

**Date:** August 19, 2015

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 Tom Aartila, NR Basin Supervisor, Wisconsin DNR Park Falls Service Center, Park Falls, WI 54552  
 Nancy Larson, NR Manager, Wisconsin DNR Ashland Service Center, Ashland, WI 54806  
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**From:** Laura Gauger, 1321 E. 1<sup>st</sup> St. #201, Duluth, MN 55805; [kettu2010@gmail.com](mailto:kettu2010@gmail.com)

**RE:** Proposal from Flambeau Mining Company (FMC) for an “Artificial Waterbody Connected to a Navigable Stream”

**Docket Number:** IP-NO-2015-55-01907

I am pleased to see that problems with the existing infiltration basins at the Flambeau Mine site are being addressed.

As pointed out by the Wisconsin DNR in an email sent to Sharon Kozicki and Stephen Donohue (Foth Infrastructure & Environment, Green Bay, WI) in 2013, “we clearly cannot continue responding frantically every spring when the North and East Basins fill up to capacity. This is not a viable management strategy. The basin waters may infiltrate eventually, but they are clearly having difficulty handling the spring melt volumes.”

Department correspondence confirms that repeated pumping of the basins was required in 2012, 2013 and 2014 due to the inability of the engineered infiltration basins to handle spring melt and heavy rainfall events.

While it is a positive step to be eliminating the flawed infiltration basins at the Flambeau Mine site, any new plan that proposes to use Stream C as a conduit for conveying potentially-contaminated stormwater runoff from the mine site to the Flambeau River (as does the current plan under review) needs to take into account 2 important facts regarding Stream C that the FMC/Foth proposal fails to recognize:

1. Stream C is a navigable water protected under provisions of the Clean Water Act; and
2. Stream C was recently added to the EPA’s Section 303(d) impaired waters list, mandating added protections.

Stream C is a small but precious tributary of the Flambeau River. Please see the below photo and those included at the end of this report (**Appendix 1**), and I believe you will agree. That’s why I want to make sure the tributary receives the full protections awarded to it under the Clean Water Act, and that is why I am submitting the following comments for your consideration, pursuant to the “Notice of Pending Application/Public Hearing” issued by the Department on July 24, 2015.



**Figure 1.** Stream C, downstream of the Flambeau Mine site (United States Court of Appeals for the 7<sup>th</sup> Circuit, Case: 12-2969; Doc. 30-2, p. WA-27, filed 2/6/2013; photo taken April 2004).

**BACKGROUND:** In January 2011, I was one of three plaintiffs who filed suit against Flambeau Mining Company (FMC; a wholly owned subsidiary of Rio Tinto) in the U.S. District Court for the Western District of Wisconsin for violations of the Clean Water Act at the company's Flambeau Mine near Ladysmith, Wisconsin.<sup>1</sup>

The case involved discharges of contaminated runoff from a man-made biofilter/detention basin at the site into a tributary of the Flambeau River classified as navigable by the Wisconsin DNR (Stream C). The company had never obtained a WPDES permit for regulating the discharge, and the U.S. District Court for the Western District of Wisconsin agreed with the plaintiffs that: (a) the contaminated discharge was reaching a water of the United States; and (b) the company was in violation of the Clean Water Act by virtue of not having a WPDES permit. The U.S. District Court decision, later appealed, was handed down on July 24, 2012.

Perhaps the most important piece of evidence submitted by the plaintiffs at trial was an April 2012 report issued by the Wisconsin DNR regarding Stream C<sup>2</sup> and a December 2011 recommendation from the Department that the tributary be added to the EPA's Section 303(d) Clean Water Act list of impaired waters. The EPA agreed with the Department's recommendation and subsequently added Stream C to the impaired waters list, effective April 2012. The stream was listed for copper and zinc toxicity linked to the Flambeau Mine operation. Clearly, the tributary was/is polluted, and it is because of the Flambeau Mine.

Even though the U.S. District Court ruled in the plaintiffs' favor, however, the decision was later overturned, on a technicality, by the U.S. Court of Appeals for the 7<sup>th</sup> Circuit.<sup>3</sup>

In its August 2013 ruling, the Court of Appeals did NOT disagree with the lower court's finding that FMC was discharging pollutants to a water of the United States. This, of course, would have been difficult to justify, given the fact that Stream C is now on the EPA's impaired waters list. Rather, the court focused on a very narrow issue regarding whether or not FMC could be held *accountable* for the company's failure to have the federally-mandated WPDES permit, and they ruled that the *mine permit* issued by the State of Wisconsin to FMC *shielded* the company from prosecution under the Clean Water Act (even though the state-issued permit had not placed limitations on the amount of contaminants discharged to Stream C).

In retrospect, it appears the plaintiffs lost their case because of a mistake made by the Wisconsin DNR in its administration of the Clean Water Act (i.e., the Department had never required FMC to obtain the federally-mandated WPDES permit for discharging pollutants to a water of the United States). FMC's failure to secure the permit, which would have put strict limitations on the amount of contaminants in the discharge, most certainly contributed to the impairment of Stream C. Still, the appellate court was reluctant to place any of the blame on the company itself.

One more item of relevance: While the lawsuit was playing out in court, FMC, in what appeared to be a thinly-veiled attempt to undercut the plaintiffs' case, reconfigured the problematic biofilter into an "infiltration basin," removing the pond's outlet to Stream C. The work plan, in turn, was showcased by the company in testimony offered at trial.

One of FMC's witnesses (James Hutchison, Foth Infrastructure & Environment, Green Bay, WI) assured the judge, under oath, that the new infiltration basin would be able to withstand a 100-year flood, a claim also made on page 5 of the May 2011 work plan developed by Foth.<sup>4</sup> Imagine the company's chagrin, when the basin later proved to be so ineffective that, for three years in a row, it could not even withstand Rusk County's spring melt!

This is what led to the development of the new surface water management plan currently under review – the malfunction of the infiltration basin that had been hastily constructed by FMC in 2012, when our Clean Water Act case was being litigated in federal court.

**ANALYSIS.** The new stormwater management plan proposed by FMC for the southeast corner of the Flambeau Mine site is a throw-back to the original biofilter management plan that was found, by the courts, to be discharging contaminated runoff to a water of the United States. The "new" plan calls for the runoff to be collected in shallow man-made ponds and ditches (analogous to the original biofilter and even proposed for the exact same location), allowed to overflow into the Stream C channel north of Copper Park Lane (just like the overflow from the original biofilter did) and ultimately exit the property through a large culvert (60 inches in diameter x 90-100 feet long) that is directly connected to Stream C, both north and south of Copper Park Lane (just like when the original biofilter was in place, except the culvert was 48 inches in diameter).

You can see how the "new" plan is a throw-back to the old one by comparing the schematics of the two systems shown on the following page (enlarged copies of the schematics are also included in **Appendix-2**). The first schematic, taken from the *Copper Park Business and Recreation Area Work Plan* (May 2011), shows the original biofilter system at the Flambeau Mine site, prior to conversion of the biofilter to an infiltration basin in 2012. The second schematic, taken from the *Copper Park Business and Recreation Area Work Plan Supplement* (May 2015), the plan that is the subject of the present hearing, shows the proposed "new" stormwater management plan.

<sup>1</sup> Wisconsin Resources Protection Council, Center for Biological Diversity and Laura Gauger (Plaintiffs) v. Flambeau Mining Company (Defendant); United States District Court for the Western District of Wisconsin, Case No. 11-cv-45, (2011-2014).

<sup>2</sup> Surface Water Quality Assessment of the Flambeau Mine Site, Wisconsin Department of Natural Resources, April 2012.

<sup>3</sup> Wisconsin Resources Protection Council, Center for Biological Diversity and Laura Gauger (Plaintiffs-Appellees/Cross-Appellants) v. Flambeau Mining Company (Defendant-Appellant/Cross-Appellee); United States Court of Appeals for the Seventh Circuit, Appeal No. 12-2969 and 12-3434.

<sup>4</sup> Copper Park Business and Recreation Area Work Plan, Foth, May 2011.

Figure 2. Original Biofilter System at Flambeau Mine Site (prior to conversion of Biofilter to Infiltration Basin in 2012).

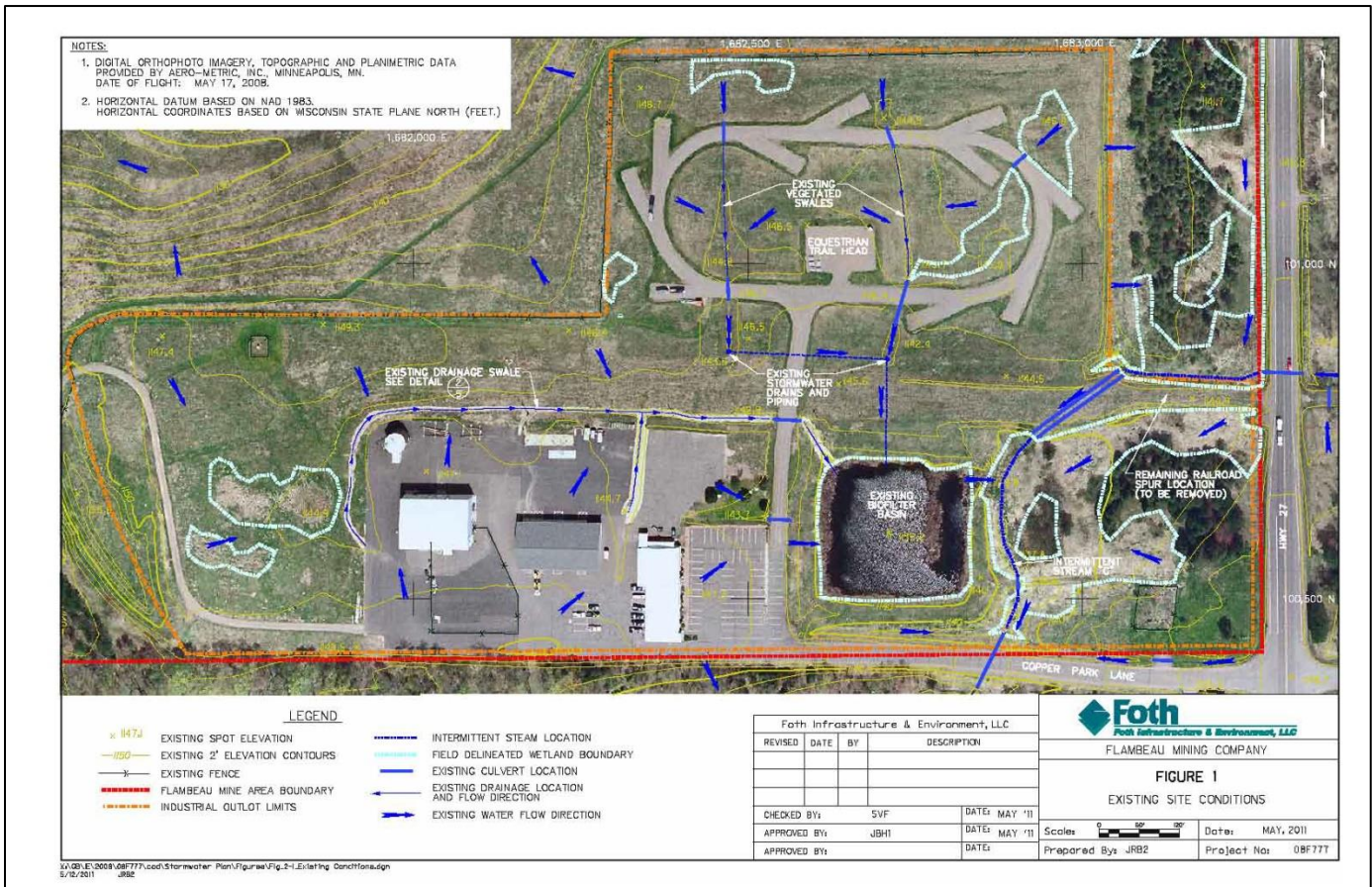
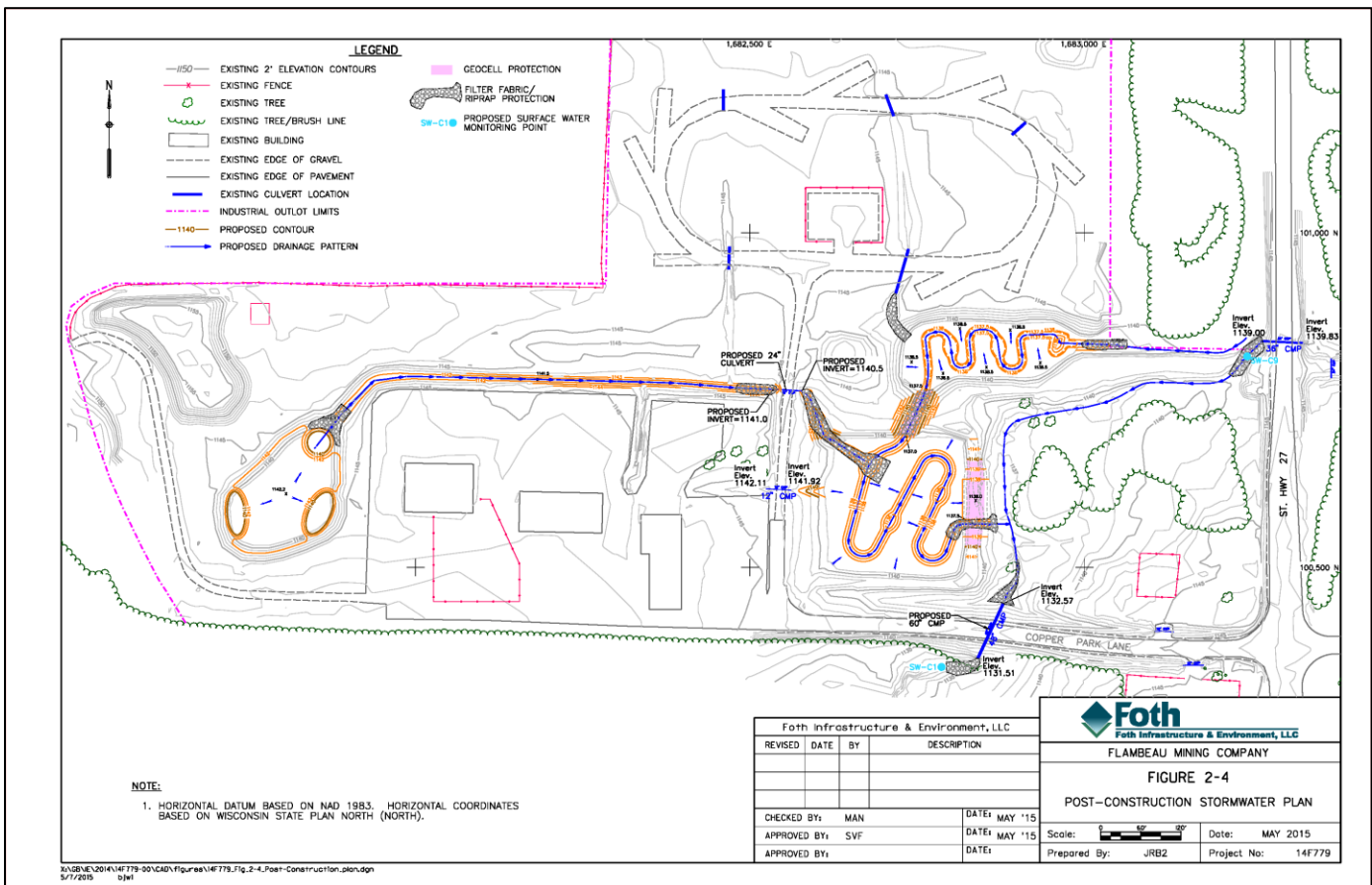


Figure 3. Proposed "New" Stormwater Management Plan for Flambeau Mine Site, May 2015.



Basically, the only change FMC has made to its original biofilter plan is in the *wording*. Instead of calling the east basin a “biofilter with a finger peninsula and outlet,” they now refer to it as a system of “shallow pools with a connecting ditch and an overflow structure/weir.” If it looks like a duck, swims like a duck, and quacks like a duck, then it’s a duck.

Since 1998, when the original biofilter plan was approved by the Department, there have been two new developments regarding Stream C (as discussed above) that render the throw-back plan unacceptable *unless* protections for the tributary guaranteed to it under the Clean Water Act are incorporated.

First off, we now have a U.S. District Court ruling on the books that established, for legal purposes, that contaminated runoff from the original biofilter at the Flambeau Mine site was indeed reaching a water of the United States, thereby requiring a Clean Water Act permit to regulate contaminant levels in the discharge. This was followed up by a U.S. Appellate Court ruling that, in effect, shifted the blame for FMC’s failure to have the required permit onto the Wisconsin DNR.

Since Foth’s own schematics show FMC’s “new” surface water management plan to have the same discharge pattern involving Stream C, the Wisconsin DNR is now in a position to correct the earlier mistake by requiring the company to secure a WPDES permit, and that is what I am asking the Department to do.

By failing to put strict limitations on the amount of pollutants discharged to Stream C, the same set of circumstances would be recreated that most certainly contributed to the impairment of Stream C to begin with – a problem well documented in the Department’s own assessment of stream conditions in 2012. <sup>2</sup>

And that leads to my next point. Unlike in 1998, when the original biofilter was built, Stream C is now on the EPA’s Section 303(d) impaired waters list, a designation that mandates added protections such as the development of TMDL standards. There are no added protections or even a mention of TMDL standards in FMC’s “new” plan.

This is something that the State of Wisconsin, in light of its delegated Clean Water Act authority, is obligated to address.

**Please note that nowhere in my comments am I asking the Wisconsin DNR to send FMC/Foth back to the drawing board to develop a new plan. Rather, I am asking the DNR to *augment* the proposed plan with safeguards guaranteed to Stream C under the Clean Water Act.** That would truly make it a win-win for all involved, including Stream C.

For the various reasons outlined above, I respectfully request the Wisconsin DNR (and EPA, if necessary) to take action on the following:

1. FMC’s new surface water management plan needs to acknowledge and address the fact that Stream C is now on the EPA’s impaired waters list, and I would ask that any approval document issued by the Wisconsin DNR for said plan also acknowledge the 303(d) listing of the stream to make sure it stays on the radar screen.

I realize that the Department is under-staffed and under-funded and that it might not be possible for staff to develop TMDL standards for Stream C in the near future. *In the interim, though, I would ask that the Department take all steps necessary to insure that any new surface water management plan impacting Stream C will not make the situation worse.* The stream is already damaged, the Wisconsin DNR and EPA have determined that the stream needs protection, and FMC must be required to work within those parameters.

2. So that the same mistake exposed in the CWA case cited above is not repeated, I am asking the Wisconsin DNR to require FMC to obtain a WPDES permit for the discharge of potentially contaminated runoff from its detention basin/culvert system to Stream C.

Even though FMC has changed the *names* of the various components of its runoff discharge system, company diagrams show no substantive difference between the original biofilter system and what is now proposed. What’s more, the runoff historically has proven to be contaminated (as proven by environmental monitoring data on record with the Department), and Stream C is in need of added protection due to its impaired status.

As mentioned at the beginning of my comments, I am glad to see that efforts are being made to improve the existing surface water management plan at the Flambeau Mine site. The infiltration basins have malfunctioned and something needs to be done, but not without taking into account the fact that Stream C, the conduit chosen by FMC to convey historically-contaminated stormwater runoff to the Flambeau River, is a water of the United States AND on EPA’s impaired waters list.

**Please use the tools at your disposal to help defend the defenseless – in this case, a small but precious tributary of the Flambeau River.**

Thank you,



Laura Gauger

# **Appendix – 1**

## **Photos of Stream C**

Source: Wisconsin Resources Protection Council, Center for Biological Diversity and Laura Gauger (Plaintiffs) v. Flambeau Mining Company (Defendant); United States Court of Appeals for the 7<sup>th</sup> Circuit, Case No. 12-2969, Document 30-2, filed February 6, 2013.

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EXHIBIT 13  
7/23/11  
Roesler  
Professional Reporters, Ltd.

WRPC

WA.1

N 45.436300° W 091.113240° 1120 ft WGS 84

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Case: 3:11-cv-00045-bbc Document #: 51-8 Filed: 11/16/11 Page 2 of 2



WA.26

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Case: 12-2969

Document: 30-2

Filed: 02/06/2013

Pages: 85

WA.27



WA.39

**EXHIBIT  
12**

4/19/2004 10:45am



Exhibit 84

FMC033332

WA.40



Exhibit 86

FMC033057

WA.41

## **Appendix – 2**

### **Original Biofilter System at Flambeau Mine Site**

(prior to conversion of Biofilter to Infiltration Basin in 2012)

Source: Copper Park Business and Recreation Area Work Plan, Foth, May 2011, Figure 1.

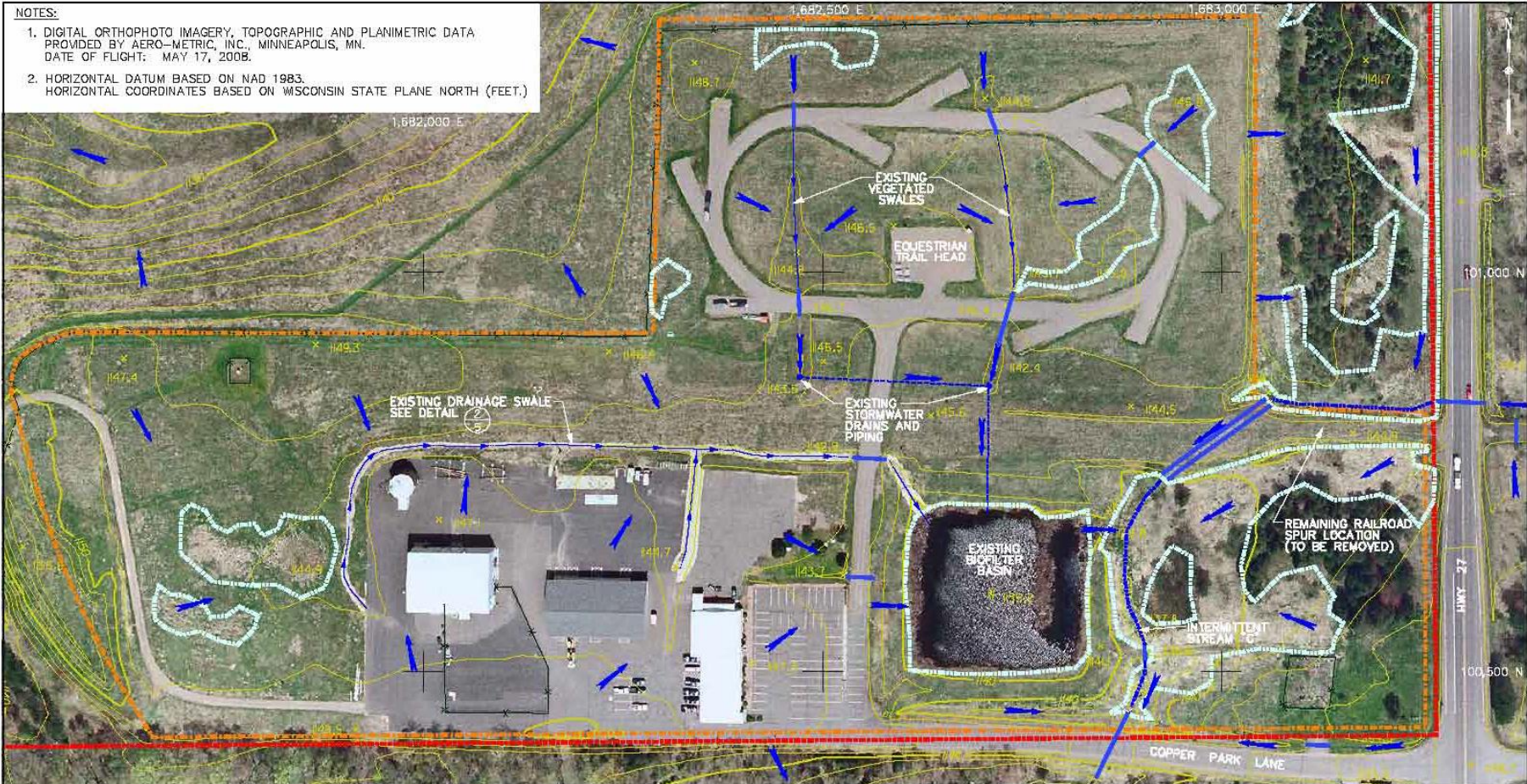
-and-

### **Proposed “New” Stormwater Plan for Flambeau Mine Site**

(plan entails elimination of Infiltration Basin and reconstruction of Biofilter System)

Source: Copper Park Business and Recreation Area Work Plan Supplement, Foth, May 2015, Figure 2-4

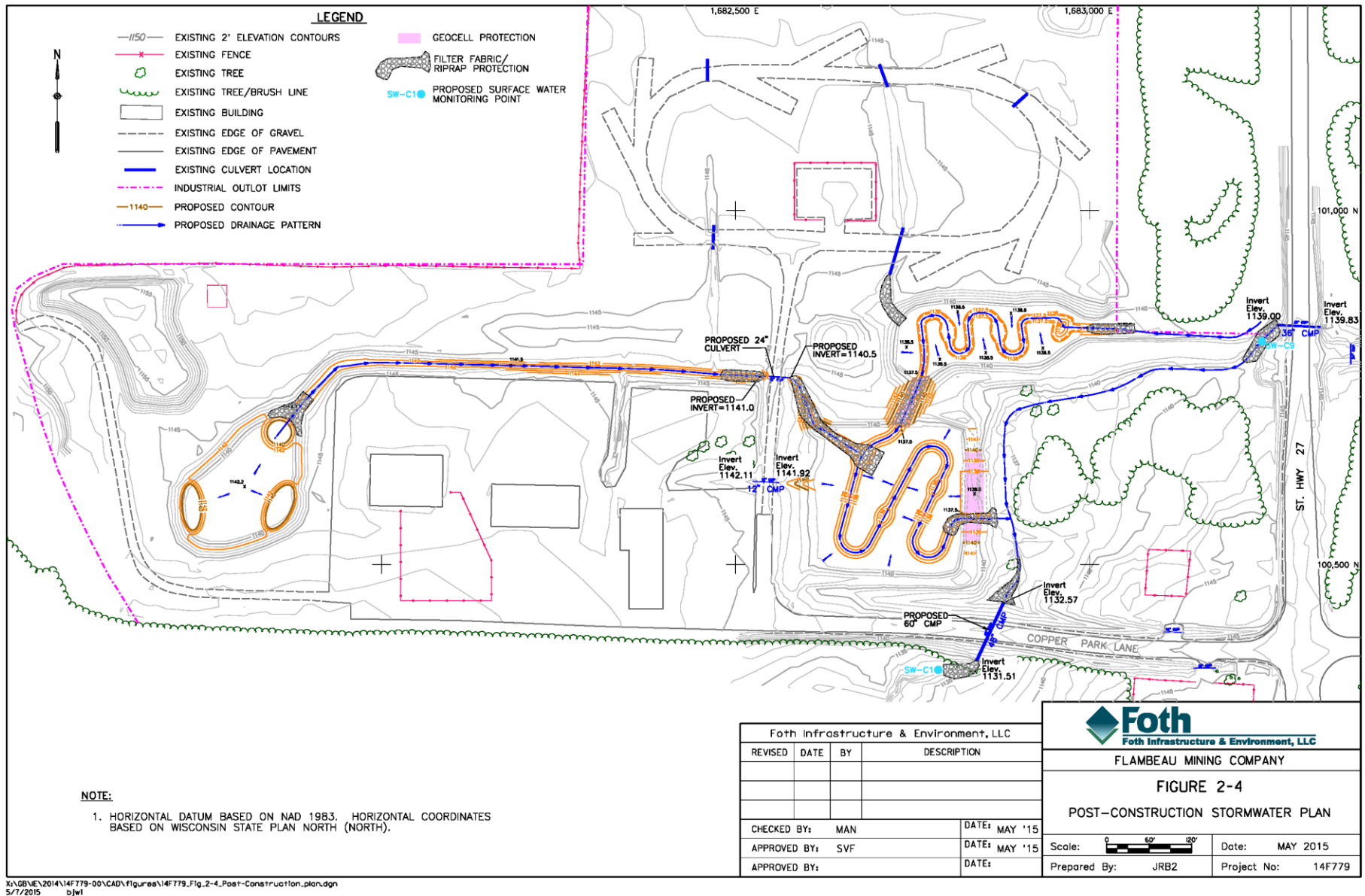
NOTES:  
 1. DIGITAL ORTHOPHOTO IMAGERY, TOPOGRAPHIC AND PLANIMETRIC DATA PROVIDED BY AERO-METRIC, INC., MINNEAPOLIS, MN. DATE OF FLIGHT: MAY 17, 2008.  
 2. HORIZONTAL DATUM BASED ON NAD 1983. HORIZONTAL COORDINATES BASED ON WISCONSIN STATE PLANE NORTH (FEET.)



LEGEND		Foth Infrastructure & Environment, LLC		Foth Infrastructure & Environment, LLC												
x 1147.1	EXISTING SPOT ELEVATION	-----	INTERMITTENT STREAM LOCATION	FLAMBEAU MINING COMPANY												
---1150---	EXISTING 2' ELEVATION CONTOURS	-----	FIELD DELINEATED WETLAND BOUNDARY	FIGURE 1												
---	EXISTING FENCE	-----	EXISTING CULVERT LOCATION	EXISTING SITE CONDITIONS												
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 5/12/2011 JRB2

**Original Biofilter System at Flambeau Mine Site (prior to conversion of Biofilter to Infiltration Basin in 2012), Copper Park Business and Recreation Area Work Plan, Foth, May 2011, Figure 1.**



Proposed "New" Stormwater Management Plan for Flambeau Mine Site, Copper Park Business and Recreation Area Work Plan Supplement, Foth, May 2015, Figure 2-4.