

MASLON**Evan A. Nelson**
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December 27, 2019

Via E-filing and hand deliveredThe Honorable John H. Guthmann
Ramsey County District Court
1470 Ramsey County Courthouse
15 Kellogg Boulevard West
St. Paul, MN 55102**Re: Ramsey County Court File No. 62-cv-19-4626**

Dear Judge Guthmann:

Pursuant to paragraph 7 of the Court's Amended Order Setting Evidentiary Hearing ("Amended Order") and Telephone Conference Tr. ("Conf. Tr.") 35:1-10 (Dec. 6, 2019), Relators move the Court to amend Relators' Exhibit List to include documents Respondent Minnesota Pollution Control Agency ("MPCA") recently provided to Relators through the Minnesota Government Data Practices Act ("DPA"), documents recently provided to Relators by the U.S. Environmental Protection Agency ("EPA") in response to a Freedom of Information Act ("FOIA") request, attachments inadvertently not included with their parent document on Relators' Exhibit List, and a response only made potentially relevant due to the listing of a document on MPCA's Exhibit List.

I. BACKGROUND**A. DPA Documents**

As discovery progressed and MPCA continued to divulge evidence showing MPCA had destroyed relevant information, Relators determined that it was relevant to know when MPCA placed a litigation hold on materials related to the PolyMet NPDES Permit. (Declaration of Elise L. Larson ("Larson Decl.") ¶ 4 (Dec. 27, 2019)). During a November 11, 2019 meet and confer, Relators asked MPCA's counsel whether MPCA had a litigation hold in place and, if so, its timing and content. (*Id.* ¶ 5). MPCA's counsel refused to provide that information to Relators. (*Id.*) In response, Relator Minnesota Center for Environmental Advocacy ("MCEA") submitted a DPA request form to MPCA on November 14, 2019. (Larson Decl. ¶ 6-7 & Ex. A), stating:

I request, pursuant to the MGDPA, Minn. Stat. s. 13.03 that the Department make available the following: any and all litigation hold notices and subsequent documents (e.g. litigation hold letters, notices, emails, memoranda, and acknowledgment of litigation hold letters, notices, emails, memoranda by MPCA staff, etc.) related to the PolyMet Northmet project, and, in particular, all litigation

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Page 2

holds and subsequent documents related to the PolyMet NPDES Permit MN0071013.

(Larson Decl. ¶ 7 & Ex. A).

On December 17, 2019, MPCA responded to MCEA's DPA Request. (*See* Larson Decl. ¶ 10 & Ex. B). MPCA's response stated: "The above is what we have in response to your request." (*Id.*) The response included a forwarded email from June 26, 2019 from Adonis Neblett to MPCA Staff. (*Id.*) The email also attached a copy of a litigation hold to Minnesota Information Technology dated November 27, 2019 indicating a litigation hold needed to be placed on data from Rebecca Flood, Ann Foss, Shannon Lotthammer, and John L. Stine. (*See* Larson Decl. ¶ 11 & Ex. C).

B. FOIA Documents

Relator WaterLegacy first sought EPA records, including notes, pertaining to meetings with MPCA regarding the PolyMet water pollution permit on March 27, 2018. (Declaration of Paula G. Maccabee ("Maccabee Decl.") ¶ 3 (Dec. 27, 2019). WaterLegacy was initially denied a fee waiver for these records and advised in April 2018 that EPA's search alone would cost from \$6,500 to \$10,000. (*Id.* ¶4). A July 2018 appeal from the fee waiver denial was granted by EPA on August 14, 2019, but the records produced as a result included no EPA notes. (*Id.* ¶¶ 4-6).

WaterLegacy filed a separate and specific FOIA request for EPA's notes from the September 25 and 26, 2018 meetings between EPA, MPCA and PolyMet on June 19, 2019. (*Id.* ¶ 7). EPA denied this FOIA request, and WaterLegacy appealed on October 18, 2019. (*Id.* ¶ 8). EPA initially lost track of the appeal, requiring its resubmission and request for expedited review. (*Id.*) On November 15, 2019, EPA granted WaterLegacy's appeal in part, and on December 18, 2019, EPA informed WaterLegacy that EPA would release segregable responsive documents. (*Id.* ¶¶ 8-9). Those documents, including EPA notes of the September 2018 meetings, were downloaded on December 23, 2019 and copies were provided to Respondents' counsel the next day. (*Id.* ¶ 9)

C. Relators' Exhibit List Submission

On December 16, 2019, Relators submitted their Exhibit List to the Court, listing MCEA's DPA request as Exhibit 760. (Larson Decl. ¶ 9). Relators' Exhibit List also listed exhibits documenting WaterLegacy's efforts under the FOIA to secure EPA's notes of the September 25 and 26, 2018 meetings between EPA, MPCA, and PolyMet. (Maccabee Decl. ¶ 10).

Relators' Exhibit List included an email to EPA regarding upcoming September 2018 meetings, but meeting agenda attachments that document what information EPA received were inadvertently left off the Exhibit List. (*Id.* ¶ 12). Relators' Exhibit List also did not include the response by the Fond du Lac Band of Lake Superior Chippewa (the "Band") to a June 12, 2019 letter from Regional Administrator Cathy Stepp. (*Id.*), since this response only became relevant when MPCA listed Ms. Stepp's letter as an exhibit. (*Id.*) Without the Band's response, Ms. Stepp's characterization of EPA's release of PolyMet permit comments to the Band is incomplete. (*Id.* ¶ 13).

II. ANALYSIS

In the Amended Order Setting Evidentiary Hearing, the Court scheduled an Exhibit List deadline for December 9, 2019. (Am. Order ¶ 7). The Court provided that "[u]nlisted exhibits shall not be

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admitted unless the court determines that good cause existed for failing to disclose the exhibit.” (*Id.* (emphasis omitted)). At the December 6, 2019 conference, this Court moved the Exhibit List deadline to December 16, 2019. (Conf. Tr. 35:1-10).

The Court’s discussion at the conference clearly establishes that Relators have good cause to amend their Exhibit List to include MPCA’s response to MCEA’s November 14, 2019 DPA request and EPA’s response to WaterLegacy’s June 19, 2019 FOIA request. At the December 6, 2019 conference, the Court specifically stated that good cause exist and post deadline use of a document justified, even if opposing counsel objected, where Relators had no control of a document in the possession of the government, sought to procure the document in a timely fashion, and received it for the first time after the December 16, 2019 deadline. (Conf. Tr. 36:14-25).¹

As explained above and in the attached declarations, the documents MCEA received in response to its DPA request and the documents WaterLegacy received in response to its FOIA request fall precisely into this exception the Court described. Relators would be prejudiced without the ability to use these documents at the hearing. (Larson Decl. ¶ 13; Maccabee Decl. ¶ 11).

For the remaining documents, Relators meet the good cause standard for allowing such a slight modification to the pretrial scheduling order. *See Cotroneo v. Pilney*, 343 N.W.2d 645, 649 (Minn. 1984) (stating that the degree to prejudice to the parties, the impact of the modification at the state of litigation and the degree of willfulness, bad faith or inexcusable neglect are the factors used to determine good cause to amend a scheduling order). Relators will suffer prejudice if the September 25 and 26, 2018 agendas provided to EPA and the Band’s response to the letter from Regional Administrator Stepp were not allowed as exhibits because they are relevant and important to this matter. (Maccabee Decl. ¶¶ 12-13). Further, the Band’s response letter only became relevant after Relators reviewed MPCA’s exhibit list. (*Id.*)

Respondents MPCA and PolyMet will suffer no prejudice from the use of these documents as hearing exhibits. The agenda documents provided to EPA and the Band’s response to Ms. Stepp’s letter were supplied to Respondents in discovery. Further, allowing Relators add a handful of documents to the Exhibit List will in no way modify the litigation. Finally, Relators submit this request within two weeks after the Exhibit List deadline and in the middle of numerous deadlines and holidays. Relators have shown no willfulness, bad faith, or inexcusable neglect in requesting post-deadline use of these documents.

For these reasons, Relators respectfully request this Court find Relators have shown good cause to add the documents provided in Exhibits A through F to Relators’ Exhibit List so that they may be used as hearing exhibits.

[signature blocks on following page]

¹ Relators sent Counsel a meet-and-confer email on December 23, 2019, but received no response either objecting to or supporting Relators’ Informal Motion to Amend the Exhibit List.

December 27, 2019

Page 4

Respectfully submitted,

MASLON LLP/s/ Eyan A. Nelson

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 Wilderness, and Minnesota Center for
 Environmental Advocacy*

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 Email: mmurdock@sonosky.com

*Attorneys for Relators Fond du Lac Band of
 Lake Superior Chippewa*

Enclosures

cc: Counsel of Record (via Odyssey)



520 Lafayette Road North
St. Paul, MN 55155-4194

Information request form

Records Management

Doc Type: Information Request Form

Prior to submitting this form, please verify that the information you are requesting is not already available through the following Minnesota Pollution Control Agency (MPCA) online link: <https://www.pca.state.mn.us/environmental-data>.

Use this form with Internet Explorer Web browser or Adobe Acrobat Reader to request information from the MPCA. If you have questions, please contact the MPCA Records Management Intake/Triage staff at recordsmanagementintaketriage.pca@state.mn.us or call 651-757-2728 or 1-844-828-0942.

1. Please fill out **one form for each Information Request**. Up to 10 requests processed per day, per requestor.
2. To ensure you are using the most updated request form, please go to the MPCA website for every new request.
3. You will receive an email response with the name of your file manager once your request is assigned, and then again when it is completed.

Requester information

(If a requester chooses not to give any identifying information, the MPCA will provide him/her with contact information so that he/she will be able to check on the status of his/her request. However, if the agency file manager handling the request has questions about it but is unable to contact the requester for clarification, this may result in a delay in processing the request.)

Date: 11/14/2019

*Requester name: Eric Lindberg

*Phone number: (651) 287-4868

*Requester email address: elindberg@mncenter.org

*Organization name: Minnesota Center for Environmental Advocacy

*Organization or requester billing address: 1919 University Ave W #515, St Paul, MN 55104
(Address, Street, City, State, Zip)

Site/Facility information

(If you are requesting information about a specific site or facility, all the fields marked with an asterisk(*) are required to be filled in before the form will submit. If no site/facility is associated with this request, then you may enter N/A. Please note that failure to include required information will delay your request and may increase your cost.)

*Site/Facility name: NorthMet Project

Previous site/
facility name: N/A

*Site address/location: 6500 County Road 666

*City: Hoyt Lakes

*Zip code: 55750

*County: St. Louis

Program(s): Water Quality

Agency Interest ID number: 226251 (Must also select one area of interest below)

*MPCA Preferred ID or Site ID from WIMN (e.g., leak #, permit #, haz waste #): MN0071013

Current public notice item: Yes No

*Area of interest (check one box only per request form)

- | | | | |
|--|---|---|--|
| <input type="checkbox"/> Air quality | <input type="checkbox"/> Rules, Standards | <input type="checkbox"/> Feedlots | <input type="checkbox"/> Unpermitted Landfill |
| <input type="checkbox"/> Closed Landfill | <input type="checkbox"/> Site Assessment | <input type="checkbox"/> Hazardous waste | <input type="checkbox"/> Voluntary Investigation and Cleanup (VIC) |
| <input type="checkbox"/> Contracts | <input type="checkbox"/> Solid Waste | <input type="checkbox"/> Leaks, tanks, spills | <input type="checkbox"/> Wastewater |
| <input type="checkbox"/> Superfund | <input type="checkbox"/> SSTS | <input type="checkbox"/> Stormwater | <input checked="" type="checkbox"/> Water Quality |

Information requested - Describe the information that you need (be as specific as you can):

I request, pursuant to the MGDPA, Minn. Stat. s. 13.03 that the Department make available the following: any and all litigation hold notices and subsequent documents (e.g. litigation hold letters, notices, emails, memoranda, and acknowledgment of litigation hold letters, notices, emails, memoranda by MPCA staff, etc.) related to the PolyMet Northmet project, and, in particular, all litigation holds and subsequent documents related to the PolyMet NPDES Permit MN0071013.

If this request or any part of it is denied, please provide the specific authority for such a denial as required by Minn. Stat s. 13.03, subd. 3(f). I am requesting access to these documents as they are kept by the Department and will determine after such review which, if any, I would like copied. If some of the documents are only kept electronically (e.g., emails), I am willing to review the electronic versions.

Yes - I acknowledge and agree by submitting this Information request form that I may be subject to costs as per the current costs schedule. (The costs schedule can be found on the Estimate for copy services form. This form can be found on the MPCA Information Requests website at <https://www.pca.state.mn.us/about-mpca/information-requests>.)
I also agree to pay all costs within 30 days of the invoice date.

Submit

Reset



Eric Lindberg <elindberg@mncenter.org>

PolyMet Legal Hold notice request

1 message

Richards, Leonard (MPCA) <leonard.richards@state.mn.us>
To: Eric Lindberg <elindberg@mncenter.org>

Tue, Dec 17, 2019 at 9:39 AM

Hi Eric,

The above is what we have in response to your request.

Sincerely,

Lenny Richards

Minnesota Pollution Control Agency (MPCA)

520 Lafayette Road | St Paul, MN | 55155

Voice (651) 757-2667

leonard.richards@state.mn.us*Our mission is to protect and improve the environment and human health.*

NOTICE: This email (including attachments) is covered by the Electronic Communications Privacy Act, 18 U.S.C. 2510-2521. This email may be confidential and may be legally privileged. If you are not the intended recipient, you are hereby notified that any retention, dissemination, distribution, or copying of this communication is strictly prohibited. Please reply back to the sender that you have received this message in error, then delete it. Thank you.

----- Forwarded message -----

From: "Neblett, Adonis (MPCA)" <adonis.neblett@state.mn.us>

To: "#MPCA_All Staff-MPCA Only" <AllStaff-MPCAOnly.MPCA@state.mn.us>

Cc: "Courneya, Celeste (MPCA)" <celeste.courneya@state.mn.us>, "Malec, Chris (MPCA)" <chris.malec@state.mn.us>, "Fredrickson, Leslie (MPCA)" <leslie.fredrickson@state.mn.us>, "Neblett, Adonis (MPCA)" <adonis.neblett@state.mn.us>

Bcc:

Date: Wed, 26 Jun 2019 01:03:50 +0000

Subject: Poly Met Mining, Inc.-- Legal Hold

Legal Hold
Poly Met Mining, Inc.

RELATORS_0065952

All staff:

The Office of Legislative Audits has informed Commissioner Bishop that it is initiating a review to examine concerns related to the approval of the NPDES permit issued to Poly Met Mining, Inc. ("PolyMet") for its NorthMet Project. The MPCA has also received a number of data requests seeking data related to the NPDES permit for the NorthMet Project. In order to properly assist with the review and respond to these data requests, all MPCA employees must immediately preserve all agency data associated with the NPDES permit for PolyMet's NorthMet Project. This hold encompasses all data from any agency program that are related to the company's NPDES permit and to the property located at 6500 County Road 666 in Hoyt Lakes, Minnesota 55750 (with Tempo agency interest identification number 213111).

The preservation of data includes all documentation existing in both paper and electronic form. This includes: calendar entries, databases, e-mails/attachments, facsimiles, letters, maps, memoranda, meeting minutes, photographs, reports, spreadsheets, telephone logs, voice mails, work processing documents, etc., whether stored on a C-drive, D-drive, H-drive, X-drive, camera, cell phone, compact disc, digital versatile, laptop, microfiche, microfilm, mobile storage devices, OnBase, Outlook, slide, video tape, voice mail, etc.

Staff members must not delete any related data from this moment forward. Data should be preserved in their existing state. If you are in doubt as to whether certain data should be preserved, retain these data.

It is not necessary to print copies of data that are stored electronically, but it is necessary to preserve such data.

If you have deleted PolyMet-related e-mails within the last 30 days, you must recover them. If these e-mails are still contained in your "Deleted Items" folder, retrieve them and place them back in your "Inbox" or in a folder within your "Inbox" that you create to hold PolyMet-related e-mails. If your "Deleted Items" folder is empty, you must recover your deleted e-mails and retrieve the ones related to the Poly Met Mining, Inc. legal hold. To do this, click on "Deleted Items" in your Microsoft Outlook account. Once in the "Deleted Items" folder, click on "Recover Deleted Items

from Server.” Doing this will recover the last thirty days of deleted e-mails. Retrieve the Poly Met Mining, Inc. legal hold-related e-mails and store them in your “Inbox” or in a folder within your “Inbox” that you create to hold these Poly Met Mining, Inc. legal hold-related e-mails.

If you know of staff members who have or are likely to have documents and data relevant to this matter, please provide their names to Chris Malec. Staff members who are identified will receive further information regarding how to manage the data related to this legal hold in a future communication.

If you have any questions or concerns regarding the preservation of these Poly Met Mining, Inc.-related data, please contact the agency’s Records Management supervisor, Celeste Courneya at 651-757-2197.

Thank you,

Adonis A. Neblett


General Counsel

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3 attachments

 **PENDING-Information Request Form - 11-19-2019.pdf**
104K

 **Poly Met Mining, Inc.-- Legal Hold.eml**
16K

 **1440_001.pdf**
45K



Eric Lindberg <elindberg@mncenter.org>

PolyMet Legal Hold notice request

1 message

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To: Eric Lindberg <elindberg@mncenter.org>

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To: "#MPCA_All Staff-MPCA Only" <AllStaff-MPCAOnly.MPCA@state.mn.us>

Cc: "Courneya, Celeste (MPCA)" <celeste.courneya@state.mn.us>, "Malec, Chris (MPCA)" <chris.malec@state.mn.us>, "Fredrickson, Leslie (MPCA)" <leslie.fredrickson@state.mn.us>, "Neblett, Adonis (MPCA)" <adonis.neblett@state.mn.us>

Bcc:

Date: Wed, 26 Jun 2019 01:03:50 +0000

Subject: Poly Met Mining, Inc.-- Legal Hold

Legal Hold
Poly Met Mining, Inc.

RELATORS_0065952

All staff:

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If you know of staff members who have or are likely to have documents and data relevant to this matter, please provide their names to Chris Malec. Staff members who are identified will receive further information regarding how to manage the data related to this legal hold in a future communication.

If you have any questions or concerns regarding the preservation of these Poly Met Mining, Inc.-related data, please contact the agency’s Records Management supervisor, Celeste Courneya at 651-757-2197.

Thank you,

Adonis A. Neblett


General Counsel

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3 attachments

 **PENDING-Information Request Form - 11-19-2019.pdf**
104K

 **Poly Met Mining, Inc.-- Legal Hold.eml**
16K

 **1440_001.pdf**
45K

General Information

Request Status: Completed (Successful)
ID: REQ000001082841
Title: Agency Data and Legal Request
Submit Date: 11/27/2019 3:11:59 PM
Actual Completion Date: 12/10/2019 12:03:06 PM
Requested By: Adonis Neblett
Requested For: Adonis Neblett
Company: Pollution Control Agency
Phone: 651 757-2791
Email: adonis.neblett@state.mn.us

Question Responses

What is the urgency of this request?: Low

Check all that apply

:

- (A) E-mail Box:
- (B) Telecom (voicemail):
- (C) Telecom (call records):
- (D) Access to a drive:
- (E) Access to an e-mail box:
- (F) E-mail legal hold: Yes
- (G) Out of Office Message:
- (H) Other Electronic Legal Hold: Yes
- List what you would like preserved: computer drives
- (I) Investigation:
- (J) Ongoing Journaling:
- (K) Implement or Remove an E-mail Retention Policy:
- (L) International Travel Notification:
- (M) Mobile Device Records:
- (X) Request for something else: Yes

Additional details that MNIT should know in order to process this request: We need to get a legal hold in place for data contained in the outlook accounts, computer/hard-drives, and backups for the following 4 individuals: Rebecca Flood, Ann Foss, Shannon Lotthammer, and John L. Stine. There may not be data for one or more of these individuals in all data storage sources but if we have stored data for them we want to preserve that. Andre Champagne has knowledge of the nature of this hold request and the form of data storage.

I authorize MNIT to provide the above requested data to a specific individual:

Once MNIT has provided the requested data to an authorized employee or the requested delegate of the requesting agency, the requesting agency assumes all responsibility for the data.

:



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

DEC 18 2019

WP-16J

Ms. Paula Maccabee, Esq.
Water Legacy
1961 Selby Avenue
Saint Paul, Minnesota 55104

Re: Freedom of Information Act Appeal No. EPA-HQ-2020-000877 (Request No. EPA-R5-2019-006658)

Dear Ms. Maccabee:

This letter responds to your Freedom of Information Act (FOIA) request dated June 19, 2019. You requested from the U.S. Environmental Protection Agency notes from a specific set of meetings on September 25, 2018 and September 26, 2018. The Agency identified 48 pages of responsive records and withheld the records in full pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5) in a final determination issued July 30, 2019. You administratively appealed this decision, and the appeal was partially granted on November 15, 2019. Since that time, the Agency has re-evaluated the 48 pages of responsive records and is producing some previously withheld information today as a partial grant/partial denial of your FOIA request.

The 38 pages of notes from the custodians Krista McKim, Linda Holst, Kevin Pierard, and Candice Bauer are being produced. An additional 14 pages of notes from Attorney Advisor Barbara Wester are withheld in full pursuant to FOIA Exemption 5, the Attorney Work Product Privilege. These notes contain several pages of one or a few sentences each, that were combined as an estimated ten pages of material in the original FOIA response.

An itemized list of the withheld records, along with the basis for withholding and an estimate of the volume of withheld records, is provided in Enclosure B to this letter.

The Agency would like to provide some context for the records that are produced today. These are the personal notes of individual staff. The staff taking these notes did so for their personal use, and for that reason, some notes may be disorganized, unpolished, or otherwise reflect that the staff did not intend that the notes would be used by others. While the Agency does not necessarily take the position that these personal notes are subject to the FOIA, they are being produced today in the interest of transparency.

EPA will be providing the records responsive to your request through the FOIA Online system. An index of the records we are releasing is included with this letter as Enclosure A. We are unable to provide you with other records, or portions of other records, responsive to your request because we have determined that those records are exempt from mandatory disclosure under Exemption 5 of 5 U.S.C. §§ 552(b)(5). Exemption 5, 5 U.S.C. § 552(b)(5), protects inter- or

intra-agency documents that would not be available by law to a party in litigation with the agency, which includes the attorney/client, attorney work product and deliberative process privilege(s) recognized under common law. An itemized list of the withheld material, along with the bases for withholding and an estimate of the volume of withheld materials, is provided, as noted, in Enclosure B.

You will receive a "Final Disposition" email from the Region 5 FOIA Office. An invoice will be attached to the email if there are any applicable charges for search, review, and duplication of responsive records. If no invoice is attached to the email, then no charge is applicable for processing your request.


You can access the records responsive to your request by doing the following

1. Wait for the Final Disposition email to arrive;
2. Go to <https://foiaonline.gov/foiaonline/action/public/search>;
3. Enter the tracking number in the box next to "Keyword Search" and click Go;
4. A list of the records will come up. To access a record, click on the "+" under the Detail column, then click on the Title.

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals *received* after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (301) 837-1996 or (877) 684-6448; or fax, (301) 837-0348.

If you have questions regarding this response please contact Mark Ackerman, at (312) 353-4145 or ackerman.mark@epa.gov; or Barbara Wester at (312) 353-8514 or wester.barbara@epa.gov.

Sincerely,



Thomas R. Short Jr.
Acting Director, Water Division

Enclosures

Enclosure A

U.S. Environmental Protection Agency
FOIA No. EPA-R5-2019-006658

1. EPA Region 5 is withholding 3 pages of notes from the September 25, 2018 and September 26, 2018 meetings from Krista McKim. Exemption 5, deliberative process is the basis for withholding.
2. EPA Region 5 is withholding 10 pages of notes from the September 25, 2018 and September 26, 2018 meetings from Barbara Wester. Exemption 5, deliberative process is the basis for withholding.
3. EPA Region 5 is withholding 8 pages of notes from the September 26, 2018 meeting from Linda Holst. Exemption 5, deliberative process is the basis for withholding.
4. EPA Region 5 is withholding 7 pages of notes from the September 25, 2018 and September 26, 2018 meetings from Kevin Pierard. Exemption 5, deliberative process is the basis for withholding.
5. EPA Region 5 is withholding 20 pages of notes from the September 25, 2018 and September 26, 2018 meetings from Candice Bauer. Exemption 5, deliberative process is the basis for withholding.

Enclosure A

EPA Region 5 Water Division and Office of Regional Counsel

Index of released records for FOIA Appeal # EPA-HQ-2020-000877 (Request No. EPA-R5-2019-006658)

Title	Author	To	From	Date	FOIA Exemption	Reason for Redaction	Length (pages)
"Meeting in st paul, mpca polymet"	Krista Mckim	Employee's personal file	N/A	September 25 - 26, 2018	None Asserted	No Redactions	3 pages
"US EPA Region 5/MPCA Meeting Agenda. . . ."	Linda Holst	Employee's personal file	N/A	September 26, 2018	None Asserted	No Redactions	8 pages + 1 page for agenda
"Polymet mtg. w/PCA, 9.25 + 26 2018"	Kevin Pierard	Employee's personal file	N/A	September 25 - 26, 2018	None Asserted	No Redactions	7 pages
"9/25/18"	Candice Bauer	Employee's personal file	N/A	September 25 - 26, 2018	None Asserted	No Redactions	20 pages

Enclosure B

EPA Region 5 Water Division and Office of Regional Counsel

Index of withheld records for FOIA Appeal # EPA-HQ-2020-000877 (Request No. EPA-R5-2019-006658)

Title	Author	To	From	Date	FOIA Exemption	Reason for Withholding	Size
"Polymet meeting with mpeca and co."	Barbara L. Wester	Attorney's personal file	N/A	9/25-9/26	Exemption 5	Attorney Work Product	14 pages

BAUER

- 1 -

9/25/18

~~Polymet~~
Don

Christie

Dennis Don

Jeff Udd - PN March 2018
 Resp to Courts since then
 a cont. case hearing req.

Treatment system

- ① Mine H₂O treat bef tailings basin
- ② Seepage from tailing basin

Iron Solids pretreat

Greensand filter

↳ Nanofiltrat

↳ RO filtration

Discharge $\approx 20\%$ for return flow
 to streams \rightarrow treat only enough
 as is req of augmentation

FEIS model \rightarrow GoldSim mass balanceDesign model \rightarrow Gold flow monitoring

↳

\Rightarrow would run nanofiltrat most of time
 if it cd be RO concentrate w/ some

~~Polymet~~

\Rightarrow pilot tested both NF & RO
 w/ some \uparrow SO₄ waters from Pt 5

⇒ GPM - 2,000 1-7 yrs (aft 2 yrs const)
 in year 8 flow increases & up to max
 of 4000 gpm in yrs 9-10
 & in yr 8/9 to v to get H₂O out
 of ponds bc the l b fall
 - most water is coming from mine
 after first several years
 (from Colby Lk @ beginning)

Concentrations
 - 600 ug/L Cu in yr 1-7
 600 mg/L Sulf in yr 8
 ↳ first flush from legacy

100^{ug/L} to 200 mg/L @ closure
 Cu Sulf
 when + less infiltrat
 due to cap

Greensand - pilot test results
 of 2 yrs w/ spiked samples
 Cu 94.19% rem efficiency
 Most & greater in 85% rem
 As Fe Mn
 Co Pb Ni
 Zn

- 3 -

RO removal
 99% sulf removal (99.3-99.5)
 97-100% of other constituents
 of metals for before
 ↳ conservative estimates
 NF → can be as low as 70% removal
 of some constituents but usually
 in 90% range

n up 1 - almost all metals
 n influent conc & below wgs

n up 10 - some are higher than wgs

	influent conc	target
Arsenic	24.5	10
Cobalt	24.5	5
Copp	395	9.3
Lead	31.7	3.2
Nickel	344	52
hardness	585	100
Sulfate	337	10

Hg %o target < 77%

Hard %	98.8
Sulf	98.4
Hard	59%
Boron	42%
Copper	9.3%

Modular system

if v addl flow

C use comb o NF + RO

Mercury

- filtrals through taconite tailings
expected to remv Hg to 1.0 mg/L

- ^{some} bench testing o taconite tailing

- Greensand filtrals

Dome

- Membr Sep

20-99.9% v b reported

Each RO

influent up to 2.5 mg/L
below 0.5 in effluent

Humboldt up to 4.0 mg/L

but conc o effluent \approx 0.5 mg/L

lime granular

Calcrete used @ end

↪ spec of water trtmt
has low Al conc.

NF of Hg → GE ^{monitor} does not v data
on Hg removal

5-

LTV & Polymet tails 2007-2008
Appendix to RS 2019 by NTS

used conc from modeling as singular
value so did not do RP using TSD
aprc ^{typical} → looked @

for 1st permit → MPCA does not typically
put in limits of WQS so long as
facility is built to remove to meet WQS
- Long Prairie example of Hg

Krista - tr & lots of uncertainty
in mine water quality & permit
so isn't this diff

Kyzer - memb techn & proven &
used all over

Krista - tes plants v RO & limits
in permit

MDEQ includes limits if the
present (Humboldt/Copperwood/Betty)

Jeff ^{did} → to & expected quality
& so to struggle to find RP
& to monitor in permit
→ not just Polymet - to need
evidence to make initial decs w/o
monitoring

Richard

- Yr 10 table showed
900 nitrate target \rightarrow 10 mg/L sulf
- permit req nitrate system to
built in accordance w/ application

Kevin

It's not usually way EPA permits
bc we don't tell people how
to build

John Kyser

MPLA ^{wants to} consistently ~~to include~~ ~~any~~
permit

Richard

he did also box into nitrate
bc couldn't deviate too far
from EIS

Brad

- he wd v to go back to EIS
if change too much
- ~~source~~ - also concerned abt anti-backslidg
"there wd not be new info mail"
- Lawyer - threshold in permit did not
consider ROE & beginning so not applies to
apples

-7-
*Eads was closely ~~and~~ litigated

- Jeff Udd:

- lawyer

antibacksliding is an issue
th is only narrow route
to loosening limits in to
future

- Krista → ~~th~~ is new information ^{from} ~~actual~~ _{non-date}

- Barbara

↳ don't believe in antibacksliding
↳ as big a concern

- not a duality

- Brad says "litigated" if permit
backslid

- Mike Schmidt

↳ allowance of backsliding is
new information except changes
to WQS so we are stuck

- Barbara

did EIS single out 10mg/L Subj
WQS

Richard

10mg/L >

ask ^{him} _{to} Rob

-8-
Barbara
Reports - included in permit
so what is operable of enforcement

Jeff
cant anticipate everything so
has ability to be "living document"
- now say I follow permit modified
w/ MPCA review & approval of
AM - will determine whether
major mod consistent w/
State rules
- Richard 7 or 8 parts of permit

Krista
↳ would to req correctv act?

Example

Krista 6.10.16-18

No disCg to surf H₂O

- what is correctv act

Richard to be taken if not good

Compreh Oporal Report

we consider any correctv act
to be adaptive man.

Barbara
is proactive

AM = correctv act is offer to solve problem

- 9 -

- discuss whether Hg from trench
 const. wd. be digged & viol WQS
 ↳ the v to covered under GP of
 SW
- Krusta
 also do we v defend o GP ^{SW} coverage
 vs indiv permit coverage?
 until operat o WQTS
 + BMPs v demonstrated
- Old ^{cliffs} permit vs New permit coverage
 Permit Area Handout
- MPCA said to adding clarification
 to prevent aluminum sources
 off line
 & to adding chron mining
 TBGLs

example of limits to WQBELs
 to removed if to fund to the v
 no RP
 ↳ I'm sure we do. Ohio? if way to
 Barbara - can we cite to permit med reqs?

~~changes to permit~~ Wed Sep 20 ^{MTG w/} ~~Blawie~~
Clarify no disley req in permit

- mine site no direct disley
to surf H₂O

- plant
no direct disley to surf
H₂O

- ^{Align} Mon locations
bed rock

surf H₂O along corridor
Δ in couple locals

- Limit

TV_c = 1 is included
extended to quarterly of
life of permit:

^{just} bef to disley → Corridor & footprint.

- Reinserted Hg min strategy
↳ internal processes

- req constr as proposed in ^{Oct 2017} ~~capital~~
+ PE identified
+ ~~TA~~ constr meets design performance
+ OMS manual bell control

- to > more prescriptive to normal
 the v disc its concept
 → submit of gas built diagrams
- keep captr system
 - maintain inward gradient
 - v to monitor more/plan to fix ⊕ & investy cause
 - 7 days to restore inward gradient
 - worst case → would not migrate through barrier
 - no mon freq unless problem
 - prohibd f add OAI
 - reduced notifiac time of reporting o problems
 - ^{proposed} AM subject to review & approval
 & subject to review as to whetr
 to > • major modifacs f
 UN & w

- Equalized ponds - need to be part of perform planning w/ PE cert.

- HRF

- asmt has to be done by PE
- HRF liner plan must discuss adeq of existing & proposed monitoring
- have not done site investigation yet
- will rip out concentrate until it build its

- Monitoring list

added
total/dissolved lead
↳ sulfate ↳ GW

- Add TBEL of dis iron for

- dissolved Hg mon added for infl & eff of trtmt system

Not changing

- allowed design (flow)

- Sewage trtmt

of diked & intervening trtmt so not necessary

Barbara - still v. quest's abt. fed
enforceability bc of
internal outfall

if it were a WQBEL
we wdn't b having to
discuss

but to s. lit risk
& to s. big issue of us

Linda - @ we discuss to w/
ABC

Barbara - we c do it's

Krista
What does Polymet v to do if
to decide to change design?

~~Issue~~

req of permit mod? major -> no
minor

does language explain it?

Richard - AM - wd v to notify MPCA

Richard - may need to clarify to
while building it wd need to
do it same as above?

Issue - core. Topical says l dis up to wqc/RS

Mark - est limit w/ lane to will drop
limit. Based upon real date -> Wisconsin

Mark - how do we fit in
+ much resonance with

Shannon - fundamental dif in approach
do we need to agree on a
good prohibitions fix ts of food
certifiability standpoint

Mark - step toward middle ground
devil in detail

- to vendors footnote performance
to say cannot guarantee

Richard - to look @ ts closely

Kevin

Hg/As - wd MPCA
consider operating limits
of other parameters

at least those where conc = infl & get to
Hg - conc WQC plus Hg
we need tm to do smtg more

Jeff → to discuss ts w/ company

Krista - EIS expects dig to
SW fm GW pathway
so how did he prohibit
ts

Richard - deal w/ ts thru small controls

Krista - monitoring array of ts permit
mdl/issuance to prevent dists

Richard - and report will document
to of "early warning"

if its a plume - to wd adapt
man & if tes is not successful
to wd need permit coverage

Kista - so is disclg prohibited

Richard - no to > not prohibited

Kista

Richard General asmt & spall
extent

ES talked abt to
pump out techn or feasible
enhance lining / cover systems

Kevin - suggested to upgrade
liners but he didnt go to but
to a techn.

up to 45 days
 but wd like it
 - was in conversation
 RG/H/O/C
 KFKREP
 this new proposed permit
 15d new permit
 EPA Rest period
 Permitting a ES
 DUTL Dec 10 Oct
 3rd wk - Oct
 not yet problem

- Permit issuance
- H₂O operating limit - to feel uncomfortable since cone

401 same timeline

Annual avg of flow - no change
Richard
to Red Dog mine
booked
to calculate
2.4 #
↳ v numeric limit of CERCLA
410

MPCA

95 percent precip - stat max
comp as ^{avg} evap (50 percent)

4.0 billion gallons/yr

GS/ Gold Sim max flow rate is 1.9
bill gll / yr (3600 gpm)

4.0 is 2x max 1.9

if you v actual w/ carryover
it would be less

cum overlf = permit to red be lower
to way we wd do to

& to expl wd be added to fact
sheet

Krista - wasn't a clear limit on 20 permit

Richard 2-7 yr lag from rainfall to
discharge @ mine site

1.9 Δ year LO

Kristin - but in no yr shd exceed
4.0 bg/yr.

Richard/Gelf - to talk abt that
internally

Kristin

used max bc shd use to 6
calc limits

adding word direct to discharge prof from
mine site

BREAK

Kevin

AM - proactive actions

to modified lang

- But we're worried to to may
complicate prevent relationship

Richard to look @ to but wanted to
be clear

- SW - ^{Kevin} Concerns w/ sub~~st~~ release =
Hq GP - no mon/limits or
in narrative prohibition
- what kind of monitoring
wd to b part of 401 monitoring
- ^{Kevin}
- C to add b Sediment basins
& mon into SWPPP

Jeff - tr o map o constr SW acreage

Richard - SWPPPs r ve detailed

401 cert → monitor of encl lang
of SWPPP/addl bed ponds

Shannon - to talk abt to more
& talk more w us on the
followup.

Jeff → to send us tempo
version

↳ will send us cheat sheet
to crosswalk 2
verbs (word doc)

Kevin

↳ annual flow - consider adding
max

↳ SWPP / mon of constr SW
401 disc w/ Peter

↳ ~~max~~ add operty limits

↳ AM ^{lays} clarifca

↳ narratr probbs of total fac

3rd wk o Oct 4 firm

KP

Polymer mg.
w/HR
9.25.2018

Revised

what was added in permit

- No dish using in permit

No direct dish of more water on process
water

HRF - No dish to SW or SW

- Monitoring locations

Bc well

SW on Tiers corridor

* Added limit WET of 1.0 quarterly spot check
(point is after line add)

zero & fat head

Added Hg min. requirement - although
confident w/RO

* - Submittal of as built into

- O & M @ each unit

- Seepage capture

inward gradient

outward must monitor more

Eliminate actual grad.

investigate cause

Violation of permit if it grad

not corrected w/ 7 days

must come a monthly grad to weekly

if out grad detected.

- Per. req for various equalization ponds

- Hierarchy of non network -

HRF - Not constructed @ 13 permits cycle -

K of 15 ^{10/15/19} submit PAP
 20 ^{10/20/19} but
 - Narrative go not exceed WAS
 - Build that you are going
 - OR inc. Hg @ 1.3
 Tobuild - lang → more centered on
 components say WAS
 must consist of
 + TB seepage treat 5x3,
 green sand + combo RO
 + Nano

follow permit
 process for med
 - wet limit no
 - adapt right lang. goal + goal + goal
 - intent of permit
 mon. 1st
 inc both total & dissolved
 on inherent with tot & dissolved
 treatment sys.

- Allowable discharge - No A but added fact sheet
 into.

sewerage treat - we've said needed
 secondary but PCA determined not
 necessary due to T Vol after dilution
 water goes to TB & recycled
 process or may seep out of basin &
 captured

could add lang on co-operer lang to be more specific
 possibility of adding general prohibition on violation
 on WAS.

CAP ACTION
 OCC input on ext. "operating limit"

could add lang that after permit issuance if there
 is a in construction plan must submit TO PCA as
 permit mod → PCA decides major/minor mod.

add adapt right lang. to make clear section covers early action prior to any violation
 operating limits for other pollutants - will consider

annual vol limit - PCA will adding the max (43 or 1.95?) in condition
 annual 558 prep - Ann Equip = 4.3 bil/gal/yr - actual projected
 max discharge 1.9 B gal/yr

consider stormwater swtllp specifications + monitoring options (pass. mon. 10/15/19)

- Coord. of DNR

Training permit & water appropriation

- DNR expects decision 3rd wk OCT. → Issuance of DNR permit

- This may be possibly cause of prop.

Transfer - Solid WET permits - etc

- Polymet must own/control land prior to DNR permit issuance

- Send PPP + fact sheet by 3rd wk OCT.

- In advance of that
* cable prior to
submission of PPP.

* will have new commission - as of Jan 8

Spec-water Discharge

Entirety of multiple permits / CO.

- Colby Lake

- Decision making

⊖ Adapt mgmt - NOT CA

eventually
expanding

Firm of
that this is
proactive
approach

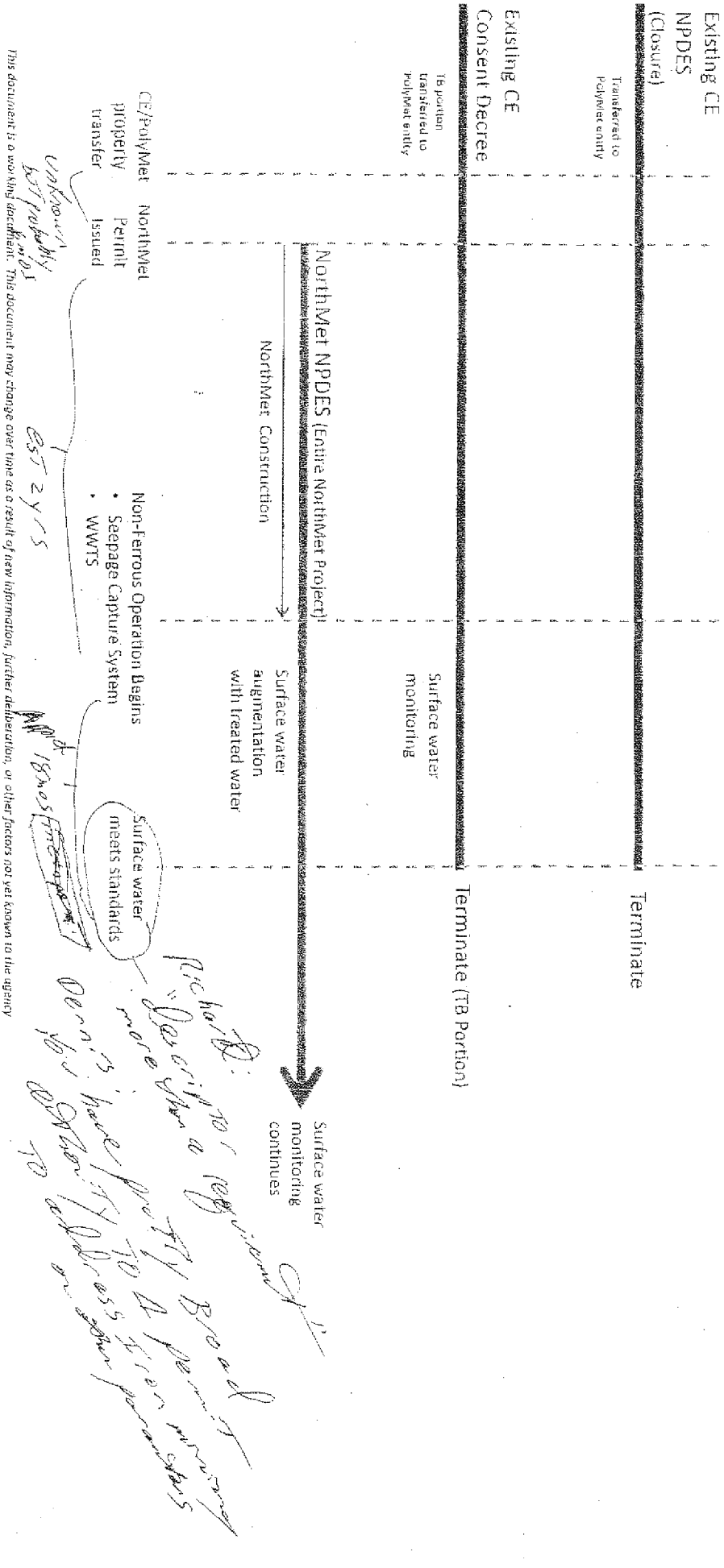
- ~~State~~ SWPPP - Add settle basin

~~SWPPP~~ will go 1 cert.
100 men to certain meeting
V&P part of ~~the~~ No
violation of WQS.

Proposed Permitting Approach:

DRAFT

Key
CE = Cliffs Erie
NM = NorthMet



This document is a working draft. This document may change over time as a result of new information, further deliberation, or other factors not yet known to the agency.

so polymer will ~~not~~ assume responsibility for CE permit and hold to permit or a CD covers monitoring req.

BT only some portions of the permit are CD. → portions of the permit are CD.

Richard: no responsibility for permit. more info needed from permit. 10/16/19. 10/16/19. 10/16/19.

Bred
00012

- QBELS

312 7713364

ELCS - Prop

- App. disclosed pollutants @ WQS but no limits in permit

Enforceability - allowed

of. Precludes ent.

Decision making?

Operating limits

- Plans, reports & other actions

QBELS for City of As. Cd. Zn

Prohibit disch. that violates Narrative

limits for disch. to rec. water

Amended ~~process~~

Don
Patra
Kristine
Dennis
Brad

Primary focus of membranes is to
remove sulfate
say if C/P would
used to model system

independent
of
DAB

exp. TB @ end
- Colby Lake
6/15/2017

PCA did not use typical model for RP

We know that RO would not all due to meeting
sulfate so in all likelihood
fact will meet all WQS

- Reliance on RO - High degree of confidence
- Downstream consideration

* Application @ WQS
* not all treat.

not
my own resources
consistent
of the

Test
mon
every

- New source - model is needed
- new type of model

Limits -

operating limits vs WQBELs

of limits for cur & Sox

want added Hg As Cd Zn
& prohibit disch. that violates
numeric stds

stance of model exploit + into - at odds w/ application 1.5 T.29
expected effluent @ @ was

issues new source New mine

- "limits" @ internal outfall prior to line addition

included adaptive mgmt. (Jett) because this is a new facility &
cant predict everything that may happen

- Add lang that no violation of of WQBELs

↳ Address

+ Polymer toker
if

+ go through permit
A's in response to
LEAF comments

* WQBEL's

- Backsliding is one issue but if the N. of other parameters would it as well triggering New Env. Review.

- Dept. Mgmt - JESH - in future case see fact. + can't predict everything that may happen.
 more proactive than correction -

- Richard - New permit lang on Dept. Mgmt & pass
 - then case submit to PCA for approval
 PCA will make determination @ that time as to go or not.

Permit presented "permitting legacy issues"

PCA needs examples of where units are dropped based on data during early permit Term.
 Permit fact sheets

MCKin

Meeting in st paul, mpca polymet

Tuesday, September 25, 2018 12:40 PM

Polymet - christie Kearney, Don Richards (Barr), Dennis Donohue (Warner Norcross – counsel)

Mpca - udd, smith, schmidt, handeland, clark, Scott Kyser, Brian Schweiss

Polymet starts

1. Background

- General overview of where we are at in the permit process
 - Mpca - has been working on responses to comments. Building record.

2. Discussion

- Treatment technology design and operation (PolyMet)
 - How does it work
 - Polymet gives powerpoint presentation
 - Wfd: iron pretreat, greensand, primary RO/NF, lime contactor, degas
 - Large range of influent parameter concentrations. (orders of mag)
- Limits development and monitoring (EPA, MPCA)
 - Water quality and technology approach
- Permit enforceability (EPA)
 - General concerns
 - mpca has added language, that they are proposing, to the permit that will improve the aspects of our concerns that relate to decision making.
 - They might not address bringing facility back into
- Decision making process and permit modification (EPA, MPCA)
 - Adaptive management
 - Process used for future changes
- Permitting approach to legacy issues (MPCA, PolyMet)
 - How will this work?
- Other (All)

Meeting in st paul with mpca

Wednesday, September 26, 2018 8:15 AM

Recap of yesterday

No movement on either mpca or epa's part

Mpca walks through changes:

Modified "no discharge" language. (change - no direct discharge....)

Hrf - no discharge to ground or surface waters

Monitoring locations - added bedrock monitoring well at tb. Additional sw monitoring along transpo corridor. Relocated another monitoring well.

Added limit for WET in permit. TUC 1.0. quarterly.

Mercury minimization plan added

Added language - construction as proposed in the oct 2017 application. Certification from PE that liner design meets spec. maintenance manual for each control. (not submitted).

Submittal of as-builts.

Seepage capture systems - maintain inward gradient. If outward gradient found, increase monitoring, eliminate outward gradient. Need to investigate cause. Get 7 days to re-establish inward gradient.

Added language - prohibits addition of aluminum.

Some cases - reduced notification times.

Adaptive management - added language specified that any proposed adaptive management is subject to review and approval. Any proposed adaptive management is subject to ...permit mod and PN.

Eq basins - mine site - constructed as industrial ww ponds. Ponds are part of performance evaluations.

Existing and proposed monitoring network for HRF... evaluation deferred until the HRF is designed.

Added dissolved mercury monitoring at infl and effl to treatment system.

NOT changed:

Allowable discharge (flow)

Sd001 - not necessary.... Dilution.... Sewage system effluent

Linda asks why mpca didn't find rp. Jeff explains that based on pilot study and treatment that was chosen. Controlling system for sulfate, means that other metals and things would go along with it. Asks about reopener. Mpca has reopener in rules.

Federal enforceability of the internal monitoring location - mpca understands that epa couldn't put it in, but according to mpca epa/citizen could enforce any condition of a permit. Case law is mixed on this.

Mpca seems to agree that they could add narrative statement on prohibition of discharge violating wqs.

Mark makes points about caveats in the pilot study reports from vendors saying that pilot study performance is not guaranteed in full scale.

Kevin asks if mpca would add more parameters for internal outfall limits.

Influent predicted to be higher than wqs.

As

Co

Cu

Pb

Ni

Hardness

sulfate

Migration from mine pit question: monitoring. Annual report. Migration will be evaluated.

Schedule: 3rd week in october for dnr to issue permit. Depends on property transfer between cliffs and polymet.

Mpca is planning to send ppp and fs by 3rd week in october. Epa has 45 days to review per email agreement. Jeff is concerned about what epa would send, if we send something. Already bringing up the shortening of the 45 days.

Sum:

Prohibit violation of wqs

Wet limits

Reopener

Additional parameters operating limits

Specify on when mod needs to come in.

401 cert - following same schedule - target of 3rd week in october.

Adm provisions - intent is to get permittee to adjust as they go along to prevent violations

Construction stormwater. Has the narrative limit but no monitoring. Question is when does 401 cert monitoring start. Or do swp's include monitoring.

Mpca will look into swp review, potential monitoring under the swm and/or the 401 cert.

Linda Holst

US EPA Region 5/MPCA Meeting Agenda

Wednesday, September 26, 2018

8:00am – 11:30am

MPCA St. Paul Office, Commissioner's Conference Room (6th floor)

1. Introductions

2. Discussion (All)

- Follow up from Tuesday meeting
 - Current status of issues
 - Any new issues/further clarification needed
- Permit and factsheet revisions
 - General overview
- How to move forward on issues raised by EPA?
- Process and timing
 - NPDES/SDS permit
 - 401 certification
- Other

3. Next steps

4. Action items

Planned Attendees:

US EPA R5

Linda Holst

Kevin Pierard

Candice Bauer

Barbara Wester

Krista McKim

Mark Ackerman

MPCA

Shannon Lotthammer

Jeff Smith

Jeff Udd

Richard Clark

Stephanie Handeland

Mike Schmidt

9/26/18 MPCA Mtg on PolyMet

Jeff Udd, Richard Clark, Shannon

Brad,
Dennis

1. Recap from yesterday -
 - went thru higher level issues w/ PolyMet
 - PolyMet presented on treatment technical + results of their pilot test
 - then discussed how to regulate, limits, monitoring + where
 - discomfort on lack of WQBELs + 2 places where they are monitoring
 - it's a brown fields site - old facomite site which PolyMet is taking over a piece
 - EPA went over our draft comments (verbally) so PolyMet understood EPA's concerns.

2. EPA's list / what MPCA changed Richard

- clarified no discharge lang to be consistent
 - ↳ no direct discharge for keep well
- monitoring locations - added add'l bedrock well at tailings basin, swept along transport corridor, and relocation of surficial well to get sufficient overburden
- added a limit for WET testings $TLC = 1$,
 - ↳ quarterly throughout life of permit - gets at uncertainty on whether they are adding enough clay post RO. Cerros depth = 10 ft
 - ↳ will be treating tailings basin
- reinserted the minimum requirement, post w/ RO treatment

- requires certification from PE that construction meets design performance criteria.
- need to have operation manuals for aspects of treatment they will use internally
- Submittal of asbuilt drawings
- Seepage capture systems → assurance that there won't be unauth. discharge have to eliminate any outward gradients, invert causes. if inward gradient is estab w/in 7 days, won't be a violation → 7 day is worst case scenario to mitigate for it to be a discharge. Monitoring will be weekly under this scenario
- added lang to prohibit addn of Aluminum to stabilization process.
- Adaptive mgmt lang → specified any adapt mgmt proposal is subject to MPCA approval. May be? subject to PN + public comment.
- Equalization basins - have lines - clarified that ponds need to be part of overall performance requirements - signed off by PE
- HRF - assessments have to be done by PE - have to discuss adequacy of existing + proposed monitoring network when it's designed
- specified total for SW, dissolved for GW for metals
- added TBQ for dissolution

- 2 -

- added dissolved H_2 ions (total + dissolved)
for influent + effluent
- Did not propose
 - keepers allowable disch, added new lang in test slot
 - 2^o treatment limits at 50001 - MPCA doesn't think it's necessary given all dilution + intervening steps in unnecessary

2. RP - don't have data since facility hasn't been met in modeling, pilot test

- have internal nitfall limit for sulfate of 10mg/l

- 2 yrs of construction, then treatment in place, so they would know w/in a few years if they misjudged on RP

- have reoper lang - stay in their permit

- would want to reoper after they have sufficient data in data will be on their website

3. MPCA - will consider ^{removal} caveat, or adding prohibition that they can't violate WQS - similar to what's in GP
↳ would help citizen suits, + us for fed regs

Will federal program be able to enforce internal outfall limit on sulfate?

↳ is there some reason we can't enforce?

↳ putting in prohibition against violating state → would help resolve EPA's concern.

- application shows they will be discharging close to / up to wqs + other states w/ minimum permits + include WQBELS.

↳ WQBEL establish limits, with language that permittees can request laws to change limits over time based on their own data.

creates permit as a shield

- would MPCA consider operating limits for mercury, arsenic like they did for Copper.

↳ MPCA - if you hit for Copper in membrane treatment, will

influent (, Arsenic, Pb, nickel, cobalt)
> WQS

↳ if they are confident in system they should agree

- Hg → operational limit → will talk w/ Polymet

-3-

- annual assessment of adequacy of monitoring wells - MPCA reviews + approves.

CB - are there enough instream sampling of conductivity to detect seepage?
 Piebald - focuses on upstream channel of site where event occurs so probably not.

- will have lots of turb data where conductivity will be collected

- annual GWD assessment - will look at whether pollutants on disc to GWD + are they leach to SW... if they are, plan would be to implement adopt mgmt... if disch occurs, they could need perm. MPCA will review annual report.

↳ MPCA did not include prohib that disch to SW from GW is prohibited

↳ EPA don't want an unpermitted discharge.

What would they do to fix it? (if there is seepage to SW)

- pump out turbid
- enhance lining, cover systems

4. Next Steps

• MPCA is coord w/ MDMR on permit to mine for timing

↳ DMR schedule is to have permit decision made (3rd week of Oct) →
Mum's the word

That is final issuance of permit assuming property transfer goes thru. Applicant has to own the land to control land to get permit.

• MPCA - pre-proposed permit + fact sheet by 3rd week of Oct - we have 45 day. Would like EPA to review more quickly. EPA will talk through any issues. (They will have new Admin + Commissioner) + want this done before Jan 8, 2019.

15 day EPA review for proposed permit.

5. Other issues:

- adaptive mgmt - spot things before they become a problem - not a corrective action - "fix" language
- restriction of discharge volume - mention the max volume that can't be exceeded (Krista's suggestion)

- 4 -

• can submit ~~MPA/MSH~~/mine, they will have a construction permit to drain wetlands (peat bog) - mercury will be released - what are the acts will be covered under permit to mine, ^{construction} permit when does discharging for construction be separate from permit to mine

↳ will the water be treated?

Some sort of controls for mercury → can be part of indiv permit

→ is there anything they can do short of indiv permit

→ ~~can~~ GP for stormwater, have the state cant violate WQS in OP → if they require monitoring, they can see exceedances of WQS.

⊗ when will monitoring start - needs to occur while construction is occurring to catch potential Hg issue

Reconciling of MPCA

1. Adaptive mgmt - needs to be early id of problems - not a set procedure for viol of permit cond → MPCA agrees.

2. Stormwater permit - wetlands - Hg release GP doesn't have monit.

- what monitoring will be done during construction → would it be included in 401 cert.

(*) MPCA will look at stormwater plan + 401 cert plans - understand EPA's concern

(*) Jeff Udd will pull in Peter Swanson re 401.

3. Once treatment plant is operating, are Cliff's permits ~~revised~~ 18 months later terminate

It's an approximate

18 mos is when Polynat has to monitor streams (under Northwind permit)

US EPA Region 5/MPCA/PolyMet Meeting Agenda
Tuesday, September 25, 2018
12:30pm – 4:30pm
MPCA St. Paul Office, Room 100 (1st floor, behind reception desk)

1. Introductions**2. Purpose of the meeting**

- Common understanding of issues
- Discuss/resolve concerns on permit

3. Background

- General overview of where we are at in the permit process

4. Discussion

- Treatment technology design and operation (PolyMet)
 - How does it work
 - Expected water quality at discharge
- Limits development and monitoring (EPA, MPCA)
 - Water quality and technology approach
- Permit enforceability (EPA)
 - General concerns
- Decision making process and permit modification (EPA, MPCA)
 - Adaptive management
 - Process used for future changes
- Permitting approach to legacy issues (MPCA, PolyMet)
 - How will this work?
- Other (All)

5. Next steps**6. Action items****Planned Attendees:**US EPA R5

Kevin Pierard
 Candice Bauer
 Barbara Wester
 Krista McKim
 Mark Ackerman

MPCA

Jeff Smith
 Jeff Udd
 Richard Clark
 Stephanie Handeland
 Mike Schmidt
 Scott Kyser
 Brian Schweiss

PolyMet

Brad Moore
 Christie Kearney
 Dennis Donohue (Warner Norcross – counsel)
 Don Richards (Barr)

US EPA Region 5/MPCA Meeting Agenda
Wednesday, September 26, 2018
8:00am – 11:30am
MPCA St. Paul Office, Commissioner's Conference Room (6th floor)

1. Introductions

2. Discussion (All)

- Follow up from Tuesday meeting
 - Current status of issues
 - Any new issues/further clarification needed
- Permit and factsheet revisions
 - General overview
- How to move forward on issues raised by EPA?
- Process and timing
 - NPDES/SDS permit
 - 401 certification
- Other

3. Next steps

4. Action items

Planned Attendees:

US EPA R5

Linda Holst
Kevin Pierard
Candice Bauer
Barbara Wester
Krista McKim
Mark Ackerman

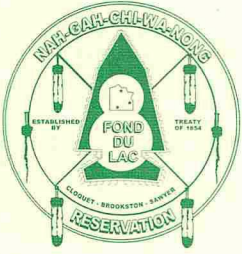
MPCA

Shannon Lotthammer
Jeff Smith
Jeff Udd
Richard Clark
Stephanie Handeland
Mike Schmidt

Fond du Lac Band of Lake Superior Chippewa

Reservation Business Committee

1720 Big Lake Rd.
Cloquet, MN 55720
Phone (218) 879-4593
Fax (218) 879-4146



Chairman
Kevin R. Dupuis, Sr.

Secretary/Treasurer
Ferdinand Martineau, Jr.

Dist. I Representative
Wally J. Dupuis

Dist. II Representative
Bruce M. Savage

Dist. III Representative
Roger M. Smith, Sr.

Executive Director,
Tribal Programs
Miyah M. Danielson

June 18, 2019
Via E-Mail

Cathy Stepp
Regional Administrator
U.S. EPA, Region 5
77 West Jackson Blvd
Chicago, IL 60604-3590
stepp.cathy@epa.gov

Re: PolyMet Mining Inc. NorthMet Mine

Dear Regional Administrator Stepp:

The Fond du Lac Band of Lake Superior Chippewa (“Band”) is in receipt of your June 12 letter responding to the Band’s May 15 in-person request for documents related to EPA’s review of the National Pollutant Discharge Elimination System (“NPDES”) permit issued for the NorthMet mining project. The Band appreciates receiving the eight page “Enclosure” document with EPA comments to the Public Notice Draft Permit Received January 17, 2018. Upon review of the disclosure, the Band was disappointed to learn that the disclosure of information EPA provided to it does not contain all of the relevant pages or copies of documents that were provided to WaterLegacy. WaterLegacy received additional information on June 12 as a result of pending litigation over a Freedom of Information Act request.


Based on the documents EPA provided to WaterLegacy, which were shared with the Band, it appears that EPA prepared and was ready to send written comments to the Minnesota Pollution Control Agency (“MPCA”) detailing its concerns on the draft NPDES permit. Although your June 12 letter notes that EPA staff are encouraged to work more collaboratively and speak face-to-face with state officials, it is not clear why EPA did not send the written comments to MPCA. The documents provided to WaterLegacy confirm that the comments were in final form and ready to send. Indeed, the handwritten note on the transmittal letter provided to WaterLegacy states that the comments were read word for word over the phone to MPCA. As such, the Band does not agree that those documents were subject to any applicable privilege.

Cathy Stepp
June 18, 2019
Page 2

The Band is also concerned about the lack of transparency regarding the EPA's communications with MPCA and its unwillingness to publicly share its concerns related to the NorthMet project throughout the permitting process. Based on recent news articles it also appears that EPA staff developed a memorandum to the file dated December 18, 2018 which documents how many of the issues raised by EPA were not resolved. *See* StarTribune Article dated June 14, 2019 (attached). The Band hereby requests that memorandum be promptly released to the Band. If EPA believes that the memorandum is privileged, we would appreciate a detailed explanation as to EPA's reasoning.

Thank you.

Sincerely,



Kevin R. Dupuis
Chairman

LOCAL

Federal watchdog opens inquiry into EPA handling of Minnesota PolyMet pollution permit

Retired agency attorney calls permit process "unethical" and "bizarre."

By Jennifer Bjorhus (<http://www.startribune.com/jennifer-bjorhus/34031274/>) Star Tribune

JUNE 14, 2019 — 10:28PM

The Environmental Protection Agency Office of Inspector General has opened an investigation into the agency's handling of a crucial pollution permit for Minnesota's first copper mine after a retired agency attorney raised questions about the episode.

The [investigation \(https://www.epa.gov/office-inspector-general/notification-hotline-complaint-epa-review-polymet-mining-companys-national\)](https://www.epa.gov/office-inspector-general/notification-hotline-complaint-epa-review-polymet-mining-companys-national) was announced June 12, the same day the Environmental Protection Agency (EPA) released documents related to the water quality permit requested by several parties, including the Minnesota-based advocacy group WaterLegacy and U.S. Rep. Betty McCollum, D-Minn.

Release of the documents shows that written comments by EPA regulators, challenging key parts of the permit, were never formally submitted for the public record and were never sent to officials at the Minnesota Pollution Control Agency (MPCA). Instead, the comments were read to MPCA staff over the telephone last spring, a practice that the retired EPA attorney described as "bizarre."

The Star Tribune has also requested the documents, but the EPA hasn't yet provided them.

The documents relate to a crucial state water quality permit issued to PolyMet Mining, a Toronto-based minerals firm that wants to build a \$1 billion copper-nickel mine in northeast Minnesota. After years of review, PolyMet cleared most of Minnesota's regulatory hurdles in late 2018. The newly released documents include seven pages of detailed criticism by EPA Region 5 staff in Chicago, which oversees Minnesota's enforcement of federal pollution laws, outlining deficiencies in the permit that the MPCA issued to PolyMet last December. It is the first time the EPA's official comments on the permit, which will regulate dangerous pollutants in effluent from the mine, have been made public.

The written comments note that the permit would "authorize discharges that would exceed Minnesota's federally-approved human health and/or aquatic life water quality standards for mercury, copper, arsenic, cadmium, and zinc." In one core passage, they said the permit lacked specific effluent limits, known as WQBELs, which are numeric limits on how much of a pollutant can be in the effluent pumped out a discharge pipe.

A retired EPA attorney from Boston, Jeffrey Fowley, learned of the phoned-in comments from confidential sources in January and filed a complaint with the EPA's Office of Inspector General.

The sources told him EPA leadership in Region 5 were suppressing staff comments. Fowley has called it "serious improper conduct" and "unethical."

"In all my years of experience, I have never heard of a situation where EPA personnel have read written comments on a permit to state personnel over the phone," Fowley said in a sworn declaration filed with the Minnesota Court of Appeals.

MPCA officials told the Star Tribune there was nothing unusual about their exchange with the EPA, and that they did incorporate many of the agency's concerns into the final permit for PolyMet.



ANTHONY SOUFFLE — STAR TRIBUNE

The Polymet tailings ponds could be seen over a small berm.

In an interview Friday, Fowley said he and Minnesota's Fond du Lac Band of Lake Superior Chippewa, which also filed a complaint, were pleased with the Inspector General's decision.

"I think the fact that they're taking up this one indicates they think there is something seriously wrong," Fowley said.

McCollum, who waged a monthslong public battle to obtain the EPA documents, had only brief comments. In a statement to the Star Tribune she said her role was to "ensure transparency."

"Now the courts and the public have the information needed to determine whether the final permit adequately addresses the many concerns raised by the EPA," said McCollum, who leads a House subcommittee that oversees the EPA.

Differing documents

In a letter to McCollum with the documents, EPA Acting Associate Administrator Joseph Brazauskas said it's common practice for complex permitting decisions to be handled verbally rather than in writing.

"EPA Region 5 Administrator Cathy Stepp has specifically encouraged EPA staff to work more collaboratively and speak 'face-to-face' with state officials," Brazauskas wrote.

Brazauskas also said the EPA hadn't planned to release the written comments because it considers them private under the "deliberative process privilege" exemption to the federal Freedom of Information Act.

However, he said, the agency had given the comments voluntarily to the Fond du Lac tribe, so it could no longer withhold them.

The EPA's written comments were also sent to WaterLegacy, an advocacy group in St. Paul, and the Fond du Lac Band, whose land is downstream from PolyMet's proposed mine near Babbitt.

The parties together have challenged the water permit over its lack of stringent, federally enforceable limits on nearly two dozen pollutants regulated by the Clean Water Act.

The documents received by WaterLegacy, however, differ slightly from those sent to McCollum; they include a separate letter from Kevin Pierard, a senior official in the EPA's Chicago office, to Jeff Udd, the MPCA's director of metallic mining, which underscores the fact that the EPA's concerns were conveyed by phone, not in writing.

Many sections in this copy of the written comments were underlined and numbered; across the top Pierard wrote by hand that the underlined sections were "conveyed verbally" to the MPCA on April 5, 2018, and lists the MPCA staff on the phone call.

The phone conversation occurred several weeks after the public comment period on PolyMet's draft permit closed in March 2018, meaning that the EPA-written criticisms were never entered in the public record.

The EPA's criticisms should have been public from the start, said WaterLegacy lawyer Paula Maccabee.

"They are some of the strongest comments I've ever seen," she said. "It's like one of the most important documents in this entire case, and it's not in the administrative record."

'Rigorous' review

MPCA officials and former MPCA Commissioner John Linc Stine said nothing improper occurred in the episode and that the final PolyMet permit did reflect some of the EPA comments.

In an interview, Stine said nothing requires the EPA to submit written comments during the public comment period. He also said that the concerns the EPA read over the telephone were similar to comments other stakeholders had filed previously.

"It didn't strike me that there was anything that was plowing new ground," he said.

In a statement, MPCA spokesman Darin Broton described the PolyMet permit process as "rigorous" and said the agency discussed technical issues with the EPA frequently.

"Based on those conversations, as well as other comments received ... during the official comment period, the MPCA made substantive changes to the draft permit, including additional limits for arsenic, cobalt, lead, nickel and mercury; and new language was added that clearly states that the discharge must not violate water quality standards," Broton said. "That's why the EPA did not object to the MPCA's final permit."

Several MPCA staff members have filed sworn statements as part of an appeal filed by WaterLegacy, making similar arguments.

Former MPCA staff attorney Michael Schmidt said in his declaration that no one tried to conceal anything. They noted how quickly the EPA staff read the comments on the phone that day, making note-taking difficult.

In an interview Friday, Fowley, the former EPA attorney, accused both the EPA and the MPCA of a "coverup." He said confidential sources told him that the EPA's Region 5 staff were so frustrated about their unheeded concerns that they filed a memo Dec. 18 — just before the permit was issued — documenting the issues that had not been resolved. Fowley said the memo contained sufficient information to justify an EPA objection to the permit.

Fowley characterized PolyMet's permit as weak, and "an end run around the ... requirements of the Clean Water Act."

"It's kind of like if instead of speed limits they told people not to drive too fast," Fowley said. "I've never seen this situation before."

Jennifer Bjorhus is a reporter covering the environment for the Star Tribune. She was a business reporter for much of her career but in recent years focused on criminal justice issues, including police use of force and responses to sexual assault.

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