

Flambeau Mining Company: A Case Study



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Recently Sen. Tom Tiffany (R-Hazelhurst) and Rep. Rob Hutton (R-Brookfield) introduced the Mining for America Act, which is legislation that would eliminate the moratorium on metallic mining.¹ Some groups immediately came out in opposition to the proposal. Included in the talking points is the argument that the moratorium was a direct response to the Flambeau mine, which they allege was found to have violated the Clean Water Act. What exactly is the moratorium and did the Flambeau mine violate the Act? The analysis below sets the record straight.

The Mining Moratorium

Prior to 1998, mining took place in Wisconsin under a strict series of mining regulations. Under Wisconsin Chapter 293, a hearing would first take place where the Wisconsin Department of Natural Resources (“DNR”) would determine whether a mining applicant met the terms of the chapter. Specifically, within 90 days of the completion of a public hearing, the DNR was required to issue a mining permit if six separate elements were met.²

First, a mining plan and reclamation plan would have to be reasonably certain to result in reclamation of the mining site, all consistent with the terms of the relevant statutory sections. Next, an applicant was required to show a proposed operation would comply with all applicable air, groundwater, surface water and solid and hazardous waste management laws and rules of the DNR. The applicant would also have to show a proposed site was not unsuitable for mining. An applicant would also be required to establish a proposed mine would not endanger public health, safety or welfare, it would result in a net positive economic impact in the area reasonably expected to be most impacted by the activity, and the operations would conform with all applicable zoning ordinances. In the event a permit was granted, the DNR required the permit holder to perform adequate monitoring of environmental changes

Despite the existence of what seemed like a rather rigorous permitting process, in 1998 legislators joined with Gov. Thompson to enact a moratorium on the issuance of permits for mining of sulfide ore bodies. As emphasized by Sen. Tiffany and Rep. Hutton in their press statement announcing the introduction of the Act, Wisconsin’s comprehensive mining laws under Chapter 293 were in effect prior to 1998 and had appeared to responsibly regulate the industry.³ The moratorium has effectively prevented these otherwise reasonable regulations from being used. Critics of the moratorium argue that with no guarantee from the DNR that examples can be readily identified which would meet the respective ten year requirements under the law, mining companies are hesitant to invest in Wisconsin deposit exploration.⁴

In 2013, Sen. Tiffany led the effort to provide flexibility for iron mining operations. However, because the 2013 legislation only lifted the moratorium with respect to iron mining, the restriction on sulfide mining, which includes



Takeaways:

1. Proponents of legislation that would lift the moratorium on metallic mining cite the Flambeau mine as an example of a successful operation.
2. Opponents of the legislation respond that the Flambeau mine operation was found to have violated the Clean Water Act, and therefore not a useful example.
3. In fact, while the trial court found a de minimis violation, it found “[p]laintiffs have failed to show that any violation was serious in nature” and that none of the discharges “came close to meeting or exceeding the copper ... limit ... that the DNR ha[d] imposed on defendant.”
4. The trial court also emphasized the company incurred the extra costs associated with a biofilter only because it wanted to help out a city that was struggling economically.
5. Despite the finding by the trial court of a de minimis violation, ultimately the Flambeau operation was deemed by the Seventh Circuit Court of Appeals to be “in compliance with the CWA.”

the mining of copper, has remained in place. As the use of copper in consumer items like cell phone batteries and even vehicular batteries has increased, the demand for domestic production has only become greater.

In addition to the lost economic opportunities for Wisconsin residents, the lack of a domestic supply is particularly troubling when one considers that international mining operations have been well documented as having some of the worst working conditions for employees, including child laborers as young as eight years old. According to an analysis of a 2016 report from Amnesty International and Afreewatch, “[t]he dangers to health and safety make mining one of the worst forms of child labour.”⁵ In one particularly troubling account, an orphan noted he “would spend 24 hours down in the tunnels. I arrived in the morning and would leave the following morning ... I had to relieve myself down in the tunnels.”⁶ The bill authors further pointed out that often these metals are mined in countries “with little to no environmental

regulations” and therefore mining should instead take place in a state like Wisconsin “that chooses to rigorously protect its environment.”⁷

Under the terms of the moratorium, the DNR is prohibited from issuing a permit for sulfide ore mining to an applicant unless the DNR can first determine, based on information provided by the applicant, that a mining operation in the United States or Canada has operated which “has a net acid generating potential...for at least 10 years without the pollution of groundwater or surface water from acid drainage” and a mining operation in the United States or Canada has operated which “has been closed for at least 10 years without the pollution of groundwater or surface water from acid drainage.”⁸ While critics refer to the law as a “moratorium” conservationists often refer to it as Wisconsin’s “prove it first” law. It is unique among mining regulations nationwide.⁹

Some have argued the terms of the moratorium were specifically crafted to exclude the Flambeau Mine in Ladysmith.¹⁰ The Flambeau Mine was operational from 1991 to 1997. The moratorium took effect in 1998. According to the Ladysmith City Administrator, “Wisconsin’s moratorium cleverly, but unfairly, created an artificial standard (period in operation) that does not allow for Flambeau Mine at Ladysmith to be cited as an example of a mine that had operated successfully in our state. Although successful and environmentally sound, the Flambeau Mine played out in five years rather than the required ten.”¹¹

The Legislative Response

In response to these concerns, Sen. Tiffany and Rep. Hutton introduced Senate Bill 395, the Mining for America Act. The most obvious reform is a repeal of the existing prohibition on the issuance of sulfide ore mining permits. But the proposal also tackles other perceived challenges to mining development.

The bill makes changes to the locations at which groundwater standards may apply at nonferrous metallic mining and prospecting sites, imposing a vertical limit at the point where human consumption of water is not possible. Currently, the “management zone” that applicants must consider extends vertically through all saturated geological formations. The bill no longer requires the DNR to issue wetland permits in a manner consistent with the federal Clean Water Act, instead relying on standards detailed in Wisconsin state statute. The bill creates a separate process for engaging in bulk sampling for nonferrous metallic minerals. Currently the process for obtaining a prospecting permit is similar to the process for obtaining a mining permit. The new process would simply allow for removing less than 10,000 tons of material to assess the quality and quantity of nonferrous metallic mining deposits before seeking a full mining permit. A bulk sampling plan, addressing

issues like surface erosion and revegetation, would still be required.

Finally, the bill makes several procedural improvements to the application, review, and permitting processes. With respect to the preapplication process, the bill removes the prohibition on collecting data before filing the notice of intent to apply. Currently, a person who intends to apply for a permit must notify the DNR of that intent but may not collect data intended to be used to support the application. Several changes would be made to the application process. The bill would prohibit the DNR from requiring an applicant to examine a time period under predictive modeling longer than the proposed operating period of the waste site plus 250 years. Under the financial assurance requirement, an applicant would no longer be required to create and maintain an irrevocable trust in perpetuity. The bill would create reasonable timelines which must be met by DNR during the review process, all of which could be reset and begin anew under various circumstances. The bill addresses conditions which must be included when the approval of a high capacity well is at issue. And the bill reforms the hearing and review process, prohibiting a contested hearing on a DNR decision relating to exploration and bulk sampling but allowing such hearings on a DNR decision relating to a mining or prospecting permit.

Environmental Activists Respond

As to be expected, environmental activists reacted vociferously. The John Muir Chapter of the Sierra Club issued a statement condemning the “mining giveaway bill.”¹² Among other incendiary comments, the Club noted the Flambeau Mine, one of the key examples cited by the bill’s authors of a mining operation which operated safely and successfully prior to passage of the moratorium, “was found to have violated the Clean Water Act.”¹³ Even in January, a full eight months prior to the bill’s introduction, the Club preemptively argued “[t]he court case against the Flambeau mine demonstrated that the mine did cause pollution. That’s without dispute from anyone.”¹⁴ A recent briefing paper from the Sierra Club and the Wisconsin Resources Protection Council emphasized the Flambeau Mine “was found guilty by U.S. District Judge Barbara Crabb of eleven counts of violating the Clean Water Act in 2012 by polluting Stream C.”¹⁵ This position has been parroted in numerous op-eds, most recently in Urban Milwaukee.¹⁶

Is the Club correct? Was the posterchild of copper mining in Wisconsin found to have been in violation of federal law? Like most incendiary comments, the Club’s account omits key facts that undermine the very purpose of the statement. In fact, a closer look reveals that the Flambeau Mine operated safely and that the lower court opinion, ostensibly finding a violation, was ultimately reversed by the Seventh Circuit Court of Appeals, a fact deceptively omitted by the Club.



The Ladysmith Mine

After the court addressed competing motions for summary judgment (denying the defendant's motion in its entirety),¹⁷ a bench trial was held and the court assessed penalties against the Flambeau Mining Company in a July 2012 Opinion and Order. The decision was authored by Judge Barbara Crabb of the Western District of Wisconsin. The decision includes a helpful summary of the relevant facts:

"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."¹⁸

As the court alluded to, part of the reclamation process defendant agreed to required the construction of a biofilter. Defendant graded the surface of the outlet where the buildings rested to keep most of the industrial area storm water flowing towards the former surge pond, which had been used during mining operations for overflow water destined for treatment. Defendant simply converted this pond into a biofilter by installing a non-permeable lining. The biofilter ultimately was a 0.9 acre square expanse of water enclosed by berms 10 feet high. It was designed so that water flowing out of the outlet would flow along the slope of the berm through heavy vegetation intended to filter out additional particulates.

Crabb Decision

Judge Crabb began her analysis by emphasizing that the 32 acre parcel in question only became relevant because the City of Ladysmith asked the company not to dismantle the buildings it had constructed and instead lease them (for \$10 a year) to the city for economic development.¹⁹ The area even included an equestrian

site built by the company at the request of a local riding club.²⁰

Did the company receive accolades for serving as a thoughtful community partner? No. It instead was served by a complaint from the Wisconsin Resources Protection Council and the Center for Biological Diversity. And you guessed it. They alleged the biofilter – the one constructed because the company simply agreed to retain the buildings for the benefit of the City – was a "point source" that allowed the company to discharge copper into the intermittent Stream C and from there into the Flambeau River, which is a protected body of water under the Clean Water Act.²¹ The parties agreed copper entered into the river. The company simply argued the plaintiffs failed to prove the metal came from the biofilter.

While the court ultimately found sufficient evidence to prove that copper was discharged from the biofilter, it noted "[t]he amounts were so modest that I would declare them de minimis if the Clean Water Act did not impose strict liability."²² The court emphasized that the highest amount recorded was never more than the limit imposed under the Wisconsin permit (a crucial point on appeal).²³ Put another way, while the court found the company had discharged water from the biofilter, it was always in compliance with the Wisconsin permit and were in levels so minimal the court would have ignored them but for the strict liability required by federal law. Hardly the stinging rebuke the Club makes it out to be.

In fact, the opinion goes on to essentially offer a glowing review of the mine. In imposing a "pro forma penalty", i.e. a mandatory light slap on the wrist, the court described the discharges as "slight" and the company's "exemplary efforts to protect the environment during its mining operations and reclamation effort."²⁴ Going on, it declared "[t]hese efforts deserve commendation, not penalties."²⁵

The court also emphasized the testimony of a DNR biologist, who concluded based on his monitoring that "the river did not show any significant changes in copper and zinc concentrations in response to mining activities."²⁶ The initial permits, secured in 1991 and therefore prior to the moratorium, resulted in nearly constant supervision of the mining site.²⁷ DNR employees often visited the site twice a week. While the limits for copper discharge were 42 parts per billion, the company voluntarily required that the discharge remain under 21 parts per billion.²⁸ The company never violated the toxicity limits during the mining operation.²⁹ In fact, the court pointed out "the water failed the bioassay tests because it was so clean it left nothing for organisms to live on." (emphasis added)³⁰

Even with respect to the actual reclamation process, the court pointed out that "[i]n 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."³¹ Going on, "if



[employees] 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.”³² The entire reclamation plan was ultimately reviewed and approved by the Wisconsin DNR.³³ Part of the process included annually filing reports with the DNR, which the company did.³⁴ The court noted “[w]henver the DNR recommended doing something in addition to what defendant had been planning, or in place of it, defendant followed the DNR recommendation.”³⁵

In determining liability, the court (in a close call) found circumstantial evidence that discharges from the biofilter flowed into a nearby stream considered navigable water by the Act. But it did so in a way that utterly undermines the critics’s argument that the company was a habitual polluter. Despite the court noting the company “went to great lengths to keep pollutants from getting from the biofilter into the Flambeau River,” it found excess water had likely flowed indirectly into the waterway that eventually became Stream C.³⁶

The penalty for the strict liability statute could have included up to \$32,500 a day for each violation. With eleven technical violations, the penalty in the case could have reached \$357,500. In applying the penalty standard, the court began by noting “[p]laintiffs have failed to show that any violation was serious in nature.”³⁷ Specifically, none of the water measured in the outlet discharges “came close to meeting or exceeding the copper ... limit ... that the DNR has imposed on defendant.”³⁸

With respect to any economic benefit to the company that resulted from the violation – there was none. The court emphasized “[i]t 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.”³⁹ In addition, the court noted that the agreement the company entered into actually subjected it to “far more stringent monitoring” from the DNR that it would have been subject to under the wastewater discharge permit.⁴⁰

Let that sink in for a moment. Not only was the company under no obligation to essentially donate its buildings to the city for economic development purposes, but by doing so, it was actually subjecting itself to the terms of the more stringent mining permit.

The team responsible under the terms of the mining permit had nothing but positive things to say about the company. According to testimony from the head of the DNR mining team, it “never had any dispute with defendant over any aspect of its work.”⁴¹ In fact, the record contained “no history of any violations by defendant of any kind during the 23 years the two entities have worked together.”⁴² The DNR mining team head also testified to having “a good working

relationship with defendant for the years he represented the DNR.”⁴³

In applying the penalty standard, the court made sure to detail it “took 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 acted in all respects as a good neighbor.”⁴⁴ Taking into account all of these considerations, the court set a whopping penalty of \$25 per violation, or a total of \$275.

And in a stunning rebuke, the court denied the plaintiffs’ request for attorney fees, observing “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.”⁴⁵

Seventh Circuit Reverses

While critics of the Flambeau mine have responded that the court nevertheless found a technical violation of the Clean Water Act, the jarring reality is that the Crabb decision that hit the company with a minor fine, along the way praising the company for its environmental stewardship, was ultimately overturned by the Seventh Circuit Court of Appeals for failing to properly apply the Act’s permit shield. In other words, the company did not violate the Act in any way. To say otherwise is based on either complete ignorance or sheer dishonesty ... or a combination of both.

In a decision issued by Judges Ripple, Hamilton, and Stadtmueller (sitting by designation), the Seventh Circuit emphasized that the Act “embodies Congress’s intent ‘to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution’” by empowering the EPA to “delegate its permitting and enforcement authority to individual states.”⁴⁶ This important point was waived off by plaintiffs and specifically not given appropriate weight by the trial court.

The court relied on the Clean Water Act’s permit shield provision under 33 U.S.C. § 1342(k), which details that “if a [NPDES] permit holder discharges pollutants precisely in accordance with the terms of its permit, the permit will ‘shield’ its holder from CWA liability.” The court held it could not “consistent with the requirements of due process, impose a penalty on Flambeau for complying with what Wisconsin deemed a valid WPDES permit.”⁴⁷

Looking to basic principles of due process, the Seventh Circuit emphasized it is “a cardinal rule of administrative law that a regulated party must be given fair warning of what conduct is prohibited or required.”⁴⁸ Applying this foundational standard to



the conduct of the Wisconsin DNR, which is the designated Clean Water Act designee in the state, the court concluded “Flambeau did not have notice that its permit might not be a valid WPDES permit or that it needed a permit other than the one the WDNR determined was required.”⁴⁹

This is so because as “Flambeau transitioned from active mining to reclamation, the WDNR determined that Flambeau did not require a separate, specifically termed ‘WPDES’ permit apart from its mining permit and sua sponte terminated the separate permit.”⁵⁰ Because of this, the court concluded the company could not logically bear any responsibility. It concluded “[w]e do not require a regulated party to establish that the regulating agency had actual authority to issue a facially proper, and therefore presumptively valid, regulation before complying with the agency’s command.”⁵¹ Even more directly, and basically, a “private party is entitled to rely on published regulations.”⁵²

Conclusion

In the end, Flambeau was deemed by the Seventh Circuit Court of Appeals to be “in compliance with the CWA.”⁵³ To state otherwise is inexcusable. The Flambeau mine in Ladysmith can, and should, serve as a useful example of the possibility of safe mining and strong environmental stewardship. The two policy aims are not mutually exclusive. In fact, Wisconsin is proving it can be a national economic powerhouse while at the same time preserving and protecting the environmental resources we all cherish. Critics of the proposed legislation would benefit from a close (and honest) read of the Flambeau decisions.

Endnotes

- 1 <https://docs.legis.wisconsin.gov/2017/proposals/sb395>
- 2 Wis. Stat. § 293.49(1)(a)1.-6. (available <https://docs.legis.wisconsin.gov/statutes/statutes/293.pdf>)
- 3 <http://legis.wisconsin.gov/assembly/13/hutton/media/1129/mining-for-america.pdf>
- 4 <http://www.foxbusiness.com/markets/2017/09/24/in-wisconsin-gop-pushes-to-end-sulfide-mining-moratorium.html>
- 5 <https://www.amnesty.org/en/latest/news/2016/01/Child-labour-behind-smart-phone-and-electric-car-batteries/>
- 6 Id.
- 7 <http://legis.wisconsin.gov/assembly/13/hutton/media/1129/mining-for-america.pdf>
- 8 Wis. Stat. § 293.50(2)(a) and (b) (available <https://docs.legis.wisconsin.gov/statutes/statutes/293.pdf>)
- 9 <http://www.foxbusiness.com/markets/2017/09/24/in-wisconsin-gop-pushes-to-end-sulfide-mining-moratorium.html>
- 10 <http://mediatrackers.org/wisconsin/2017/08/17/lawmakers-propose-repealing-metallic-mineral-mining-ban>
- 11 Id.
- 12 <https://sierraclub.org/wisconsin/blog/2017/08/sierra-club-condemns-senator-tiffany-s-latest-mining-give-away>
- 13 Id.
- 14 <https://www.wpr.org/northern-wisconsin-lawmaker-wants-repeal-mining-moratorium-law>
- 15 https://sierraclub.org/sites/www.sierraclub.org/files/sce-authors/u560/Briefing%20on%20WI%20Mining%20Moratorium%20Law%204%2013%2017_0.pdf
- 16 <http://urbanmilwaukee.com/2017/09/23/op-ed-flambeau-mine-was-bad-for-state/>
- 17 Wisconsin Res. Prot. Council, Ctr. For Biological Diversity v. Flambeau Min. Co., 903 F.Supp.2d 690 (W.D.Wis. 2012) (available at <http://www.will-law.org/wp-content/uploads/2017/10/wisconsin-resources-protection-council-center-for-biological-diversity-v-flambea.pdf>).
- 18 Wisconsin Res. Prot. Council, Ctr. For Biological Diversity v. Flambeau Min. Co., No. 3:11-cv-00045-bbc, at *1-2 (W.D.WI July 24, 2012) (available at <http://www.will-law.org/wp-content/uploads/2017/10/crabb.pdf>)
- 19 Id. at *1, 5.
- 20 Id. at *5.
- 21 Id. at *2.



A full-body illustration of a man standing and facing slightly to the right. He is wearing a bright red, long-sleeved button-down shirt, dark brown trousers, and tall black boots. On his head is a blue top hat with a gold band and a small gold ornament on top. He holds a pickaxe in his left hand, with the head of the pickaxe resting on the ground. His right arm is slightly extended to the side. The background is plain white.