

DATE: January 7, 2015

FILE REF: NMAC

TO: NMAC

FROM: TJ Maglio and Tom Portle

SUBJECT: Minutes of 2014 NR 135 Nonmetallic Mining Advisory Committee Meeting

Following are the minutes from the NR 135 Nonmetallic Mining Advisory Committee (NMAC) meeting held on October 28, 2014 at State Patrol HQ in Deforest.

**NMAC members present:** Justin Cavey, Susan Courter, Mike Erickson, Tom Hunt, Ron Garrison, Marty Lehman, Bryce Richardson, and Clint Weninger (sitting in for Ed Reesman)

**NMAC members not present:** Ed Reesman and Gary Werner

**Note:** For affiliations and contact information of NMAC members please see:

<http://dnr.wi.gov/topic/Mines/Advisors.html>

**WDNR staff present:** John Budzinski, Ann Coakley, Phil Fauble, Ed Lynch, TJ Maglio, Zoe McManama, and Tom Portle and Mike Szabo

**Others present:** Gerry Kokkonen, Jefferson County; Matt Bremmer, Adams County; Scott Konkle ECWRPC; Brooke Muhlack, Buffalo County; Tony Tomashek of Milestone Materials

The meeting began at 9:30 with a “Welcome and Go-around” so NMAC members could suggest anything that came up recently from the stakeholder groups they represent. During this Mike Erickson indicated some concerns having to do with excessive inspection frequency, high fees in some jurisdictions, and confusion of zoning with reclamation requirements. TJ Maglio and Tom Portle have had to place added emphasis on making distinctions between zoning and reclamation requirements this during some recent NR 135 reclamation program audits. Financial Assurance expiration dates and other Financial Assurance (FA) concerns came up. These are discussed in more detail below. After the go-around, Ed Lynch introduced Zoe McManama and Mike Szabo of DNR.

► **Report to the NMAC on overall status of the statewide NR 135 Reclamation Program and plans for the coming year.**

**Tom Portle** gave a summary of the Department’s NR 135 activities since the last NMAC meeting and on activities planned between this and the 2015 NMAC meeting. After last year’s meeting the Fee Report was submitted to the Natural Resource Board (NRB), a financial assurance workshop held in December 2013 and two roundtables for NR 135 administrators were held. Dunn County and Fond du Lac County were partners in the roundtables held in January and February respectively. Several new NR 135 programs have been recently established in western Wisconsin. To assist these during their “start-up” phase the Department conducted initial technical support audits for five new municipal reclamation programs. Since the October 2013 NMAC meeting, 22 NR 135 audits were performed involving 19 NR 135 regulatory authorities (RA)s; these included thirteen County and nine city, village & town reclamation programs. Further, during this period an unusual number of follow-up audits we conducted. The 22 NR 135 Program Review Audits was the highest number of NR 135 RA program audits since 2003 and is summarized as follows:

- Thirteen routine reclamation program performance review audits (11 county and 2 local),
- three were follow-up municipal audits,
- two were flow-up county audits and
- four were initial targeted technical support audits for new programs.

General Audit Results

On-going efforts to address deficient programs found during previous audits have resulted in: the choice on the part of

several municipal RAs to give their NR 135 program back to the county; a major improvement in a county that had had serious issues and complaints from the public, and only mixed success on some follow-up audits at others. Unfortunately, we have found one additional county that has some serious deficiencies. In these past months the DNR has found several programs that are deficient. Among the issues are extremely low FA, failure to revise the reclamation ordinance and failure to administer a program that meets the bare minimum standards in state laws and in NR 135. We have been providing much technical assistance, follow-up audits, and have been called on to provide written technical and administrative opinions and to engage in the dispute resolution process per NR 135.52 owing to a program that has made controversial permitting decisions.

Plans for coming year (November 2014 to October 2015).

The DNR will provide the usual two NR 135 roundtables for NR 135 administrators, a training event for new administrators (November 13), a training event to be held next field season on reclamation success evaluation, the annual NMAC meeting and to conduct at least ten NR 135 Reclamation Program performance review audits. There will also be follow-up audits and technical support provided to those programs in need due to turn-over, lack of experience or as a result of deficiencies found in NR 135 audits. In addition, there is an on-going effort to provide more regular and timely electronic communication of information deemed to be currently most helpful to NR 135 program administrators. We will rely on our existing publications to do this and when necessary the information will be updated or tailored to current needs.

### ► **Current compliance issues with subpar NR 135 NR 135 reclamation programs reclamation programs per NR 135 program audits.**

Attorney **Mike Szabo** spoke to the mandate that all NR 135 Reclamation programs must be audited by the Department at least once every ten years and receive a written compliance determination from the Department as per NR 135.47. Following reclamation program audits the DNR highlights any areas of concern or deficiencies, specifies what actions are needed for the program to be in compliance and, as necessary, sets a timeline for these deficiencies to be remedied. When the NR 135 RA does not address these items properly and on a timely basis then the NR 135 reclamation program in that jurisdiction may become in jeopardy. **Mr. Szabo** went on to describe the Department's intent to make every effort to support RAs in complying with NR 135. Efforts include technical assistance, consultation, supplying written materials including examples of the necessary forms, checklists, models of documents used in proper program administration and on-site assistance. However, if the statewide reclamation standards are not met, if minimum program administrative requirements are not achieved then further action is necessary to ensure consistency and predictability among NR 135 programs on a statewide basis. As discussed below under WCCA concerns, this inconsistency is not an acceptable outcome. When necessary it must be addressed as follows: First, the Department determines that the RA is "*not achieving compliance*" (the test in NR 135.47); then the Department brings the matter to the NMAC for consultation (NR 135.47 (6) and NR 135.52 (3); please recall that "Streamlined" consultation criteria had previously provided to and approved by the NMAC and may apply in some instances. (Examples of these are when a jurisdiction has failed to revise their applicable reclamation ordinance as required by the 2006 NR 135 revision and when an NR 135 RA fails to transfer annual reclamation fees to the DNR and/or provide annual reports to the Department as required by NR 135.37 and NR 135.39 respectively, among others). After consultation with the NMAC the DNR schedules and conducts a hearing in the RA's jurisdiction pursuant to NR 135.48. The hearing addresses the question: Should the RA continue administering its NR 135 Reclamation Program or not?

### ► **WCCA Input and Concerns Justin Cavey**

**Justin Cavey**, as representative of the Wisconsin County Code Administrators (WCCA) gathered input including some concerns expressed during a recent WCCA (October 2014) statewide meeting. **Justin** conveyed these at the NMAC meeting. Perhaps the most recent concern is that some Cities and Towns are adopting a NR135 program for the purpose of minimizing restrictions on operations and reducing the regulatory burden on operators and thus the enforcement of NR135 reclamation standards. A primary concern appeared to be with NR 135 reclamation program consistency. The WCCA "consistency" concern is exemplified when operators that have permits in multiple jurisdictions inform an NR 135 RA that they are either "too stringent in administration of NR 135" or that they are "too lax in the administration of NR 135" compared to other jurisdictions. This is exactly the outcome the DNR NR 135 program seeks to avoid.

**Justin** indicated that WCCA does attribute some of this as the inevitable result of on-going staff turn-over but perhaps there was a sense that this issue was more complex than could be attributed to staff turn-over.

Solution proposed by WCCA:

The WCCA cited an existing NR 115 Guidebook they felt was especially helpful for new administrators. Further they recommended that a similar “NR 135 Guidebook” be developed. The intent of this document would be to minimize ambiguity in understanding code provisions, assist administrators in protecting resources and assist in program administration. Subsequent to the meeting the WCCA NR 115 Guidebook <http://www.ncwrpc.org/NR115/> was received by the Bureau of Waste and Materials Management. Thanks to Justin and Kay Lutze, WDNR Shoreland Zoning Policy Coordinator. Perhaps an effort in this area could augment current Department plans for a combination of outreach including roundtables and training, technical support and more targeted and topic-specific communication.

► **Financial Assurance (FA)**

Financial Assurance expiration dates came up during the “go-around”. We also discussed financial assurance (FA) concerns raised in the media and consequential concerns raised by several NR 135 Regulatory Authorities around the FA issue. We discussed possible automatic renewal language used by some NR 135 RAs to address this matter. **Justin** indicated that WCCA was seeking answers on language that appears in some Irrevocable Letters of Credit making them automatically renewable on the expiration date unless formally cancelled by the surety or holder. Once again, a common issue found during DNR NR 135 Reclamation audits was an inadequate dollar amount in some jurisdictions for FA. The issue is a persistent one although it was helped by the well-attended financial assurance workshop held in December 2013. A focus of the workshop was actions taken by the NR 135 RA when there was a failure a major company in several counties, case studies by NR 135 administrators who have seize the FA and take on site reclamation.

Also addressed was the problem of expiration dates especially on Letters of Credit (LOC) s was brought up by **Scott Konkle** of ECWRPC. He and **Justin Cavey** indicated that keeping tabs of expiration dates has, in their estimation, been essential. Scenarios where the expiration date is imminent can result in permit revocation or suspension or a stop work order thus ceasing mining in an effort to get the FA in hand and the permittee into compliance. Concerns were raised at this point about delay and even loss of the FA should a permit be revoked and that action appealed by the operator. **Tom Portle** suggested that while an appeal of a permit revocation is specifically addressed in the code but that similar appeal language is not present in NR 135 with regard to a suspension of the permit.

► **Managing NMAC Reappointment & Recruitment.**

Prior to this year’s NMAC meeting, DNR staff sent a memo to NMAC members discussing need to have mechanisms in place for recruitment of new members in the event of turn-over and to ensure that the NMAC continues to represent affected stakeholder groups. **TJ Maglio** began the discussion by citing language contained in NR 135.51 (2) stating that NMAC members are appointed for terms not exceeding 3 years and it is implicit that the terms are to be staggered and that there should be some “turn-over”. The code also indicates that NMAC membership should include scientific, cultural and economic interests; along with representatives from extraction, road building, and representation from an organization of persons who administer a NR 135 reclamation program. There was discussion questioning the need for a more deliberate process for recruitment, appointment and reappointment. One idea was that there could be an open application process and the solicitation of possible members from a wider range of groups and organizations. **Marty Lehman** asked, what’s driving this? He pointed out that the three-year terms have worked in the past and the NMAC has remained effective and able to work together. Others also underscored the successful working relationship of the NMAC as an important consideration. **Tom Portle** while in agreement suggested that, in any case, a process ought to be in place for recruitment and appointment even if there is currently no immediate need. **Sue Courter** advocated that there be a known process as this would promote the groups’ overall goals. **Dr. Tom Hunt** weighed in setting a set of criteria should new members be required: The NMAC member should be able to contribute in a manner that goes “beyond” their personal interest, the clear purpose of his or her employer or the organization they represent. He pointed out the possible risk of disruption to the historical NMAC dynamic should a future member come to the table putting their agenda ahead of the NMAC process which has traditionally relied on a more collaborative model. Dr. Hunt also emphasized the importance of a demonstrated **commitment to be present and contribute** to the NMAC. He finished by underscoring the changed environment since NR 135 was promulgated: today we

often face a more dynamic situation with a rapidly changing set of variables. This makes it more important than ever that members maintain an open mind regarding any discussions or actions needed and be prepared to face new challenges and emerging issues. **Justin Cavey** and **Bryce Richardson** spoke to the importance of being certain that individual NMAC members represent their organization and have its endorsement. That is a result of formal process for replacing an outgoing member because that member is charged with representing their organization as a whole. **Phil Fauble** and others spoke to the importance of the **continuity** among NMAC members as a way to ensure on-going functional knowledge of mining and reclamation. **Ron Garrison** suggested that one way to address broader input would be to have “auxiliary or ad hoc” member organizations. That way more views would be heard and the existing members would be able to get to know those who could potentially be candidates for any replacements needed in the future. **Ron Garrison, Matt Bremmer and others** said there should be a known “designated replacement” for members in the event they could not make the meeting. **Tom** brought up that it may be useful to have a WisDOT member as there had been one present during the rule-making process and issues came up as recently as at last year’s meeting. Tom also thought it might be a good idea to get a scientific/academic organization involved similar to how it worked with Bruce Brown of the WGNHS.

On completing the discussion it appeared clear that the Department intends to resume the more formal process of regular re-appointment to the NMAC and that a recruitment/appointment process should be in place if needed. **Dr. Tom Hunt** requested that the Department put the process in writing and provide these guidelines to the NMAC for review. This has been drafted for comment by the NMAC.

► **Public Input** opportunity (5 minute limit) – none.

► **Final go-around** – Feedback & Schedule Next Meeting next meeting. Consensus is that the **next meeting** should be held in **mid-October 2015**.

► **ADJOURNED**. The 2014 NMAC meeting **adjourned** about 3:00.