

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WISCONSIN RESOURCES PROTECTION  
COUNCIL, CENTER FOR BIOLOGICAL  
DIVERSITY and LAURA GAUGER,

Plaintiffs,

v.

FLAMBEAU MINING COMPANY,

Defendant.

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OPINION AND ORDER

11-cv-45-bbc

Between 1993 and 1997, defendant Flambeau Mining Company operated a mine near Ladysmith, Wisconsin, from which it extracted copper and other metals. As a condition of its mining permit issued by the Wisconsin Department of Natural Resources, defendant agreed that once mining operations ceased, it would return the entire mine site to its natural state and make it available to the public for recreation and wildlife viewing. Before that could happen, the City of Ladysmith asked defendant not to dismantle the buildings it had constructed on the property but to lease them to the city for economic development. Defendant agreed to retain the buildings and immediate surroundings for the city's use; this amounted to about 32 acres of the approximate 180-acre mine site. The agreement required defendant to file a supplement to its original reclamation plan for approval by the DNR.

Retaining the 32 acres known as the industrial outlot made reclamation of the mine

site more difficult for defendant. For the major portion of the site, including the mine pit, defendant dug up the soil and deposited it in a certified landfill, replaced the soil and revegetated it. In retaining the industrial outlot, it would not be digging up the graveled and paved surfaces but would have to address the problem of storm water runoff from these surfaces. Among other remediation efforts, defendant proposed building a 0.9 acre biofilter at the east end of the area to store storm water runoff from the outlot. The biofilter would allow copper and other pollutants to settle out of the water into the layers of soil in the biofilter, and eventually discharge cleaner water into an area to the east of the biofilter. The department approved the plan; defendant built the biofilter and put it into service.

In this civil action, plaintiffs Wisconsin Resources Protection Council, Center for Biological Diversity and Laura Gauger allege that the biofilter was a point source that allowed defendant to discharge copper into an intermittent stream and from there into the Flambeau River, which is a protected body of water under the Act. They contend that defendant violated § 1311(a) of the Clean Water Act by discharging a pollutant without a permit and without complying with the requirements of the Act. Defendant does not deny that copper entered the Flambeau River at the mouth of the intermittent stream, Stream C, but contends that plaintiffs have not proved that the metal came from the biofilter.

Before trial, both sides filed motions for summary judgment and defendant filed two motions to dismiss. Plaintiffs prevailed on their motion for summary judgment with respect to certain issues, including their standing to sue and their claims that defendant released water containing pollutants from the biofilter and that both the Flambeau River and Stream C (from

the Flambeau River northeast to Copper Park Lane) are “waters of the United States.” Defendant lost its motion for summary judgment on plaintiffs’ claims and its motions to dismiss the suit for failure to join an indispensable party and for mootness.

The case went to trial before the court. At the end of plaintiffs’ case, defendant moved for judgment on partial findings. Fed. R. Civ. P. 52(c) (court may enter judgment against party that has been fully heard on an issue during a nonjury trial or may decline to render any judgment until the close of evidence). Defendant contended that plaintiffs had failed to prove that it had discharged any pollutants from the biofilter into a tributary of the Flambeau River or into a wetland that had a biological, chemical and physical connection to the tributary (Stream C) or to the river. The motion was taken under advisement until the end of trial and is now before the court for decision. Although defendant’s motion was limited in scope, the parties agreed that defendant would stand on that motion and plaintiffs could argue all of the evidence, including the evidence put in by defendant in its case.

I conclude that plaintiffs’ evidence is sufficient to prove by a preponderance of the evidence that copper was discharged from the biofilter into a water of the United States. The amounts were so modest that I would declare them de minimis if the Clean Water Act did not impose strict liability. (The highest amount recorded was never more than the 42 parts per billion limit imposed on defendant for direct discharge into the Flambeau River under the Wisconsin Pollutant Discharge Elimination System Permit it held during mining operations, and in most instances considerably less.)

I will enter judgment for plaintiffs on liability, but I will impose only a pro forma penalty

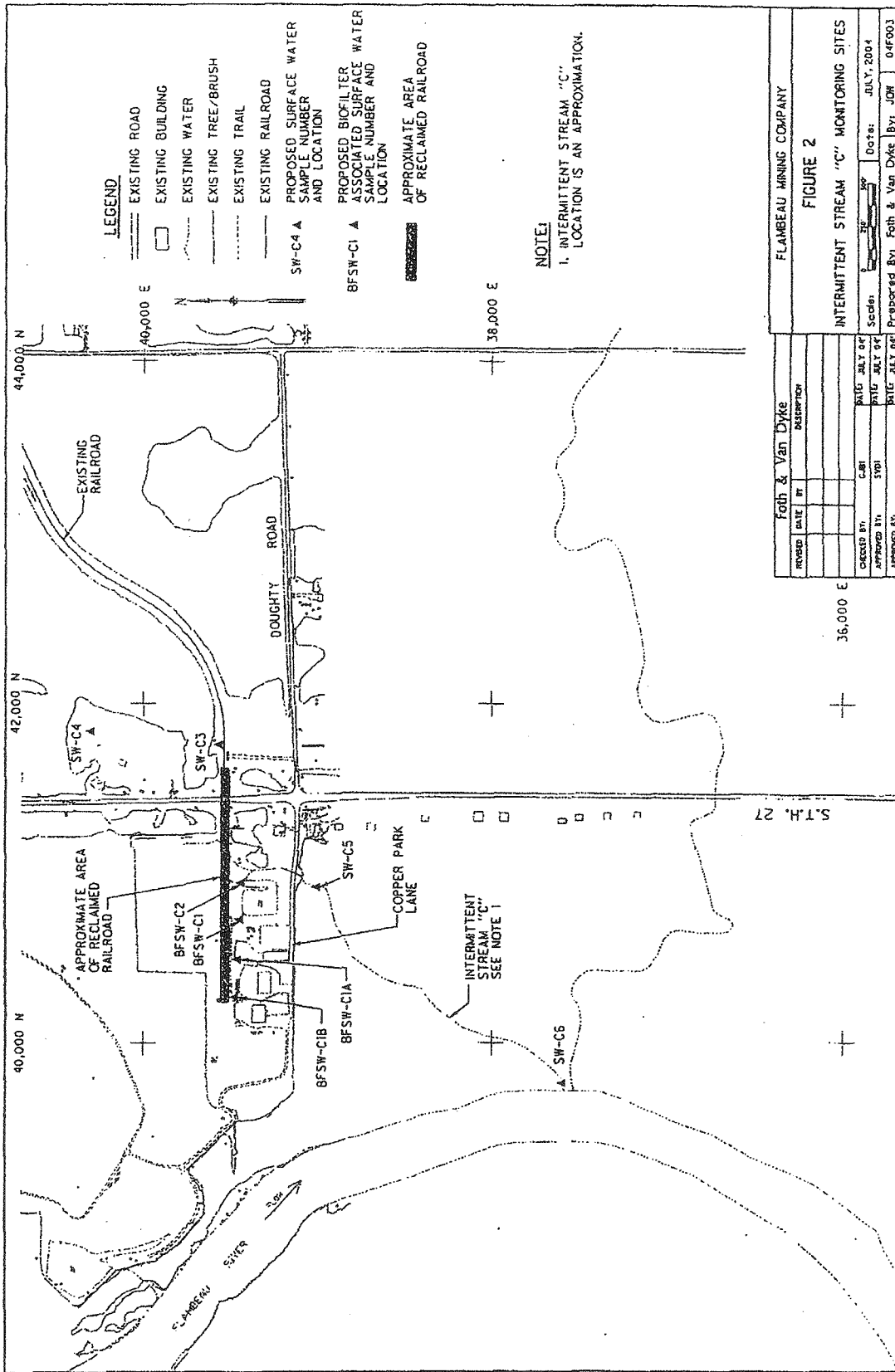
on defendant, not only because the discharges of pollutants were so slight, but because of defendant's exemplary efforts to protect the environment during its mining operations and reclamation effort. These efforts deserve commendation, not penalties. Finally, in light of the steps defendant has taken since this suit was filed to make further improvements in the filtration of storm water runoff, it would be premature to decide whether defendant should be required to apply now for a Wisconsin National Pollutant Discharge Elimination System permit or to impose any other injunctive relief.

From the record, from the facts stipulated by the parties and from the evidence adduced at trial, I find the following facts relevant to the questions remaining in dispute. As much as possible, I have limited the findings of fact to those relevant to the two remaining issues of liability, whether the biofilter discharged a pollutant into Stream C or into the wetlands adjacent to the biofilter, and to the issue of penalties.

## FACTS

### A. Mine Site

Around 1987, defendant Flambeau Mining Company began negotiations with the Wisconsin Department of Natural Resources and the local community to operate a mine near Ladysmith, Wisconsin to extract copper and other metals. The company purchased approximately 180 acres of land for the project. Taking up the major portion of the property was the mine site, which was bordered on the west by the Flambeau River, on the south by Copper Park Lane, on the east by State Highway 27 and on the north by Blackberry Lane.



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At least three unnamed streams run through the site. Defendant referred to them as Streams A, B and C; only C is relevant to this case. Stream C is an intermittent, seasonal stream that flows into the Flambeau River in the southwest part of defendant's property below the mine site; its beginning is in dispute. Plaintiffs contend that for the purposes of this suit it begins to the northeast of the industrial outlot at Highway 27; defendant contends that it first takes on the characteristics of a stream several meters south of Copper Park Lane.

In deciding the motion for summary judgment, I found that below Copper Park Lane, Stream C is "a navigable waterway" under the Clean Water Act because it is a tributary to the Flambeau River, which is a navigable river covered by the Act. Summ. Jmt. Order, Dkt. #137, at 52. Over the years, defendant has manipulated the channel of this stream on the mine site, re-routing segments, adding a rail spur, installing culverts beneath a former access road ("the farm road"), and performing significant grading of the lands that drain to the stream.

The mine site was in operation from 1993 to 1997. Defendant has returned it to a natural state for recreational use, with the exception of the 32-acre area known as the industrial outlot, which is leased to the City of Ladysmith for \$10 a year. The outlot includes a few office buildings, the former waste water treatment facility, an equestrian area built by defendant at the request of a local riding club and a biofilter built to treat storm water runoff from the outlot. The eastern end of the outlot includes a wetland area referred to as Wetland 7 and the alleged flow path of Stream C north of Copper Park Lane.

## B. Biofilter

Had defendant not agreed to Ladysmith's request to retain the industrial outlot, it would have treated the area as it did the rest of the mine site: it would have removed all of the structures, including the gravel road beds, gravel parking areas and rail spurs, covered the area with topsoil and revegetated it. Under the revised plan, defendant graded the surface of the outlot to keep most of the industrial area storm water flowing eastward toward the former surge pond, which had been used during mining operations for overflow water destined for treatment. Defendant converted the pond into a biofilter in 1998 by installing a non-permeable lining, filling the area with about nine feet of on-site till material and one foot of on-site top soil that it "inoculated with on-site hydric soil (wetland soil)." Donohue Rep., Plts.' Exh. 46, at 6. An east-west ditch to the west of the biofilter was regraded to direct water to the new biofilter.

The biofilter is essentially a 0.9 acre square expanse of water enclosed by berms that are about 10 feet high and slope outward for about 30 feet. At its northeast corner, about 30 feet along the top of the berm is lower than the rest of the berm and serves as the outlet for overflows from the biofilter. This "outlet" is a broad, heavily vegetated swale, or depression, with rocks added at the top to prevent erosion. The "rip rap" area is not "an apron of crushed stones," as I found at summary judgment, dkt. #137 at 17, but rocks spaced two to three inches apart in the heavily vegetated soil of the berm.

The biofilter was designed so that water flowing out of the outlet would flow eastward along the slope of the berm through heavy vegetation intended to filter out additional particulates. The design of the outlet, which is intended to disperse any overflow, and the

thick, coarse vegetation make it difficult to detect flow.

### C. Stream C

#### 1. Length of stream

Many of the maps and plans of the mine site prepared by defendant or its contractors show an “Intermittent Stream C” that makes its first appearance on the site at a culvert on the west side of highway 27, curves west for a short distance before turning south toward the northeast side of the biofilter. The “stream” is shown as heading south along the east side of the biofilter through a wetland, flowing through a culvert under the farm road and another 100 feet south through a culvert under Copper Park Lane. From there, it is depicted as proceeding in a southwesterly direction for approximately 2500 feet to the Flambeau River.

#### 2. Visual observations of Stream C north of Copper Park Lane

##### a. John Coleman

John Coleman is the environmental section leader of the Great Lakes Indian Fish and Wildlife Commission, a natural resources agency created by 11 member tribes of the Lake Superior Chippewa to provide assistance to the tribes in monitoring and managing natural resources. He holds a Ph.D. in wildlife management. He has visited defendant’s property 11 times, most recently in June 2010. At that time, he saw water flowing through the Highway 27 culvert and flowing east along a grassy swale for about 100 yards. He saw water flowing through the culverts under the rail spur. Further south, between the farm road culvert and



Copper Park Lane, he saw a stream channel somewhat incised into the grassy area.

Coleman has observed a flow of water through the outlet of the biofilter and he has observed water flowing from the outlet east about 10 feet from the base of the sloping berm toward what he describes as Stream C east of the biofilter. He has seen water in Stream C from the culverts at Highway 27 along its entire length to a point south of Copper Park Lane and he believes that there is a continuous surface water connection from Stream C at Highway 27 to the Flambeau River. He saw flow north of Copper Park Lane on several occasions in 2007, 2008 and 2010. He has seen water discharging from the biofilter on three of the 11 times he has visited the site, all in 2004. He admits that it would be impossible to see a channel or swale along the east side of the biofilter because of the high grasses and hummocks in the area.

b. Robert Nauta

Robert Nauta, a hydrogeologist and one of plaintiffs' two expert witnesses, visited the mine site for the first time in February 2012 after he had prepared his expert report. He based the report on maps and written documents, including sampling data. In his opinion, the biofilter discharges to a hummocky wetland full of mounds with channels between them. He acknowledges that channels would divert the water somewhat but he thinks it would continue down slope to a stream channel about 10 to 12 feet from the base of the biofilter outlet. He testified that he had observed this drainageway and described it as about a foot wide and six to eight inches deep alongside the biofilter. He said that he could clearly follow a stream bed northeasterly from Copper Park Lane to the double culvert at the railroad line northwest of the

biofilter. He hypothesizes that waters discharging from the biofilter will migrate to Stream C adjacent to the biofilter and then downstream to the Flambeau River, with no impediments, although he has never observed this occurring.

c. Craig Roesler

Craig Roesler is a water quality biologist with the Wisconsin Department of Natural Resources. He has a master's degree in water resources and is a state-licensed hydrologist. His work involves monitoring of lakes and streams for flow and for chemical and biological conditions. Roesler has visited the Flambeau mine site about 15 times and has monitored the copper and zinc concentrations in the drainage from a portion of the property. He is familiar with Stream C because it was a focus of his monitoring effort.

Roesler described Stream C as an intermittent stream starting from the lower end of the culvert under Highway 27, continuing to the upper end of the double culverts under the former rail spur, down along the biofilter to Copper Park Lane and eventually reaching the Flambeau River. He has observed flow movement in this area. On October 26, 2010 and April 27, May 11 and June 19, 2011, he saw water flowing in the south portion of Stream C below Copper Park Lane, as well as on September 27 and October 13, 2010, and on May 6 and May 11, 2011, when he was sampling fish or macroinvertebrates. On three of these dates, he also saw water flowing out of the culvert under the farm road and on three dates, he saw water flowing out of the culvert under Highway 27. He also saw water flowing out of the double culverts under the rail spur into the wetland area and then out of the wetland area through the culvert

under the farm road.

On October 26, 2010, April 27 and June 19, 2011, and on two other occasions between April and June 2011, Roesler observed water flowing out of the biofilter. He assumes that it flowed eastward until it hit a low spot in the flow path and headed south along the flow path toward Copper Park Lane, but he could not see it. He did, however, feel water in the vegetation under his feet. Roesler also collected fish from the biofilter in the immediate vicinity of the outlet that were the same species as some of those found in Stream C south of Copper Park Lane. Roesler concluded from the monitoring of the Flambeau River that the river did not show any significant changes in copper and zinc concentrations in response to mining activities.

d. Elizabeth Day

Elizabeth Day was retained by defendant as an expert witness. She is a senior environmental scientist employed by Stantec Consulting Services. She has a master's degree in water resources and is both a licensed professional hydrologist and a professional wetland scientist. She has worked for the Army Corps of Engineers and for the Wisconsin Departments of Transportation and Natural Resources.

Day made one visit to the mine site, on October 18, 2011. On that occasion, she walked downgradient along what she called the "drainageway" known as Stream C from Highway 27 to the Flambeau River. (She defines drainageway as an area for the drainage of water collecting from a watershed.)

Day observed culverts north of the drainageway at four locations: Highway 27 north of

the former railroad grade; a railroad grade located north of the biofilter; the farm road; and Copper Park Lane. At each culvert she noticed “short segments of channel-like features” within each culvert and immediately upgradient and downgradient of the culvert. Day Report, Tr. Exh. 1022, at 3. These features had areas of standing water that varied from less than one foot to six feet beyond the ends of each culvert. This kind of surface water feature occurs where drainage from saturated soils such as wetlands or sheetflow (water moving across a broad, flat area of land) is channelized by a narrow conveyance through a manmade barrier. These features do not indicate the presence of a stream, in and of themselves.

North of the farm road, Day found no obvious presence of a continuous streambed of discernible width demarcated by obvious banks of a discernible height. She concluded that the farm road is the northernmost reach of an actual stream.

Day followed the track of Stream C down to the Flambeau River. Below the culvert under Copper Park Lane, she observed no apparent channel but what looked like a dry field. As she proceeded downstream, she observed that Stream C had a well-defined channel about two to three feet wide and six to ten inches deep, with easily noticeable flow. A bit farther down, the waterway flattened out and meandered, creating some oxbows. The stream then went through some steeper valleys and some rocky sections where there was no standing water or flow, but presumably water was being conveyed downward underground.

e. Jana Murphy

Jana Murphy began work as the environmental supervisor at the Flambeau mine site in

1992, before mining started. She remained in that position until 1998, after the mining operations had stopped, when she became the environmental and reclamation manager. Since about 2002, she has been the only Flambeau Mining representative at the site. She has a master's degree in environmental and public health.

As environmental supervisor during mining operations, Murphy collected or oversaw the collection of samples, coordinated work on reports with consultants, reviewed the DNR's reporting requirements, reviewed reports and discussed actions that needed to be taken. She was responsible for the monitoring of the Flambeau River, air, surface water, groundwater and biota on the site. She continues to collect samples, perform monitoring tasks and analyses.

In Murphy's opinion, the flow of water described on the mine site maps and plans corresponds to what she has seen on site and to her understanding of how the water would flow on the east side of the biofilter. She believes that it would flow east from the biofilter outlet and then in a southerly direction down through Wetland 7 to the stream under Copper Park Lane. On one occasion, on April 25, 2009, she observed in her log book that the flow across the outlet into Stream C was low and added that a tree had been cut upstream [of the biofilter outlet] and that it had been felled across the channel.

#### D. Biofilter Discharges

Both Nauta and Coleman are of the opinion that overflows from the biofilter will reach Stream C south of the farm road. Nauta visited the mine site on only one occasion, in February 2012, when the area was snow-covered and any water was frozen. He agreed with Day that the

wetland at the base of the outlet was hummocky, but, as noted, he believed that the pools were interconnected and that water would flow downslope to the lowest point in the wetland, about 10 to 12 feet from the base of the biofilter berm and, fFrom there, downstream to Stream C south of Copper Park Lane and on to the Flambeau River with no impediments. He never observed any water flowing from the outlet to confirm his theory, but relied on his background and experience of hydrogeology and his study of the land elevations in Wetland 7.

Day saw no evidence that any of the small discharge from the biofilter flowed as surface water into anything that could be called Stream C, wherever it originates. When she examined the biofilter outlet, she did not see any evidence of a continuous flow; the outlet surface displayed a discontinuous series of lightly scoured areas of ground running in an east-west direction rather than scoured waterways indicating frequent or heavy discharges.

From the evidence Day saw in the field, she concluded that there was occasional overflow of the biofilter during periods of high water or a lot of precipitation but in such small quantities that it did not flow along the same path often enough to create a defined channel down the face of the berm. If the discharges were frequent or in large quantity, a scoured waterway would have been evident.

Although Day got down on her hands and knees at the point where a biofilter discharge would come down into the flatter land and tried to tear the grasses away, she was unable to find any kind of connecting body of water. She found pools of water, but each was surrounded by an area of grass that prevented the waters from joining any free flowing space of water.

It appeared to Day that when the water did get to the base of the berm, it spread out

or infiltrated the soil because she saw no evidence of any channel extending toward the east, which would be the lowest point. She described the rip rap as being mostly at the top of the berm when the actual overflow would occur; otherwise the berm was mostly soil.

On a number of occasions, Jana Murphy has written in her logbook and in correspondence with the DNR and defendant's consultants that discharges from the biofilter outlet flowed into Intermittent Stream C. E.g., Environmental Sampling Logbook, Plts.' Tr. Exh. 8, FMC 0371111 (noting at biofilter outlet: "low flow across Stream C"); id. at FMC 037096 (noting that Stream C is flowing, "as well as the IO BF [industrial outlot biofilter] into ST C"); email to Dale Lueck, Jt. Tr. Exh. 1008, at FMC0177739 ("Water flowing out of the biofilter flows into a small intermittent stream designated as Stream C.")

Murphy has seen water emerging from the biofilter outlet in an easterly direction, although the thick grass keeps her from seeing where the water goes beyond the rock area. She knows it has the possibility of going into the adjacent wetland to the east. She referred to the wetland area adjacent to the biofilter as Intermittent Stream C because the area had the potential for runoff that would reach Stream C.

Stephen Donohue is employed by Foth Infrastructure and Environment, consultants for defendant, and has worked with defendant on both the mining operation and the reclamation project. He believes that discharges from the biofilter would have percolated to the east and from there southward, because the wetland drains to the south, eventually flowing into Stream C south of Copper Park Lane.

Donohue testified that one could speculate that a discharge from the biofilter could flow

into Wetland 7 adjoining the biofilter and out again, but he does not believe that there is any definitive evidence showing either the ultimate destination of any water leaving Wetland 7 or whether anything leaving the biofilter reached the Flambeau River via Stream C. He acknowledges that if copper is already in Wetland 7, he cannot say that it could not get to Stream C south of Copper Park Lane.

The record contains no measurements of the volume of flow coming out of the biofilter or the frequency of discharges.

#### E. Wetland 7

Wetland 7 is located directly to the east of the biofilter. Despite its name, it is often dry. The ground water monitoring wells defendant installed around the site show that the ground water is lower than the land surface, indicating a seepage of water into the ground. When the area is wet, the water often ponds, increasing the ponding pressure going down into the subsurface.

In a wetland delineation report prepared for defendant in 2011, Tr. Exh. 1012, James Engelhardt concluded that Wetland 7 is a native wet meadow wetland that drains to the south by way of an intermittent waterway that flows under Copper Park Lane. Id. at WRPC015458.

Wetland 7 is a dynamic hydrologic environment choked with vegetation and characterized by hummocks. It is not possible to visually observe water going from one point to another in that kind of environment. A precise determination of water movement through



the wetland would require a dye or tracer test, which has never been undertaken.

#### F. Initial Permits

Defendant filed its first application to develop a metallic minerals operation near Ladysmith with the Department of Natural Resources in April 1989. It submitted a revised application in December 1989. In January 1991, defendant secured a mining permit and other environmental permits issued by the Wisconsin Department of Natural Resources that governed both the active mining operations and the subsequent reclamation of the mine site. One of these permits was a waste water discharge permit issued under the Wisconsin Pollutant Discharge Elimination System program. It was reissued for another five years on March 29, 1996.

The mining permit required defendant to prepare a Surface Water Management Plan, which it submitted to the department in May 1991. The plan called for defendant to apply Best Management Practices for storm water management and erosion control, including mulching and revegetation of exposed soil surfaces, stabilizing slopes by seeding and mulching and construction of terraces and diversion berms to protect long slopes. Plts.' Trial Exh. 46, Donohue Rep., at 4. During construction of the mine, defendant detained storm water on site, released it at non-erosive velocities and diverted surface water from active areas. Id. at 5. To facilitate erosion control, defendant used temporary and permanent sedimentation basins, berms, slope drains toe of slope ditches, diversion berms, silt fences, hay bales and rip rap areas lined with filter fabric. Id.

Lawrence Lynch is a hydrogeologist employed by the DNR who worked with defendant on the mining project, starting in the late 1980's when defendant first applied for its permit. For most of the time he was the leader of the department's metallic mining team, responsible for reviewing defendant's application, conducting technical reviews of documents, performing site inspections, attending public hearings and preparing portions of the draft and final environmental impact statements. He wrote the mining permit for defendant and he testified at the contested case holding held in connection with the permit.

Once the mining permits issued, Lynch acted as coordinator for the project. In that position he had frequent contact with defendant's personnel, contractors and consultants. He made more than 100 trips to the site, some of them unannounced, and often walked or drove the site. A DNR employer based in Rhinelander provided additional supervision and was able to visit on an even more frequent basis than Lynch, usually twice a week. Among other things, this employee would monitor defendant's sampling activities and take portions of the samples to be tested independently by the State Laboratory of Hygiene.

#### G. Waste Water Treatment

During mining operations, defendant operated a waste water treatment facility in the industrial outlot on the mine site to treat Type Two waste water, which was primarily runoff water from the waste rock stockpiles. The operation was designed to keep the water on site, either in settling ponds near the mine pit or in one of two surge ponds above the pit. The water treatment operation was complex, involving constant supervision of the water quality,

employment of techniques to remove solids, adjust pH and add chemicals to remove as much of the metals as possible. The state-imposed limit for copper concentration was 42  $\mu\text{g/L}$ . (The parties focus only on copper; zinc concentrations were of less concern.) Defendant did not allow discharges of any water until the operators had determined that the water met defendant's own water quality standard, which was twice as stringent as its permit required. Thus, for a permit limit of 42 parts per billion of copper, the only discharges allowed had to be less than 21]5 parts per billion. The staff worked in continuous improvement mode to reduce the metal in the discharged water further, experimenting with pH levels and using different polymers to remove more of the suspended solids.

Defendant never violated the toxicity limits during the mining operation, but on two or three occasions, the water failed the bioassay tests because it was so clean it left nothing for organisms to live on. After experimentation, the operators learned that they could compensate by adding citric acid to the water before it was discharged.

Once the treated water met defendant's standard, it was pumped to the Flambeau River unless it was needed for fire protection, dust control or washing vehicles. Defendant used only treated water on the property.

The treatment facility had an instrument and control technician on duty, who was responsible for monitoring the computerized reports of water quality and quantity. If at any time the computer showed that more water was being pumped up from the pit than the runoff and surge ponds could accommodate, the facility operator was authorized to shut off the pump pit and put a lock on it, which meant that all work in the pit had to stop.

#### H. Mine Site Reclamation

The reclamation of the mine site began with the construction of the mine and was regulated under the provisions of the mining permit's Surface Water Management Plan. As the mine was dug, defendant prepared for the end of mining operations and return of the site to a natural state. It salvaged wetland soils, placing pockets of the wetland hydric soil in a special stockpile, and it stabilized and revegetated the external berms left after the generation of waste rock. In test plots facing different slopes, defendant experimented with seed mixes, fertilizers, soil amendments and sun exposure to determine the best varieties for revegetation. Defendant dug up trees that were in the way of construction and kept them in a separate nursery for replanting. In accordance with its policy of putting safety and the environment first, defendant expected its employees to dig up any oil leaks and put them in a barrel for disposal and store equipment on pads to prevent leaks into the ground. If they were driving equipment that developed an oil leak, they were required to stop where they were and wait for assistance rather than drive to the machine shop and continue to spill oil. Defendant emphasized dust control, taking into consideration wind direction when assigning employees to any particular area for reclamation discing, seeding and mulch spreading. It employed crimping techniques to keep the mulch from escaping after it had been spread.

As part of the reclamation, defendant created drainage features for permanent drainage on site. Much of the area within the mine site was broken down into separate watersheds, with each watershed having different draining features. Plts.' Tr. Exh. 46, at 5. The supplemental reclamation plan included detailed grading plans for routing storm water from nearly all of the

industrial outlet through the biofilter, with flow directed toward what was called the Stream C watershed, of which the headlands were Wetland 7, directly to the east of the biofilter.

DNR staff reviewed the supplemental plan and advised defendant that its current water handling procedures were acceptable to the department and consistent with the mining permit, including the Surface Water Management Plan, as well as with the Wisconsin Pollutant Discharge Elimination System Permit. Lynch intended to use the latter permit to continue to regulate discharges from the site through outfalls 1 and 2 (the biofilter outlet) as long as water was pumped from one location on the site to another and any discharges through those outfalls complied with the effluent and monitoring requirements specified in the permit.

The DNR gave formal approval to the supplemental plan on July 30, 1998. In response to citizen requests made at public hearings, the department added a condition that defendant dismantle the waste water treatment plant. Defendant completed site grading, decommissioned the waste water treatment plant and constructed the biofilter in the area of the former surge pond on the east side of the property, approximately 75 yards north of Copper Park Lane, the southern boundary of the mine site.

In 1999, the Ladysmith Community Industrial Development Corporation became the manager of the outlot buildings. At the request of a local riding club, defendant developed part of the area for an equestrian trail head area and directed the surface flow of water from the trail head area (the parking lot for riders) to the biofilter.

The supplemental plan called for long-term care and maintenance monitoring of the site. This required site inspections, maintenance of land forms and monitoring of ground water,

vegetation, terrestrial ecology and surface subsidence. Defendant submitted a Notice of Completion to the DNR in September 2001; two months later, the four-year monitoring period required to obtain a Certificate of Completion began. In 2005, the DNR received objections to the issuance of the certificate and scheduled a contested case hearing, during which defendant worked out an agreement with the objectors that the certificate would not include the 32-acre industrial outlot. The parties stipulated to areas of concern in the outlot, to continued surface water sampling and to hiring Foth to develop a plan for sampling. The certificate issued for the mine site, excluding the outlot, in 2007.

In 2003-04, defendant and the Ladysmith Development Corporation agreed that the Wisconsin Department of Transportation should remove the rail spur from the industrial outlot as part of a renovation of Highway 27. In response to testing that showed elevated levels of copper in the top six inches of surface material, defendant obtained permission from the DNR to remove the material to a certified landfill, and did so. Id. Seven months later, it excavated additional soil, deposited it in an approved landfill, added 2,760 cubic yards of native topsoil to the area and seeded, mulched and fertilized the area.

In 2005, defendant's parent company, Rio Tinto, conducted an audit of the mine site, to insure that defendant had complied with all standards and procedures for public health and safety. The auditing team was small, consisting of Fred Fox and an outside lawyer. Fox's area was communities, health and safety. The lawyer was assigned to Clean Water Act subjects such as spill prevention control plans, surface and ground water monitoring. The team's objective was to insure that the operations complied with corporate policy and with the company's

standards and procedures. When it discovered discrepancies between actual operations and corporate policies, it noted these and identified them as high, moderate or low urgency. These findings then became the basis for a site action plan that Rio Tinto tracked from its corporate headquarters.

Despite the work that defendant had undertaken in 2003-04, it saw no drop in copper concentrations in water flowing to the biofilter, so it undertook additional remediation. This time it proposed to the DNR the removal of all surface materials down to four inches in the industrial outlot, the capping of previously unpaved areas with asphalt and the replacement of the soils in the east-west ditch that carried storm water runoff from the lot to the biofilter. The work was performed in the spring of 2006. Defendant conveyed the excavated materials to certified landfills and covered the exposed subgrades of the excavations with geotextile fabric as a filter to slow the migration of lower subgrade soil material upward into the limestone subgrade. It put 372 tons of limestone aggregate into the drainage ditches on the perimeter of the lot and 2,176 tons of limestone aggregate onto the parking lot.

As a result of these actions, the copper concentrations measured in the biofilter inflow site, which was the entry point for runoff from the remediated area, declined from a mean of 1,035 parts per billion to a mean of 48 parts per billion. "Surface Water Quality Assessment of the Flambeau Mine Site," Wis. Dept. of Natural Resources, April 2012, Jt. Tr. Exh. 1028, at WRPC 017352. The department noted in the report that, in 2011, defendant had built an infiltration pond at the west end of the industrial outlot to manage storm water and was planning to remove the geomembrane liner and overlying sediment in the existing biofilter and

convert it to an infiltration basin in the spring of 2012. Id. The department anticipated that these improvements would further reduce the copper inputs to Stream C from the biofilter pond's former drainage area. Id.

James Hutchison, an independent consultant and former employee of Foth, has been assisting defendant in preparing its annual reports since 2000. Under the mining permit issued by the DNR, defendant is required to submit an annual report of the data obtained during the year, activities occurring on the site and trends in the data related to ground and surface water, air quality during construction activities and pit backfilling and reclamation work. Defendant filed the lengthy reports each year with the DNR, where they were maintained as open records. After each report was filed, defendant met with the DNR to discuss the best course of action for reclaiming the site to a point at which the surface water and surface soil reports would show no levels of concern for copper or zinc. Whenever the DNR recommended doing something in addition to what defendant had been planning, or in place of it, defendant followed the DNR recommendation.

#### I. Wisconsin Pollutant Discharge Elimination System Permit

In 1998, the DNR decided to use defendant's mining permit for continued regulation of the mine site. It advised defendant in writing on September 8, 1998 that its surface water management and related discharges were no longer subject to the provisions of the Pollutant Discharge Elimination System Permit and that all storm water management and discharges through the biofilter outlet would be regulated under the mining permit.



The decision to use the mining permit was made by Lawrence Lynch, in his capacity as leader of the DNR's metallic mining team. He had several reasons for it. The most important was his knowledge that the DNR's storm water staff was too busy to visit defendant's site more than once or twice a year. At the same time, he knew that the department's mining employee in Rhinelander could continue his twice-weekly visits to the mine site; he knew that Jana Murphy would continue her sampling, monitoring and analyzing surface water and collecting environmental data, as she had done since 1992, before mining began; and he knew that it was only storm water management that was left for monitoring. The key concern in storm water management is making sure that the permit holder is following best practices, such as making sure that the slopes are stable, erosion control features are in place and maintained and drain features are not exhibiting scouring. The mining permit required defendant to develop a surface water management plan, which gave the department the authority to deal with storm water on the site, and the staff's familiarity with the site meant that staff members knew what was required on the site and how it should be maintained.

On September 23, 1998, the DNR formally terminated defendant's Wisconsin Pollutant Discharge Elimination System Permit. No further discharges to waters of the state would be allowed under the permit; all existing waste water discharge points from the waste water treatment system were to be abandoned, with the exception of outfall 1, which collected drainage from the former pit area on the main part of the mining site, and outfall 2, the biofilter. These would be allowed to discharge storm water runoff through the biofilter overflow regulated under the mining permit. After termination of the WPDES permit, the

DNR continued to regulate the discharges out of the two biofilters.

#### J. Copper Concentrations

For the years 2007-11, the average total recoverable copper concentration measured in the Flambeau River was 1.9 micrograms per liter ( $1.9 \mu\text{g/L}$ ), or parts per billion, of total copper at the mouth of Stream C, higher than the upstream average of total copper of  $1.2 \mu\text{g/L}$ . All concentrations were below values toxic to aquatic organisms and below the state acute and chronic toxicity criteria for total recoverable copper of  $8 \mu\text{g/L}$  and  $5 \mu\text{g/L}$ , respectively. Fairbrother Rep., Dft.'s Tr. Exh. 587, at 8.

The copper concentration measured in Stream C was higher than that measured in the river and it exceeded the state acute toxicity criterion of  $8 \mu\text{g/L}$  on a number of occasions. However, when Craig Roesler studied the stream in 2011 as part of a DNR project, he noted that all bioassays conducted on water samples collected from the stream at that time were negative, indicating that the stream was not toxic to aquatic organisms, despite the fact that total recoverable concentrations in Stream C exceeded DNR water quality criteria values on a number of days. Both he and Anne Fairbrother, defendant's expert in ecological and biological sciences, testified that they had found no adverse effect from either copper or zinc on biota, either fish or macroinvertebrates, in Stream C. In fact, Ephemeroptera (Mayflies), Plecoptera and Trichoptera taxa were thriving in Stream C, although they are generally considered to be sensitive to metals. The Index of Biotic Integrity (a general measure of environmental degradation that measures the integrity of various species, including fish populations and

aquatic macroinvertebrates) taken in the Flambeau River showed higher values of biotic integrity downstream of Stream C than upstream.

On 11 occasions between October 4, 2006 and September 27, 2011, water flowing out of the biofilter outlet contained concentrations of copper exceeding Wisconsin's acute toxicity criterion for copper:

1. Oct. 4, 2006 - 23  $\mu\text{g/L}$
2. Nov. 28, 2006 - 34  $\mu\text{g/L}$
3. May 24, 2007 - 13  $\mu\text{g/L}$
4. Sept. 21, 2007 - 15  $\mu\text{g/L}$
5. April 25, 2008 - 22  $\mu\text{g/L}$
6. April 25, 2009 - 15  $\mu\text{g/L}$
7. Oct. 3, 2009 - 18  $\mu\text{g/L}$
8. April 16, 2010 - 11  $\mu\text{g/L}$
9. Sept. 17, 2001 - 4.8  $\mu\text{g/L}$
10. April 27, 2011 - 11  $\mu\text{g/L}$
11. Sept. 27, 2011 - 42  $\mu\text{g/L}$

During the years that defendant had a Wisconsin Pollutant Discharge Elimination Permit for waste water discharge, the permit's effluent limit was 42  $\mu\text{g/L}$  for copper in treated waste water piped directly into the Flambeau River.

## OPINION

### I. LIABILITY

The Clean Water Act, 33 U.S.C. §§ 1251-1387, is violated when (1) person (2) adds a pollutant from (3) a point source (4) into navigable waters of the United States (5) without a permit. Plaintiffs have shown that (1) defendant (2) discharged a pollutant (3) from its biofilter, which is a point source; (4) south of Copper Park Lane, Stream C is a navigable water

of the United States and (5) defendant did not have a Clean Water Act permit when the discharge occurred. Also, the parties have stipulated that discharges of water from the biofilter occurred on 11 occasions between November 16, 2005, which was five years before plaintiffs filed their notice of suit. In all of the instances, the concentration of copper measured at the outlet was higher than Wisconsin's acute toxicity criterion. The only remaining question is whether the discharged pollutant reached Stream C south of Copper Park Lane, where it is a tributary to the Flambeau River and therefore, a navigable river under the Clean Water Act.

Plaintiffs contend that when the biofilter overflows, it discharges water into Stream C south of Copper Park Lane in one of two ways: either the water follows a stream channel alongside the biofilter that continues down to the stream south of the lane or the water disperses into the wetland, where it follows the natural slope of the ground and eventually joins Stream C below the lane. Plaintiffs devoted a major portion of their presentation at trial to witnesses who testified that Stream C exists as a stream north of Copper Park Lane and, in particular, along the east side of the biofilter, adjacent to the outlet slope. However, plaintiffs contend that they do not have to prove that the biofilter flows directly or even indirectly into Stream C; if it flows out of the biofilter into Wetland 7, it is covered by the Act either because that wetland has a "significant nexus" to the Flambeau River or because of the wetland's adjacency to Stream C.

The evidence of the flow path to Stream C is disputed; Elizabeth Day's observations and conclusions point in one direction; those of Coleman, Nauta and Roesler, in another. No definitive evidence exists to prove that *any* overflow from the biofilter has ever made its way

to Stream C below Copper Park Lane, let alone that a polluted overflow ever did. Given the nature of the surrounding wetland, with its tall reedy grasses, hummocks and low water table, it would not be possible to determine this by visual observation, unless the entire area were so inundated that such a result would be inevitable. No witness testified to observing such a situation and neither side undertook any dye or tracer tests that would put the issue to rest.

Nevertheless, the circumstantial evidence supports plaintiffs' view. Witnesses have observed water flowing west from the culvert under Highway 27 and continuing through the culverts under the old rail spur in a southerly direction past the biofilter and have seen water coming out from the presumed channel next to the biofilter through the farm road culvert and flowing on to the culvert under Copper Park Lane. Even if the actual route of this flow of water past the biofilter cannot be observed, it seems more probable than not that it is a sufficiently confined, discrete and discernible channel to convey water down to Copper Park Lane, where it flows eventually into the more clearly defined Stream C.

Anyone concluding that no biofilter discharge ever reached Stream C below Copper Park Lane would have to disregard the evidence of the plan that defendant designed for handling runoff from the industrial outlot—a plan that the DNR approved. From the beginning, defendant proposed handling runoff from the industrial outlot by directing it to the biofilter and from there to Stream C or to “the existing intermittent Stream C channel located in that area of the site.” Dft.'s 1997 Supplement to the Surface Reclamation Plan, Jt. Tr. Exh. 1010, at WRPC015575. See also Dft.'s 2004 Proposed Monitoring Plan for Intermittent Stream C, Joint Tr. Exh. 1016, at FMC000886 (“The biofilter has two factors that might influence its

ability to control the copper levels discharged to intermittent Stream C, the influent characteristics and the sediment that has been collected to date”), and at FMC 000885 (purpose of monitoring plan was to “[e]valuate the aspects of the bio-filter that may influence the copper levels discharged to intermittent Stream C”); Dft.’s 2004 Mid-Summer Progress Report, Jt. Tr. Exh. 1003, at FMC 002370 (“The non-point sources of runoff from the Industrial Outlot are being passively treated by the 0.9 acre biofilter that substantially reduces the concentrations of metals before flowing into Intermittent Stream C that eventually discharges to the Flambeau River.”); Dft.’s 2007 “Biofilter Sediment Deposition Monitoring Plan,” Jt. Tr. Exh. 1007, at FMC002765 (“The biofilter allows settling of suspended solids from the surface water to settle out prior to delivering the water to Stream C.”); Def.’s 2010 Annual Report, Joint Tr. Exh. 1004 (the biofilter “substantially reduces the concentrations of metals before flowing into Intermittent Stream C that eventually discharges to the Flambeau River”). Even Jana Murphy thought of the waterway north of the biofilter as a channel, as shown by her notation in the logbook to that effect (“tree felled across channel”).

It was defendant’s intent to reduce the copper concentration in water that might reach Stream C south of Copper Park Lane by directing it through the lowest point of the wetland adjacent to the biofilter and into the channel identified north of Copper Park Lane. Defendant went to great lengths to keep pollutants from getting from the biofilter into the Flambeau River. It built the biofilter to allow suspended copper to settle out and it built an enclosure in the form of a long sloping berm to slow the flow of water out of the biofilter during periods of high moisture and allow it to infiltrate the soil. If the water did flow beyond the berm, it would flow

into the adjacent wetland, where it had an additional opportunity to infiltrate the soil. If that did not happen, the wetland's hummocks would slow the flow of water and keep it dispersed.

Nevertheless, as plaintiffs' witnesses testified, there were occasions when water was flowing in large quantities out of the biofilter, making it likely that it would overwhelm the soil's infiltration capacity, continue flowing into the wetland down to the lowest point, which defendant called Stream C, and then make its way down to Copper Park Lane. Even Stephen Donohue, defendant's expert witness and long time consultant, testified that he had seen that phenomenon. The possibility is further increased by the topographic maps of Wetland 7, which show that the land was sloped and shaped so that the lowest point was east of the biofilter, in the area marked on many of the maps and plans as Stream C. It would be almost inevitable that in high water periods, excess water from the biofilter would flow down to this point and from there down to the more clearly channelized Stream C south of Copper Park Lane. Even if the flow path was not a channel for the entire distance, it was a discernible path developed by defendant through manipulation of the ground surfaces. Moreover, the distance between the biofilter outlet and the culvert under the farm road was only about 50 yards.

I find that it is more probable than not that on 11 occasions, excess water flowed out of the biofilter containing concentrations of copper that exceeded Wisconsin's acute toxicity criterion for that metal and that at least some of this water followed the slope of the berm down through the wetland and into the waterway that eventually became Stream C on each of the 11 occasions. I conclude therefore that defendant violated § 1311(a) on each of these

occasions.

The law does not require a finding that a pollutant was discharged *directly* into a navigable water; it forbids the “‘addition of any pollutant *to* navigable waters.’” Rapanos v. United States, 547 U.S. 715, 743 (2006) (quoting 33 U.S.C. § 1311(a)). Justice Scalia adopted the approach of two lower courts that had found that “the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.” Id. (citing Sierra Club v. El Paso Gold Mines, Inc., 421 F. 3d 1133, 1137, 1411 (10th Cir. 2005); United States v. Velsicol Chemical Corp., 483 F. Supp. 945, 946-47 (W.D. Tenn. 1976)). The waterway north of Copper Park Lane is a sufficiently discernible, confined and discrete directly upstream of the biofilter outlet and below the adjacent wetland to constitute such a conveyance.

This finding makes it unnecessary to decide whether the waterway north of Copper Park Lane is a continuation of Intermittent Stream C or whether the wetland has a significant nexus to the Flambeau River.

## II. PENALTIES

Plaintiffs are suing under 33 U.S.C. § 1365, which allows citizens to bring civil actions against any person who is violating an effluent standard or limitation under ch. 26 of the Act (Water Pollution and Prevention and Control). Plaintiffs have shown by a preponderance of the credible evidence that defendant violated 33 U.S.C. § 1311(a) by discharging a pollutant into a water of the United States. Despite defendant’s efforts to avoid the discharge of any



pollutant, the fact that 11 such discharges occurred makes defendant subject to penalties of up to \$32,500 a day for each violation occurring before January 12, 2009 and \$37,500 for each violation occurring after that date. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. Neither the minimal levels of copper concentration nor defendant's efforts to prevent the discharge change the fact that a discharge of a pollutant occurred. Kelly v. United States Environmental Protection Agency, 203 F.3d 519, 522 (7th Cir. 2000) (Clean Water Act does not recognize good faith or lack of knowledge as defense; civil liability is strict).

In selecting the proper penalty, the Act provides factors for courts to consider: (1) the seriousness of the violation; (2) the economic benefit, if any, resulting from the violation; (3) any history of such violations; (4) any good faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the violator; and (6) "such other matters as justice may require." § 1319(d).

#### I. Seriousness of violation

Plaintiffs have failed to show that any violation was serious in nature. With one exception, none of the effluent measured in outlet discharges came close to meeting or exceeding the copper effluent limit of 42 $\mu$ g/L that the DNR had imposed on defendant under its Pollutant Discharge Elimination System Permit while defendant was treating waste water and storm runoff during active mining operations. (On September 27, 2011, the concentration in the biofilter discharge matched the permit limit of 42.)

Both Dr. Fairbrother and Dr. Roesler found no adverse effect on biota (either fish or

macroinvertebrates) in Stream C from either copper or zinc. Even on June 19, 2011, when Roesler observed that Stream C exceeded the state's water quality criteria values, all of the bioassays he was conducting on water samples from the stream were negative, indicating that the stream was not toxic to aquatic organisms.

2. The economic benefit resulting from the violation

Defendant gained no economic benefit from any discharge from the biofilter. Not only was it no longer making any money from the mine site, but the discharges were a setback to its efforts to full reclamation of the industrial outlot. It would have been less expensive for defendant to have refused the city's request to keep the outlot and the buildings, removed them and dug up the outlot. It incurred the extra costs only because it wanted to help out a city that was struggling economically.

Plaintiffs argue that it was to defendant's economic benefit to agree to Lawrence Lynch's request on behalf of the Wisconsin Department of Natural Resources to administer the monitoring of the reclamation efforts under a mining permit rather than a Wisconsin Pollutant Discharge Elimination System permit, but they have adduced no evidence of this. In fact, as Lynch explained at trial, defendant's agreement meant that it would be subject to far more stringent monitoring from the department than it would have been had it been subject to a wastewater discharge permit, because the mining team would be able to make many more visits to the site (once or twice a week) than the team monitoring the water permits (once or twice a year).

3. History of violations

According to Lynch, who was head of the mining team for the Wisconsin Department of Natural Resources during the majority of the time that defendant was operating the mine and doing reclamation work, the department never had any dispute with defendant over any aspect of its work. The record contains no history of any violations by defendant of any kind during the 23 years the two entities have worked together.

4. Good faith efforts to comply with the applicable requirements

Again, Lynch testified to having a good working relationship with defendant for the years he represented the DNR in overseeing the mining and reclamation work. When the department asked for changes or suggested new projects for improving the environment, defendant adopted them.

5. The economic impact of the penalty on the violator

It is unlikely that any penalty would have a significantly adverse effect upon defendant or its parent company, Rio Tinto, except a reputational one.

6. Such other matters as justice may require

Under this open-ended factor, I will take into account the extensive efforts that defendant made to protect the environment of the Flambeau Mine site, both during the mining operation and afterwards during the reclamation effort. It would not advance the goals of the

Clean Water Act to impose anything but a pro forma penalty on a company that was compliant with the Act and with the directives of the state's Department of Natural Resources and acted in all respects as a good neighbor.

Taking into consideration all of the statutory factors, I believe that the penalty for each of the 11 violations should be set at no more than \$25.00.

### III. INJUNCTIVE RELIEF

Plaintiffs contend that injunctive relief is warranted, either requiring defendant to stop all discharges or to require it to obtain a permit. They acknowledge that defendant cannot do the first because it can not be expected to stop the rain, so it must be required to obtain a permit.

As plaintiffs point out, the Clean Water Act authorizes courts to enforce a prohibition on the unpermitted discharge of pollutants. 33 U.S.C. § 1365(a) & (f)(1). However, plaintiffs have not shown that any such discharges are occurring under defendant's new system of infiltration basins, installed in 2011 and afterwards. At trial, I did not allow defendant to put in any evidence about these new basins, beyond the fact that defendant had proposed their installation, the DNR had approved the installation and it had gone ahead. However, it is reasonable to expect that they will improve on the efficiency of the biofilter. To require defendant to apply for a permit in these circumstances would be exalting form over substance—and would have the illogical result of relieving defendant of the close and

knowledgeable scrutiny of the mining team.

Moreover, plaintiffs have not proven that they have suffered irreparable injury from any biofilter discharge. At no time has a discharge contained a concentration of copper close to the level formerly allowed under the permit. The evidence shows that the Flambeau River has a higher level of copper upstream of the mouth of Stream C than downstream, indicating that any discharge that makes its way to Stream C is not impairing the water in the river. The evidence also shows that the level of copper in Stream C, which is generally higher than that of any biofilter discharge, is not toxic to the species most likely to be affected, which are the biota in the stream.

Plaintiffs cannot make a plausible argument that the quality of the water in the river is affected by the discharges from the biofilter. They can continue to enjoy the river for fishing, recreation and wildlife viewing without any concern for the river's water quality resulting from biofilter discharges, not only because the biofilter is being replaced but because it never threatened the river's water quality during the period at issue in this suit.

Because plaintiffs have not shown that they have suffered any irreparable injury from the discharges, there is no need to spend any time determining whether legal remedies are inadequate. For the same reason, the balance of harms does not tip in their favor, particularly after defendant has expended time, effort and money to build a better filtration system to prevent copper in storm water runoffs from entering Stream C.

The last factor, the public interest, does not weigh in favor of plaintiffs' request to require defendant to obtain a Wisconsin Pollutant Discharge Elimination System permit. At

this point, there is no showing that such a requirement is reasonable or that it would enhance water quality protection for Stream C and the Flambeau River. Plaintiffs have adduced no evidence that changing the team responsible for monitoring the mine site would increase the frequency and effectiveness of the monitoring.

#### IV. ATTORNEY FEES AND COSTS

In the unusual circumstances of this case, I am persuaded that plaintiffs are not entitled to an award of fees or any costs other than those allowed by statute. Although plaintiffs seem to be motivated by an admirable concern for the environment, it remains unclear to me why they would have expended so much time and energy litigating against a company that seems every bit as committed as they are to the protection of the environment and preservation of water quality.

#### ORDER

IT IS ORDERED that

1. Defendant Flambeau Mining Company's motion for judgment on partial findings, #244, is DENIED;
2. The motion of plaintiffs Wisconsin Resources Protection Council, Center for Biological Diversity and Laura Gauger for leave to file a supplemental closing argument, dkt. #250, is GRANTED;
3. Plaintiffs' motion to amend their exhibit list, Dkt. #239, is DENIED as moot; the

photographic exhibits were received at trial;

4. Judgment is GRANTED in favor of plaintiffs on their claim that defendant discharged a pollutant from a point source that entered a water of the United States and that it did not have a permit issued under the Clean Water Act when it did so;

5. Defendant is required to pay a penalty of \$25.00 for each of 11 unpermitted discharges, for a total of \$275.00; and

6. Plaintiffs' request for attorney fees and costs other than those permitted by statute to prevailing parties is DENIED.

The clerk of court is directed to enter judgment for plaintiffs and close this case.

Entered this 24th day of July, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge