



**James N. Saul**  
Attorney at Law LLC

November 16, 2010

**BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

President / Chief Executive Officer Flambeau Mining Company N4100 Highway 27 Ladysmith , WI 54848	Registered Agent Flambeau Mining Company c/o CSC-Lawyers Incorporating Service Co. 8040 Excelsior Drive, Suite 400 Madison , WI 53717
President / Chief Executive Officer Kennecott Minerals Company 224 North 2200 West Salt Lake City, UT 84116	Registered Agent Kennecott Minerals Company c/o Corporation Service Company 2180 South 1300 East, Suite 650 Salt Lake City, UT 84106

**RE: Notice of Intent to Sue Flambeau Mining Company and Kennecott Minerals Company for violations of the federal Clean Water Act, 33 U.S.C. 1251 et seq.**

To Whom It May Concern:

On behalf of the Wisconsin Resources Protection Council, the Center for Biological Diversity, and Ms. Laura Gauger (collectively, "WRPC"), we hereby notify you of WRPC's intent to file a civil action against Flambeau Mining Company and Kennecott Minerals Company (collectively, "FMC") in the U.S. District Court for the Western District of Wisconsin on or about the sixtieth day following the date of this Notice to abate FMC's ongoing violations of the Clean Water Act ("CWA" or "the Act"). This action is authorized by the CWA's "citizen suit" provision, 33 U.S.C. § 1365, and will address FMC's ongoing violations of the CWA's prohibition on the discharge of pollutants without compliance with the substantive requirements of the Act, including the requirement to obtain an NPDES permit prior to discharge. *See id.* §§ 1311(a); 1342. This Notice identifies the specific claims to be raised and the parties giving notice, thereby fulfilling the notice requirements of 33 U.S.C. § 1365(b) and 40 C.F.R. § 135.3.

**A. Legal Background: The Clean Water Act**

The Clean Water Act, 33 U.S.C. §§ 1251 et seq., was enacted by Congress to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). The Act unequivocally prohibits the discharge of pollutants without explicit authorization. *Id.* § 1311(a). One form of authorization is a permit issued under section 402 of the Act, which creates the National Pollutant Discharge Elimination System ("NPDES"). *Id.* § 1342(a). Section 402 authorizes the U.S. Environmental Protection Agency ("EPA") or a state with an approved NPDES permit program to issue permits for the discharge of pollutants only where such

discharge will, *inter alia*, ensure compliance with applicable effluent limitations, water quality standards, and other substantive requirements and limitations established by the CWA. *Id.* Wisconsin has an EPA-approved NPDES permitting program, and the Wisconsin Department of Natural Resources (“DNR”) is the agency that issues NPDES permits to point-source dischargers within this State.

The CWA authorizes citizens to commence a civil action against any person, including any corporation, alleged to be in violation of the substantive requirements or prohibitions of the Act. 33 U.S.C. § 1365(a)(1). Citizens may file suit in the appropriate federal district court to abate those violations and are authorized to seek injunctive relief, civil penalties, and an award of costs of litigation, including reasonable attorney’s fees. *Id.* §§ 1365(a), (d). Before filing suit, citizens must provide an alleged violator with sixty days’ notice of their intent to sue. *Id.* § 1365(b)(1)(A).

#### **B. Factual Background: The Flambeau Mine and Related Facilities**

Flambeau Mining Company is a wholly-owned subsidiary of Kennecott Minerals Company. FMC owns property located at N4100 Highway 27, Ladysmith, WI 54848. This property contains an abandoned and partially reclaimed metallic mine and several related industrial facilities and structures. From 1993-1997, FMC actively mined this site and extracted gold, silver, and copper from an open pit mine. To treat polluted runoff from the site, FMC built and operated a wastewater treatment facility that received wastewater from various sources, including the mine pit itself; acid mine drainage from the high-sulfur waste rock stockpile; and other sources. While the mine was in operation FMC was authorized to discharge pollutants from the wastewater treatment facility directly to the Flambeau River according to the limitations and conditions contained in Wisconsin Pollutant Discharge Elimination System (“WPDES”) Permit No. WI-0047376-2. That Permit was terminated by DNR on or about August 13, 1998, and since that date FMC has not held an NPDES permit<sup>1</sup> for the Flambeau mine site.

As part of its ongoing reclamation and industrial activities at an approximately 30-acre section of the site, known by FMC and DNR as the “Industrial Outlot,” FMC maintains and operates a 0.9-acre man-made stormwater containment and treatment structure<sup>2</sup> or “Biofilter” located at the southeast corner of FMC’s property. This Biofilter contains an outlet by which polluted stormwater is routinely discharged to a receiving water known as Stream C. FMC has acknowledged this discharge, explaining its 2007 Biofilter Management Plan that “[t]he purpose of the biofilter is to capture particulates in the surface water from the site prior to discharge to Intermittent Stream C,”<sup>3</sup> and FMC routinely monitors the water quality at the Biofilter outlet to Stream C (at a sampling point identified in FMC’s own as BFSW-C2) and reports water quality data to the DNR at least twice a year.<sup>4</sup>

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<sup>1</sup> For purposes of this Notice Letter, we use the phrase “NPDES permit” to mean a permit issued pursuant to section 402 of the Clean Water Act, either by EPA under the federal NPDES program or by DNR under Wisconsin’s EPA-approved NPDES program, the Wisconsin Pollutant Discharge Elimination System (“WPDES”).

<sup>2</sup> The stormwater retention and treatment structure from which pollutants are discharged is known to and identified by FMC alternately as either a “Surge Pond,” a “Biofilter,” or a “Detention Basin,” but will be identified in this Notice Letter as the “Biofilter.” An aerial photograph of the Flambeau mine site, prepared by FMC’s consultants in October 2008 and identifying the exact location of the Biofilter and its point of discharge to Stream C, is included here as Attachment A.

<sup>3</sup> Flambeau Industrial Outlot Biofilter Management Plan at 1 (January 2007), included here as Attachment B.

<sup>4</sup> *Id.* at 5.

### C. FMC's Specific Clean Water Act Violations

Since at least August 13, 1998, FMC has violated, and continues to violate, sections 301(a) and 402(a) of the CWA by discharging pollutants from the Biofilter to Stream C without a valid NPDES permit. The pollutants discharged include copper, zinc, iron, and other pollutants known to FMC and reported routinely to DNR by FMC's consultants or authorized representatives. These pollutants are discharged via an outlet from the Biofilter, and FMC's own water quality monitoring results from the outlet connecting the Biofilter to Stream C indicates that several of the pollutants identified above –most notably, copper – have been and continue to be discharged at levels that far exceed applicable water quality standards.

#### (1) FMC's violations of the discharge prohibition of 33 U.S.C. § 1311(a)

Section 301(a) of the CWA states that “[e]xcept as in compliance with this section and [other substantive provisions of the Act], the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). The substantive provisions referenced in section 301(a) include, *inter alia*, the requirement to achieve compliance with applicable effluent limitations and water quality standards, *id.* § 1311(b) and (e), as well as the requirement to obtain and comply with an NPDES permit issued under section 402 (or, where appropriate, a permit issued under section 404). *Id.* § 1342. Because FMC has discharged and continues to discharge pollutants from the Biofilter to Stream C without complying with those referenced substantive provisions (and in particular without obtaining an NPDES permit) FMC has violated and continues to violate section 301(a) of the CWA.

#### (2) FMC's violations of the NPDES permit requirements of 33 U.S.C. § 1342

FMC does not presently hold, nor has it ever held, an NPDES permit issued under authority of section 402 of the CWA, 33 U.S.C. § 1342, authorizing the pollutant discharges from the Biofilter to Stream C. Therefore FMC is in violation of that section's requirement to obtain an NPDES permit prior to the discharge of pollutants. Section 402 of the CWA, and the federal regulations and Wisconsin statutes promulgated or enacted to effectuate the NPDES program established by that section, include requirements for the permit application and issuance process; requirements to ensure that all discharges comply with applicable effluent limitations and water quality standards; and requirements to ensure meaningful public and EPA participation in the development and enforcement of NPDES permit terms. By failing to apply for, obtain, and comply with a valid NPDES permit, FMC has violated and continues to violate section 402 of the CWA.

#### (3) Specific Dates of FMC's CWA Violations

WRPC will allege that FMC's CWA violations have occurred every day since August 13, 1998, because that is the date that FMC closed its wastewater treatment facility and diverted the discharge from the Biofilter directly to Stream C. These unpermitted discharges occurred at least on the specific dates identified in the table provided in Attachment C because on those specific dates the mine site received precipitation of at least 0.5” which thereby caused the Biofilter to overflow through its outlet to Stream C. FMC is in the best position to know precisely what additional dates the Biofilter discharged to Stream C.

Discharges from the Biofilter to Stream C (and, therefore, violations of the CWA) are known by FMC to have occurred at least on 28 separate occasions between November 1999 and April 2010. On

those 28 occasions either FMC or DNR collected and sampled the discharge and subsequently analyzed and reported water quality data for a number of pollutants. A table showing the exact dates of those 28 discharges from the Biofilter to Stream C and the levels of various pollutants in the discharge as identified by laboratory analysis conducted by FMC or DNR is included here as Attachment D. Since 1999, FMC has routinely sampled the discharge from the Biofilter to Stream C; FMC's Biofilter Management Plan explains that monitoring of the Biofilter outlet will take place twice a year in April and September or at other times if no precipitation event occurs.<sup>5</sup> These and other documents in the possession of FMC identify the sampling results of the Biofilter outfall and identify when additional violations occurred.

WRPC expects to identify additional discharges from the Biofilter to Stream C, including discharges that occurred or occur from April 2010 through the end of the 60-day notice period, and after any complaint is filed in this matter. WRPC will therefore allege that additional CWA violations occurred on those dates. WRPC will also allege CWA violations for all other unlawful discharges for which this Notice Letter provides you with sufficient notice.

#### **D. Parties Giving Notice**

The Parties giving notice are:

Wisconsin Resources Protection Council  
c/o Al Gedicks, Executive Secretary  
210 Avon St. #4  
La Crosse, WI 54603

Ms. Laura Gauger  
1321 E. 1<sup>st</sup> St. #210  
Duluth, MN 55805

Center for Biological Diversity  
P.O. Box 710  
Tucson, AZ 85702

However, these parties request that they be contacted through their attorneys as follows:

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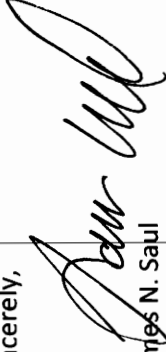
<sup>5</sup> FMC Biofilter Management Plan, Attachment B, at 5.

**E. Conclusion**

Should WRPC file suit, it will seek those remedies authorized by the CWA's citizen suit provision, including the imposition of civil penalties totaling at least \$ 3,500,000 (to be calculated as \$32,500 to \$37,500 multiplied by the number of days of violation of the CWA); injunctive relief sufficient to bring FMC into full and complete compliance with the CWA; an award of litigation costs, including reasonable attorneys fees; and any other relief as a court may find reasonable and appropriate under the circumstances.

If you have any information concerning the violations alleged in this Notice Letter, please forward it to WRPC. WRPC is willing to discuss the violations alleged herein with representatives of FMC during the sixty-day notice period so that this matter may be resolved without resort to litigation. If, however, those discussions do not take place or if the matter is not resolved to the satisfaction of WRPC, it will file suit on or about January 17, 2011.

Sincerely,



James N. Saul  
James N. Saul, Attorney at Law LLC

Marc O. Fink  
Center for Biological Diversity

Daniel Mensher  
Pacific Environmental Advocacy Center

*Attorneys for Wisconsin Resources Protection Council;  
Center for Biological Diversity; and Ms. Laura Gauger*

Encl. (4)

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