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June 16, 2009

VIA CERTIFIED MAIL

Mr. Matt Frank, Secretary
Wisconsin Department of
Natural Resources
101 S. Webster Street
Madison, WI 53707-7921

Ms. Jana Murphy
Environmental Manager
Flambeau Mining Company
N4100 Hwy. 27
Ladysmith, WI 54848

Re: Notice of Intent to File Citizen Suit under Wis. Stat. § 293.89

Dear Secretary Frank and Ms. Murphy:

As required by Wis. Stat. § 293.89, we are hereby notifying you, the Wisconsin Department of Natural Resources (“DNR”), and the Flambeau Mining Company (“FMC”), that the prospective Plaintiffs (“Plaintiffs”) named below intend to file a citizen suit against the DNR and FMC under Wis. Stat. § 293.89. Plaintiffs are represented in this matter by Attorney Glenn M. Stoddard. Plaintiffs intend to file a citizen suit against the DNR and FMC under Wis. Stat. § 293.89, setting forth the following allegations, claims, and requested relief:

PARTIES

1. Plaintiffs are a citizen organization and two individuals (collectively “Plaintiffs”). Plaintiffs use and enjoy the environment surrounding the partially

reclaimed Flambeau Mine (hereinafter “the Mine”), which is located near Ladysmith, Wisconsin, and is owned and operated by FMC.

2. Plaintiffs are interested parties who are being adversely affected by environmental pollution being emitted from the Mine site and DNR’s failure to carry out its nondiscretionary duty to address the pollution. Plaintiffs are also interested in the DNR’s implementation and enforcement of the mining laws, rules, and regulations of the State of Wisconsin (“State”), as these activities relate to the Mine and other potential mines at other locations throughout the State.

3. Plaintiff Wisconsin Resources Protection Council (“WRPC”), c/o Al Gedicks, 210 Avon St. #4, LaCrosse, WI 54603, is a nonprofit, public interest citizens’ environmental organization. WRPC was a party to the original permit proceeding in which FMC obtained its mining permit and subsequent reclamation proceedings. Members of WRPC have visited and live near the Mine site and operation, and they use and enjoy the nearby air, water and other natural resources for recreational and aesthetic purposes, including the Flambeau River where it passes near the Mine site.

4. WRPC’s members are concerned that if the Mine is not properly monitored, regulated and reclaimed at this time, that the Mine site will never be properly regulated and reclaimed, and that FMC’s long term care of the Mine will be inadequate to protect the ground and surface waters of the State. In addition, WRPC’s members are concerned that their recreational and aesthetic interests in the nearby air, water and other natural resources will be directly and adversely affected. WRPC’s members are also concerned that they and other taxpayers of the State of Wisconsin will have to pay for further reclamation and long term care activities at the site in the future to address environmental problems that should be addressed by FMC at its sole expense at this time.

As such, WRPC's interests in this matter are different in kind or degree from those of the general public and it has standing as an interested party to this proceeding.

5. Plaintiff Al Gedicks ("Gedicks") is an adult resident of the State of Wisconsin who resides at 210 Avon St. #4, LaCrosse, WI 54603. Gedicks was an expert witness for the Wisconsin Greens in the original permit proceeding in which FMC obtained its mining permit. Gedicks is also a founder and officer of WRPC, which was a party to the original permit proceeding and subsequent reclamation proceedings.

6. Gedicks has visited the Mine site and FMC's operation, and he uses and enjoys the nearby air, water and other natural resources for recreational and aesthetic purposes, including the Flambeau River where it passes near the Mine site. Gedicks is concerned that the Mine site will never be properly reclaimed and that FMC's long term care of the Mine will be inadequate to protect the ground and surface waters of the State, and that his recreational and aesthetic interests in the nearby air, water and other natural resources will be directly and adversely affected.

7. Gedicks is also concerned that he and other taxpayers of the State of Wisconsin will have to pay for further reclamation and long term care activities at the site in the future to address environmental problems that should be addressed by FMC at its sole expense at this time. As such, Gedicks' interests in this matter are different in kind or degree from those of the general public and he has standing as an interested party to this proceeding.

8. Plaintiff Laura Furtman ("Furtman") is an adult resident of the State of Wisconsin who resides at 27426 Cty. Rd. H, Webster, WI 54893. Furtman has a direct and personal interest in the reclamation and long term care of the Mine based on her work as the co-author with the late Roscoe Churchill, of a book concerning the Mine. Furtman

is also a member of WRPC, which was a party to the original permit proceeding and subsequent reclamation proceedings.

9. Furtman's unique interests in this matter are that she has a deep-felt desire to protect the ground and surface waters of the State near the Mine site for her own use and enjoyment, and that of future generations, and for all forms of wildlife, which she values and enjoys viewing. Furtman spent hundreds of hours with Roscoe Churchill at his home and on his farm which is very close to the Mine site. She has, therefore, used and enjoyed the air, water, and other natural resources in the vicinity of the Mine, and she is concerned that if the Mine is not fully and properly reclaimed and subject to necessary long term care requirements that her personal, recreational and aesthetic interests in the nearby air, water and other natural resources will be directly and adversely affected.

10. Furtman is also concerned that if the Mine is not fully and properly reclaimed and subject to necessary long term care requirements that she and other taxpayers of the State of Wisconsin will have to pay for reclamation and long term care activities at the site in the future to address environmental pollution problems that should be addressed by FMC at its sole expense at this time. As such, Furtman's interests in this matter are different in kind or degree from those of the general public and she has standing as an interested party to this proceeding.

11. Defendant Wisconsin Department of Natural Resources ("DNR") is an agency of the State of Wisconsin, created under Wis. Stat. § 15.34, whose principal office is located at 101 South Webster Street, P.O. Box 7921, Madison, WI 53707-7921. The DNR has jurisdiction and nondiscretionary legal duties to address the issues raised by Plaintiffs by properly exercising its discretion in this matter.

12. Defendant Flambeau Mining Company (“FMC”) is a subsidiary of Kennecott Minerals Company of Salt Lake City, Utah. FMC owns the Flambeau Mine and is legally liable and responsible for reclamation and long term care of the Mine site, and for environmental and water pollution caused by the Mine, as alleged herein, under Wisconsin and Federal law. FMC’s address is N4100 Highway 27, Ladysmith, WI 54848.

FACTS

13. The Flambeau Mine, an open-pit copper-gold-silver mine located near Ladysmith, Wisconsin was permitted in January 1991 and began production in 1993. The Mine yielded 181,000 tons of copper, 334,000 ounces of gold and 3.3 million ounces of silver over the mine’s four-year lifespan. Approximately 4.5 million tons of waste rock characterized as “high sulfur” and 4 million tons of “low sulfur” waste were generated and stockpiled on site for eventual return to the pit. Sulfide rock is known to form toxic sulfuric acid.

14. When the mining operations ceased in 1997, the open pit was 220 feet deep, a half mile long and 32 acres in size. Backfill operations commenced thereafter, and over 30,000 tons of limestone was blended into the sulfide-bearing waste rock on relocation. The limestone was intended to neutralize sulfuric acid.

15. A layer of non-acid generating waste was also placed on top of the acid-generating waste backfilled into the pit.

16. Groundwater has since infiltrated the backfilled pit. However, the combination of neutralizing limestone and submergence of the acid-generating material in water, which limits the availability of oxygen, was intended to slow the generation of acid and dissolution of metals in this material.

17. Backfill operations at the Mine were completed by early 1998, at which time surface reclamation began. This entailed recontouring the surface, spreading topsoil and establishing plant communities.

18. In late 2001 a Notice of Completion of reclamation activities was submitted by FMC to the DNR, followed by a mandatory four-year statutory monitoring period.

19. In May 2007, a partial Certificate of Completion of reclamation activities (“COC”) was granted by DNR to FMC for its surface reclamation of a substantial portion of the Mine site, pursuant to a stipulated agreement that was negotiated between opposing parties at a contested case hearing.

20. Groundwater contamination within the Mine’s backfilled pit, exceedances of applicable groundwater standards at the Mine’s legally-established intervention boundary, and data related to potential impacts of the Mine on macroinvertebrates, sediment, crayfish, and walleye in the Flambeau River were not assessed as part of the COC process and, therefore, did not factor into the stipulated agreement or decision by DNR.

21. Instead, the partial COC for the Mine was based upon completion of backfill operations according to reclamation plans previously approved by DNR, and successful revegetation of the surface of the pit area of the Mine.

22. Because of continuing problems with surface water pollution in a small creek that receives runoff from the Mine site, COC certification was withheld for a 32-acre section of the Mine site known as the Industrial Outlot.

23. The Industrial Outlot includes the area where the Mine's rail spur, runoff and surge ponds, water treatment plant and administrative building were located during the mining years, as well as a portion of the high sulfur waste rock that was stockpiled.

24. During mining, water was pumped from the pit to keep it relatively dry. This pumping caused a groundwater cone of depression to form around the pit, directing all groundwater flow during mining toward the pit.

25. At mine closure the pumping ceased and natural groundwater flow patterns were restored.

26. The southwestern edge of the pit is 140 feet from the Flambeau River. The pit is separated from the Flambeau River by a slurry cutoff wall designed to limit groundwater flow to/from the river both during and after mining.

27. The post-mining groundwater hydrology is described as flow from the pit towards the Flambeau River. (See Exhibit 1, Figures A & B)

28. Ore from the mine received only minimal processing at the Mine site. An ore crusher was positioned close to a Mine site rail terminal, and from there the ore was shipped to Canada for further processing.

29. During mining, water pumped from the pit that came in contact with acid-generating rock and contaminated water from the Mine's high sulfur waste rock stockpile was routed to a surge pond and from there to an onsite water treatment plant.

30. After mining ceased, the water treatment plant was decommissioned according to reclamation plans previously approved by DNR. In addition, the reclamation plan was modified in 1998 to allow the surge pond to stay in place, and the pond was modified to facilitate its use as an artificial wetland biofilter for treating surface

runoff waters collected from the southeast corner of the mine site where the Industrial Outlot is located. The surface runoff waters constitute storm water discharge. (See Exhibit 1, Figure C)

31. This wetland, the “Outlot (0.9 acre) Biofilter,” now discharges into Stream C, which flows into the Flambeau River. (See Exhibit 1, Figure D)

32. An independent analysis of FMC data conducted for Plaintiffs by David M. Chambers, Ph.D. and Kendra Zamzow, Ph.D., of the Center for Science in Public Participation, shows that the partially reclaimed Mine is causing both surface water pollution and groundwater pollution, as follows:

First: Water discharged from the Outlot Biofilter wetland into Stream C does not meet Wisconsin surface water quality standards. This water flows into the Flambeau River.

Second: Groundwater in a monitoring well between the pit and the Flambeau River (on the Flambeau River side of the slurry wall separating the pit from the river) does not meet [1991 Flambeau Mine Permit standards or current] Wisconsin groundwater quality standards.

(See Exhibit 1)

33. An independent analysis of FMC data conducted for Plaintiffs by Ken Parejko, Ph.D., Professor Emeritus, Department of Biology, UW-Stout, shows that:

First: Statistically significant increased copper concentrations in crayfish (whole-body specimens), walleye (liver tissue) and sediment (when 2008 downstream copper measurements are included) have been observed downstream from the Mine, raising the possibility of a causal relationship.

Second: Due to various sampling and reporting issues with FMC’s study design, including but not limited to inadequate baseline data collection, changing sampling procedures, and inadequate replication, it is very difficult to draw defensible conclusions regarding the presence or absence of a mining-related effect on the Flambeau River.

(See Exhibit 2 (Sediment Report); Exhibit 3 (Macroinvertebrate Report); Exhibit 4 (Crayfish Report); and Exhibit 5 (Walleye Report))

34. Additional and expanded monitoring is needed in order to address the full extent of surface water and groundwater pollution, and the possibility of adverse impacts to aquatic organisms in the Flambeau River from this pollution.

35. Another independent analysis conducted for Plaintiffs, by David M. Chambers, Ph.D. and Kendra Zamzow, Ph.D., of the Center for Science in Public Participation, and Ken Parejko, Ph.D., Professor Emeritus, Department of Biology, UW-Stout, provides a series of recommendations for additional and expanded monitoring of groundwater at the Mine site, and of surface water in Stream C, and in the Flambeau River. (See Exhibit 6)

DNR'S NONDISCRETIONARY LEGAL DUTIES

36. In 1973, the Wisconsin Legislature passed an act to regulate metallic mining. L. 1973, c. 318, § 6. That act created a statutory scheme which required the DNR to create rules setting minimum standards for reclamation and long term care of mining sites, under Wis. Stat. § 293.13(2)(c). The rules adopted by the DNR shall, among other things, require mining permit holders to provide for the following at all mining sites:

3. Management, impoundment or treatment of all underground or surface runoff waters from open pits or underground prospecting or mining sites so as to prevent soil erosion, flooding, damage to agricultural lands or livestock, wild animals, pollution of surface or subsurface waters or damage to public health or safety.

Wis. Stat. § 293.13(2)(c)3.

37. The DNR adopted such rules and under Wis. Admin. Code § NR 132.12(1), the DNR has nondiscretionary legal duties to periodically review FMC's "mining and reclamation plans."

38. Pursuant to Wis. Admin. Code § NR 132.12(2), the DNR has the following nondiscretionary legal duties:

(2) If the department finds that because of changing conditions, including but not limited to changes in reclamation costs, reclamation technology, minimum standards in s. 293.13 (2) (c), Stats., or government land use plans, the reclamation plan for a mining site is no longer sufficient to reasonably provide for reclamation of the mining site consistent with ch. 293, Stats., and the provisions of this chapter, the department shall require the applicant to submit amended mining and reclamation plans which shall be processed in the same manner as an application for an original mining permit. The applicant shall be deemed to hold a temporary mining permit which shall be effective until the amended mining permit is issued or denied.

Wis. Admin. Code § NR 132.12(2).

39. Pursuant to Wis. Stat. § 293.49(7):

(7) The department, in granting a permit under this section, shall require the permit holder to perform adequate monitoring of environmental changes during the course of the permitted activity and for such additional period of time as is necessary to satisfactorily complete reclamation and completely release the permit holder from any bonds required.

REGULATION OF FLAMBEAU MINE SURFACE WATER POLLUTION

40. Pursuant to Wis. Stat. § 293.65(1), “[d]ischarges of waters [from a mine] are subject to ch. 283.”

41. Under the Federal Clean Water Act and Wis. Stat. § 283.33(1)(d), a Wisconsin Pollutant Discharge Elimination System (“WPDES”) “storm water discharge” permit is required for the discharge of “storm water from a facility or activity...if the [DNR] determines that the discharge either contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the state.”

42. The Flambeau River and Stream C are waters of the state.

43. Pursuant to Wis. Admin. Code § NR 105.06, the applicable Acute Toxicity Criterion (ATC) for copper in Stream C, the water discharged from the Outlot

Biofilter wetland into Stream C and the Flambeau River is dependent on water hardness and, at a hardness of 50 mg/l, is 8.07 ug/l.

44. Pursuant to Wis. Admin. Code § NR 105.06, the applicable Chronic Toxicity Criterion (CTC) for copper in Stream C, the water discharged from the Outlot Biofilter wetland into Stream C and the Flambeau River is dependent on water hardness and, at a hardness of 50 mg/l, is 5.72 ug/l.

45. Pursuant to Wis. Admin. Code § NR 105.06, the applicable Acute Toxicity Criterion (ATC) for zinc in Stream C, the water discharged from the Outlot Biofilter wetland into Stream C and the Flambeau River is dependent on water hardness and, at a hardness of 50 mg/l, is 65.66 ug/l.

46. Pursuant to Wis. Admin. Code § NR 105.06, the applicable Chronic Toxicity Criterion (CTC) for zinc in Stream C, the water discharged from the Outlot Biofilter wetland into Stream C and the Flambeau River is dependent on water hardness and, at a hardness of 50 mg/l, is 65.66 ug/l.

47. Under Wis. Admin. Code § 216.21(2)(a)3.a, the WPDES storm water discharge permit requirement of Wis. Stat. § 283.33(1)(d), is specifically applied to storm water discharges from “active and inactive mining operations,” including the discharges by FMC from the Mine site to Steam C and the Flambeau River.

48. FMC’s surface water pollution of Stream C and the Flambeau River from the Mine site and its failure to obtain a WPDES permit constitute illegal violations, as set forth above, and are subject to regulation pursuant to Wis. Stat. § 293.83(1)(a):

- (1) (a) *Violations; order or other action required.*** If the department finds a violation of law or any unapproved deviation from the mining or reclamation plan at a mining site under a mining permit:
1. The department shall issue an order requiring the operator to comply with the statute, rule or plan within a specified time;

2. The department shall require the alleged violator to appear before the department for a hearing and answer the charges complained of; or
3. The department shall request the department of justice to initiate action under s. 293.87.

Wis. Stat. § 293.83(1)(a).

REGULATION OF FLAMBEAU MINE GROUNDWATER POLLUTION

49. Wisconsin law requires the establishment of two different boundaries at mine sites for enforcement of groundwater quality standards: the compliance boundary and the intervention boundary.

50. The compliance boundary is located 1,200 feet from the outer perimeter of the mining waste facility, except for property boundary restrictions, pursuant to Wis. Admin. Code §§ NR 182.075 & NR 132.17(9). The term "compliance boundary" was changed to "design management zone" when Wis. Admin. Code § NR 182.075(1) was repealed and recreated in 1998; it is referred to in the present document as the "compliance boundary," since that was the controlling term when permits were granted in 1991.

51. In the case of the Mine, the unlined backfilled pit constitutes the existing mining waste facility. (See Exhibit 1, Figure A for the location of the Flambeau Mine compliance boundary.)

52. Pursuant to Wis. Stat. § 293.49 and the 1991 Permit, drinking water standards established under Wis. Admin. Code Ch. NR 140 cannot be exceeded at or beyond the compliance boundary of the Mine site. These standards, known as Maximum Contaminant Levels (MCLs), were specifically listed in the 1991 Permit as the applicable groundwater enforcement standards for the Mine's compliance boundary, with the exception of manganese.

53. Since baseline manganese levels at the mine site already exceeded the typical MCL of 50 ug/l, the Flambeau-specific enforcement standards for the compliance boundary were set at 90 ug/l (overburden), 360 ug/l (shallow Precambrian) and 230 ug (deep Precambrian).

54. At present, only one nest of monitoring wells has been installed along the entire compliance boundary of the Mine, which is approximately 3.7 miles in length.

55. In addition to the compliance boundary, an intervention boundary was established for the Mine between the pit and the compliance boundary, as required by Wis. Admin. Code § NR 182.075. Monitoring groundwater quality at the intervention boundary is designed to help identify emerging pollution problems before they have a chance to reach the compliance boundary, or, in the case of the Mine, before they reach the Flambeau River. As such, the applicable groundwater enforcement standards, known as Preventive Action Limits (PALs) and listed in Wis. Admin. Code Ch. NR 140, are typically 10-20% of the corresponding MCLs, with some as high as 50%.

56. Five different monitoring well nests (MW-1000, 1002, 1004, 1005 and 1010) constitute the intervention boundary for the Mine as established on page 92 of the 1991 Permit. Pursuant to the 1991 Permit, two different sets of enforcement standards for groundwater pollution apply to the wells: (1) MW-1002, 1004 and 1005 are subject to PAL standards; and (2) MW-1000 and 1010 are subject to the same, except in the case of copper, iron, manganese and sulfate, where enforcement standards are based upon water quality projections for the backfilled pit as set forth in Table No. 2-5 of Appendix L of the Mining Permit Application.

57. Consistent and statistically significant exceedances of 1991 Permit standards and current Wisconsin groundwater quality standards at the Mine's intervention

boundary and occasional exceedances of 1991 Permit standards at the Mine's compliance boundary, as set forth in Exhibit 1, constitute illegal violations of the 1991 Permit standards and are subject to regulation pursuant to Wis. Stat. § 293.83(1)(a):

(1) (a) *Violations; order or other action required.* If the department finds a violation of law or any unapproved deviation from the mining or reclamation plan at a mining site under a mining permit:

1. The department shall issue an order requiring the operator to comply with the statute, rule or plan within a specified time;
2. The department shall require the alleged violator to appear before the department for a hearing and answer the charges complained of; or
3. The department shall request the department of justice to initiate action under s. 293.87.

Wis. Stat. § 293.83(1)(a).

CITIZEN SUITS

58. Wis. Stat. § 293.89 gives citizens the right to commence a civil action to enforce Wis. Stats. Ch. 293. L. 1977, c. 421, s. 53. It states, in pertinent part:

293.89 Citizen Suits. **(1)** Except as provided in sub. (2), any citizen may commence a civil action on his or her own behalf:

(a) Against any person who is alleged to be in violation of this chapter.

(b) Against the department [of Natural Resources] where there is alleged to be a failure of the department to perform any act or duty under [Chapter 293] which is not discretionary with the department.

(2) No action may be commenced

(a) Under sub. (1) (a):

1. Prior to 30 days after the plaintiff has given notice of the alleged violation to the department and to the alleged violator;

....

(3) The court, in issuing any final order in any action brought under this section, shall award costs of litigation including reasonable attorney and expert witness fees to the plaintiff if he or she prevails, and the court may do so if it determines that the outcome of the controversy is consistent with the relief sought by the plaintiff irrespective of the formal disposition of the civil action.

Wis. Stat. § 293.89.

FIRST CLAIM

THE DNR HAS FAILED TO FULFILL ITS DUTIES UNDER WIS. STATS. §§ 293.13(2)(c) & 293.49(7), AND WIS. ADMIN. CODE § NR 132.12(2) TO PROPERLY MONITOR AND REGULATE SURFACE WATER POLLUTION FROM THE MINE

59. Plaintiffs reallege and incorporate herein each preceding paragraph of this complaint.

60. The DNR has nondiscretionary duties under Wis. Stats. §§ 293.13(2)(c) & 293.49(7), and Wis. Admin. Code § NR 132.12(2), with respect to the Mine and FMC's reclamation and long term care plans for the Mine site, to require FMC to properly monitor surface waters from the partially reclaimed Mine site, as recommended by Plaintiffs' experts in Exhibits 1 & 6, and properly manage and treat polluted waters, so as to meet applicable surface water quality standards, yet the DNR has failed to carry out these duties.

61. Plaintiffs have been injured by the DNR's failure to fulfill its nondiscretionary duties as set forth above, because Plaintiffs are interested parties who are being adversely affected by environmental pollution being emitted from the Mine and they have an interest in the implementation and enforcement of the State's mining laws, rules, and regulations, particularly with respect to the Mine.

62. The DNR must be required by the Court to fulfill its nondiscretionary duties under Wis. Stat. §§ 293.13(2)(c) & 293.49(7), and Wis. Admin. Code § NR 132.12(2), with respect to the Mine and FMC's reclamation and long term care plans for the Mine site, by requiring FMC to properly monitor surface waters from the partially reclaimed Mine site, as recommended by Plaintiffs' experts in Exhibits 1 & 6, and properly manage and treat polluted waters, so as to meet applicable surface water quality standards.

SECOND CLAIM

THE DNR HAS FAILED TO FULFILL ITS DUTIES UNDER WIS. STATS. §§ 293.13(2)(c) & 293.49(7), AND WIS. ADMIN. CODE § NR 132.12(2) TO PROPERLY MONITOR AND REGULATE GROUNDWATER POLLUTION FROM THE MINE

63. Plaintiffs reallege and incorporate herein by reference each preceding paragraph of this complaint.

64. The DNR has nondiscretionary duties under Wis. Stats. §§ 293.13(2)(c) & 293.49(7), and Wis. Admin. Code § NR 132.12(2), with respect to the Mine and FMC's reclamation and long term care plans for the Mine site, to require FMC to properly monitor the groundwater at the partially reclaimed Mine site, as recommended by Plaintiffs' experts in Exhibits 1 & 6, and to properly manage and treat the polluted groundwater migrating outside the pit area and toward the Flambeau River, so as to meet applicable groundwater and surface water quality standards, yet the DNR has failed to carry out these duties.

65. Among the deficiencies listed by Plaintiffs' experts is the fact that only one nest of monitoring wells has been installed by FMC along the Mine's entire compliance boundary.

66. Plaintiffs have been injured by the DNR's failure to fulfill its nondiscretionary duties as set forth above, because Plaintiffs are interested parties who are being adversely affected by environmental pollution being emitted from the Mine and they have an interest in the implementation and enforcement of the State's mining laws, rules, and regulations, particularly with respect to the Mine.

67. The DNR must be required by the Court to fulfill its nondiscretionary duties under Wis. Stats. §§ 293.13(2)(c) & 293.49(7), and Wis. Admin. Code § NR 132.12(2), with respect to the Mine and FMC's reclamation and long term care plans for

the Mine site, by requiring FMC to properly monitor the groundwater at the partially reclaimed Mine site, as recommended by Plaintiffs' experts in Exhibits 1 & 6, and to properly manage and treat the polluted groundwater migrating outside the pit area and toward the Flambeau River, so as to meet applicable groundwater quality standards.

THIRD CLAIM

THE DNR HAS FAILED TO FULFILL ITS DUTIES UNDER WIS. STATS. §§ 293.13(2)(c) & & 293.49(7), AND WIS. ADMIN. CODE § NR 132.12(2) TO PROPERLY MONITOR THE FLAMBEAU RIVER FOR POTENTIAL ADVERSE ENVIRONMENTAL IMPACTS FROM THE MINE

68. Plaintiffs reallege and incorporate herein each preceding paragraph of this complaint.

69. The DNR has nondiscretionary duties under Wis. Stats. §§ 293.13(2)(c) & 293.49(7), and Wis. Admin. Code § NR 132.12(2), with respect to the Mine and FMC's reclamation and long term care plans for the Mine site, to require FMC to properly monitor the partially reclaimed Mine and the Flambeau River upstream and downstream of the Mine site for potential mine impacts, as recommended by Plaintiffs' experts in Exhibits 1, 2, 3, 4, 5 & 6, yet the DNR has failed to carry out these duties.

70. Plaintiffs have been injured by the DNR's failure to fulfill its nondiscretionary duties as set forth above, because Plaintiffs are interested parties who are being adversely affected by environmental pollution being emitted from the Mine and they have an interest in the implementation and enforcement of the State's mining laws, rules, and regulations, particularly with respect to the Mine.

71. The DNR must be required by the Court to carry out its nondiscretionary duties under Wis. Stats. §§ 293.13(2)(c) & 293.49(7), and Wis. Admin. Code § NR 132.12(2), with respect to the Mine and FMC's reclamation and long term care plans for the Mine site, by requiring FMC to properly monitor the partially reclaimed Mine and the

Flambeau River upstream and downstream of the Mine site for potential mine impacts, as recommended by Plaintiffs' experts in Exhibits 1, 2, 3, 4, 5 & 6.

FOURTH CLAIM

THE DNR HAS FAILED TO FULFILL ITS DUTIES UNDER THE FEDERAL CLEAN WATER ACT, WIS. STATS. §§ 283.33(1)(d) & 293.83(1)(a), AND WIS. ADMIN. CODE CH. NR 216.21, TO PROPERLY REGULATE WATER POLLUTION FROM THE MINE

72. Plaintiffs reallege and incorporate herein each preceding paragraph of this complaint.

73. The DNR has nondiscretionary duties under the Federal Clean Water Act, Wis. Stats. §§ 283.33(1)(d) & 293.83(1)(a), and Wis. Admin. Code Ch. NR 216.21, to require FMC to obtain a WPDES storm water discharge permit and properly manage and treat the surface water pollution entering into Stream C and the Flambeau River from the Mine, in order to bring the water quality into compliance with applicable surface water quality standards, yet the DNR has failed to carry out these duties.

74. Plaintiffs have been injured by the DNR's failure to fulfill its nondiscretionary duties as set forth above, because Plaintiffs are interested parties who are being adversely affected by environmental pollution being emitted from the Mine and they have an interest in the implementation and enforcement of the State's mining laws, rules, and regulations, particularly with respect to the Mine.

75. The DNR must be required by the Court to carry out its nondiscretionary duties under the Federal Clean Water Act, Wis. Stats. §§ 283.33(1)(d) & 293.83(1)(a), and Wis. Admin. Code Ch. NR 216.21, by requiring FMC to obtain a WPDES storm water discharge permit and to properly manage and treat the surface water pollution entering into Stream C and the Flambeau River from the Mine, in order to bring the water quality into compliance with applicable surface water quality standards.

FIFTH CLAIM

FMC'S POLLUTION DISCHARGES OF COPPER INTO STREAM C AND THE FLAMBEAU RIVER ARE IN VIOLATION OF THE 1991 PERMIT, WIS. STATS. § 293.65(1) & CH. 283, AND THE FEDERAL CLEAN WATER ACT

76. Plaintiffs reallege and incorporate herein each preceding paragraph of this complaint.

77. An independent analysis of FMC data conducted for Plaintiffs by David M. Chambers, Ph.D., of the Center for Science in Public Participation, shows that copper in Stream C and the water discharged from the Outlot Biofilter wetland into Stream C has significantly and repeatedly exceeded the ATC and CTC for copper since at least 2004, including the latest round of reported data from October 2008. The hardness-based ATC for zinc was also exceeded in Stream C in 2008. (Exhibit 1)

78. An independent analysis of FMC data conducted for Plaintiffs by David M. Chambers, Ph.D., of the Center for Science in Public Participation, shows that copper in the Flambeau River, immediately downstream of the Stream C outflow, exceeded the ATC and CTC for copper in April 2008.

79. As set forth in Exhibit 1, FMC is in violation of the 1991 Permit, Wis. Stats. § 293.65(1) & Ch. 283, and the Federal Clean Water Act, because water discharged from the Outlot Biofilter wetland into Stream C and the Flambeau River does not meet applicable Wisconsin surface water quality standards for copper, and FMC does not have a current WPDES Permit allowing such pollution discharges into Stream C and the Flambeau River.

80. Copper levels in Stream C significantly exceed both chronic and acute water quality criteria and it is likely that these levels are contributing to a lack of aquatic life in Stream C, as set forth by Plaintiffs' experts in Exhibit 1.

81. Plaintiffs have been injured by FMC's surface water pollution of Stream C and the Flambeau River, because Plaintiffs are interested parties who are being adversely affected by environmental pollution being emitted from the Mine and they have an interest in the implementation and enforcement of the State's mining laws, rules, and regulations, particularly with respect to the Mine.

82. FMC must be subject to a corrective Order requiring a fine, forfeiture or other penalty, together with corrective action through issuance of a restrictive WPDES Permit, for the surface water pollution it has caused, and is continuing to cause, to Stream C and the Flambeau River.

SIXTH CLAIM

POLLUTION DISCHARGES TO GROUNDWATER AT THE MINE SITE ARE IN VIOLATION OF THE GROUNDWATER ENFORCEMENT STANDARDS FOR THE MINE'S INTERVENTION BOUNDARY SET FORTH IN THE 1991 PERMIT

83. Plaintiffs reallege and incorporate herein each preceding paragraph of this complaint.

84. As set forth in Exhibit 1, FMC is in violation of the groundwater enforcement standards at the Mine's Intervention Boundary, as set forth in the 1991 Permit (also known as Preventive Action Limits, or PALs), because there have been consistent and statistically significant exceedances of the 1991 Permit groundwater enforcement standards at Monitoring Well #1000PR (MW-1000PR), for manganese, calcium, conductance and total dissolved solids (TDS); and manganese exceeds the groundwater enforcement standards by an order of magnitude

85. Based on the exceedances that have occurred at MW-1000PR, and the movement of contaminants out of the pit towards MW-1000PR and the Flambeau River,

it is likely that the contaminated groundwater is moving into and/or under the Flambeau River, as set forth by Plaintiffs' experts in Exhibit 1.

86. Plaintiffs have been injured by FMC's groundwater pollution because Plaintiffs are interested parties who are being adversely affected by environmental pollution being emitted from the Mine and they have an interest in the implementation and enforcement of the State's mining laws, rules, and regulations, particularly with respect to the Mine.

87. FMC must be subject to a corrective Order requiring a fine, forfeiture or other penalty, together with corrective action through issuance of a modification of the 1991 Permit or Reclamation Plan, to stop the pollution that has and is continuing to exceed the groundwater enforcement standards set in the 1991 Permit.

SEVENTH CLAIM

POLLUTION DISCHARGES TO GROUNDWATER AT THE MINE SITE HAVE BEEN IN OCCASIONAL VIOLATION OF THE GROUNDWATER ENFORCEMENT STANDARDS FOR THE MINE'S COMPLIANCE BOUNDARY SET FORTH IN THE 1991 PERMIT AND ARE NOT BEING APPROPRIATELY MONITORED

88. Plaintiffs reallege and incorporate herein each preceding paragraph of this complaint.

89. As set forth in Exhibit 1, FMC has installed only one nest of monitoring wells along the Mine's entire compliance boundary. In addition, "The company's groundwater modeling suggests that [this nest of wells, Monitoring Well # 1015 (MW-1015)] is not likely to receive a substantial influx of groundwater from the backfilled pit."

90. Nonetheless, MW-1015B has been in occasional violation of the groundwater enforcement standards at the Mine's Compliance Boundary, as set forth in the 1991 Permit (also known as Maximum Contaminant Levels, or MCLs), because

Monitoring Well # 1015B (MW-1015B) has shown exceedances of the 1991 Permit standard for manganese during 2002 to 2004, and had an exceedance of the 1991 Permit standard for iron in at least one sample in every year from 2002 to 2007. (See Exhibit 1)

91. Plaintiffs have been injured by FMC's groundwater pollution because Plaintiffs are interested parties who are being adversely affected by environmental pollution being emitted from the Mine and they have an interest in the implementation and enforcement of the State's mining laws, rules, and regulations, particularly with respect to the Mine.

92. Based on the occasional exceedances of applicable groundwater enforcement standards that have occurred at MW-1015B, even though it is not in the direct line of flow of groundwater from the backfilled pit to the Flambeau River, FMC must be ordered to expand its monitoring at the Mine site to include the installation and sampling from additional monitoring wells, as set forth by Plaintiffs' experts in Exhibits 1 & 6.

93. FMC must be subject to a corrective Order requiring a fine, forfeiture or other penalty, together with corrective action through issuance of a modification of the 1991 Permit or Reclamation Plan, to properly monitor and stop the pollution that has exceeded the groundwater enforcement standards set in the 1991 Permit.

REQUESTED RELIEF

WHEREFORE, if the DNR will not order such relief on its own, Plaintiffs intend to request the Dane County Circuit Court to order the following relief:

1. That the DNR fulfill its nondiscretionary duties under Wis. Stats. §§ 293.13(2)(c) & 293.49(7), and Wis. Admin. Code § NR 132.12(2), with respect to the Mine and FMC's reclamation and long term care plans for the Mine site, by requiring

FMC to properly monitor surface waters from the partially reclaimed Mine site, as recommended by Plaintiffs' experts in Exhibits 1 & 6, and to properly manage and treat polluted waters, so as to meet applicable surface water quality standards;

2. That the DNR fulfill its nondiscretionary duties under Wis. Stats. §§ 293.13(2)(c) & 293.49(7), and Wis. Admin. Code § NR 132.12(2), with respect to the Mine and FMC's reclamation and long term care plans for the Mine site, by requiring FMC to properly monitor the groundwater at the partially reclaimed Mine site, as recommended by Plaintiffs' experts in Exhibits 1 & 6, and to properly manage and treat the polluted groundwater migrating outside the pit area and toward the Flambeau River, so as to meet applicable groundwater quality standards;

3. That the DNR fulfill its nondiscretionary duties under Wis. Stats. §§ 293.13(2)(c) & 293.49(7), and Wis. Admin. Code § NR 132.12(2), with respect to the Mine and FMC's reclamation and long term care plans for the Mine site, by requiring FMC to properly monitor the partially reclaimed Mine and the Flambeau River upstream and downstream of the Mine site for potential mine impacts, as recommended by Plaintiffs' experts in Exhibits 1, 2, 3, 4, 5 & 6;

4. That the DNR fulfill its nondiscretionary duties under the Federal Clean Water Act, Wis. Stats. §§ 283.33(1)(d) & 293.83(1)(a), and Wis. Admin. Code Ch. NR 216.21, to require FMC to obtain a WPDES storm water discharge permit and properly manage and treat the surface water pollution entering into Stream C and the Flambeau River from the Mine, in order to bring the water quality into compliance with applicable surface water quality standards;

5. That the DNR withhold granting a partial COC for the 32-acre section of the Mine known as the industrial outlot until all of the surface water and groundwater pollution problems at the Mine site have been fully eliminated;

6. That the DNR be required to fulfill the above duties within 90 days;

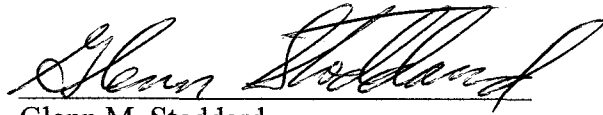
7. That FMC be subject to a corrective Order requiring a fine, forfeiture or other penalty, together with corrective action through issuance of a restrictive WPDES Permit, for the surface water pollution it has caused, and is continuing to cause, to Stream C and the Flambeau River;

8. That FMC be subject to a corrective Order requiring a fine, forfeiture or other penalty, together with corrective action through issuance of a modification of the 1991 Permit or Reclamation Plan, to stop the pollution that has and is continuing to exceed the groundwater enforcement standards set in the 1991 Permit;

9. That the DNR pay Plaintiffs' costs of litigation in this action, including but not limited to Plaintiffs' reasonable attorney and expert witness fees, costs, and disbursements, as allowed by law; and

10. Such other and further relief as the Court deems just and appropriate under the circumstances.

Dated this 16th day of June, 2009.



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Enclosures (Exhibits 1-6)
cc: Attorney Henry J. Handzel (via Certified Mail)