authority shall be in an amount equal to the estimated cost to the regulatory authority for reclaiming all sites the operator has under project permits. The regulatory authority may accept a lesser initial amount of financial assurance provided that the permittee initiates a process to continuously increase the amount of financial assurance until it is adequate to effect reclamation. An escrow account may be established that is based on production gross sales and serves to provide regular payments to an account that is designed to grow to the amount necessary to guarantee performance of reclamation by the expected time of final reclamation. The period of the financial assurance is dictated by the period of time required to establish the post mining land use declared and approved of in the mine reclamation plan. This may extend beyond the permit if required to accomplish successful and complete implementation of the reclamation plan.

(4) FORM AND MANAGEMENT. Financial assurance shall be provided by the operator and shall be by a bond or an alternate financial assurance. Financial assurance shall be payable to the regulatory authority and released upon successful completion of the reclamation measures specified in the reclamation plan. Alternate financial assurances may include, but are not limited to cash, certificates of deposits, irrevocable letters of credit, irrevocable trusts, established escrow accounts, demonstration of financial responsibility by meeting net worth requirements, or government securities. Any interest from the financial assurance shall be paid to the operator. Certificates of deposit shall be automatically renewable or other assurances shall be provided before the maturity date. Financial assurance arrangements may include, at the discretion of the regulatory authority, a blend of different options for financial assurance including a lien on the property on which the nonmetallic mining site occurs or a combination of financial assurance methods.

(5) MULTIPLE PROJECTS. Any operator who obtains a permit from the regulatory authority for 2 or more nonmetallic mining sites may elect, at the time the second or subsequent site is approved, to post a single financial assurance in lieu of separate financial assurance instruments for each nonmetallic mining site. When an operator elects to post a single financial assurance in lieu of separate financial assurances for each mining site, no financial assurances previously posted on individual mining sites shall be released until the new financial assurance has been accepted by the regulatory authority.

(6) MULTIPLE JURISDICTIONS. In cases where more than one regulatory authority has jurisdiction, a cooperative financial security arrangement may be developed and implemented by the regulatory authorities to avoid requiring the permittee needing to prove financial assurance with more than one regulatory authority for the same nonmetallic mining site. Financial assurance is required for each site and 2 or more sites of less than one acre by the same operator, except that governmental units are not required to obtain financial assurance.

(7) CERTIFICATION OF COMPLETION AND RELEASE. (a) The operator shall notify the regulatory authority, by filing a notice of completion, at the time that he or she determines that reclamation of any portion of the mining site or the entire site is complete. The regulatory authority shall inspect the mine site or portion thereof that was the subject of the notice of completion to determine if reclamation has been carried out in accordance with the approved reclamation plan. The regulatory authority may partially release the financial assurance if it determines that compliance with a portion of the reclamation plan has been achieved and requires no waiting period. After determining that reclamation is complete, the regulatory authority shall issue a certificate of completion and shall release the financial assurance.

(b) The regulatory authority shall make a determination of whether or not the certification in par. (a) can be made within 60 days that the request is received.

(c) A regulatory authority may make a determination under this subsection that:

1. Reclamation is not yet complete;

2. It is not possible to assess whether reclamation is complete due to weather conditions, snow cover or other relevant factors;

3. Reclamation is complete in a part of the mine; or

4. Reclamation is fully complete.

(8) FORFEITURE. Financial assurance shall be forfeited if any of the following occur:

(a) A permit is revoked under s. NR 135.25 and the appeals process has been completed.

(b) An operator ceases mining operations and fails to reclaim the site in accordance with the reclamation plan.

(9) CANCELLATION. Financial assurance shall provide that it may not be cancelled by the surety or other holder or issuer except after not less than a 90–day notice to the regulatory authority in writing by registered or certified mail. Not less than 30 days prior to the expiration of the 90–day notice of cancellation, the operator shall deliver to the regulatory authority a replacement proof of financial assurance. In the absence of this replacement financial assurance, all mining shall cease until the time it is delivered and in effect.

(10) CHANGING METHODS OF FINANCIAL ASSURANCE. The operator of a nonmetallic mining site may change from one method of financial assurance to another. This may not be done more than once a year unless required by an adjustment imposed pursuant to sub. (12). The operator shall give the regulatory authority at least 60 days' notice prior to changing methods of financial assurance and may not actually change methods without the written approval of the regulatory authority.

(11) BANKRUPTCY NOTIFICATION. The operator of a nonmetallic mining site shall notify the regulatory authority by certified mail of the commencement of voluntary or involuntary proceeding under bankruptcy code, 11 USC, et seq., naming the operator as debtor, within 10 days of commencement of the proceeding.

(12) ADJUSTMENT OF FINANCIAL ASSURANCE. Financial assurance may be adjusted when required by the regulatory authority. The regulatory authority may notify the operator in writing that adjustment is necessary and the reasons for it. The regulatory authority may adjust financial assurance based upon prevailing or projected interest or inflation rates, or the latest cost estimates for reclamation.

(13) NET WORTH TEST. (a) Only an operator that meets the definition of "company" in s. 289.41 (1) (b), Stats., may use the net worth method of providing financial assurance.

(b) The operator shall submit information to the regulatory authority in satisfaction of the net worth test requirements of s. 289.41 (4), Stats. The criteria in s. 289.41 (6) (b), (d), (e), (f), (g), (h) and (i), Stats., shall apply.

(c) An operator using the net worth test to provide financial assurance for more than one mine shall use the total cost of compliance for all mines in determining the net worth to reclamation cost ratio in accordance with s. 289.41 (6), Stats.

(d) The department determinations under the net worth test shall be done in accordance with s. 289.41 (5), Stats.

(e) In addition, the operator shall submit a legally binding commitment to faithfully perform all compliance and reclamation work at the mine site that is required under an applicable nonmetallic mining reclamation ordinance.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.41 Interim reclamation waiver. If the regulatory authority determines that areas within a mining site have been successfully reclaimed on an interim basis in accordance with the reclamation plan, the regulatory authority:

(1) Shall waive annual acreage fees for those areas, and

(2) May reduce or waive financial assurance requirements for those areas.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.42 Regulatory authority right of inspection. **(1)** No person may refuse entry or access onto a nonmetallic mining site of a duly authorized officer, employee or agent of the regulatory authority or the department who presents appropriate credentials to inspect the site for compliance with the nonmetallic mining reclamation permit, the applicable reclamation ordinance, this chapter or ch. 295, subch. I, Stats. Any person who enters the site under this right of inspection shall obtain training and provide their own safety equipment needed to comply with any federal, state or local laws or regulations controlling persons on the nonmetallic mining site.

(2) If requested, the department shall furnish to the operator a written report of its inspection under this section, setting forth all relevant observations, information and data which relate to the site's compliance status under this chapter and ch. 295, subch. I, Stats.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.43 Enforcement, orders, penalties. **(1)** LOCAL ORDERS AND ENFORCEMENT. The regulatory authority that administers a nonmetallic mining reclamation ordinance, or an agent designated by that governing body, may do any of the following:

(a) Issue an order, requiring an operator to either comply with provisions of or cease violations of ch. 295, subch. I, Stats., this chapter, an applicable reclamation ordinance, a nonmetallic mining reclamation permit, permit conditions or an approved mining reclamation plan.

(b) Issue a special order suspending or revoking a nonmetallic mining reclamation permit under s. NR 135.25, or directing an operator to immediately cease an activity regulated under this chapter or under an applicable reclamation ordinance until the necessary plan approval is obtained.

(c) Submit an order to abate violations of the nonmetallic mining reclamation ordinance to a district attorney, corporation counsel, municipal attorney or the attorney general for enforcement. The district attorney, corporation counsel, municipal attorney or the attorney general may enforce those orders.

(2) RIGHT OF REVIEW. A person holding a reclamation permit who is subject to an order pursuant to sub. (1) shall have the right to review the order in a contested case hearing under s. 68.11, Stats., notwithstanding the provisions of ss. 68.001, 68.03 (8) and (9), 68.06 and 68.10 (1) (b), Stats.

(3) DEPARTMENT ORDERS. (a) If the department is the regulatory authority, it may issue an order as provided in sub. (1).

(b) In addition to orders issued under sub. (1), the department may issue a special order directing the immediate cessation of an activity regulated under this section until the nonmetallic mining site complies with the nonmetallic mining reclamation standards established under subch. II.

(c) A person holding a reclamation permit who is subject to an order issued under this subsection shall have the right to review the order in a contested case under s. 227.42, Stats.

(4) PENALTIES. (a) Any person who violates this chapter or an order issued under sub. (1) or (3) may be required by the regulatory authority to forfeit not less than $25 nor more than $1,000 for each violation. Each day of continued violation is a separate offense. While an order issued under this section is suspended, stayed or enjoined, this penalty does not accrue. The cost of enforcement incurred by the regulatory authority shall be considered in establishing these forfeitures.

(b) Except for the violations referred to in par. (a), any person who violates ch. 295, subch. I, Stats., this chapter, any reclamation plan approved pursuant to this chapter or an order issued under sub. (1) or (3) shall forfeit not less than $10 nor more than $5,000 for each violation. Each day of violation is a separate offense. While an order issued under this section is suspended, stayed or enjoined, this penalty does not accrue.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

Subchapter V — Department Oversight and Assistance

NR 135.44 Department review of pre–existing ordinances. **(1)** Any county or municipality that intends to enforce a nonmetallic mining reclamation ordinance that was in effect before June 1, 1993 shall submit a copy of the ordinance to the department.

(2) If the department finds that any part of the submitted reclamation ordinance is not at least as restrictive as the requirements of this chapter, or is not adequate to effect the purposes of ch. 295, subch. I, Stats., and meet the requirements of this chapter, it shall communicate this finding and the basis for it to the county or municipality in writing. The county or municipality may amend its reclamation ordinance and submit the amended ordinance to the department for a determination under this subsection of whether the amended ordinance is at least as restrictive as the requirements of this chapter. The county or municipality may continue administering its reclamation ordinance while working to amend the ordinance to comply with this chapter. Where amendment is necessary pursuant to this subsection, the county or municipality shall submit a copy of the amended reclamation ordinance as enacted to the department.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.45 Department review of new ordinances. **(1)** A county or municipality which proposes to adopt a nonmetallic mining reclamation ordinance in accordance with this chapter shall submit the proposed ordinance to the department for review and a determination of compliance at least 45 days prior to its adoption. The county or municipality may submit a description of its proposed nonmetallic mining program to the department for technical advice.

(2) The department shall determine whether the ordinance will comply with this chapter.

(3) Within 30 days of receipt of a proposed ordinance under this section, the department shall advise the county or municipality of its determination under sub. (2).

(4) Before the governing body of a county or municipality adopts a proposed ordinance, it shall obtain a determination of compliance from the department under this section.

(5) Upon enactment, the county or municipality shall submit a final copy of the ordinance to the department.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.46 Amendment of ordinances. A county or municipality may not amend its nonmetallic mining reclamation ordinance in a manner which makes it more or less restrictive than this chapter. The county or municipality shall submit a copy of an amended ordinance to the department.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.47 Department audits. **(1)** The department shall periodically review the nonmetallic mining program of each regulatory authority to determine if the program is being conducted in compliance with this chapter, and is effective and consistent in ensuring operator compliance with the statewide uniform reclamation standards contained in this chapter.

(2) The program review shall include a performance audit and on–site inspections of mining operations within the jurisdiction.

(3) During the performance audit, the department may evaluate the regulatory authority with respect to all of the following:

(a) Compliance with the county or municipal regulatory authority's nonmetallic mining reclamation ordinance and the standards in this chapter.

(b) The procedures employed by the regulatory authority regarding reclamation plan review, and the issuance and modification of permits.

(c) The methods for review of annual reports received from operators.

(d) The method and effectiveness of fee collection.

(e) Procedures to accurately forward the department's portion of collected fees in a timely fashion.

(f) Methods for conducting on–site compliance inspections and attendant reports, records and enforcement actions.

(g) Responses to citizen complaints.

(h) The method of and accuracy in determining the amount of the financial assurance obtained from the operator to guarantee reclamation performance.

(i) The maintenance and availability of records.

(j) The number and type of approvals for alternative requirements issued pursuant to this chapter.

(k) The method of determining the success of reclamation in meeting the criteria contained in the reclamation plan and subsequently releasing the financial assurance pursuant to s. NR 135.40 (7).

(L) Any changes in local regulations, ordinances, funding and staffing mechanisms or any other factor which might affect the ability of the regulatory authority to implement its nonmetallic mining reclamation program.

(m) The amount of fees collected in comparison to the amount of money actually expended for nonmetallic mining reclamation program administration.

(n) Any other performance criterion that the department may deem necessary to ascertain compliance with this chapter.

(4) The department shall issue a written determination to the audited regulatory authority not less than every 10 years within 90 days of its audit, of whether or not the reclamation program administered by the regulatory authority is in compliance with the provisions of this chapter.

(5) If the department finds and states, within 90 days of its audit, in its written determination that the regulatory authority is not in compliance with this chapter, the department shall give the regulatory authority adequate opportunity to correct deficiencies and respond to the department's comments.

(6) Following a preliminary determination that a nonmetallic mining reclamation program administered by a county or municipal government regulatory authority is not achieving compliance with this chapter, the department shall consult with the nonmetallic mining advisory committee.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (3) (a) and (6) Register November 2006 No. 611, eff. 12–1–06.

NR 135.48 Noncompliance hearing. If, as a result of adoption of an ordinance or an audit pursuant to s. NR 135.47, the department determines that a regulatory authority is not in compliance with this chapter and has not corrected deficiencies after written notice, the department may schedule a hearing regarding whether the regulatory authority shall continue administering its nonmetallic mining reclamation program. The department shall provide 30 days' notice to the regulatory authority prior to conducting the hearing. The hearing shall be held within the jurisdiction of the regulatory authority. The department shall issue a written decision of its conclusion as soon as practicable after the hearing.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.49 Municipal noncompliance, consequences. **(1)** If, as a result of a noncompliance hearing held pursuant to s. NR 135.48, the department issues a written decision finding a municipality is out of compliance with this chapter, the municipality's authority to administer its nonmetallic mining reclamation program shall be revoked. In this case, the applicable reclamation ordinance of the county in which the municipality is located shall apply in the municipality.

(2) A municipality whose authority has been revoked may apply to the department to resume administration of its applicable reclamation ordinance and nonmetallic mining reclamation program after 3 years have elapsed since revocation. The department, after hearing, may approve the municipality's request to resume administering its nonmetallic mining reclamation program if it finds that the municipality demonstrates the capacity to comply with this chapter.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.50 County noncompliance, consequences. **(1)** If as a result of a noncompliance hearing held pursuant to s. NR 135.48, the department issues a written decision finding a county is out of compliance with this chapter, the department shall, as soon as practicable after the hearing, assume responsibility for the administration of the nonmetallic mining reclamation ordinance and program in that county, including collection of fees and review and approval of reclamation plans and permit applications.

(2) Municipalities that are approved to administer an applicable reclamation ordinance and program may continue to do so after the department begins to administer a nonmetallic mining program pursuant to this section. However, no municipality may enact for the first time an applicable reclamation ordinance during the time that the department administers the program in the county in which the municipality is located.

(3) The county found to be in noncompliance may apply to the department, at any time to resume administration of the nonmetallic mining reclamation program. The department, after hearing, may approve the county's request to resume administering its nonmetallic mining reclamation program if it finds that the county demonstrates the capacity to comply with this chapter.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.51 Nonmetallic mining advisory committee. **(1)** The department shall appoint a nonmetallic mining advisory committee to advise it on the administration of this chapter and ch. 295, subch. I, Stats.

(2) The nonmetallic mining advisory committee shall consist of 9 members appointed for terms not exceeding 3 years. Members shall represent economic, scientific and cultural viewpoints and shall include a representative from businesses that extract nonmetallic minerals, a representative from a business that uses nonmetallic minerals for road building and other purposes and a representative of an organization of persons who administer county zoning ordinances. The nonmetallic mining advisory committee shall meet at least annually.

(3) The nonmetallic mining advisory committee shall be consulted before the department may hold a hearing on revoking a nonmetallic mining reclamation program pursuant to s. NR 135.48.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.52 Department assistance. **(1)** In order to assist regulatory authorities in the development, implementation and administration of nonmetallic mining reclamation programs, the department may provide training workshops, written materials and technical assistance addressing how to establish and implement a nonmetallic mining reclamation program. The department may make computer software available to regulatory authorities to assist in record keeping and in the generation of standard forms.

Note: Specific mine safety training for reclamation inspectors may be made available through the department of safety and professional services or the federal mine safety and health administration.

(2) Any party may request the department's technical or administrative opinion to interpret, clarify or to otherwise facilitate progress in permitting matters or in the resolution of any other matter between a regulatory authority and a nonmetallic mine operator.

(3) (a) Any party may request the department's written technical or administrative opinion in a matter involving a dispute between a regulatory authority and a nonmetallic mine operator.

(b) The party should provide a written request detailing the nature and facts of the dispute, a history of previous attempts to resolve the matter, a precise description of the issue or issues where dispute exists and upon which the department is requested to render its technical or administrative opinion.

(c) The department shall respond to requests for technical or administrative opinions in writing within 10 days of receipt of the request indicating whether or not it will render a formal opinion on the matter. If the department acts to provide an opinion, it shall render its written opinion within 45 days of receipt of the request for a technical or administrative opinion. This timeframe may be extended where circumstances such as a lack of sufficient information prevent the department from rendering a valid technical or administrative opinion. In reaching its opinion, the department shall provide an opportunity for all parties to the dispute to provide relevant information and may consider the following: the need for a timely and expeditious resolution, environmental or health risk, economic hardship, whether the opinion is important to statewide program consistency considering significant departure from consistent administration of this chapter's programs and to the uniform application of reclamation standards, or whether its opinion is precedent setting, or any other factors the department deems relevant.

Note: If the dispute is not resolved as a result of the department's opinion, any person who meets the requirements of s. 227.42 (1), Stats., may obtain a contested case hearing under s. 68.11, Stats., on a county or municipal regulatory authority's decision to issue, deny or modify a nonmetallic mining reclamation permit. Please see s. NR 135.30 (1) for more information on appeals procedures.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: r. and recr. Register November 2006 No. 611, eff. 12–1–06.

Subchapter VI — Registration of Marketable Nonmetallic Mineral Deposits.

NR 135.53 Definitions. In this subchapter:

(1) "Contiguous parcels" means 2 or more parcels of land that share a common property boundary or have property boundaries that meet on at least one point. For purposes of this definition, parcels are contiguous notwithstanding the existence of public or private roads or easements.

(2) "Marketable nonmetallic mineral deposit" means a nonmetallic mineral deposit that meets the criteria in s. NR 135.54.

(2m) "Permitted or conditional use" means conducting nonmetallic mining under any existing zoning if one of the criteria in s. NR 135.56 (3) (b) is met.

(3) "Zoning authority" means any county or municipal zoning board or other authority which exercises authority to zone the land which a landowner seeks to register under this subchapter.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.54 Marketable nonmetallic mineral deposit. A marketable nonmetallic mineral deposit is one which can be or is reasonably anticipated to be commercially feasible to mine and has significant economic or strategic value. The significant economic or strategic value must be demonstrable using geologic, mineralogical or other scientific data, due to the deposit's quality, scarcity, location, quantity or proximity to a known user.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.55 Who may register a marketable nonmetallic mineral deposit. Beginning on June 1, 1994, a landowner may register his or her land pursuant to this subchapter.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.56 Registration requirements. **(1)** The registration shall include a legal description delineating the land and a certification and delineation by a licensed professional geologist or a registered professional engineer that the land has a marketable nonmetallic mineral deposit. In making this certification, the licensed professional geologist or registered professional engineer shall describe the type and quality of the nonmetallic mineral deposit, the areal extent and depth of the deposit, how the deposit's quality, extent, location and accessibility contribute to its marketability, and the quality of the deposit in relation to current and anticipated standards and specifications for this type of material. This certification shall be supported by logs or records of drilling,

boring, geophysical surveys, records of physical inspections of outcrops or equivalent scientific data.

(2) The certification shall include the licensed professional geologist's or registered professional engineer's seal affixed to this statement:

"I hereby certify that this document contains a description of a marketable nonmetallic mineral deposit consistent with the requirements of Chapter NR 135, Wisconsin Administrative Code."

(3) (a) A person wishing to register land pursuant to this subchapter shall provide evidence that nonmetallic mining is a permitted or conditional use for the land under zoning in effect on the day in which notice is provided to the zoning authorities pursuant to sub. (4).

(b) Nonmetallic mining is a permitted or conditional use for land if any of the following apply:

1. There is no existing zoning.

2. The land is in a zoning category that expressly states that nonmetallic mining is either a permitted use or may be allowed as a conditional use.

3. The land is in a zoning category that allows general uses and the zoning authority allows nonmetallic mining as a permitted or conditional use as a subset of the general uses listed for that zoning category, even though nonmetallic mining in not expressly referred to in the zoning.

(c) If the existing zoning requires a conditional use permit for nonmetallic mining, there is no need to apply for or obtain a conditional use permit in order to register the land pursuant to this subchapter.

(4) A copy of the proposed registration and supporting information shall be provided to each zoning authority if the land is zoned, the county regulatory authority, the municipal regulatory authority if one exists, the city, village or town in which the deposit is located, and the department at least 120 days prior to filing of the registration. Each zoning authority shall maintain records of proposed registrations of lands containing marketable nonmetallic mineral deposits which they shall receive in a manner of the zoning authority's choosing.

(5) The registration shall include a certification by the landowner and binding on the landowner and his or her successors in interest that the landowner will not undertake any action that would permanently interfere with present or future extraction of the nonmetallic mineral deposit for the duration of the registration.

(6) Registration shall be accomplished by recording the information required by this section, the date of recording, and the date registration expires as a deed notice in the office of registrar of deeds pursuant to s. 59.43 (1c) (a), Stats., in the county in which the land is located no sooner than 121 days and no later than 240 days after notice to zoning authorities has been provided pursuant to sub. (4).

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. (1) and (2) Register November 2006 No. 611, eff. 12–1–06; correction in (6) under s. 13.92 (4) (b) 7., Stats., Register January 2017 No. 733.

NR 135.57 Registration of contiguous parcels. Contiguous parcels of land meeting all of the following criteria may be included in one registration under this subchapter.

(1) The parcels are owned by the same person.

(2) The parcels contain a marketable nonmetallic mineral deposit as defined in s. NR 135.54.

(3) The parcels are contiguous as defined in s. NR 135.53 (1).

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.58 Objection to registration by a zoning authority. (1) A zoning authority of land that a landowner intends to register as a marketable nonmetallic mineral deposit may object to the proposed registration only if it gives notice of its intent to object and the reasons for its objection no later than 60 days after receiving notice of intent pursuant to s. NR 135.56 (3). A zoning authority may object to registration only on the grounds of one of the following conditions:

(a) Zoning in effect on the date that notice of intent to register land containing a deposit was provided to the zoning authority does not permit or conditionally permit nonmetallic mining under the criteria in s. NR 135.56 (3) (b); or

(b) There is not a marketable nonmetallic mineral deposit, as defined in s. NR 135.54, on the land proposed to be registered.

(2) A landowner who is notified under sub. (1) of the zoning authority's intent to object may withdraw or modify the proposed registration of a deposit.

(3) A zoning authority may sustain its objection to registration only by filing suit in the circuit court with jurisdiction over the land to be registered within 60 days of providing notice to object pursuant to sub. (1). The zoning authority may prevail in this suit only if it demonstrates by a preponderance of credible evidence that, notwithstanding any modifications pursuant to sub. (2), one of the conditions in sub. (1) (a) or (b) exists.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.59 Duration and renewal of registration. (1) Registration of land containing a marketable nonmetallic mineral deposit expires 10 years after the date registration is recorded unless renewed according to this section.

(2) A landowner may not renew registration of land containing a marketable nonmetallic mineral deposit if the deposit has been commercially depleted.

(3) (a) A landowner may renew registration of land containing a marketable nonmetallic mineral deposit upon which mining has not yet taken place for one additional 10–year term without a new determination of marketability by notifying the zoning authority and recording a deed notice renewing registration with the county registrar of deeds. Renewal of registration shall be recorded at least 10 days and no more than one year before registration expires. A zoning authority may object to this one–time renewal according to the procedures of s. NR 135.58, but only on the grounds that there is no longer a marketable nonmetallic mineral deposit. Once this one–time renewal of registration has expired, the landowner may register land containing the deposit again in accordance with this subchapter.

(b) A landowner may not submit a notice of intent to register land containing a nonmetallic mineral deposit more than one year before the expiration of current registration.

(4) Notwithstanding sub. (3), a person may continue to renew registration in accordance with this section of land on which nonmetallic mining is taking place for an unlimited number of 10–year periods, so long as active mining is taking place on any portion of the registered land.

(5) Registration of land containing a marketable nonmetallic mineral deposit may not be rescinded by the county in which it is located, or by the landowner or his or her successors or assigns except by expiration in accordance with this section or by termination pursuant to s. NR 135.61.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.60 Previously registered deposits. (1) Land that has been registered as an economically viable nonmetallic mineral deposit under s. 144.9407 (9), 1993 Stats., or s. 295.20, Stats., prior to December 1, 2000 shall become a registered marketable nonmetallic mineral deposit to which this subchapter applies.

(2) Land registered under sub. (1) shall remain registered as a marketable nonmetallic mineral deposit for a period that ends 10 years after the initial date of registration was recorded as a notation in the office of the registrar of deeds in the county in which the nonmetallic mineral deposit is located. After this 10–year registration period, the land may be re–registered as a marketable nonmetallic mineral deposit in accordance with s. NR 135.56.

Land which has become registered pursuant to sub. (1) may not be re–registered for a 10–year term as provided in s. NR 135.59 (3).

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.61 Termination of registration of a depleted deposit. The landowner may terminate registration under this subchapter of land containing a marketable nonmetallic mineral deposit where the deposit has been depleted, or where the deposit is no longer economically viable to mine. Termination of registration shall be accomplished by the landowner filing a statement of the foregoing, with supporting certification by a registered licensed professional geologist or registered professional engineer, at the office of the register of deeds in the county in which the land is located.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00; CR 06–024: am. Register November 2006 No. 611, eff. 12–1–06.

NR 135.62 Relationship to planning and zoning. **(1)** A county or municipality that has received notice of intent to register pursuant to s. NR 135.56 (3) may not, by zoning, granting a variance, or other official action or inaction, permit the erection of permanent structures on, or otherwise permit the use of any subsequently registered land containing a marketable nonmetallic mineral deposit in a manner that would permanently interfere with the present or future extraction of the nonmetallic mineral deposit. This limitation begins when notice of intent to register is received.

(2) Any request by the owner of registered land or his or her agent for a permit, grant of authority, variance, zoning change or other official action shall be accompanied by a copy of the registration, certified by the register of deeds as the recorded document.

(3) The limitation of government action in sub. (1) applies to land where a zoning authority with jurisdiction has provided notice of intent to object to registration pursuant to s. NR 135.57 (1), until the time the registration expires, is terminated, or the objecting zoning authority finally prevails in court action pursuant to s. NR 135.58 (3) to sustain its objection.

(4) (a) Notwithstanding sub. (1), a county or municipality may rezone land which contains a marketable nonmetallic mineral deposit and upon which mining has not begun on any portion if the rezoning is necessary to implement a master plan, comprehensive plan or land use plan which has been lawfully adopted by an appropriate governing body at least one year prior to the rezoning.

(b) Any zoning change to implement a lawfully adopted master plan, comprehensive plan or land use plan does not apply to land containing a registered marketable nonmetallic mineral deposit until the expiration of the current registration period or the one–time registration renewal period under s. NR 135.59 (3), whichever comes last. A zoning change which has been adopted pursuant to this subsection may be used by a zoning authority as the basis for objecting, pursuant to s. NR 135.58 (1) (a), to reregistration of land containing a marketable nonmetallic mineral deposit.

(c) Registration of land containing a marketable nonmetallic mineral deposit does not relieve the property owner from the obligation to obtain all necessary permits and approvals to be able to mine the deposit, nor does mineral registration create a presumption that these permits will be granted. However, land use plans and zoning ordinances adopted by a county, municipality or agency shall make all reasonable provisions to preserve identified marketable nonmetallic mineral deposits.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.63 Right of eminent domain. Nothing in this subchapter affects any state, county or municipal authority to acquire property by eminent domain.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.

NR 135.64 Exceptions. Nothing in this subchapter shall prohibit:

(1) A use of land permissible under a zoning ordinance on the day before the land containing a marketable nonmetallic mineral deposit was registered pursuant to this subchapter.

(2) Acquisition of land containing a registered marketable nonmetallic mineral deposit by a county, municipality or other governmental unit for a public purpose.

History: Cr. Register, September, 2000, No. 537, eff. 12–1–00.