

STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

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In the Matter of the Denial of Contested Case  
Hearing Requests and Issuance of National  
Pollutant Discharge Elimination System/State  
Disposal System Permit No. MN0071013 for  
the Proposed NorthMet Project, St. Louis  
County, Hoyt Lakes and Babbitt, Minnesota

Court File No. 62-CV-19-4626  
Judge John H. Guthmann

**DECLARATION OF  
PAULA G. MACCABEE**

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State of Minnesota    )  
                                  ) ss.  
County of Ramsey    )

I, Paula G. Maccabee, hereby declare as follows:

1. I am an attorney licensed in Minnesota. I represent WaterLegacy in the above-captioned matter.

2. MCEA, Friends of the Boundary Waters Wilderness, Center for Biological Diversity, WaterLegacy and the Fond du Lac Band of Lake Superior Chippewa (collectively, “Relators”) are the Relators in the above-captioned matter.

3. On March 27, 2018, WaterLegacy made a Freedom of Information Act (“FOIA”) request to the U.S. Environmental Protection Agency (“EPA”) for documents, including notes, pertaining to meetings or phone communications between the EPA and the Minnesota Pollution Control Agency (“MPCA”) regarding the PolyMet mine project since January 1, 2015. (FOIA request EPA-R5-2018-005870). WaterLegacy requested a fee waiver for this FOIA request.

4. On April 13, 2018, EPA denied WaterLegacy’s fee waiver request, and on April 25, 2018, EPA advised WaterLegacy that the cost to search for the requested documents would

be between \$6,500 and \$10,000. On July 12, 2018, WaterLegacy appealed EPA's denial of the fee waiver.

5. Despite follow-up calls and email, EPA did not act on this appeal until August 14, 2019, when EPA notified WaterLegacy that EPA had granted the fee waiver.

6. Upon receiving the fee waiver from EPA, I again followed up with phone calls and email. On September 23, 2019, EPA informed WaterLegacy that we could obtain responses to our FOIA request EPA-R5-2018-005870 by reviewing records being released in response to other FOIA requests related to the PolyMet project. I downloaded these responses, and Relators supplemented discovery with these documents. Documents released by EPA to others and in response to WaterLegacy's FOIA request EPA-R5-2018-005870 included no notes of meetings or phone communications with MPCA.

7. On June 19, 2019, WaterLegacy made a FOIA request to EPA specifically requesting EPA notes from meetings with MPCA and PolyMet on September 25 and 26, 2018. (FOIA request EPA-R5-2019-006658). EPA informed WaterLegacy on August 1, 2019 that EPA was denying this FOIA request.

8. On October 18, 2019, WaterLegacy appealed EPA's denial of our FOIA request for the September 2018 notes. After several calls and emails to follow up on the appeal, we submitted it a second time on November 6, 2019, requesting expedited review. WaterLegacy received a determination on November 15, 2019 that EPA had reopened our request for September 2018 notes and would provide reasonably segregable material.

9. On December 18, 2019, EPA informed WaterLegacy that the EPA would release documents responsive to FOIA request EPA-R5-2019-006658. On December 23, 2019, I downloaded these documents, attached as **Exhibit D**, which include EPA's notes from the

September 25 and 26, 2018 meetings with MPCA and PolyMet. Relators notified opposing counsel on December 23, 2019 that we had obtained these documents and provided pdf copies of the documents the next day, on December 24.

10. There is good cause for Relators' failure to disclose these exhibits on or before December 16, 2019. Despite FOIA requests, appeals, follow-up and due diligence, Relators didn't secure access to these EPA documents until after December 16. On the day that WaterLegacy downloaded the documents released by EPA, Relators notified Respondents' counsel, following up one day later to send them pdf copies of the documents. Relators had listed as exhibits WaterLegacy's FOIA request EPA-R5-2019-006658, initial denial, FOIA appeal, and follow up to secure the **Exhibit D** documents as Relators' Exhibits 504-513 and 724-747.

11. Relators would be prejudiced if EPA's notes from the September 25 and 26, 2018 meetings with PolyMet and MPCA were not allowed as exhibits in this matter. Several MPCA staff have made assertions as to what transpired at the meetings, and all but one of the EPA participants at the meetings are still employed by EPA and not available to testify. The **Exhibit D** notes received by WaterLegacy in response to FOIA request EPA-R5-2019-006658 are highly probative and unavailable by other means.

12. Relators also seek to add three documents that were previously provided to Respondents in the course of discovery. The two documents in **Exhibit E** are agendas for the September 25 and 26, 2018 meetings attached to an email in EPA's files (RELATORS\_64226). These attachments were inadvertently left off Relators' Exhibit List. This is an excusable error, and Respondents are not prejudiced by Relators' request to include these exhibits after December 16, 2019. The third document in **Exhibit F** is a response by the Fond du Lac Band of Lake Superior Chippewa (the "Band") to a June 12, 2019 letter from Regional Administrator Cathy Stepp to the

Band, identified by MPCA as its Exhibit 1125. There is good cause for Relators' addition of the Band's response to MPCA's Exhibit 1125 after December 16, 2019, since the Band's response is only relevant if Ms. Stepp's letter is introduced into evidence and, if so, is needed to create a fair and complete record.

13. Relators would be prejudiced if the agendas for the September 25 and 26, 2018 meetings in **Exhibit E** were not allowed as exhibits, since these documents demonstrate what information was provided to EPA regarding the upcoming meetings. Relators would, further, be prejudiced if the Band's response in **Exhibit F** was not allowed as an exhibit, since the June 12, 2019 letter from Regional Administrator Stepp, without this response, provides an unfair and incomplete description of events surrounding the release of EPA's comments on the draft PolyMet water pollution permit.

I declare under penalty of perjury that everything that I have stated in this document is true and correct

Dated: December 27, 2019

*s/s Paula G. Maccabee*  
PAULA G. MACCABEE



## 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.

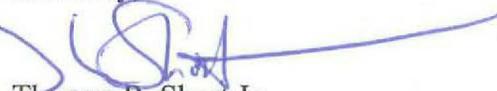
You can access the records responsive to your request by doing the following

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](mailto: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](mailto: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](mailto: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](mailto:ackerman.mark@epa.gov); or Barbara Wester at (312) 353-8514 or [wester.barbara@epa.gov](mailto: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  
& cont. case hearing req.

Treatment system

- ↳ Mine H<sub>2</sub>O treat bef tailings basin
- ↳ Seepage from tailing basin

Iron Solids pretreat

Greensand filter

↳ Nanofiltration

↳ 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 nanofiltration most of time  
if it could be RO concentrate water from

~~polymet~~

$\Rightarrow$  pilot tested both NF & RO  
at some  $\uparrow$  SO<sub>4</sub> 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 H<sub>2</sub>O 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<sup>ug/L</sup> to 200 mg/L @ closure  
 Cu sulf when + less infiltrat  
 due to cap

Greensand - pilot test results  
 Cu 94.19% remefency <sup>8 - 2 yrs w/ spiked samples</sup>  
 Most & greater in 85% remef

|    |    |    |
|----|----|----|
| As | Fe | Mn |
| Co | Pb | Ni |
|    |    | Zn |

- 3 -

RO removal  
 99% sulf removal (99.3-99.5)  
 97-100% of other constituents  
 of metals 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 of NF + RO

Mercury

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

- <sup>some</sup> bench testing of taconite tailing

- Greensand filtrals

Dome

- Membr Sep

20-99.9% v-l reported

Each RO

influent up to 2.5 mg/L  
below 0.5 in effluent

Humboldt up to 4.0 mg/L

but conc of effluent  $\approx$  0.5 mg/L

lime granular

Calcrete used @ end

↪ spec of water trtmt  
has low Al conc.

NF of Hg → GE <sup>monitor</sup> 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 <sup>typical</sup> → looked @

for 1<sup>st</sup> 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 <sup>did</sup> → 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 → 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 <sup>wants to</sup> 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 <sup>from</sup> ~~actual~~ <sub>non-date</sub>

- 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

10 mg/L >

ask <sup>him</sup> <sub>to</sub> 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 H<sub>2</sub>O

- 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 s. problem

- 9 -

- discuss whether Hg from trench  
 const. wd. be digged & viol WQS  
 ↳ to v to covered under GP of  
 SW
- Krista  
 also do we v diffrd o GP SW coverage  
 vs indiv permit coverage?  
 until operat o WQTS  
 + BMPs v demonstrated
- Old <sup>cliffs</sup> 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 find to to v  
 no RP  
 ↳ I'm sure we do. Ohio? if way to  
 Barbara - can we cite to permit med reqs?

~~changes to permit~~ <sup>request</sup> Wed Sep 20 <sup>MTG w/</sup> ~~Blawie~~ <sup>PCA</sup>  
Clarify no disley req in permit

- mine site no direct disley  
to surf H<sub>2</sub>O

- plant  
no direct disley to surf  
H<sub>2</sub>O

- <sup>Align</sup> Mon locations  
bed rock

surf H<sub>2</sub>O along corridor  
Δ in couple locals

- Limit

TV<sub>c</sub> = 1 is included  
extended to quarterly of  
life of permit:

<sup>just</sup> bef to disley → Corridor & footprint.

- Reinserted Hg min strategy  
↳ internal processes

- req constr as proposed in <sup>Oct 2017</sup> <sup>capital</sup>  
+ PE identified  
+ 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 notification time of reporting o problems
  - <sup>proposed</sup> AM subject to review & approval & subject to review as to whether to > major modifications of 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

total/dissolved lead  
↳ sulfate      ↳ GW

- Add TBEL of dis iron for

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

Not changing

- allowed design (flow)

- Sewage treatment

of diked & intervening treatment 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 is 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  
 RGH/tot  
 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
- H<sub>2</sub>O 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 <sup>avg</sup> 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  $\Delta$  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 - <sup>Kevin</sup> 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
- <sup>Kevin</sup>  
- 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 l 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

↳ ~~mon~~ add operty limits

↳ AM <sup>lays</sup> clarifca

↳ narratr prohb of total fac

3rd wk o Oct 4 firm

KP

Polymer mfg.  
w/HRF  
9.25.2018

Revised

what was added in permit

- No dish usage in permit

No direct dish of more water on process water

HRF - No dish to SW or SW

- Monitoring locations

B or well

SW on Tiers corridor

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

zero & fat head

Added Hg min. requirement - although considered 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 out grad

not corrected w/in 7 days

must come to monthly grad to weekly

if out grad detected.

- Per. req for various equalization ponds

- Hierarchy of non network -

HRF - Not constructed @ 13 permit cycle -



- 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

Firm of  
that this is  
proactive  
approach

- ~~State~~ SWPPP

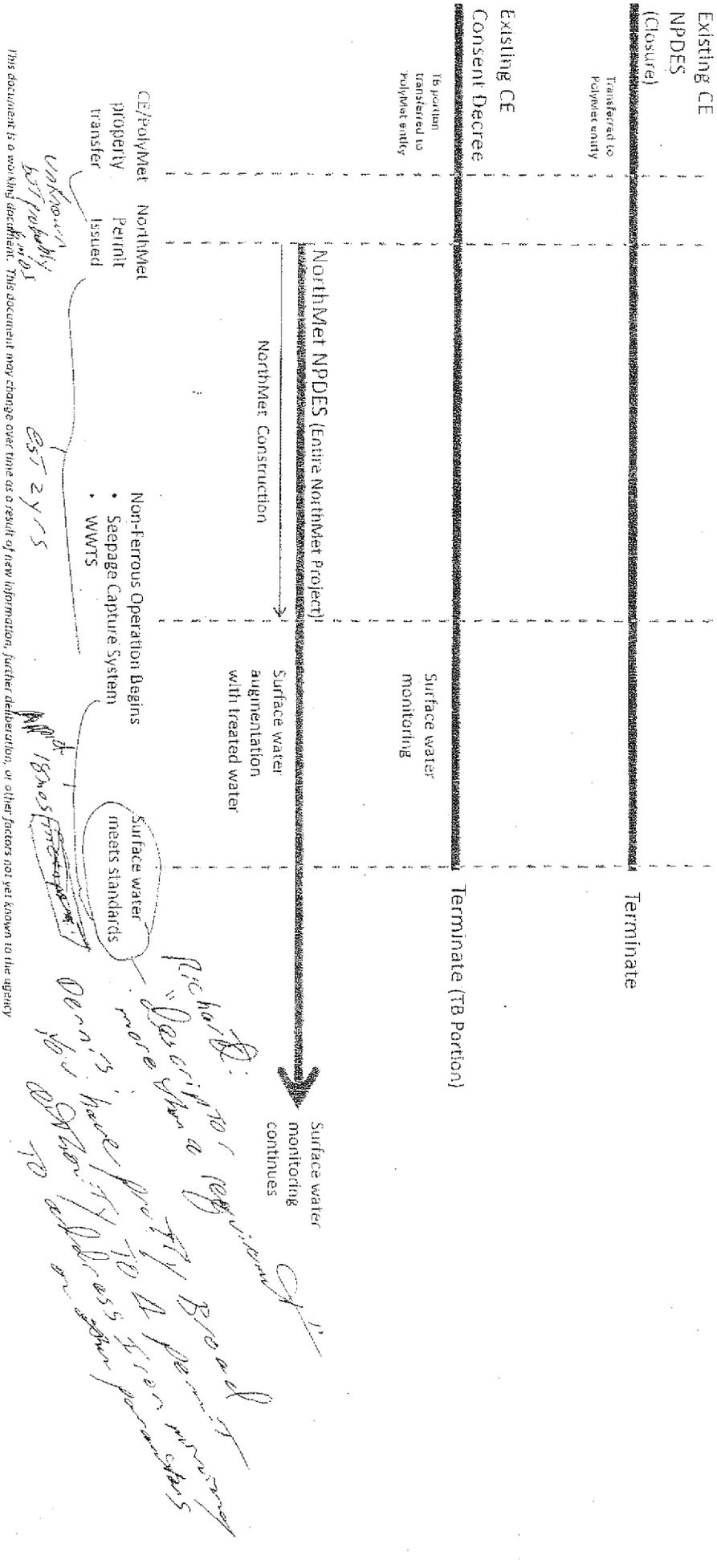
- Add settle basin

~~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 permit will ~~not~~ assume responsibility for CE permit also → hold to permit on a  
- CD covers monitoring req.  
- But only some portions of the permit  
- get CD → portions docs will  
- address

Bred  
00012

- QBELS

312 7713364

ELCS - Prop

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

Enforceability - allowed

of. Precludes est. -

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  
Kristie  
Dennis  
Brad

Primary focus of membranes is to  
remove sulfate

say if CRT would  
used to modify 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  
any more resources  
sufficient of the  
consistency

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

change of model export + 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

\* WQBELs

- 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.  
 result  
 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 approved.

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 reponer. 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 (6<sup>th</sup> 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 = 15 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
  - keeps allowable disch, added new lang. in test slot
  - 2<sup>o</sup> 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 - still in their permit

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

3. MPCA - will consider <sup>removal</sup> 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.

↳ WI 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?  
 Problem - focuses on upstream channel of site where event occurs so probably not.

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

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

↳ MPCA did not include prohibit 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 + treat  
 - 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 (3<sup>rd</sup> 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 3<sup>rd</sup> 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, <sup>construct</sup> permit  
 when does denaturing 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

→ ~~in~~ 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 mos 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 (1<sup>st</sup> 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 (6<sup>th</sup> 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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