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Attachment 1 to Relators' List of Alleged Procedural Irregularities

**STATE OF MINNESOTA
IN COURT OF APPEALS**

<p>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.</p>	<p>Case Nos. A19-0112, A19-0118, A19-0124</p>
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**WATERLEGACY MOTION FOR TRANSFER TO THE DISTRICT COURT OR,
IN THE ALTERNATIVE, FOR STAY
DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS**

INTRODUCTION

Pursuant to Minn. Stat. § 14.68, Relator Water Legacy respectfully requests that this Court transfer this matter to the District Court for the County of Ramsey, where the Minnesota Pollution Control Agency (“MPCA”) has its principal office, due to irregularities in procedure pertaining to the PolyMet NorthMet NPDES/SDS permit (“NorthMet permit”) not shown in the record. In the alternative, WaterLegacy requests a stay of this appeal and the NorthMet permit pursuant to Minn. Stat. § 14.65.¹

Critical documents are missing from the record as a result of procedural irregularities. Credible evidence suggests MPCA’s Commissioner and political leaders at the United States Environmental Protection Agency (“EPA”) developed a plan to keep

¹ Relator Fond du Lac Band of Lake Superior Chippewa (“Fond du Lac”) and Minnesota Center for Environmental Advocacy support this motion, and Respondents oppose it.

EPA criticism of the NorthMet permit out of the public record and the record for judicial review. This is contrary to applicable law and EPA's Clean Water Act oversight role.

EPA written comments on the draft NorthMet permit and MPCA notes when these comments were read over the phone to MPCA are missing from the record. Documents obtained under the Minnesota Government Data Practices Act ("Data Practices Act") show that EPA had substantive concerns about the NorthMet permit's compliance with the Clean Water Act ("CWA"). Presumably, MPCA will argue that EPA's concerns were resolved. But, due to procedural irregularities, there are no documents in the record reflecting how, or even if, MPCA resolved the concerns raised by EPA in its oversight role. That is fundamentally unfair to Relators, who will be severely prejudiced by the incomplete record and the inability to evaluate or respond to MPCA's assertions.

WaterLegacy filed a lawsuit in the United States District Court for the District of Columbia to compel production of EPA comments under the Freedom of Information Act ("FOIA"). Formal complaints have also been filed with the EPA Office of Inspector General.

MPCA's procedural irregularities are substantial and material to Relators' claims that the NorthMet permit violated the CWA. Relief is needed due to address gaps in the administrative record, avoid prejudice to Relators, serve the public interest, and protect the appellate court's jurisdiction. WaterLegacy respectfully requests that this Court transfer these cases to Ramsey County District Court to resolve procedural irregularities or, in the alternative, stay the appeal and permit pending FOIA litigation to obtain EPA comments.

BACKGROUND

A. EPA Oversight of MPCA NorthMet NPDES Permit

MPCA is authorized to issue NPDES permits pursuant to the CWA, subject to EPA oversight. 33 U.S.C. §1342. During environmental review of the NorthMet project, EPA Region 5 staff provided written comments detailing expectations for the future NorthMet NPDES permit. Exh. A. On November 3, 2016, EPA staff wrote to MPCA citing deficiencies in PolyMet's NorthMet NPDES permit application, highlighting EPA's oversight role and emphasizing that "it is important that the content of the application be fully documented and the record before the permitting Agency be complete and transparent." Exh. A at 7.

B. MPCA and EPA Developed an Irregular Process for the NorthMet NPDES Permit to Prevent a Written Record of EPA Concerns

Shortly after the public comment period for the draft NorthMet permit ended on March 16, 2018, WaterLegacy first learned that there might be something unusual about EPA's comment process related to the permit. On March 26, 2018, WaterLegacy filed the first of five Data Practices Act requests to MPCA seeking all documents, including handwritten notes, pertaining to written or oral communications or phone or in-person meetings with EPA regarding the NorthMet permit.² Maccabee Decl., ¶ 3. Documents were received in response to these requests. *Id.*, ¶ 4, Exh. C.

WaterLegacy also made a broad Freedom of Information Act ("FOIA") request to

² Additional Data Practices Act requests were made on September 20, 2018; December 12, 2018; January 1, 2019 and February 3, 2019. Exh. B.

EPA in March 2018. *Id.*, ¶ 6. In follow-up discussions with counsel for EPA Region 5 about this unfulfilled FOIA request, WaterLegacy was told that EPA staff had prepared final written comments on the draft NorthMet permit that were not sent to MPCA, and that a simple FOIA request would produce this document. *Id.*, ¶ 7. WaterLegacy made a FOIA request for EPA draft NorthMet permit comments on October 19, 2018. *Id.*. When EPA failed to produce the comments or respond, WaterLegacy filed a FOIA lawsuit in federal court on January 31, 2019 to secure EPA Region 5 written comments on the draft NorthMet permit. *Id.*, ¶ 11.

Since January 2019, WaterLegacy has also sought assistance from Congressional leadership to secure a copy of EPA's comments on the NorthMet NPDES permit. *Id.*, ¶ 8; Exh. D. Congresswoman Betty McCollum sent two letters to EPA's Administrator requesting EPA's comments on the NorthMet NPDES permit and made inquiries in committee hearings, but the Congresswoman has been unable to obtain EPA's comments. *Id.*, ¶ 9; Exh. E.

MPCA handwritten notes WaterLegacy obtained under the Data Practices Act reveal that EPA Region 5 staff repeatedly told MPCA that staff had substantive concerns about the draft NorthMet permit before, during and after the public comment period. Exh. C, at 1-3, 5-14, 18-25. EPA repeatedly expressed concerns that the NorthMet permit should have water quality based effluent limits ("WQBELs") to limit metals and other pollutants discharged from the project. *Id.*, at 2-3, 5-6, 9, 14, 22, 25. Effluent limitations serve as the primary mechanism in NPDES permits to control discharge exceeding water quality standards. Maccabee Decl., ¶ 13.

EPA Region 5 staff intended to provide written comments to MPCA prior to release of the draft NorthMet permit, in response to the draft NorthMet permit and, later, in response to the final permit in its pre-proposal stage, but was blocked each time. MPCA notes during November 2017, show that EPA wanted to make sure the record was transparent. MPCA handwritten notes reflect, “EPA wants to make sure all things considered are available to the public.” Exh. C at 2. (emphasis in original notes). EPA wanted to send a letter before the draft permit was noticed, but EPA accepted the “proposal of MPCA” not to provide comments until the draft permit. *Id.* at 3, 4. During the March 2018 comment period on the draft permit, MPCA’s notes state, “EPA wants to submit comments – Make clear what EPA concerns are. Clarify permit conditions. EPA will submit comments during PN [public notice] period.” *Id.* at 14. Even after the draft comment period, EPA staff still intended to provide written comments on the permit before it was finalized. *Id.*, at 16, 23.

The notes and emails received by WaterLegacy and placed in the record indicate that no written comments on the NorthMet permit were ever transmitted by EPA to MPCA, but they fail to explain why or if EPA concerns about the permit were resolved.

Some answers to the question of why EPA comments are missing from this record are provided in a January 31, 2019 complaint filed by retired EPA attorney Jeffrey Fowley with the EPA Office of Inspector General (“OIG”) alleging “Possible Waste, Fraud or Abuse in EPA Region V: Suppression of Comments on the Poly Met Mining Company State Water Permit and other Permit Actions by Minnesota, and the Region Making Comments Off the Record in a Way that Hides Them From the Public.” Exh. F at 1. Based

on credible information from sources within EPA, Mr. Fowley stated that “planned EPA staff written comments on the permit were suppressed by the Region V Regional Administrator Cathy Stepp,” *Id.* Mr. Fowley explained that

after [Cathy Stepp] reportedly was called by the State Commissioner, John Linc Stine, who reportedly complained about the planned comments, I have been told that the EPA Regional Administrator for Region V, Cathy Stepp, directed in March 2018, that the EPA staff not send any written comments to the State.

Id., at 2.

Mr. Fowley’s OIG complaint stated that Region 5 staff written comments prepared for transmittal to MPCA raised serious issues about whether the State was complying with basic CWA requirements. The complaint stated:

[W]hile significant EPA concerns about the permit reportedly were instead communicated to the State by telephone, I also have been advised that the Region cooperated with the State in helping to keep such comments off the state record, in ways that seem designed to hide the concerns from the public and even from the Minnesota state appeals court that is expected to review the permit.

Id., at 1.

Emails obtained from MPCA under the Data Practices Act confirm that MPCA had a “plan” with EPA to avoid creating a written record of EPA’s comments, including a meeting “the first week of April to walk through what the comment letter would have said if it were sent.” Exh. C at 15. MPCA’s Assistant Commissioner and Ms. Stepp’s chief of staff thanked each other for “dialogue and cooperation” and for working “to find a solution to this matter.” *Id.*, at 15-16.

Mr. Fowley’s OIG complaint asserted that, “state personnel then agreed to have

EPA staff read key parts of their written comments to the state personnel over the telephone” in April 2018, just after the close of the public comment process. Exh. F at 4. His assertion was confirmed by EPA’s Answer to WaterLegacy’s FOIA Complaint in April 2019. EPA admitted that staff prepared written comments on the draft NorthMet permit, that they were read on the phone to MPCA staff, and that EPA has retained a copy reflecting which parts of the comments were read to MPCA staff. EPA’s Answer states:

22. . . .Defendant avers that EPA staff drafted a written document concerning the draft NorthMet permit that was not finalized by Region 5.

23. Defendant admits that EPA staff verbally shared portions of a draft document concerning the NorthMet permit with MPCA staff during a phone call in April 2018. Defendant admits that it has retained a copy of the draft document that memorializes what was shared verbally with MPCA staff.

Exh. G at 17.

WaterLegacy has not yet secured EPA’s comments on the draft NorthMet permit. Maccabee Decl. ¶ 11. But, the federal court has scheduled summary judgment motions in WaterLegacy’s FOIA case, with the final reply brief due on August 5, 2019. *Id.*, ¶ 10.

WaterLegacy has been advised that MPCA took notes when EPA read its comments on the draft NorthMet permit over the phone in April 2018. On information and belief, at one point MPCA staff requested that EPA read more slowly because MPCA staff were taking notes. *Id.* ¶ 12. Handwritten notes from this important April 2018 conference call between MPCA and EPA have not been produced by MPCA either under the Data Practices Act nor in the administrative record provided to Relators. *Id.* Notes from phone or in-person meetings with EPA after MPCA transmitted the pre-proposal permit to EPA may also be missing. *Id.*

C. MPCA Findings and Responses Excluded Reference to EPA Comments

Notably, MPCA's December 20, 2018 Finding of Fact, Conclusions of Law, and Order ("Findings") on the NorthMet permit made no mention of *any* comments provided by EPA to MPCA during the permitting process. (R.6163-6206). The 304-page spreadsheet of MPCA's responses to comments provided with the Findings neither identified nor responded to any of the comments EPA made to MPCA over the phone either during the public comment period or in April 2018. (R.5380-5683).

In fact, by omission and in direct statements, MPCA conveyed the impression that EPA had raised no concerns during the NorthMet permitting process. MPCA's public statement on the NorthMet permit stated that "EPA will be reviewing the permits in the coming weeks," but did not mention any prior review by EPA, let alone comments critical of the permit. Exh. C at 26. In responding to comments by Relator Fond du Lac on discrepancies between EPA's views and the draft permit, MPCA implied that EPA had no concerns, stating, "The MPCA considered the previously submitted EPA comments in its development of the permit. The permit complies with Clean Water Act requirements identified by EPA, including permit coverage for all pollutant discharges expected from the facility." (R. 5512-13, 5521-22).

In response to an email from Relator Minnesota Center for Environmental Advocacy asking if MPCA had heard anything on the NorthMet permit, MPCA made a categorical denial: "We did not get any feedback from EPA on the PolyMet permit." Exh. C at 28.

ARGUMENT

I. Transfer to the District Court is Needed to Address Substantial Evidence of Irregularities in Procedure.

Minnesota Statutes §14.68 provides for transfer to the district court when this Court is confronted with procedural irregularities not fully reflected in the record:

The review shall be confined to the record, except that in cases of alleged irregularities in procedure, not shown in the record, the court of appeals may transfer the case to the district court for the county in which the agency has its principal office or the county in which the contested case hearing was held. The district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure.

In determining whether transfer to the district court is appropriate for a certiorari case under Minn. Stat. § 14.68, the Court “examine[s] the extra-record materials to determine whether there is substantial evidence of irregularities.” *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 174 (Minn. App. 2001). Although most of the notes and emails obtained by WaterLegacy under the Data Practices Act and provided in Exhibit C have been placed in the administrative record, Exhibits D to G attached to this motion, including Mr. Fowley’s OIG Complaint, letters to and from Congresswoman McCollum and EPA’s admissions in FOIA litigation that substantiate procedural irregularities are all extra-record evidence. *See* Maccabee Decl., ¶¶ 4, 7-10.

In *Hard Times Café*, where evidence suggested the city’s licensing decision considered information not in the record, the Court found it impossible “to entangle these improper influences from respondent’s final decision, and determine whether the evidence in the record support the [respondent’s] decision.” 625 N.W.2d at 174. The Court admonished, “Governmental bodies must take seriously their responsibility to develop and

preserve a record that allows for meaningful review by appellate courts.” *Id.*, citing *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999). See also *Mampel v. E. Heights State Bank*, 254 N.W.2d 375, 378 (Minn. 1977) (providing limited discovery in review of agency decision to “insure meaningful review to persons aggrieved by administrative action by allowing them to inquire into those procedures which comprise the fundamental decision-making process”).

Procedural irregularities preventing a written record either of EPA’s comments on the NorthMet permit, MPCA’s notes on hearing these comments, or of MPCA’s response to those comments require transfer to district court. These irregularities are substantial and material to the merits of Relators’ claims.

A. MPCA’s procedures in the NorthMet permit decision-making process were inconsistent with CWA regulations and state statutes and rules.

1. CWA regulations require a public response to comments.

Regulations implementing the CWA require MPCA to “describe and respond to all significant comments on the draft permit . . . raised during the public comment period.” 40 C.F.R § 124.17(a)(2). Under federal law, “[t]he response to comments shall be available to the public.” *Id.* § 124.17(c).³ MPCA’s “plan” with EPA circumvented this federal regulation.

³ Minnesota Rules 7001.1070, subpart 3 arguably allows responses to public comments to be made either orally or in writing.

Handwritten notes obtained through the Data Practices Act reveal that, from January 31, 2018 through March 5, 2018, EPA made significant comments to MPCA criticizing the lack of effluent limits (WQBELs) in the draft NorthMet permit, the permit's unenforceability, and effects of mercury on the downstream Fond du Lac Band. Exh. C at 5-6, 9, 11, 13-14. None of these comments made *during* the public comment period were mentioned in MPCA's publicly available responses to comments. (R.5380-5683)

Federal precedent indicates a failure to respond to comments is a serious infirmity. Where an EPA Region issued an NPDES permit without responding to comments on the need for WQBELs, the EPA Appeals Board remanded the case to the permitting authority. *In re Wash. Aqueduct Water Supply Sys.*, NPDES Appeal No. 03-06, 2004 WL 3214486, at *2-3, 2004 EPA App. LEXIS 28 (EPA Env'tl. App. Bd., July 29, 2004). The Board emphasized that, though the commenter had "attempted in a variety of ways" to persuade the permitting authority of the inadequacy of its analysis regarding effluent limits, *id.* at *11, documents in the record contained no meaningful response. *Id.* at *18-20. The Region's failure to comply with 40 C.F.R. §124.17(a)(2) required remand. *Id.* at *20.

WaterLegacy respectfully requests that this Court transfer this matter to the district court to hear and determine irregularities related to the absence of EPA's comments or MPCA's responses in this record.

2. *MPCA failed to provide critical notes of EPA comments.*

Although MPCA produced other documents, MPCA failed to comply with WaterLegacy's requests for critical data – including handwritten notes from the April 2018 phone call with EPA during which EPA read its draft NorthMet permit comments to MPCA

and notes from conversations on the final NorthMet pre-proposal permit. Maccabee Decl., ¶ 12. Failure to provide these notes was irregular and leaves a critical gap in the record.

The Data Practices Act, Minn. Stat. ch. 13, requires that responsible authorities “insure ‘requests for government data are received and complied with in an appropriate and prompt manner.’” *Webster v. Hennepin Cnty.*, 910 N.W.2d 420, 427 (Minn. 2018). The Court held that use of the word “insure” means that the statute “should result in appropriate and prompt responses *in all cases*,” and a government entity acts improperly even if it “does not commit multiple violations.” *Id.* at 431 (emphasis in original).

WaterLegacy respectfully requests that this Court transfer this matter to the district court to determine irregularities and secure missing MPCA notes and documents for the record.

3. *Minnesota rules impose a duty of candor on MPCA.*

Minnesota Rule 7000.0300 establishes a duty of truthfulness, accuracy, disclosure and candor on the MPCA as well as on persons dealing with the Agency:

In all formal or informal negotiations, communications, proceedings, and other dealings between any person and any member, employee, or agent of the board or commissioner, it shall be the duty of each person and each member, employee, or agent of the board or commissioner to act in good faith and with complete truthfulness, accuracy, disclosure, and candor.

MPCA has imposed a financial penalty, and this Court has upheld enforcement when a permittee omitted material information and failed to provide notification of its activities. *In re Admin. Penalty Issued to Erickson Enterprise*, No. 7-2200-14389-2, 2001 WL 35926172, at *4-6, 2001 Minn. ENV LEXIS 12, *13-14 (Minn. OAH Sept. 28, 2011). Similarly, in this case, MPCA’s reported efforts to keep EPA’s comments on the NorthMet

permit out of the written record, MPCA's public failure to disclose the existence of EPA comments, as well as MPCA's flat denial that it had received feedback on the permit from EPA (*supra* at 8) fail to meet the duty of candor required by Rule.

However, MPCA's violation of due candor alone may not be sufficient to render an agency's decision arbitrary and capricious. *Interim Permit for the Planning, Construction and Operation of an Animal Feedlot and/or Manure Storage Area*, C7-98-2203, 1999 Minn. App. LEXIS 584 *; 1999 WL 329664 (Minn. Ct. App. May 25, 1999). As such, transfer to district court may be the only way to address procedural irregularities and secure the information that would have been available in the administrative record had MPCA acted with complete truthfulness, disclosure and candor.

B. Procedural irregularities preventing a written record of EPA's comments or MPCA's responses are material to Relators' claims.

EPA's comments on the draft NorthMet permit are critical to Relators' claims that MPCA's issuance of the permit violated the CWA. Maccabee Decl. ¶¶ 13-14. State interpretations of standards under the CWA have a federal character, and "EPA's reasonable, consistently held interpretation of those standards is entitled to substantial deference." *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992); *see also In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance ("Annandale")*, 731 N.W.2d 502, 525 (Minn. 2007) ("EPA's interpretation of the state's standard is entitled to deference."). For example, in *Annandale*, the Court supported MPCA's use of offsets for pollution relying, in part, on EPA's similar interpretation in an analogous permitting situation. *Id.* at

520-521. The Court stressed that “the position advanced by EPA is compelling evidence” of reasonable interpretations of CWA regulations. 731 N.W.2d at 521.

MPCA’s Findings and responses to comments dismiss Relators’ interpretations of CWA regulations, including Relators’ claims that MPCA was obligated to impose WQBELs to limit NorthMet discharge. *See e.g.* Findings 19-20 (R.6181-82), Responses 254 (R.5633). EPA’s comments on the draft NorthMet permit are material to Relators’ claims that the NorthMet permit violated the CWA and federal regulations. Gaps in the administrative record prejudice Relators in presenting their claims and deprive them of compelling evidence that could rebut MPCA’s claims supporting the permit. Maccabee Decl. ¶14. Because EPA’s comments, MPCA’s notes when the comments were read on the phone, and MPCA responses to comments are not in the record, it is impossible to evaluate whether MPCA would have reached a different decision on the NorthMet permit if regular procedures had been followed and this evidence made public.

The procedural irregularities in the NorthMet permit cases are substantial and go to the heart of Relators’ ability to pursue claims that the NorthMet permit is inadequate to protect Minnesota water quality. WaterLegacy respectfully requests that these cases be transferred to district court pursuant to Minn. Stat. §14.68.

II. Stay of this Appeal and the NorthMet Permit is Needed to Prevent Prejudice to Relators, Serve the Public Interest, and Protect the Court’s Jurisdiction.

In the alternative, if the Court declines to transfer these appeals to the district court, Relator WaterLegacy respectfully requests a stay of these appeals and the NorthMet

permit⁴ to allow its FOIA litigation to proceed. This relief pursuant to Minn. Stat. §14.65 would protect Relators from prejudice, serve the public interest and protect this Court's jurisdiction, while allowing WaterLegacy to secure release of documents from EPA that are missing from the administrative record.

In deciding on a stay request, the court must consider “the public interest, which includes the effective administration of justice.” *Webster v. Hennepin Cnty.*, 891 N.W.2d 290, 293 (Minn. 2017), *citing State v. N. Pac. Ry. Co.*, 22 N.W.2d 569, 574-75 (Minn. 1946). The Court must balance “the appealing party's interest in preserving the status quo, so that effective relief will be available if the appeal succeeds” with the interests of the prevailing party in the decision. *Webster*, 891 N.W.2d at 291-92, *citing DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 144 (Minn. App. 2007). In evaluating whether a stay should be granted, “the most important factor to consider” is whether “issuing a stay would preserve the court of appeals' jurisdiction by preventing a significant legal issue from becoming moot during appeal.” *Webster*, 891 N.W.2d at 293. Each of these factors support WaterLegacy's request for stay in this matter.

A. Relators would be prejudiced absent a stay.

Relators would be severely prejudiced if this appeal proceeded without critical EPA comments missing from the administrative record. Maccabee Decl. ¶14. Based on MPCA's handwritten notes, EPA written comments on the draft NorthMet permit likely asserted

⁴ WaterLegacy petitioned for reconsideration and a stay of the NorthMet permit on December 31, 2018, alleging CWA violations and various procedural irregularities. MPCA denied its petition on March 11, 2019.

that the permit must include effluent limits. Exh. C at 2-3, 5-6, 9, 14, 22, 25. They may also have recommended permit changes to reduce mercury or make the permit enforceable, reflecting other issues mentioned in MPCA notes. *Id.*, at 5-6, 9, 11, 13, 19-22, 24. Since EPA positions may be compelling evidence of how CWA regulations should be interpreted, *Annandale*, 731 N.W.2d at 521, the absence of EPA comments undermines Relators' ability to prosecute the claims they have raised in their certiorari appeals.

Relators would also be prejudiced by the failure to stay the NorthMet permit pending the FOIA litigation and resolution of these certiorari appeals. Maccabee Decl., ¶¶ 15-16. NorthMet construction is scheduled to begin this summer, and construction of the tailings basin seepage containment system authorized in the NorthMet permit would harm 140 acres of wetlands. *Id.*, ¶15 Should the NorthMet permit be reversed and remanded pending this appeal, this substantial wetlands destruction would be for naught. *Id.*, ¶ 16.

B. Harm to Respondents is outweighed and results from their conduct.

Litigation under the FOIA to secure EPA comments on the NorthMet permit is proceeding on an aggressive schedule, and briefing will be complete by early August. Maccabee Decl., ¶ 10. Any harm to Respondents will be short in duration and should not weigh heavily in this Court's decision. *See Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1039 (8th Cir. 2016)(affirming district court finding that "the balance of harms favored granting the preliminary injunction," based in part on "its finding that the injunction would likely be short in duration").

In these cases, any prejudice to MPCA results from its own conduct and the procedural irregularities created by efforts to avoid disclosure of EPA's criticism of

NorthMet permit terms favorable to the Respondent-Intervenor. As with other court orders, the intent of the stay of the NorthMet permit would not be punitive, but the stay would remove any incentive to continue withholding of information routinely and appropriately contained in the administrative record for a CWA permit decision.

C. The public interest supports a stay.

The public interest supports a stay of this appeal and the NorthMet permit to ensure agencies “take seriously their responsibilities to develop and preserve the administrative record.” *Hard Times Café*, 625 N.W.2d at 174. Mr. Fowley’s OIG complaint not only suggests that the “cooperation” between MPCA and EPA management to keep EPA’s comments off the state record seemed designed to hide the concerns from the public and this Court, Exh. F at 1, but that the EPA and MPCA have reportedly “engaged in conversations about ways to continue to have EPA make comments on future permits off the record, such as sending EPA comments to the state only by screen shot.” *Id.*

If MPCA can hide EPA oversight from the public and the courts until appeals are concluded and sulfide mining activities are underway despite federal regulations, the Data Practices Act, and Minnesota’s rule establishing a duty of candor, oversight to protect Minnesota’s natural resources will be ineffectual. The integrity of the permit process is necessary to Minnesota’s declared “policy to create and maintain within the state conditions . . . in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed.” Minn. Stat. §116B.01. Stay of the NorthMet permit and appeal will serve the public interest in the integrity of MPCA permitting.

D. A stay is necessary to preserve the *status quo* and this court's jurisdiction.

Finally, a stay is needed to protect water quality in the Partridge River, Embarrass River and St. Louis River, Maccabee Decl., ¶ 1, and the efficacy of this court's review. Should this case be heard on appeal without knowing the extent and nature of EPA's concerns about the NorthMet permit, a decision could be made that conflicts with the most reasonable and long-standing interpretation of CWA regulations. *See Annandale*, 731 N.W.2d at 521.

Environmental injuries create a particular need to preserve the *status quo*. *See e.g. Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.”). If the NorthMet permit is not stayed pending resolution of this appeal, wetlands and downstream water quality may be irreparably harmed due to the laxity of a permit adopted through irregular procedures that concealed critical oversight.

For these reasons, WaterLegacy respectfully requests the Court stay the NorthMet permit and the pending appeals regarding the NorthMet permit until the resolution of the FOIA litigation.

CONCLUSION

WaterLegacy has shown compelling grounds for a transfer of this matter to district court pursuant to Minn. Stat. § 14.68 or, in the alternative, a stay of this appeal and of the NorthMet permit pursuant to Minn. Stat. § 14.65. Substantial and material irregularities in

procedure have concealed from Relators, the public, and this Court critical comments of the EPA in its oversight of the draft NorthMet permit under the CWA. The balance of harms to the parties, the public interest and protection of the Court's jurisdiction would also support a stay of this appeal and of the NorthMet permit. WaterLegacy respectfully requests the Court's relief in this matter.

Dated: May 17, 2019

Respectfully submitted,

/s/ Paula G. Maccabee

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Attachment 2 to Relators' List of Alleged Procedural Irregularities

the United States Environmental Protection Agency (“EPA”) was a cooperating agency involved with evaluating potential water quality impacts of the NorthMet project. Exhibit A contains true and correct copies of EPA written comments to MPCA on NorthMet permitting in 2015 and 2016. These documents are contained in the administrative record as exhibits to WaterLegacy’s comments. (R. 3259-3263, 3274-3281).

3. In March 2018, I first heard that there may be something irregular about the EPA’s review of the draft NorthMet permit. Beginning on March 26, 2018, I made five Minnesota Government Data Practices Act (“Data Practices Act”) requests to MPCA on behalf of WaterLegacy for comments and a broad range of documents pertaining to the NorthMet permit. Exhibit B contains true and accurate copies of these Data Practices Act requests. One of these requests is in the administrative record. (R.55126)

4. WaterLegacy received various documents from MPCA in response to our Data Practices Act requests seeking information on communications with EPA regarding the NorthMet permit. The documents contained in Exhibit C are true and correct copies of all documents received by WaterLegacy from the MPCA that appear to pertain to EPA concerns about the NorthMet permit. These documents were provided to several members of the United States Congress and to Mr. Jeffrey Fowley, and some were also attached as exhibits in litigation. Most of these documents are in the administrative record (*see* R. 41481, 43841-42, 48825-37, 49814-23, 51001), although page 4 is not in the record.

5. In March 2018, I also made a broad request to EPA for documents related to the NorthMet permit under the Freedom of Information Act (“FOIA”). In April 2018, EPA

denied WaterLegacy's request for a fee waiver and informed us that FOIA search costs would be from \$6,500 to \$10,000. On July 27, 2018, WaterLegacy appealed the denial of the FOIA fee waiver on July 27, 2018, but we've received no response from EPA.

6. In an October 2018 conversation with EPA Region 5 counsel to follow up on our FOIA request, I was advised that EPA Region 5 had prepared final comments on the draft NorthMet permit proposed by MPCA, but had never sent those comments. I was told EPA's final comments on the draft permit could be obtained with a simple FOIA request for this document at a cost of \$25. On October 19, 2018, I made an FOIA request for just the final EPA Region 5 comments on the draft NorthMet permit, and on October 23, 2018 I agreed to pay the \$25 fee. Despite phone calls, emails and the resubmission of my FOIA request on December 3, 2018 (since it had been inexplicably "lost"), EPA produced neither the comments nor any substantive response to this simple FOIA request.

7. On January 15, 2019, WaterLegacy requested assistance from the U.S. Congress to secure EPA comments on the NorthMet permit. Exhibit D contains a true and accurate copy of the letter sent by WaterLegacy to Congressional oversight committee leaders requesting this assistance. This document is not in the administrative record.

8. Congresswoman Betty McCollum has sent two letters to EPA's Administrator requesting EPA's NorthMet permit comments and has made inquiries to the Administrator in the subcommittee she chairs, but has been unable to obtain EPA comments. Exhibit E contains true and accurate copies of the Congresswoman's letters and a response letter from EPA. These documents are not in the administrative record.

9. In early January 2019, I was contacted by Jeffry Fowley, retired EPA counsel, who said he was researching current EPA practices regarding permit review. I sent Mr. Fowley copies of MPCA emails and notes obtained under the Data Practices Act relating to NorthMet permit oversight. On January 31, 2019, Mr. Fowley submitted a complaint to the EPA Office of Inspector General (“OIG”) alleging “Possible Waste, Fraud or Abuse in EPA Region V: Suppression of Comments on the Poly Met mining Company State Water Permit and other Permit Actions by Minnesota, and the Region Making Comments Off the Record in a Way that Hides Them From the Public.” Exhibit F is a true and accurate copy of Mr. Fowley’s OIG complaint. This document is not in the administrative record.

10. On February 19, 2019, represented by Public Employees for Environmental Responsibility (“PEER”), WaterLegacy filed a complaint in the United States District Court for the District of Columbia seeking EPA comments on the draft NorthMet permit under the FOIA. EPA filed an Answer on April 3, 2019, and the Court has set a schedule for summary judgment motions with the final reply brief due on August 5, 2019. Exhibit G contains true and accurate copies of WaterLegacy’s FOIA Complaint and EPA’s Answer. These documents are not in the administrative record.

11. WaterLegacy continues to make every possible diligent effort to secure EPA Region 5’s comments on the NorthMet permit, as well as to determine what oral communications took place between EPA and MPCA and how it came to pass that EPA’s

written comments were not provided to MPCA. We have not yet secured EPA's comments on the draft NorthMet permit.

12. Mr. Fowley's OIG complaint alleged that EPA read comments on the draft NorthMet permit to MPCA over the phone in April 2018, a claim that has since been verified. Mr. Fowley told me his sources at EPA said that during that call MPCA staff asked EPA staff to read EPA's comments on the draft NorthMet permit more slowly, because MPCA was taking notes during this conversation. MPCA has not provided any handwritten notes of this important April 2018 phone call or from any phone or in-person meetings with EPA after MPCA sent EPA the pre-proposal permit in October 2018 either in responses to Data Practices Act requests or in the administrative record.

13. Handwritten notes of EPA's comments in Exhibit C reveal EPA's concern that that the NorthMet permit should have water quality-based effluent limits ("WQBELs"), that the NorthMet permit was not enforceable under the Clean Water Act, and that the NorthMet project would violate downstream water quality standards. Effluent limits serve as the primary mechanism in Clean Water Act permits to prevent discharge from exceeding water quality standards. WaterLegacy's certiorari appeal and those of other Relators claim that the NorthMet permit violated the Clean Water Act, that it should have imposed WQBELs, that the permit was unenforceable, and that it would allow the NorthMet project to violate water quality standards.

14. Gaps in the administrative record - which does not contain EPA written comments on the NorthMet permit, MPCA notes reflecting EPA oral comments at critical

junctions, or MPCA responses to EPA comments - deprive WaterLegacy, along with other Relators who present similar claims, of compelling evidence that could rebut Respondents' positions supporting the NorthMet permit. WaterLegacy has obtained evidence indicating that, but for the procedural irregularities in this record, Relators and the Court would have this critical information in hand. WaterLegacy would be severely prejudiced, as would other Relators presenting similar claims, should these NorthMet permit appeals proceed without transferring proceedings to the district court to address procedural irregularities and evidence outside the record, or alternatively allowing a stay pending FOIA litigation to secure EPA comments on the draft NorthMet permit.

15. A NorthMet Project Permit to Mine Annual Report dated March 29, 2019 prepared for PolyMet states at page 9 that PolyMet "anticipates construction to start in the second half of 2019." This construction process would adversely impact wetlands as early as this summer. PolyMet's December 2017 Wetland Replacement Plan states at page 30 that construction of the seepage containment system for the NorthMet tailings basin would "result in direct impacts to 140 acres of wetlands." Thus, in the absence of a stay, PolyMet will materially damage wetlands within the next few months.

16. WaterLegacy and other Relators have all challenged the adequacy of tailings basin seepage containment authorized in the NorthMet permit. The NorthMet project and/or its containment system could be rejected or substantially altered as a result of Relators' appeals. If the NorthMet permit is not stayed pending resolution of the FOIA litigation and these appeals, 140 acres of wetlands could be destroyed to construct a

containment system serving no beneficial purpose, adversely affecting WaterLegacy's mission and the interests of its members and prejudicing WaterLegacy and other Relators.

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

Dated: May 17, 2019



PAULA G. MACCABEE

EXHIBIT A

**TO DECLARATION OF PAULA G. MACCABEE IN SUPPORT OF
WATERLEGACY MOTION FOR TRANSFER OR STAY
DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS**

Wester, Barbara

From: Pierard, Kevin
Sent: Tuesday, April 07, 2015 11:33 AM
To: Foss, Ann (MPCA)
Subject: Polymet NPDES Requirements
Attachments: 2015 04 07 NPDES MPCA Northmet email attachment.docx; NorthMet - Impact Criteria-Permittability Memo FINAL (062011).pdf

Hi Ann,

During our review of the proposed Polymet - Northmet (Northmet) project related documents and Environmental Impact Statement (EIS) drafts we had several conversations concerning EPA's comments relative to the Clean Water Act (CWA) and specifically to future National Pollutant Discharge Elimination System (NPDES) permitting for the proposed Northmet project. The Minnesota Pollution Control Agency (MPCA) requested that specific responses to our comments on NPDES related issues be deferred to the permitting phase of the project rather than during the EIS development phase. EPA accommodated that request. Since many decisions concerning NPDES were not specifically summarized in writing I thought it would be helpful to do so to assure shared understanding of the issues and documentation of decisions and approaches we agreed upon. Accordingly, I am writing this note to document our understanding of MPCA's anticipated approach to address proposed discharges of pollutants to waters of the United States through NPDES permitting, and to explain EPA's position regarding the applicability of NPDES permit requirements for point source discharges of pollutants to surface waters, including those that occur via subsurface flow. We note that because these issues were deferred to permitting during the process to develop the EIS, we do not anticipate that the information in the EIS will necessarily be sufficient to address the concerns we have enumerated, and we anticipate that MPCA will be working with Northmet to ensure the development of a sufficient record to support NPDES permit issuance.

Discharges are proposed for the Northmet site which require NPDES permit coverage in order to be in compliance with the CWA. The project proponent has a duty to submit an NPDES permit application to seek coverage for all proposed pollutant discharges, so that the permit can be in place when the proposed pollutant discharges occur. The MPCA is responsible for issuing an NPDES permit, where appropriate, that contains conditions and limits which assure compliance with all applicable requirements of the CWA and regulations, including limitations controlling all pollutants which are determined to cause or have reasonable potential to cause or contribute to an excursion from any state WQS. The enclosure highlights the more significant issues that we have identified to date for this facility and that must be addressed during the NPDES permitting process.

Although we have spoken many times regarding these concerns please let me know if you have any questions or would like to discuss further. In addition, we look forward to working with you to assure timely decisions on new and expired mining permits consistent with our joint priority.

Please see the attachment for some more information on the NPDES applicability to the Northmet project.

Pollutant Discharges from Point Sources

EPA has consistently interpreted the Clean Water Act (CWA) to apply to discharges of pollutants from a point source to surface water, including those that occur via hydrologically connected ground water.¹ The CWA defines point sources as follows:

The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

The need for an NPDES permit is highly dependent on the facts surrounding each situation. 66 *Fed. Reg.* at 3015; 63 *Fed. Reg.* at 7881. As EPA has explained:

The determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations. The time and distance by which a point source discharge is connected to surface waters via hydrologically connected [ground] waters will be affected by many site specific factors, such as geology, flow, and slope. . . 66 *Fed. Reg.* at 3017.

Mine Site

MPCA does not anticipate that NPDES permit coverage would be required prior to mine construction and commencement of operations for proposed pollutant discharges to surface waters that will occur via subsurface flow or hydrologically connected groundwater. MPCA has indicated that it would initiate NPDES permit coverage for the mine site when “a point source water discharge adds pollutants to waters of the U.S.”² It is unclear what MPCA would use to determine this criteria is met, which is why we are providing the definition of point source here, as well as the clarification on discharges that occur via subsurface flow or hydrologically connected groundwater that EPA provided in the aforementioned federal register notice.

The MPCA cites as rationale for its approach modeled projections of flow and magnitude of the potential pollutant load as represented in the SDEIS and which suggest that it could take up to 17 years after the commencement of mining for pollutants to reach the Partridge River. See SDEIS Table 5.2.2-26. The EPA’s comments on the SDEIS dated March 13, 2014, describe our concerns regarding both the reliance on the modeling approach and that the Partridge River is not the first receiving water of mine site discharges. We understand that the model expressly assumes no discharge to wetlands located between the mine site and the Partridge River. We note that as a result of this assumption, the travel times predicted in the SDEIS and in recently

¹ See, Proposed National Pollutant Discharge Elimination System Regulations for Concentrated Animal Feeding Operations, 66 *Fed. Reg.* 2960, 3015 (Jan. 12, 2001); NPDES General Permits for Storm Water Discharges from Construction Activities, 63 *Fed. Reg.* 7,858, 7,881 (Feb. 17, 1998).

² Draft PFEIS language, Section 5.2.2.3.6 Monitoring

updated reference documents (updated in support of preparation of the Final EIS)³ estimate that pollutants will begin to arrive at the Partridge River 17-34 years from the beginning of the project. Since the model predictions are based on the pollutants traveling the entire distance between the mine site and the Partridge River via a subsurface flow path, we note that pollutants may reach surface waters sooner than predicted in either or both of two ways. First, pollutants may be discharged to wetlands in close proximity to the mine site, a potential that is not considered by the modeling work that supported EIS development. Second, pollutants from discharges may reach the Partridge River evaluation locations sooner than predicted because the path pollutants travel to those locations may not be entirely in the subsurface. During our discussions MPCA confirmed their understanding that the wetlands associated with the Partridge River and the tributaries to the Partridge River are waters of the U.S. and may be the first waters receiving pollutants from mine site features.

We understand that MPCA is expecting to apply State Disposal System (SDS) permit coverage for the mine site that may include monitoring requirements. The MPCA plans to evaluate monitoring results and then expects to apply NPDES permitting authorities to the mine site if and when a discharge of pollutants to surface waters is either detected or determined to be imminent. A complete NPDES permit application must include information detailing when and where pollutants originating from mine site activities and features will enter surface waters (40 CFR §§ 122.21 and 124.3). We understand that MPCA plans to use monitoring required under the SDS program to track the progress of pollutants toward surface waters, and then would modify the existing permit to include NPDES requirements to pollutant discharges that will soon reach or have already reached surface waters. MPCA has not made clear how it intends to structure the SDS permit to assure sufficiently timely detection of potential to discharge and initiation of the NPDES process. As MPCA moves forward in development and issuance of the SDS permit we would encourage you to consider these concerns in order to provide time to take the necessary steps that may avoid noncompliance by the permittee.

An NPDES permit for discharges of pollutants will need to include numeric and/or narrative effluent limitations necessary to protect water quality standards of the receiving waters, as well as any limitations necessary to ensure that downstream water quality standards are protected. 40 CFR § 122.44(d). The facility must be able to meet standards at the time of permit issuance, as no time to comply with standards can be granted to Northmet through an NPDES permit. As a “new source” as that term is defined in 40 CFR § 122.2, the mine site is subject to New Source Performance Standards (40 CFR 440) which pertain to quantity and quality of water that can be discharged. New sources generally are not eligible for schedules of compliance or variances from water quality standards. 40 CFR § 122.47, and 40 CFR 132 Appendix F.

Under federal regulations at 40 CFR § 122.21(a)(1), “Duty to apply,” “any person who discharges or proposes to discharge pollutants ... and who does not have an effective permit ... must submit a complete application to the Director in accordance with this section and part 124 of this chapter.” The time to apply (40 CFR § 122.21(c)) is no less than 180 days prior to the commencement of discharge. However, it can take longer than 180 days to draft and issue a

³ Water Modeling Data Package Volume 1 – Mine Site. Version 13. December 29, 2014. Prepared for PolyMet Mining Inc. by Barr Engineering Co.

permit and simply applying for a permit does not provide the coverage needed to authorize discharges of pollutants to surface waters under the CWA.

If permit coverage for identified pollutant discharges is not received prior to pollutants reaching surface waters, then the company will be discharging without a permit in violation of the CWA. Note that there is no minimum threshold of predicted pollutant load needed to trigger the requirement to submit a permit application.⁴

Plant Site (Tailings Basin)

In a June 20, 2011 Memo (“Memo”), MPCA outlined criteria it would review in assessing “permittability” of the tailings basin, which included that the groundwater seepage from the tailings basin would not exceed 500 gallons/acre/day, which MPCA notes is “equivalent to an engineered lined system with respect to release of seepage to groundwater.”⁵ For a source as large as the tailings basin for the proposed Northmet facility, this would translate into seepage potentially in excess of about 2 million gallons/day.

The MPCA Memo appears to identify 500 gallons/acre/day as a threshold flow below which a facility would not be subject to NPDES requirements. Although the Memo did not address the hydrologic connection between groundwater and surface water flow at the site, the Memo states that “‘excess’ wastewater from the tailings basin [that discharges to the Embarrass River] during facility operations must meet effluent limitations based on the 10 mg/L wild rice sulfate surface water quality standard.” Memo at page 2. The Memo further explains that to evaluate permit coverage for the facility, MPCA will “seek evidence the facility will not have a statistically significant impact on sulfate in receiving waters. . . groundwater quality standards can be met at the facility property boundary, [and] all applicable surface water quality standards can be met in surface waters at the facility,” among other factors.

The CWA does not include exemptions that would limit NPDES permit coverage to only “excess” wastewater discharges that are deemed to have a “statistically significant” impact on receiving waters at property boundaries. There is no exclusion or exemption for discharges from facilities based on technology or engineering controls. See 40 CFR 122.44(d). Failure to obtain NPDES coverage for discharges of pollutants to waters of the United States would place the discharger at risk of violating the CWA. We had many discussion with MPCA and the permittee on this point and believed this was understood and agreed to by the parties some time ago.

Transfer of tailings basin permits

On July 1, 2013, EPA received a “Draft Outline for Additional Information on Permitting in SDEIS,” from MPCA, which indicated that the tailings basin permit(s) would be revised and transferred should Polymet take over operation of the tailings basin. Federal regulations

⁴ The contents of a complete permit application are described in 40 CFR § 124.3 and for new industrial sources at §§ 122.21(f), and (k). Included in the permit application requirements are requirements to identify the location of the outfall, the receiving water, and the flows and sources of the discharges, a line drawing that includes a water balance, and effluent characteristics. Effluent characteristics includes a listing of the pollutants expected to be present in the discharge, and their projected amounts, and provide the source of the information (basis for why the applicant believes the projected amounts to be representative).

⁵ Memo from Ann Foss, MPCA, to Bill Johnson, MDNR, “Minnesota Pollution Control Agency Staff Recommendations on Impact Criteria Related to the Permittability of the Proposed PolyMet Tailings Basin,” June 20, 2011.

regarding permit transfers are found at 40 CFR § 122.61. The Plant site currently includes the non-operational iron ore processing facility and the tailings basin which does not currently accept tailings. Polymet's reuse of this site would result in significant changes including types of ore processed, changes in discharge water quantity and quality, additional discharge locations, a reconfiguration of how water is managed, and additional waste management areas such as the proposed hydrometallurgical disposal facility. Substantial modifications such as these are not "minor modifications," as that term is defined in the federal regulations (see 40 CFR § 122.63), rather these are modifications that would require a major modification or revocation and reissuance of the permit(s), as provided in 40 CFR § 122.62.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

NOV 03 2016

REPLY TO THE ATTENTION OF:

WN-16J

Ms. Ann Foss
Metallic Mining Sector Director
Minnesota Pollution Control Agency
520 Lafayette Road
St. Paul, MN 55155-4194

Re: NPDES Permit Application for Polymet Mining Corporation's Northmet Mine

Dear Ms. Foss:

On July 11, 2016, Polymet Mining Corporation (Polymet) submitted an application for a National Pollutant Discharge Elimination System and State Disposal System (NPDES/SDS) permit to the Minnesota Pollution Control Agency (MPCA) for discharges related to the proposed Northmet project ("Application"). The U.S. Environmental Protection Agency obtained the Application via the MPCA's website. On August 2, 2016 MPCA informed Polymet that the application is complete for processing but also indicated that MPCA may have additional information requests as MPCA further processes the application. EPA appreciates the significant effort that went into MPCA's review of this application, and we hope you find this letter useful as you continue to review and process the application materials submitted by Polymet.

As you know, Section II of The Memorandum of Agreement (MOA) between MPCA and EPA describes the process by which EPA reviews NPDES permit applications that have been submitted to the MPCA. The MOA states that:

If the EPA determines that the NPDES application form is not complete the deficiencies shall be identified by letter to the Director. No NPDES application shall be processed by the Agency until the deficiencies are corrected and it has been advised in writing by the EPA that the NPDES application form is complete. *MOA, Part. II, Section 124.23 Transmission of Data to Regional Administrator, Paragraph 1.*

Consistent with the MOA, EPA has conducted a focused review of the application materials for that portion related to the NPDES coverage sought for the proposed Northmet project, specifically the information submitted on and referenced in the EPA Form 3510-2D (Rev.8-90) for new industrial discharges. The enclosure to this letter describes the deficiencies¹ EPA has found regarding the application materials and identifies additional concerns raised by the application materials, including:

¹ We use the term "deficiencies" because that is the term used in the MOA. We interpret "deficiencies" to refer to omissions, inconsistencies, mistakes, and other circumstances where we believe the information provided by the applicant is not responsive to the directions given on the application form. As used in the MOA, the term does not refer to any deficiencies in MPCA's application review process.

- Antidegradation requirements, and
- Federal effluent limitations guidelines as they pertain to the proposed Northmet project.

In addition, EPA notes that although: 1) the Final Environmental Impact Statement (FEIS) for the Northmet project details discharges to surface waters predicted to occur at the mine site²; and 2) the permit application contains numerous references to the FEIS³, the applicant specifically does not request NPDES permit coverage for these discharges⁴.

EPA's position, as we explained previously during the development of the FEIS, is that the incorporation of the FEIS into the Application without ensuring that NPDES permit coverage is fully consistent with the information presented in the FEIS could create potential enforcement and permit shield issues under Section 402(k) of the Clean Water Act (CWA). If the application is not revised to either request NPDES permit coverage for the specific discharges proposed in the FEIS or to remove all references to the FEIS and supporting documentation, then any draft permit must include a prohibition on discharges from mine site point sources to surface waters, including those discharges that occur via a direct hydrologic connection, as documented in the FEIS.

EPA's position as explained above is consistent with EPA's past interpretation that the CWA applies to discharges of pollutants from a point source to waters of the United States, including those made through a ground water hydrologic connection.⁵ The CWA defines point sources as follows:

The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. 33 U.S.C 1362(14)

The need for an NPDES permit is highly dependent on the facts surrounding each situation. 66 *Fed. Reg.* at 3015; 63 *Fed. Reg.* at 7881. As EPA has explained:

The determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations. The time and distance by which a point source discharge is connected to surface waters via hydrologically connected [ground] waters will be affected by many site specific factors, such as geology, flow, and slope. . . 66 *Fed. Reg.* at 3017.

Finally, we emphasize that it is important that the content of the application be fully documented and that the record before the permitting Agency be complete and transparent. As MPCA continues to receive supplemental information from the applicant (including, any materials provided by the

² For example, Page 5-35, Figure 5.2.2-7, Table 5.2.2-8, of the FEIS.

³ Including references to the project description, modeling results, monitoring data, effluent, ambient and downstream water quality predictions, and including predicted point source discharges to surface waters from the mine site including Figure 5.2.2-7 of the FEIS.

⁴ Application, Vol. 1, Chap. 2.0 states that, "The Mine Site will not discharge mine water or process water to surface waters from a point source; therefore, no NPDES permit is required and only SDS coverage is requested."

⁵ See, Proposed National Pollutant Discharge Elimination System Regulations for Concentrated Animal Feeding Operations, 66 *Fed. Reg.* 2960, 3015 (Jan. 12, 2001); NPDES General Permits for Storm Water Discharges from Construction Activities, 63 *Fed. Reg.* 7,858, 7,881 (Feb. 17, 1998).

applicant to MPCA after July 11), we strongly recommend that this information be added to the permitting record and be made available to the public and to EPA in a timely manner.

Again, we appreciate MPCA's efforts in reviewing the Polymet application and we look forward to working with you to resolve the issues identified in this review as MPCA moves forward to draft the NPDES permit for this proposed facility. We will conduct a formal review of any draft permit that MPCA proposes to issue consistent with our MOA. Please contact me or Krista McKim of my staff at (312) 353-8270 or mckim.krista@epa.gov with any technical questions. For legal questions please contact Barbara Wester of the Office of Regional Council at (312) 353-8514 or wester.barbara@epa.gov.

Sincerely



Kevin M. Pierard, Chief
NPDES Programs Branch

Enclosure

U.S. EPA's Review of the Polymet – Northmet NPDES permit application to MPCA

This enclosure presents issues identified in EPA's October 2016 focused review of the Northmet NPDES/SDS permit application. EPA looks forward to working with MPCA to obtain additional information and/or clarification to fully address these issues prior to MPCA's proposal of a draft permit for the project, consistent with the MOA.

Deficiencies Found EPA's Review of Form 2D

The deficiencies¹ identified below are organized by referencing the specific Item number or Part in "EPA Form 3510-2D (Rev. 8-90)." The Applicant submitted this form as part of its application. Unless otherwise stated, when referring to the application instructions, EPA is referring to the specific instructions for each Item or Part identified in the above-referenced form. The information requested through this form is based on the federal requirements found in 40 C.F.R. Part 122.

Item I. The applicant has provided locational information for three outfalls, SD002, SD003 and SD004. Latitude and longitude coordinates are provided for each. However, for SD003, the applicant has indicated that the "coordinates represent the average of six surface water discharge outfalls". This is not an appropriate manner for describing the outfall locations. The application should describe each outfall and its actual location. In addition, when the application is revised to include all six proposed discharge locations, please be sure to name the immediate receiving water for each outfall. In some cases, the immediate receiving water may be wetlands.

In addition, we noticed that the application materials contain conflicting or inconsistent information in some places. For example, the locations given for SD002, SD003 and SD004 elsewhere in Volume I are inconsistent with the information on the Federal form. We did not attempt to identify every instance where the applicant provided locational information for the outfalls but the applicant should ensure correct information regarding the outfall locations throughout the application.

It is important to resolve this issue with the applicant as incorrect or inconsistent locational information could result in (1) confusion for regulators and the public regarding where discharges will occur; (2) failure to identify appropriate water quality standards for the receiving waters; and (3) inability to enforce discharge limits in a final permit.

Item III-A. The application instructions require the applicant to list the average flow contributed by each outfall. For SD003 2,400 gallons per minute [gpm] is given. In providing information regarding each specific outfall location, the applicant should update this section to include an estimated average flow rate for each outfall. At this time, it is unclear if 2,400 is meant as an average flow for the 6 outfalls or a total. The applicant should provide any needed recalculations at this time as well.

It is important to provide detailed flow information because it is needed to ensure that the permit includes limits necessary to meet applicable water quality standards. Additionally, this information is needed to provide an estimate, along with the expected pollutant concentrations, of pollutant loading to

¹ We use the term "deficiencies" because that is the term used in the MOA. We interpret "deficiencies" to refer to omissions, inconsistencies, mistakes, and other circumstances where the information provided by the applicant is not responsive to the directions given on the application form. As used in the MOA, the term does not refer to any deficiencies in MPCA's application review process.

the receiving waters, and to inform decisions the permitting authority needs to make regarding implementation of federal regulations for new source performance standards.

Item III-B. The application instructions require a line drawing

... depicting the water flow through the facility. Indicate sources of intake water, operations contributing wastewater to the effluent, and treatment units labeled to correspond to the more detailed descriptions in Item III-A. Construct a water balance on the line drawing by showing average flows between intakes, operations, treatment units, and outfalls. If a water balance cannot be determined (e.g., for certain mining activities), provide a pictorial description of the nature and amount of any sources of water and any collection or treatment measures.

For this requirement, the applicant referenced “Large Figures” 2 and 3 in Volume III of the application as the response to this item. We believe the information provided in the applicant’s line drawings as depicted in these two figures is incomplete in the following respects:

- Source of water was not provided.
- Each operation contributing wastewater was not provided or identified.
- Estimation of flow – The application depicts “Average P90 Flows”. However, the applicant should clarify whether this represents the average flow rate that is expected.
- Flow diagrams do not depict the complete route taken by water from intake to discharge as required by the instructions. Figures 2 and 3 taken together are limited to only the route taken by water through the Wastewater Treatment Facility and the Wastewater Treatment Plant. The applicant should clarify and revise the line drawing as necessary to depict the route taken by water through the entire facility.
- The diagrams do not identify receiving waters. Figure 2 and 3 provide as endpoints “Stabilized effluent for discharge or potential reuse ...” or “final effluent”. The specific discharge location and receiving waters should be specifically identified.

A revised line drawing is needed to address these issues. We note that several other water flow diagrams were included in the application materials, but we did not locate any figure that contains the necessary information described above. If the applicant wishes to reference a different water flow diagram in Form 2D (and which does address all of the above information), please provide the specific reference to that flow diagram (and the form should be updated accordingly). In addition, if water management is expected to change over the course of the entire project, we recommend that the applicant submit line drawings to represent each project phase, as necessary, to illustrate how water will be managed throughout the lifetime of the project.

The complete flow diagram is needed for many parts of the application. This information assists the permitting authority and the public to understand the processes of the facility's operations and the nature of all of the materials with which the water will be in contact, including any additives. This information also assists in describing the extent to which wastewater streams may be mingled with each other and the extent to which water is reused in the facility's process(es).

The permitting authority will need this information to ensure appropriate limits and conditions are included in the permit, including the implementation of federal new source performance standards.

Item V. Effluent Characteristics. The application instructions require the applicant to report levels of pollutants as concentration and as total mass for each outfall for certain pollutants, and for others only if they are believed to be present in the discharge. The applicant has submitted data for several parameters, but only concentration data have been submitted, and only one result, not one result for each outfall, is reported. The data must also be expressed as a total mass, or pollutant load. It is unclear to which outfall the data applies as no outfall number is provided. Additionally, “Year 10” has been stamped onto the form. The significance of providing data for “Year 10”, is not explained nor is it sufficient for permitting purposes to rely on information provided for one year whose significance is not explained. We recommend that if the character of the effluent is expected to change with time and or phase of the project that the applicant provide sufficient information so that each phase of the project is represented.

Additionally, the applicant has listed what appear to be incomplete references in the space provided to identify the sources of information used to derive the effluent quality information provided on the Form. We understand that these sources may be shortened titles for documents listed in a separate collection of support documents submitted by the applicant, but we are unsure where to find the information or if it is available for public review. The specific documents and locations within those documents where the information can be located must be provided. Please ensure that these materials become part of the permit record and are made available for public review in a timely manner.

It is important to make sure that this issue is resolved with the applicant so as to provide a transparent means of verifying the source of information that was used to provide the estimates, as well as to document the basis the permitting authority will use to develop permit requirements.

Item VI. Engineering Report on Wastewater Treatment.

A. reference is made to “Waste Water Treatment System: Design and Operation Report”. We did not find this report attached to the application. It is listed in the references section of the application with an indication that it was estimated to be submitted in July 2016. The applicant should revise the application and MPCA should ensure that this report is timely available to the public for review along with the rest of the application materials in a timely manner.

B. the location of existing plants does not need to be limited to plants located in the State of Minnesota. This section could be expanded to include information from similar operations regardless of their location. This information is normally used by the permit issuing authority to assess the applicant’s information in relation to similarly situated facilities that may be discharging wastewater that is similar to the proposed discharge(s) in order to ensure adequate characterization of anticipated future loadings.

Antidegradation.

We are concerned that the antidegradation analysis submitted with the application materials pertains only to the plant site. As the mine site would be constructed as part of the same project for which the discharges from the plant site are proposed, and as there will be discharges from the mine site to Waters of the U.S., we would like to discuss with you the scope and timing of the antidegradation analysis that includes the construction of the mine site. After further analysis of the issue, EPA will provide additional comments on this matter including whether the lack of such information is a deficiency in the application.

New Source Performance Standards.

Federal regulations at 40 C.F.R. § 440 include restrictions on discharges from mills that use froth-floatation for beneficiation of copper and other ores. No discharge is allowed to occur from such process with the following exception:

In the event that the annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility exceeds the annual evaporation, a volume of water equal to the difference between annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility and annual evaporation may be discharged subject to the limitations set forth in paragraph (a) of this section. *40 C.F.R. § 440.104(b)(2)(i)*

Appendix D of Volume I of the application contains a lengthy discussion on this “zero discharge” requirement and how the proposed project might comply with it. In addition, MPCA has recently raised questions to EPA as to how to apply this requirement in the permit. We believe that a complete water flow diagram or diagrams, as required by Item III-B of the application and discussed above, will help illustrate the water management proposed for the facility and, therefore, highlight how the discharge would or would not be in compliance with the requirements at 40 C.F.R. § 440. From what we understand, the Northmet operation will manage water pumped from the mine pits, process water, and precipitation falling on the facility. The process water that will be discharged will be comingled with water pumped from the mine pits and the precipitation falling on the facility, which together will be treated before it is discharged, subject to applicable standards. In this case, we believe it may be appropriate to apply the exemption to the zero discharge requirement, and that the facility may discharge a volume of water equal to the difference between annual precipitation and annual evaporation subject to the standards provided in 40 C.F.R. § 440.104(a). EPA notes that 40 C.F.R. § 440.132(b) provides:

“Annual precipitation” and “annual evaporation” are the mean annual precipitation and mean annual lake evaporation, respectively, as established by the U.S. Department of Commerce, Environmental Science Services Administration, Environmental Data Services or equivalent regional rainfall and evaporation data.

In regard to the multi-year approach proposed by the applicant in Appendix D, Volume I, we disagree that the regulations in 40 C.F.R. § 440 do not include a timeframe for calculating the allowable discharge or evaluating the actual discharge. The regulations repeatedly utilize the word annual. While the term “annual” is not specifically defined in the regulations, it is defined in several other commonly used sources including the Miriam-Webster Dictionary as “covering the period of a year”, and there is no basis on which to interpret EPA’s intended use of the word annual to mean anything other than “covering a period of a year”.

We are available to discuss the details of how to implement 40 C.F.R. § 440 with you after the revised application materials are submitted to the MPCA and as you move forward to draft permit conditions that implement 40 C.F.R. § 440.

EXHIBIT B

**TO DECLARATION OF PAULA G. MACCABEE IN SUPPORT OF
WATERLEGACY MOTION FOR TRANSFER OR STAY
DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS**



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

Information request form

Records Management

Doc Type: Information Request Form

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1. Please fill out one form for each Information Request. Up to 10 requests processed per day, per requestor.
2. Complete the form and click on the "Submit" button at bottom of form to place it into your email.
3. To ensure you are using the most updated request form, please go to the MPCA website for every new request.
4. 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

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Date (mm/dd/yyyy): 03/26/2018

*Requester name: Paula Maccabee

*Phone number: (651) 646-8890

*Requester email address: pmaccabee@justchangelaw.com

*Organization name: WaterLegacy

*Organization or

requester billing address: 1961 Selby Avenue, 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: PolyMet NorthMet Project

Previous site/
facility name: NA

*Site address/location: NA

*City: Hoyt Lakes

*Zip code: 55732

*County: St. Louis

Program(s): water pollution, NPDES/SDS and 401 certification

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

Current public notice item Yes No

*Area of interest (check one box only)

- Air quality (emission information, monitoring data, modeling, etc.)
- Land programs (solid waste, hazardous waste, and above and underground storage tanks)
- Water quality (assessment, monitoring, and watershed)
- Standards, rulemaking, policies, etc.

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

Please provide all records since January 2015 pertaining to any of the following:

- 1) Comments, letters, emails, memos, meeting notes, phone conversation notes or any other records a) from the U.S. EPA; or b) pertaining to written or oral communications or phone or in-person meetings with the U.S. EPA regarding any proposed or draft NPDES/SDS permit for the PolyMet NorthMet Project; and
- 2) Comments, letters, emails, memos, meeting notes, phone conversation notes or any other records a) from the U.S. EPA; or b) pertaining to written or oral communications or phone or in-person meetings with the U.S. EPA regarding the cross-media mercury analysis, antidegradation analysis or any other aspect of the MPCA's proposed or draft recommendation for 401 certification of the PolyMet NorthMet Project.

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



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St. Paul, MN 55155-4194

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Date (mm/dd/yyyy): 09/20/2018

*Requester name: Paula Maccabee

*Phone number: (651) 646-8890

*Requester email address: pmaccabee@justchangelaw.com

*Organization name: WaterLegacy

*Organization or

requester billing address: 1961 Selby Avenue, St. Paul, MN 55104

(Address, Street, City, State, Zip)

Site/Facility information

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*Site/Facility name: PolyMet NorthMet Project

Previous site/
facility name: NA

*Site address/location: NA

*City: Hoyt Lakes

*Zip code: 55732

*County: St. Louis

Program(s): water pollution, NPDES/SDS and 401 certification

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

Current public notice item Yes No

*Area of interest (check one box only)

- Air quality (emission information, monitoring data, modeling, etc.)
- Land programs (solid waste, hazardous waste, and above and underground storage tanks)
- Water quality (assessment, monitoring, and watershed)
- Standards, rulemaking, policies, etc.

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

Please provide all records, including but not limited to comments, letters, emails, memos, meeting notes, phone conversation notes, draft permits, draft certifications, presentations, monitoring data, or technical materials since January 2018 pertaining to any of the following:

- 1) Any proposed or draft NPDES/SDS permit for the PolyMet NorthMet Project;
 - 2) Any proposed or draft Certification under Section 401 of the Clean Water Act pertaining to the PolyMet NorthMet Project;
 - 3) Any proposed or draft Minnesota Department of Natural Resources permits for the PolyMet NorthMet Project, including the Permit to Mine, Water Appropriation Permits, Wetlands Permit, and Dam Safety Permits; and
 - 2) Any information or analysis related to or pertaining to the PolyMet NorthMet Project of water quality issues, cross-media issues, degradation issues, wetlands impacts issues, or technology and designs to avoid, minimize or mitigate impacts to water quality or wetlands.
- WaterLegacy specifically requests that information be provided in electronic form to minimize costs to produce information. Please contact me at 651-646-8890 if you would like any clarification of our requests.

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>.)
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Date (mm/dd/yyyy): 12/12/2018

*Phone number: (651) 646-8890

*Requester name: Paula Maccabee

*Requester email address: pmaccabee@justchangelaw.com

*Organization name: WaterLegacy

*Organization or

requester billing address: 1961 Selby Avenue, St. Paul, MN 55104

(Address, Street, City, State, Zip)

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facility name: NA

*Site address/location: NA

*City: Hoyt Lakes

*Zip code: 55732

*County: St. Louis

Program(s): water pollution, NPDES/SDS and 401 certification

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

Current public notice item Yes No

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- Land programs (solid waste, hazardous waste, and above and underground storage tanks)
- Water quality (assessment, monitoring, and watershed)
- Standards, rulemaking, policies, etc.

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

Please provide all paper records, including but not limited to comments, letters, emails, memos, meeting notes, phone conversation notes, draft permits, draft certifications, presentations, monitoring data, or technical materials since WaterLegacy's most recent DPA requests this fall:

- 1) Any proposed or draft NPDES/SDS permit for the PolyMet NorthMet Project;
 - 2) Any proposed or draft Certification under Section 401 of the Clean Water Act pertaining to the PolyMet NorthMet Project;
 - 3) Any proposed or draft Minnesota Department of Natural Resources permits for the PolyMet NorthMet Project, including the Permit to Mine, Water Appropriation Permits, Wetlands Permit, and Dam Safety Permits; and
 - 2) Any information or analysis related to or pertaining to the PolyMet NorthMet Project of water quality issues, cross-media air emissions issues, degradation issues, wetlands impacts issues, or technology and designs to avoid, minimize or mitigate impacts to water quality or wetlands.
- WaterLegacy specifically requests that these documents along with any pertinent documents not provided in response to our 9-20-2018 and 10-14-2018 requests be provided immediately in electronic format or made available for inspection if no electronic copies exist.

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>.)
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Date (mm/dd/yyyy): 01/01/2019

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*Phone number: (651) 646-8890

*Requester email address: pmaccabee@justchangelaw.com

*Organization name: WaterLegacy

*Organization or

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Date (mm/dd/yyyy): 02/03/2019

*Requester name: Paula Maccabee

*Phone number: (651) 646-8890

*Requester email address: pmaccabee@justchangelaw.com

*Organization name: WaterLegacy

*Organization or requester billing address: 1961 Selby Avenue, St. Paul, MN 55104

(Address, Street, City, State, Zip)

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*Site address/location: NA

*City: Hoyt Lakes

*Zip code: 55732

*County: St. Louis

Program(s): water pollution, NPDES/SDS and 401 certification

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

Current public notice item Yes No

*Area of interest (check one box only)

- Air quality (emission information, monitoring data, modeling, etc.)
- Land programs (solid waste, hazardous waste, and above and underground storage tanks)
- Water quality (assessment, monitoring, and watershed)
- Standards, rulemaking, policies, etc.

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

Please provide all data including but not limited to comments; letters; emails; memos; notes of meetings, phone conversations and/or viewing of screen shots; or other data regardless of its physical form or storage media, not yet provided in response to WaterLegacy's September, October and December 2018 and January 2019 DPA requests, including data involving MPCA leadership or counsel, relating to the following:

- 1) Any comments or feedback provided by the U.S. EPA on the draft or pre-publication NPDES/SDS permit for the PolyMet NorthMet Project, specifically including but not limited to those read or shown by screen shot to MPCA in April 2018 or in the 45-day pre-publication review period;
- 2) Any communications with the U.S. EPA regarding Clean Water Act Section 401 Certification pertaining to the PolyMet NorthMet Project.

WaterLegacy specifically requests that these documents be provided immediately either in electronic format or made available for inspection if no electronic copies exist. If there is any assertion that these documents are exempt from disclosure, please state with specificity the asserted grounds for that exemption.

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.

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EXHIBIT C

**TO DECLARATION OF PAULA G. MACCABEE IN SUPPORT OF
WATERLEGACY MOTION FOR TRANSFER OR STAY
DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS**

EPA Call

11/1/17

Krista → enforcement section chief starting ~ November

Mark Ackerman - staff replacement for Krista

* Meeting next week.

1) CSW permit for construction at seep collection - EPA Agreed

2) ELG[±], Net zero discharge

1 yr carryover approach

- PCA - annual w/ 1-yr carryover

EPA wants annual average

- EPA disagrees.

* Check notes - what facility / Alaska did we discuss

Send name of Alaska Facility to EPA

3) Antideg - agree future discharges should be determined in Future

- How far downstream? PCA did not consider St. Louis R.

"streams" was used, implies St. Louis R. not considered

- PCA - looked at immediate waters. If no degradation

of immediate waters, then waters downstream not impacted

- EPA doesn't remember ↑ Wants impacts to St. Louis R. or

logic of why St. Louis R not mentioned

4) ISW ~~is~~ General vs Individual

- Recommend stormwater is clearly defined - PCA will rely on ISW Gen.

- 5) Permit Application (Updated) - Polymet included news/additional info based on PCA discussions & feedback from EPA.
- Is App. Full + complete
 - * EPA wants to make sure all things considered are available to the public
 - How will PCA catalog documents + display to public? (Richard)
 - Also ~~not~~ rely on EIS record
 - * EPA wants us to Identify all documents used to develop permit
 - Specifics - not just "rely on EIS" - cite specific references

Form 20

6) WQBEL^s

- R.P. analysis included all parameters - No RP to exceed WQS, no WQBEL needed
- Sulfate - Form 20 is not predicting 10.0, they are predicting less than 10
- Operating Limit = 10
- Operating Target = 9
- * EPA thinks WQBELs are appropriate

Copper
sensitivity of
effluent of
compared to
background
levels

* Set up call for next week

Next call:

- 7) Discharges via GW pathway - want to know more about monitoring

EPA Call

11-9-17

* Updated monitoring plan - send summary to Krista when finished

Allowable Discharge - Alaska example - Krista

- Alaska has max valve flow limit in permit.
- 2017 permit had identical language as previously issued EPA permit.

Operating Limit - 50y

- EPA wants WRBEL
- RP - EPA could come up w/ RP w/ some of the metals
- ^{Barbara} For purposes of enforcement + permit shield, new facility.

EPA wants to send letter prior to PN

Wants advance copy ~~to~~ prior to PN for review + comments

PCA will send PN version prior to notice to the public (Rebecca/Am)

EPA wants more than a few weeks prior to PN (2 months)

* Future calls - call both/ email ^{Krista} Mark until Thanksgiving

Subject: FW: Polymet

Date: Monday, November 20, 2017 at 12:58:55 PM Central Standard Time

From: Flood, Rebecca (MPCA) (sent by FYDIBOHF23SPDLT </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP /CN=RECIPIENTS/CN=F090CE0B00DE4CD4BA146A1C9722F4CA-RFLOOD>)

To: Foss.mPCA, Ann (MPCA), Schmidt, Michael R (MPCA)

FYI

From: Korleski, Christopher [mailto:korleski.christopher@epa.gov]

Sent: Monday, November 20, 2017 12:39 PM

To: Flood, Rebecca (MPCA)

Cc: Kaplan, Robert ; Holst, Linda ; Pierard, Kevin

Subject: Polymet

H Rebecca:

I wanted to get back to you on the Polymet issue we discussed and let you know that we accept your proposal of MPCA providing us with a draft of the permit at the same time you provide it to impacted tribes. That will give EPA approximately 45 days to comment on the draft permit. In light of MPCA's provision of the draft permit, EPA will not be providing any comments until after we have a chance to review the draft.

Thanks.

Chris

Chris Korleski

Director, Water Division, Region 5

U.S. Environmental Protection Agency

77 W. Jackson Blvd. (W-15J)

Chicago, IL 60604

312 886-1432 (Liz Rosado, Assistant)

312 353-5498 (General Office Number)

korleski.christopher@epa.gov

Mark Ackerman
Krista McKim
Kevin Pierard
Scott Ireland

Jillian Roundtree
Candice Bauer
Barbara Wester
Mark Compton

EPA Call

1/31/18

☐ ** Set up every other week call w/ EPA during PN period.

EPA

(KM) RP Analysis - GLI procedures weren't references
- TSD wasn't referenced
- MPCA - procedures to conduct RP analysis

RC - PCA used a qualitative approach. Looked at treatment being proposed
- Membrane/RO/NF - establish target goal for effluent then design system to meet effluent target.
- System is designed to never exceed 10 mg/l say.

☒ ** Send EPA background data from pilot study/modeling
(Design + Operation Report)

(KM) Concerned about Hg - was it evaluated in pilot study?

(RC) Pilot testing + modeling showed Hg would be $< 1.3 \text{ ng/l}$ (GLI)

(KM) EPA not comfortable w/ lack of WABELS

(CB?) EPA thinks there should be WABEL even though there is no data/RP.

(KM) Wants to see data reviewed for each parameter listed in the application for parameters believed present.

- PW Manual refers to TSD for situations/procedures to follow when there is no data (GLI, 132)

(KP) Application states constituents that may be present

- Permit shield issue

- Limits provide degree of assurance WQS will be met

- EPA would establish limits - but would remove limits later based on real operating data ^{permits}

RP continued

- KP Application provided info (data) of expected effluent quality
 - KM Michigan has issued permits for WRBEL^E where there is no data
 - Concerned about actual discharge quality - will it actually be able to meet effluent limits?/was.
 - what is true ~~eff~~ influent quality
 - A lot of uncertainty in operation
 - KP permittee will be shielded - PCA should establish limits in 1st permit, then remove limits later permits
 - concerned about downstream users (Tribe) Hy.
- Revisit RP on next call.

BW Does the RP analysis take into account changes in WR from TB as the facility operates?

PC Pilot looked at short term + long term influent quality

EPA Call

Mine site discharge prohibition

1/31/18

KM How will PCA evaluate compliance w/ discharge prohibition

RC - Engineering controls at mine site

- Monitoring - Comprehensive Monitoring Report
Annual Analyses of monitoring data

KP - Concerned about Mine site. Want to make sure there is no migration of groundwater off the mine site.

RC We have background data from EIS wells we can use to compare sample data

CB Is a measurable increase a violation? How would the narrative be implemented?

RC If data suggests a discharge is possible, adaptive management must be implemented.

KM Concerned if adaptive management is needed a permit mod would not be used for changes.

BW Same concern as KM - wants permits to be modified if adaptive mgmt is needed or if additional work is required by reports. How will this be tracked + enforced?

KP Concern about permit mod being built in w/o going through the modification process.

RC PCA could add language to address EPA concern to state the permit & may be subject to permit modification for requirements that could trigger additional work or adaptive mgmt.

BW Could we build in more language re: modifications of permits. What would trigger a mod.

□ Concern re: modifications (if needed)

(KM) ELG² (Allowable Discharge)
- EPA will review again

PCA - Future Call -
Want to talk about communication

Meeting 1.5 hrs / 2 weeks

For Next call - Get Pilot Data to EPA

(please fill in) []

Mark Ackerman
Cardice Bauer
Kirsta McKim
Kevin Piccard

Mark Compton
Jillian Roundtree
Barbara Wester

EPA Call

2/13/18

☐ Mark Ackerman - send map links (difficult to read)

Mark Ackerman

- Permit has TBELE which are higher than WQS. This could authorize a discharge above WQ.
- RC - No RP. System designed to treat SO₄ to 10 which will treat metals down to WQS.
- MA - Not clear how meeting SO₄ target will meet metal criteria. How is achieving SO₄ meeting WQS for metals.
- RC - System engineered to have membrane pore size to capture the charge + size of various metals ions
- MA - Hg - Pilot study was not conclusive for Hg.
- RC - Influent to WWTS has low concentrations Hg due to terracite tailings removing Hg.
- CB - What about influent from Mine Site?
- RC - Water from mine site goes to WWTP - metals are removed. Effluent from ~~that~~ portion of the WWTS discharges to FTB. Its basically treated 2x
- KM - Have we thought about uncertainty - how well will the treatment system work.
- MA - What was the scale of the Pilot Study in relation to operation? How does this affect potential uncertainty?
- RC - The degree of treatment can manage uncertainty by operating nanofiltration/RO. Its a modular system - easy to add membranes + provide additional treatment if needed
- MA - How quickly can they modify ~~the~~ system
- RC - Company plans to route effluent to TB during start up.

CB What would trigger operational changes?
 RC 9 mg/L as operating target. Pre-approved SO₄ Reduction Evaluation Plan
 MC What happens if they violate operating limit?
 KM There is not a lot of data re: variability in discharge? How does MPCA handle variability?

RC Membrane treatment should not have much variability - you would see trends (as membranes are used). They can adjust RO + NF. Data from Eagle Mine did not show much variability over several years.

□ MA Lime addition - What consideration was given for variability in lime addition - How was AI considered?

RC MPCA will check w/ Engineer + report back next call. Also there will not be a lot of variability in influent.

□ MA How can system be adjusted for large swings in influent concentrations

RC MPCA will check w/ Engineer

KP EPA would establish limits either internal or effluent. Limits are just for TBEL². It doesn't seem the company would have to adjust operations to meet TBEL². EPA doesn't trust RO reliability.

RC Operating limit for Cu (Wes).

□ Send Mark Achenbach potential mtg dates ~ 2 wks

EPA call continued

2/13/18

Stormwater

KM What/where is stormwater coverage?

RC This permit does not cover stormwater / authorize discharge of CSW.

RC CSW applies until WWTS is operational

MC How does MPCA distinguish between CSW + mine dewatering.

KM Concerned about Hg from wetland drainage. How has Hg in wetlands been considered

 RC MPCA will look into Hg issue Look for emails/EPA on wetlands re Hg during dewateringCliffs Eric Permits

RC Will transfer CE-TB permit to Polymet concurrent w/ Polymet/Northmet permit along w/ Consent Decree ~ 18 months for attenuation of legacy pollution. Consent Decree will remain.

KM Area 5?

KP When will permit transfer occur?

RC At same time or before permit decision on NM Permit is made

KP When is trench constructed?

RC Time to construct + 18 months ~ 36 months

MC What is the trigger to change permits?

RC Based on attenuation process ~ 18 months after operation.

KM Based on Polymet requesting termination? RC = Yes.

 KM Is there a requirement stating when seepage capture system is operational? When is Polymet allowed to start using the TB? Is this a permit requirement? KP Company should be required to have spare parts on site (pumps, etc...) Also relevant to WWTS. Requirement to keep extra parts on hand.

RC MPCA will consider

□ If we have an operating limit for Cu, the rest of the metals will be treated to WAS. Consider explanation by Scott/Brian. Focus on parameters w/ TBELE - Will need for potential comments

Leverage in other lines...
 ...the rest of the metals will be treated to WAS...
 ...parameters w/ TBELE... Will need for potential comments

...the rest of the metals will be treated to WAS...
 ...parameters w/ TBELE... Will need for potential comments

...the rest of the metals will be treated to WAS...
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 ...parameters w/ TBELE... Will need for potential comments

...the rest of the metals will be treated to WAS...
 ...parameters w/ TBELE... Will need for potential comments

EPA Call

3/5/18

WWTS

KM Hg - how was it analyzed during pilot study?

Treating SO₄ to 10 - how will it treat metals?

- still wants to see a 'spreadsheet' / quantitative data/analysis

Brian If copper meets standards - the membrane treatment system functions similarly to other metals.

RC Company used P90 - higher flow/concentrations for its analysis.

Brian There is redundancy - if the largest unit is out of service, the remaining units can treat the P90 flow.

Candice If units are offline - is there extra monitoring? - No

KM If Hg is being exceeded, are there specific corrective actions?

RC - It is handled by adjusting treatment accordingly. Permit does not have specific actions required for any other parameter than SO₄ Internal discussion on Hg limit for WQS vs TBEL. Check narrative statement for meeting WQS - exception for TBELS Copper - operating limit vs TBELKM What authority are we applying the operating limits for Cu/SO₄ Barbara - put the state authority to enforce internal controls in the permit
↳ 6.16.2 or 6.16.4 (FC Chapter) - check on this - get back to EPA

KM Is there a requirement for the Permittee to use high quality lime manufactured product

RC That was the product chosen in their design

BW Where in the permit would this be required?

- RC Consider requirement to use high quality lime for stabilization
- BW Set limit for Al in the permit - PCA will consider

- RC Maybe PCA can consider effluent limits for metals - discuss w/ Jeff
 - Noted this time - NO RP.
 - Wait until after PN

Cliffs Permit Transfer

* Will PolyMet ~~not~~ request termination of TB permit?

-- Mike will follow up

BW What portions of CE permits will be taking over by PolyMet?

RC Transfer 54089 to PolyMet

KM SDO26?

Udd Comments

KP EPA wants to submit comments - Make clear what EPA concerns are.

Clarify permit conditions

EPA will submit comments during PN period.

KP EPA will discuss draft comments

* Set up cull early next week - (9 or 11, or 10 Monday)

BW Does PCA retain authority to do unannounced inspections?

- Permit is standard language 6.16.13

115.04; 115B.17, subp. 4
116.091

700i.0150 subp. 3(i)

Subject: RE: Polymet Draft Permit Discussion

Date: Friday, March 16, 2018 at 2:39:32 PM Central Daylight Time

From: Udd, Jeff (MPCA) (sent by FYDIBOHF23SPDLT </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP /CN=RECIPIENTS/CN=E2EA3D7349CD4899865CE8C41466294E-JUDD>)

To: Clark, Richard (MPCA), Handeland, Stephanie (MPCA)

And I just got off the phone with Kevin. He would like to continue with the routine check-in meetings every few weeks as we go through the comments and any permit revisions. He would like to have one the first week of April to walk through what the comment letter would have said if it were sent.....

From: Udd, Jeff (MPCA)

Sent: Friday, March 16, 2018 2:06 PM

To: Clark, Richard (MPCA) <richard.clark@state.mn.us>; Handeland, Stephanie (MPCA) <stephanie.handeland@state.mn.us>

Subject: FW: Polymet Draft Permit Discussion

Here's the plan.....

From: Lotthammer, Shannon (MPCA)

Sent: Friday, March 16, 2018 2:00 PM

To: Thiede, Kurt <thiede.kurt@epa.gov>

Cc: Korleski, Christopher <korleski.christopher@epa.gov>; Pierard, Kevin <pierard.kevin@epa.gov>; Nelson, Leverett <nelson.leverett@epa.gov>; Holst, Linda <holst.linda@epa.gov>; Stepp, Cathy <stepp.cathy@epa.gov>; Stine, John (MPCA) <john.stine@state.mn.us>; Smith, Jeff J (MPCA) <jeff.j.smith@state.mn.us>; Udd, Jeff (MPCA) <jeff.udd@state.mn.us>; Schmidt, Michael R (MPCA) <michael.r.schmidt@state.mn.us>

Subject: RE: Polymet Draft Permit Discussion

Hi Kurt –

Thank you for your message. We concur with your characterization below of what we have agreed to for the Polymet draft permit next steps.

Thank you also for your demonstrated commitment to continued dialogue and cooperation, which we share. I have made a note of the suggestion for a face-to-face meeting, and will work with our team to determine when we've reached a good point to get that set up. In the meantime, if you have any questions, please let me know.

Kind regards,
Shannon

Shannon Lotthammer
Assistant Commissioner
Minnesota Pollution Control Agency
Shannon.lotthammer@state.mn.us
651/757-2537

Working to protect and improve the environment and human health.

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From: Thiede, Kurt [<mailto:thiede.kurt@epa.gov>]
Sent: Friday, March 16, 2018 12:44 PM
To: Lotthammer, Shannon (MPCA) <shannon.lotthammer@state.mn.us>
Cc: Korleski, Christopher <korleski.christopher@epa.gov>; Pierard, Kevin <pierard.kevin@epa.gov>; Nelson, Leverett <nelson.leverett@epa.gov>; Holst, Linda <holst.linda@epa.gov>; Stepp, Cathy <stepp.cathy@epa.gov>
Subject: Polymet Draft Permit Discussion

Shannon,

Thanks once again for working with us to find a solution to this matter. Here is our understanding of what EPA and MPCA have agreed to.

Once MPCA completes their response to public comments, it will develop a pre-proposed permit (PPP) and provide the PPP to EPA Region 5. Region 5 EPA will have up to 45 days to review the PPP and MPCA's responses to public comments and provide written comments on the PPP to MPCA. This would occur prior to MPCA submitting a proposed permit to EPA, which, according to the current MOA, would continue to give EPA 15 days to comment upon, generally object to, or make recommendations with respect to the proposed permit. In accordance with the current MOA and as specified in CWA Section 402(d)(2)(B) and 40 C.F.R. 123.44(b)(2), EPA still may raise specific objections within the 90 day period from receipt of the "final" proposed permit, but we are hopeful our discussions and the additional review will allow us to come to an agreement and avoid objections.

Again, it is our hope and intent to continue a dialog between MPCA staff and R5 EPA WD staff prior to receipt of the PPP and during EPA's review of the PPP as we work toward a NPDES permit that both parties

can support. In fact, I would like to suggest setting up a face-to-face meeting when appropriate to discuss the draft permit and EPA observations. It is also our intent to turn around our review and comments on the PPP as soon as possible.

Please let me know if you have any questions.

Sincerely,

Kurt A. Thiede
Chief of Staff
U.S. EPA, Region 5
Office of the Regional Administrator
77 W Jackson Blvd
Chicago, IL 60604
Email: thiede.kurt@epa.gov
Office: (312) 886-6620

EPA/PCA/Poly Met Meeting

9/25/18

Poly Met - Treatment Technology PresentationAdaptive Mgmt

- Modular system
- Multiple membrane types (RO + NF)
- Seepage capture can be adjusted - can put more to TB
- Effluent recycle to TB - for short term control of effluent

Mercury Removal

- Filtration through taconite tailings (adsorption)
 - Expected to remove Hg to 1.0 ng/l before treatment
- Greensand filtration - some removal
- Membrane separation - 22-99% membrane rejections have been reported by vendor
 - Eagle Mine uses RO - influent varies 1-2.5 ng/l → effluent 0.5 ng/l
- EPA concerned about Hg removal from NF - ~~some~~ info for another mine shows
NF removes Hg

RP/Limits Development

- Expected effluent quality shows no RP,
- PCA ~~did~~ not assign limits before actual data is available when
the pilot/FEIS data shows < WQS.
- System is designed to treat for 10 ng/l SO₄
 - Operating target 9 ng/l to consider operational issues of RO

Antibacksliding

- EPA ~~thinks~~ thinks you can remove limits in later permits if there is
no RP on actual data.
 - * Cannot provide a specific
actual example though.

EPA/MPCA

9/25/18

Permit Enforceability (EPA)

- Permit as a shield
- How are items reports, etc in the ~~report~~ ^{permit} acted upon
- If conditions change, reports are required.
 - Reports become part of the permit etc.
 - How is there accountability? How do you know what is enforceable?
 - What is the process to make sure permit captures when plans/report get folded into the permit?
- Adaptive mgmt is going to be evaluated for permit mod.
- Discuss corrective actions 9/26 mtg.
- EPA - how will PCA handle corrective actions?

Example 6.10.73 - not clear (last PP)

"Failure to implement ... is a violation of a permit"

- Maybe add something like this?

EPA

- Lack of general prohibition - no narrative prohibiting the permittee from violating WQS.

6.16.4 - cites TBELs

- Remove "except according to code"

Tables - TBELs are higher than WQS

Add - How do TBELs work for Fact Sheet

- Clarify intent of TBELs - make sure it doesn't contradict WQS.

EPA/MPCA

9/25/18

~~Permitting Authority (DEP/PCA)~~

Enforceability of Internal Operating Limit.

- EPA can only enforce EOP.
- MPCA disagrees
- Case law has not shown EPA can enforce internal operating limit. (Wester)

EPA - Potential Permits where limits were removed? (Antibacksliding issue)

Ohio

Powerplants

Permit mod rationale?

MMP - There are things w/in the internal process
they could do to reduce Hg

Backsliding - what does Mn Rules say?
Federal rules?

Domestic leads at SD001 - add lang. to Fact Sheet

Get better maps.

See General ISW CSW for violation of WQS language

EPA/MPCA

9/26/18

EPA - ~~has~~ Reopener language. Is it specific to WWTS?

PCA - has standard boilerplate

✓ Reopener language - update language for reopener?

Is there a mechanism for citizen to open permit?

They can sue for violation of WQS.

Is the permit a shield if there is no prohibition to exceed WQS?

✓ Consider - prohibition on violation of WQS.

General Permits have this general prohibition of WQS

Does Federal Law allow for enforcement of Operating limit?

EPA does not think they can enforce operating limit.

Adding prohibition on violating WQS helps this issue.

✓ "Build what you say" - Any requests for changes made after permit is issued is subject to permit mod. Add more or clarifying language. (for changes made during construction)

(EPA)

Wisconsin - has limits w/ "language to drop" if the limits are being met the permittee can petition to drop limits.

- EPA is also concerned about timely reissuance.

- Wisconsin or other state can ~~also~~ drop limits based on data

EPA/MPCA

9/26/18

✓ EPA - Would PCA consider operating limits for Metals?

Look at where influent is higher than WAS.

(As, Co, Cu, Pb, Ni, Hardness, SO₄) - Also Hg (EPA concern)

Surface water monitoring - is there conductivity in streams/tributaries?

Yes - either through permit or Consent Decree

- At one site there are not a lot of tributaries - use Partridge R.

- ~~Partridge~~ Emergency corridor - has tributary monitoring.

For PolyMet: Operational limits - metals + Hg
WQS language

p.32

✓ Look at permit re-opens language

For EPA:

- Permit + Fact Sheet - mid Oct (pre-proposed) - 45 day review
- Response to Comments - later w/ Proposed Permit - 15 day review
- Send comments as they are finished

Allowable Discharge

- Actual difference (precip - evaporation) + carryover year

- EIS projected 1.9 billion Alaska approach 4 billion

^
p.40

Consider adding flow limit/volume limit calculated on Alaska approach in addition to carry-over language in draft permit.

- Add narrative for volume, don't include in L & M tables

Added volume limit
language to
Fact Sheet

EPA/MPCA

9/26/18

Adaptive Management

- ✓ - Clarify - "adjust as you go to prevent violations."
 - Make more clear this is not in response to violation, but to prevent

Stormwater

- Concern about pent release
- What kind of monitoring will be done to make sure they are complying w/ "don't violate wqs." provision?
- Pent rule - has several basins to control Hg
 - CSU - how do SWPPS include monitoring
 - Should SWPPP include requirement of temporary basins
- Hg controlled w/ solids
- EPA wants to consider monitoring - through 401 cert?
- Map showing acreages + where things are covered
 - SWPPS are very detailed - Can the Hg concern be addressed by the SWPPS + make it part of 401 cert?
- Concerned about 401A2 - need something in 401 cert for potential downstream impacts
 - Need to show how to monitor or control downstream Hg impacts (401A2 concern)

Allowable Discharge

- PCA will consider volume statement in permit text

Operating Limits

- p. 46 - Jeff will call EPA re: additional operating limits

EPA Call

10/22/18

- Monthly avg of weekly samples
 - Operating Limit
 - ← Get this limit type into Tempo.
 - Moving avg

No sulfate can be added - did we make other prohibitions?

- ~~Stormwater~~ Stormwater - will be covered under General Permits
 - SWPPP have been submitted for ISW
 - Saturated soils - water will be pumped to WWTs area (TB)
 - ↓
 - OSLA - includes ponds

WRBEL^s - EPA will focus review on proposed language re: WRBEL^s

~~45-day~~ 45-day review followed by 15-day review.

- Set up check in 2-weeks after they receive pre-proposed ~~to~~ permit
 - Mark Ackerman - lead reviewer

Subject: MPCA sends PolyMet revised permit documents for EPA review
Date: Thursday, October 25, 2018 at 11:22:31 AM Pacific Daylight Time
From: Polymet Permitting
To: michael.r.schmidt@state.mn.us

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MPCA sends PolyMet revised draft permit documents for EPA review

In response to comments received during the public notice period (January 30 to March 16, 2018), the Minnesota Pollution Control Agency (MPCA) revised the draft air quality and water quality permit documents for the Poly Met Mining, Inc., (PolyMet) NorthMet mining project. The revised air and water quality permits and support documents were sent to the Environmental Protection Agency (EPA) for review on October 25.

This is not a final decision of the MPCA, nor is this a public comment period. Sending the revised draft permits to EPA is a normal step in the air and water permitting process as part of the federal oversight of the state permitting programs. In the interest of ensuring transparency for this high-interest project, MPCA is taking the additional step of posting the revised permits on-line. You can find the permits on the MPCA's NorthMet project pages at www.pca.state.mn.us/northmet.

The 401 certification is not required to be provided to EPA for a final review prior to MPCA making a decision on the certification. It is on a different schedule and therefore not being posted on MPCA's NorthMet project webpage at this time.

The MPCA considered the nearly 700 public comments, which resulted in the addition of numerous conditions to the permits. For example, the MPCA revised the draft air permit provisions to clarify conditions for fugitive dust control management and recordkeeping, and add monitoring and recordkeeping requirements. Examples of changes made to the draft water quality permit as a result of comments include adding additional permit limits and providing greater clarity on requirements related to the construction and operation of engineering controls (such as seepage capture and wastewater treatment systems).

Next Steps

The EPA will be reviewing the permits in the coming weeks. Following consideration of any feedback provided by EPA during this review, the MPCA Commissioner will make a decision on issuance of the permits. The intent of the MPCA is to make final permit decisions by the end of this calendar year.

Additional Information

As noted above, the permits are not open for public comment. This notification is intended to serve only as a progress report on the current status of the MPCA air quality and water quality permits.

For the most up to date information, check the state's [PolyMet web portal](#) and [MPCA's project website](#).

You are receiving this message as a subscriber to the PolyMet email notification list. This list is hosted by the Department of Natural Resources (DNR). It is used jointly by MPCA and DNR to provide regular updates and share information about key steps in the permitting/certification processes.

[Minnesota Pollution Control Agency](#) [[Contact us](#)]

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This email was sent to michael.r.schmidt@state.mn.us using GovDelivery Communications Cloud

Subject: RE: PolyMet NPDES permit
Date: Monday, December 17, 2018 at 1:25:00 PM Pacific Standard Time
From: Schmidt, Michael R (MPCA)
To: Kevin Reuther, Ann Cohen, Evan Mulholland

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Kevin,

We did not get any feedback from EPA on the PolyMet permit.

Mike

From: Kevin Reuther <kreuther@mncenter.org>
Sent: Monday, December 17, 2018 2:39 PM
To: Ann Cohen <acohen@mncenter.org>; Evan Mulholland <emulholland@mncenter.org>; Schmidt, Michael R (MPCA) <michael.r.schmidt@state.mn.us>
Subject: PolyMet NPDES permit

Hi Mike.

Did you hear anything from EPA on the PolyMet permit? Please forward if you have anything in writing. Thanks!

Kevin

--

Kevin Reuther
Chief Legal Officer
Minnesota Center for Environmental Advocacy

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EXHIBIT D

**TO DECLARATION OF PAULA G. MACCABEE IN SUPPORT OF
WATERLEGACY MOTION FOR TRANSFER OR STAY
DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS**

**Paula Goodman Maccabee, Esq.***Just Change Law Offices*

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<http://justchangelaw.com>

January 15, 2019

Chairwoman Betty McCollum
Interior, Environment, and Related Agencies Subcommittee
U.S. House of Representatives
2256 Rayburn House Office Building
Washington, D.C. 20515

Chairman Frank Pallone, Jr.
Energy and Commerce Committee
U.S. House of Representatives
2322A Rayburn House Office Building
Washington, D.C. 20515

Chairman Elijah E. Cummings
Oversight and Reform Committee
U.S. House of Representatives
2471 Rayburn House Office Building
Washington, D.C. 20515

RE: Confidential Request for Investigation and Assistance in Securing U.S. Environmental Protection Agency Documents Related to Controversial Copper-Nickel Mine Project

Dear Chairwoman McCollum, Chairman Pallone, Chairman Cummings,

Under the Clean Water Act, the United States Environmental Protection Agency (“EPA”) has oversight duties to ensure state compliance with federal delegated authorities under the National Pollution Discharge Elimination System (“NPDES”) water pollution permit program. This letter and attachments are submitted on behalf of WaterLegacy, a Minnesota non-profit organization, to express our concern about the breakdown EPA’s oversight function pertaining to a highly controversial copper-nickel mining project in Minnesota’s Lake Superior Region, including possible interference with the release of EPA comments. We have reason to believe that EPA Region 5 staff prepared final written comments on the draft water pollution (NPDES) permit for the PolyMet NorthMet project, but that they were directed by someone within the Agency not to provide those comments to Minnesota regulators in a written form accessible to the public.

We would request your assistance in looking into this matter and in securing for public review a copy of the EPA’s final comments on Minnesota’s Draft NPDES water pollution permit for the PolyMet NorthMet mine project. We understand that EPA may also possess an annotated or highlighted copy reflecting sections of the EPA’s written comments read to the Minnesota Pollution Control Agency (“MPCA”) over the phone. We would also request that a copy of these annotated or highlighted comments and any comments that the EPA may have prepared during the fall 2018 EPA oversight period for the Final PolyMet NorthMet NPDES water pollution permit be secured and provided to the public.

Letter to House Chairs – EPA Clean Water Act Oversight
January 15, 2019
Page 2

The PolyMet NorthMet project would be Minnesota's first copper-nickel mine. It would be a permanent source of polluted seepage in the headwaters of the St. Louis River, the largest U.S. tributary to Lake Superior, and collected wastewater at both the mine site and the tailings site would require hundreds of years of treatment to comply with water quality standards. The NorthMet open-pit mine would also directly destroy over nine hundred acres of wetlands in these Lake Superior Basin headwaters and indirectly impact several thousands of additional wetland acres as a result of mine drawdown and pollution.

Scientific experts have emphasized the NorthMet project's risks of methylmercury release and bioaccumulation resulting from pollution and hydrologic changes to wetlands. Groups representing 30,000 Minnesota doctors, nurses and other health professionals requested (to no avail) that a health impact assessment be done for the NorthMet mine project, particularly to address impacts of toxic water and air pollution and health impacts to downstream fetuses, infants and children from methylmercury contamination of fish. The NorthMet mine and processing facilities would be located in tribal Ceded Territories and upstream of the City of Duluth, the Fond du Lac Reservation, and the St. Louis River estuary, a significant breeding location for Lake Superior as well as St. Louis River fish. During the course of environmental review, more than 90,000 comments were submitted on this highly contested mining project.

The EPA served as a "cooperating agency" during environmental review for the NorthMet mine. Throughout environmental review, the EPA provided written comments stating that Minnesota must comply with the limits of its delegated authority under the Clean Water Act in issuing an NPDES water pollution permit for the NorthMet mine project. On August 7, 2013, the EPA wrote, "we believe that an NPDES permit is required at both the Mine and Plant Sites, with limits and monitoring requirements applied at points of discharge." The EPA cited both State and Tribal water quality standards and stated, "EPA expects downstream water quality standards to be considered and protected through the NPDES permitting process."¹

On April 7, 2015, the EPA provided detailed written comments to the MPCA, explaining EPA's expectation that the NPDES permit that would be issued for the NorthMet mine would "assure compliance with all applicable requirements of the CWA [Clean Water Act] and regulations."² On November 3, 2016, the EPA provided additional written comments, emphasizing that an NPDES permit must cover or prohibit all discharges from NorthMet point sources to surface waters, including those through ground water hydrologic connection.³

Despite requests to the EPA under the Freedom of Information Act for comments and other records related to the NorthMet mine NPDES water pollution permit, WaterLegacy received no documents. However, under the Minnesota Data Practices Act, the state MPCA provided us with emails and handwritten notes of phone calls with the EPA related to the NorthMet permit.

Documents released by the MPCA demonstrate that, in 2017 and early 2018, EPA Region 5 staff had substantive concerns about the Draft NorthMet mine NPDES permit and the protection of water quality in Lake Superior watersheds. These documents also suggest that EPA Region 5

¹ 2013-08-07 EPA, A. Walts Letter to USACE, DNR, Forest Service on NorthMet Project PSDEIS with Detailed Comments.

² 2015-04-07 EPA Pierard Email to MPCA A. Foss, Polymet NPDES Requirements.

³ 2016-11-03 EPA Pierard Letter to MPCA Foss re NPDES Permit Application for PolyMet Mining Corporation's NorthMet Mine.

Letter to House Chairs – EPA Clean Water Act Oversight
January 15, 2019
Page 3

staff wanted to provide their comments in writing to the State of Minnesota, but for some reason failed to do so.

MPCA handwritten notes of a phone conference with EPA on November 1, 2017 underscore that “EPA wants to send a letter prior to PN [public notice of the draft permit],” putting its comment in the record.⁴ But an email from EPA a few weeks later, on November 20, 2017 suggests that something had changed, and that EPA Region 5 staff would not send a letter *prior* to the Draft NPDES water pollution permit, but would wait to send EPA comments “until after we have a chance to review the draft.”⁵

From January 1, 2018 through March 5, 2018, MPCA notes from phone calls with EPA reveal that EPA continued to have substantial concerns about the Draft NPDES water pollution permit for the NorthMet mine, released in January 2018.⁶ EPA staff told the MPCA that EPA was not comfortable with the lack of water quality based effluent limits (“WQBELs”) in the NorthMet permit, given the level of uncertainty in the operation. EPA was also concerned that proposed monitoring of pollutants discharged through a groundwater pathway might be inadequate to determine Clean Water Act compliance and concerned about the effects of increased mercury on downstream communities. MPCA handwritten notes on March 5, 2018 state, “EPA want to submit comments – Make clear what EPA concerns are. Clarify permit conditions.”⁷

On information and belief, EPA finalized written comments on the Draft NorthMet mine NPDES water pollution permit, but never provided them to the MPCA.

Emails between the EPA and MPCA on March 16, 2018 suggest, once again, the submission of EPA written comments was blocked. A “solution to this matter” was developed that included “dialogue,” but precluded EPA submission of its written comments on the Draft NorthMet mine NPDES water pollution permit.⁸ The EPA again put off written comments, but stated that once the *Final* NorthMet mine NPDES water pollution permit is in its “pre-proposal” stage, Region 5 EPA would have 45 days to “provide written comments” to MPCA before the Final NPDES water pollution permit is issued.⁹

MPCA documents reveal that EPA continued to have concerns about the NorthMet NPDES water pollution permit through fall 2018. MPCA’s handwritten notes of calls with EPA staff reflect that EPA believed that the proposed NPDES permit may be unenforceable and that the permit should include water quality based effluent limits (WQBELs).¹⁰ EPA also remained concerned about potential downstream impacts from increased mercury.¹¹ On October 22, 2018, MPCA’s notes reflect that EPA planned to review the Final NorthMet mine NPDES water pollution permit during its 45-day review period and that “EPA will focus review on proposed language re WQBELs.”¹²

⁴ 2017-11-01 MPCA Staff Handwritten Notes.

⁵ 2017-11-20 EPA Korleski Email to MPCA Flood re PolyMet.

⁶ 2018-01-31 to 2018-03-05 MPCA Staff Handwritten Notes.

⁷ *Id.*

⁸ 2018-03-16 EPA Thiede and MPCA Lotthammer Emails re PolyMet Draft Permit Discussion.

⁹ *Id.*

¹⁰ 2018-09-25 to 2018-09-26 MPCA Staff Handwritten Notes.

¹¹ *Id.*

¹² 2018-10-22 MPCA Staff Handwritten Notes.

Letter to House Chairs – EPA Clean Water Act Oversight
January 15, 2019
Page 4

Three days later, MPCA informed the public that the Agency had sent a revised PolyMet NorthMet water pollution permit to EPA “as part of the federal oversight” of state permits, that “EPA will be reviewing the permits in the coming weeks” and that the MPCA would make its decisions on the *final* permit after considering EPA feedback.¹³ However, an email from the MPCA on December 17, 2018 states, in response to a public inquiry about the NPDES permit, “We did not get any feedback from EPA on the PolyMet permit.”¹⁴

We don’t know if EPA prepared written comments on the *Final* NorthMet mine NPDES permit during this “pre-proposal” oversight stage or even contacted MPCA again before the final NPDES water pollution permit was issued to PolyMet in December 2018.

It is possible that the PolyMet NorthMet project water pollution permit is an isolated example of the EPA’s failure to fulfill its oversight role under the Clean Water Act and put its comments in the public record. If so, it is still an important case, threatening toxic pollution of the headwaters to the largest U.S. tributary to Lake Superior and neurological harm to downstream infants and children as a result of increased mercury contamination of fish. But it is also possible that our experience in Minnesota is part of a larger pattern where EPA regional staff has been constrained or directed to withhold written comments from states and from the public or otherwise hamstrung in their ability to ensure compliance with federal environmental laws.

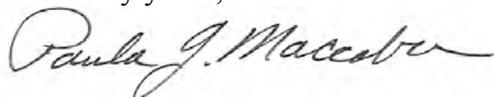
WaterLegacy and the citizens, scientists, conservation groups and community groups with which we are allied would respectfully request your help in securing for the public EPA’s comments on the NorthMet mine project Draft NPDES water pollution permit, the annotated or highlighted copy of these comments on the Draft permit reflecting what was communicated orally to the MPCA, and any comments that may have been prepared more recently during the “pre-proposal” stage for the Final NorthMet NPDES water pollution permit issued by the MPCA.

We believe that the PolyMet NorthMet NPDES water pollution permit and the related Clean Water Act Section 401 certification issued by the MPCA should be stayed; at least until these EPA documents have been secured.

We would also respectfully request that your committees investigate the PolyMet NorthMet NPDES water pollution permit review process to determine why no written comments were submitted by EPA and whether there is a new policy or practice at the EPA to refrain from exercise of EPA’s responsibility to ensure that states comply with the Clean Water Act and protect our nation’s clean water resources.

I would be happy to answer questions or provide additional information at your request.

Sincerely yours,



Paula Goodman Maccabee
Advocacy Director/Counsel for WaterLegacy

Enclosures

¹³ 2018-10-25 MPCA PolyMet Permitting Email re MPCA sends PolyMet revised documents for EPA review.

¹⁴ 2018-12-17 MPCA Schmidt Email to MCEA Reuther re PolyMet NPDES Permit.

EXHIBIT E

**TO DECLARATION OF PAULA G. MACCABEE IN SUPPORT OF
WATERLEGACY MOTION FOR TRANSFER OR STAY
DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS**

BETTY McCOLLUM
4TH DISTRICT, MINNESOTA

2256 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-6631
FAX: (202) 225-1968

661 LASALLE STREET
SUITE 110
SAINT PAUL, MN 55114
(651) 224-9191
FAX: (651) 224-3056

www.house.gov/mccollum



UNITED STATES
HOUSE OF REPRESENTATIVES

WL Motion Exh. E, page 1
COMMITTEE ON APPROPRIATIONS
RANKING MEMBER,
SUBCOMMITTEE ON INTERIOR,
ENVIRONMENT, AND RELATED AGENCIES
SUBCOMMITTEE ON DEFENSE
SUBCOMMITTEE ON LEGISLATIVE BRANCH

CONGRESSIONAL
GLOBAL HEALTH CAUCUS,
CO-FOUNDER

CONGRESSIONAL
NATIVE AMERICAN CAUCUS,
CO-CHAIR

February 25, 2019

The Honorable Andrew Wheeler
Acting Administrator
Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington DC 20004

Dear Acting Administrator Wheeler:

I am writing to you regarding EPA's review of a National Pollution Discharge Elimination System (NPDES) permit issued in December 2018 by the Minnesota Pollution Control Agency (MPCA) for PolyMet Mining Inc.'s Northmet mining facility in St. Louis County, Minnesota.

Under the leadership of former Administrator Scott Pruitt, senior EPA officials may have sought to circumvent the requirements of the *Federal Records Act* by trying to minimize the creation of written records and instead conduct substantive agency business verbally. After you became Acting Administrator, you took numerous commendable steps to differentiate yourself from your predecessor. As part of that effort, last November you sent a memo to EPA staff reaffirming your commitment to agency transparency and reminding staff of their long-standing obligations under the Federal Records Act to create written documentation for "all substantive decisions reached orally."

Pursuant to an open records request to MPCA, notes of phone conversations and emails between EPA and MPCA staff related to the Northmet project permit review have been made public. Based on those materials, it appears that EPA staff in Region 5 had serious reservations about MPCA's draft NPDES permit from January 2018. MPCA's staffs' notes suggest that EPA staff raised concerns with several provisions in the permit, including with respect to water quality based effluent limits, monitoring plans to ensure Clean Water Act compliance, and potential risks for increased mercury contamination downstream of the project. Furthermore, the notes and various email exchanges between EPA staff and MPCA staff suggest that EPA staff had prepared written comments on the draft permit and that EPA staff were planning to transmit those written comments to MPCA. I note that it is EPA's usual practice to provide state agencies written comments in these situations.

Ultimately, no written comments appear to have been transmitted to MPCA by EPA, and EPA appears to not have provided any comments at all on a revised draft permit prepared by MPCA in October 2018. As a result, the public has been left with very little insight into the specific concerns raised by EPA staff about the initial draft permit, or whether those concerns were adequately addressed by MPCA in the final permit issued in December 2018.

In the interests of transparency and maintaining the public's trust, I am requesting that you make available to the public a copy of any written comments or concerns prepared by EPA staff regarding the Northmet mine permits. To the extent that the substance of written comments were ultimately shared with MPCA verbally, I ask that the written comments be annotated to indicate which concerns were shared verbally.

EPA's mission is to protect public health by safeguarding the air we breathe and the water we drink. The American people have a right to know if the agency is faithfully meeting that obligation. It is incumbent upon EPA to act in a transparent and open fashion. EPA should immediately make its written comments on the Northmet NPDES permit available to the public.

Sincerely,



Betty McCollum
Member of Congress

CC: Region 5 Administrator Stepp

NITA M. LOWEY, NEW YORK, CHAIRWOMAN

MARCY KAPTUR, OHIO
 PETER J. VISCLOSKY, INDIANA
 JOSÉ E. SERRANO, NEW YORK
 ROSA L. DeLAURO, CONNECTICUT
 DAVID E. PRICE, NORTH CAROLINA
 LUCILLE ROYBAL-ALLARD, CALIFORNIA
 SANFORD D. BISHOP, JR., GEORGIA
 BARBARA LEE, CALIFORNIA
 BETTY McCOLLUM, MINNESOTA
 TIM RYAN, OHIO
 C. A. DUTCH RUPPERSBERGER, MARYLAND
 DEBBIE WASSERMAN SCHULTZ, FLORIDA
 HENRY CUELLAR, TEXAS
 CHELLIE PINGREE, MAINE
 MIKE QUIGLEY, ILLINOIS
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 BRENDA L. LAWRENCE, MICHIGAN
 NORMA J. TORRES, CALIFORNIA
 CHARLIE CRIST, FLORIDA
 ANN KIRKPATRICK, ARIZONA
 ED CASE, HAWAII

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515-6015

KAY GRANGER, TEXAS
 HAROLD ROGERS, KENTUCKY
 ROBERT B. ADERHOLT, ALABAMA
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 JOHN R. CARTER, TEXAS
 KEN CALVERT, CALIFORNIA
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 STEVE WOMACK, ARKANSAS
 JEFF FORTENBERRY, NEBRASKA
 CHUCK FLEISCHMANN, TENNESSEE
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 ANDY HARRIS, MARYLAND
 MARTHA ROBY, ALABAMA
 MARK E. AMODEI, NEVADA
 CHRIS STEWART, UTAH
 STEVEN M. PALAZZO, MISSISSIPPI
 DAN NEWHOUSE, WASHINGTON
 JOHN R. MOOLENAAR, MICHIGAN
 JOHN H. RUTHERFORD, FLORIDA
 WILL HURD, TEXAS

SHALANDA YOUNG
 CLERK AND STAFF DIRECTOR
 (202) 225-2771

April 9, 2019

The Honorable Andrew Wheeler
 Administrator
 Environmental Protection Agency
 1200 Pennsylvania Ave, NW
 Washington DC 20004

Dear Administrator Wheeler:

I am writing to you to follow up to your testimony last week before the House Appropriations Subcommittee on Interior, Environment, and Related Agencies.

During the hearing, I asked you several questions with respect to EPA's review of a National Pollution Discharge Elimination System (NPDES) water permit prepared by the Minnesota Pollution Control Agency (MPCA) for Poly Met Mining Inc.'s NorthMet mining project in St. Louis County, Minnesota.

In particular, I asked you if EPA staff had shared their concerns about MPCA's draft NPDES permit, and you indicated that EPA staff had done so, in a face-to-face meeting with MPCA staff. I also asked you if there were written notes or other documents prepared by EPA that documented the concerns EPA staff shared with MPCA staff. You responded that you were searching EPA records for this and other documents on response to a FOIA request, and that you would provide them to me when you located those records.

The following day, on April 3 2019, in a response filed with the U.S. District Court for the District of Columbia regarding a FOIA lawsuit, EPA admitted that "it has retained a copy of the draft document that memorialized what was shared verbally with MPCA staff."

I find it highly unlikely that EPA located this document on the afternoon of April 2, sometime between when you appeared before the subcommittee and when EPA filed its response with the Court. Rather, it is far more likely that you or your staff were fully aware that EPA had in its possession the documents I was asking about. The letter your staff sent me on April 1 and your

testimony on April 2 appears to have been intended to obfuscate this fact, and delay the production and release of the requested documents.

It is now abundantly clear that EPA has located the document in question which you committed to giving me. I therefore ask you to immediately provide this document, as well as any other relevant records I had requested in my February 25, 2019 letter, by no later than Wednesday April 10, 2019.

Sincerely,

A handwritten signature in blue ink that reads "Betty McCollum". The signature is stylized with large, flowing loops and a cursive script.

Betty McCollum
Chair,
Subcommittee on Interior, Environment,
and Related Agencies



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 18 2019

OFFICE OF
CONGRESSIONAL AND
INTERGOVERNMENTAL
RELATIONS

The Honorable Betty McCollum
Chair
Subcommittee on Interior, Environment,
and Related Agencies
U.S. House of Representatives
Washington, D.C. 20515

Dear Chair McCollum:

On behalf of the U.S. Environmental Protection Agency, I am responding to your April 9, 2019, letter regarding testimony by Administrator Andrew Wheeler before the House Appropriations Subcommittee on Interior, Environment, and Related Agencies.

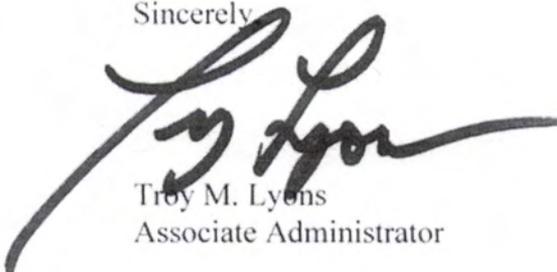
Your letter makes unfounded claims that Administrator Wheeler's testimony before the Subcommittee attempted to "obfuscate" the status of a document requested by the Subcommittee.

During the Subcommittee hearing on April 2, 2019, in response to your questions, Administrator Wheeler made clear that the information that you are seeking is the subject of a Freedom of Information Act (FOIA) request and that the Agency was working to identify documents and information responsive to that request. As you are aware, the FOIA request mentioned by the Administrator is currently in litigation.

As a part of that litigation, the Agency has determined that the document you are seeking is deliberative and should be withheld under Exemption 5 of the FOIA, the deliberative process privilege. Given the EPA's determination that the document is deliberative, the Agency will not make it publicly available. In order to protect the Agency's interests and privileges with regard to this document, the EPA will respect the judicial process and intends to let it move forward and await a ruling by the court. When the judicial process has concluded, the Agency intends to update the Subcommittee on the ruling.

If you have further questions, you may contact me, or your staff may contact Travis Voyles in my office at Voyles.Travis@epa.gov or (202) 564-6399.

Sincerely

A handwritten signature in black ink, appearing to read "Troy Lyons", with a long horizontal flourish extending to the right.

Troy M. Lyons
Associate Administrator

cc: The Honorable David Joyce, Ranking Member

EXHIBIT F

**TO DECLARATION OF PAULA G. MACCABEE IN SUPPORT OF
WATERLEGACY MOTION FOR TRANSFER OR STAY
DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS**

January 31, 2019

Re: Possible Waste, Fraud or Abuse in EPA Region V: Suppression of Comments on the Poly Met Mining Company State Water Permit and other Permit Actions by Minnesota, and the Region Making Comments Off the Record in a Way that Hides Them From the Public

From: Jeffrey Fowley, ~~individual~~ complainant (retired EPA attorney)

To: Kathlene Butler, EPA Office of Inspector General

I have received information from various sources regarding possible waste, fraud or abuse in EPA Region V. Based on the information I have received, the following appears to be the case. First, it appears that the Region has failed to meet its basic oversight responsibilities regarding a water permit that the state of Minnesota recently issued to the Poly Met mining company in the state's federally authorized NPDES program. As further explained below, the state appears to have developed a permit that does not meet minimum federal requirements. Yet, I have been advised that planned EPA staff written comments on the permit were suppressed by the Region V Regional Administrator Cathy Stepp. As also explained below, the failure to provide such comment violates legal and ethical requirements (assuming that this occurred). In addition, while significant EPA concerns about the permit reportedly were instead communicated to the State by telephone, I also have been advised that the Region cooperated with the State in helping to keep such comments off the state record, in ways that seem designed to hide the concerns from the public and even from the Minnesota state appeals court that is expected to review the permit. This procedure of EPA making comments off the record is highly unusual, and I believe it to be unethical (assuming that this occurred). Finally, I have been advised that misconduct of the kind that occurred regarding the Poly Met permit is continuing within EPA Region V and is likely to continue under the current Regional Administrator. In particular, the Region and State have reportedly engaged in conversations about ways to continue to have EPA make comments on future permits off the record, such as sending EPA comments to the state only by screen shot. The Regional Administrator also reportedly has suppressed staff comments regarding other Minnesota permit actions as well.

Because the information I have received suggests that the Regional Administrator and perhaps others have acted unethically, I am reporting this matter to your office. I am reporting this matter directly to you since I understand you are doing the investigation of the decline in EPA enforcement, and what appears to have occurred here regarding permits raises similar issues of EPA not carrying out its basic responsibilities including not doing effective state oversight.

I have no particular position one way or the other regarding the Poly Met mining project. I am simply acting as a citizen to bring to your attention improper conduct within EPA Region V that appears to have occurred. Whether or not the project should move forward, all should agree that the review of the water permit should have been handled in an ethical manner, including having both the EPA and state follow proper and transparent procedures.

I acknowledge that the information I have received is second-hand – I am not myself a witness to any misconduct. But the information seems credible and I have been able to confirm many of

the key matters through discussions with multiple sources. In any event, I believe there is enough here to justify an investigation. I hope that you will investigate this matter and determine whether improper conduct has indeed occurred. I would be happy to cooperate with any investigation, including providing you with further information, including regarding my sources of information.

I. Poly Met Permit Issues

The recently issued state water permit to the Poly Met company is for a major new mining project which will discharge mercury and other toxic pollutants into waterways which will flow downstream into tribal waters and the Great Lakes. Because this was a particularly significant permit, it was reviewed by Region V staff pursuant to the review authority provided by section 402(d) of the Clean Water Act, and the Memorandum of Agreement between EPA Region V and the Minnesota Pollution Control Agency. This review also was required by a regulation, as discussed below.

Suppression of EPA Staff Comments

I have been advised that the public noticed draft of the proposed permit and supporting materials sent to EPA by the State in early 2018 did not adequately analyze whether the mine's discharges had the potential to violate water quality standards and thus did not contain the kind of strict water quality permit limits that are required by federal law. Accordingly, the staff in Region V reportedly developed written comments to be sent to the State advising them that an adequate "reasonable potential" analysis needed to be done – and that any water quality based permit limits then shown to be necessary then needed to be developed.

Under the federal Clean Water Act, it is not sufficient for permits to contain only technology based limits based on what companies' treatment systems generally are capable of meeting. Rather, pursuant to section 301(b)(1)(C) of the Act, any permit also must contain "any more stringent limitation ... necessary to meet water quality standards." Water quality based permit limits typically are needed when there are planned significant discharges into waterways with limited flow such as the creeks and wetlands into which the Poly Met company plans to discharge. The EPA regulations specify that any permit issuer must examine whether any pollutants planned to be discharged have the "reasonable potential" to cause water quality violations, and then must include water quality based permit limits for each pollutant for which there is such a reasonable potential. 40 C.F.R. § 122.44.

The Region V staff comments reportedly raised serious issues about whether the State was complying with these basic federal requirements. However, after she reportedly was called by the State Commissioner, John Linc Stine, who reportedly complained about the planned comments, I have been told that the EPA Regional Administrator for Region V, Cathy Stepp, directed in March, 2018, that the EPA staff not send any written comments to the State. That no comments would be sent at that time was confirmed in various emails, including one from from Ms. Stepp's chief of staff, that I have obtained and can provide.

As set out in the emails, in return for the EPA not commenting at that time, the State agreed that the EPA could have 45 days to comment on the planned future draft of the permit (to be developed after the public comment period), prior to the issuance of the final permit. However, when the State later sent this final draft of the permit for potential EPA review, in the fall 2018, the EPA again did not send any written comments to the state. It seems likely that this continuing failure to comment again was done at the direction of Ms. Stepp.

Comments should have been issued by the Region in the fall 2018 since the permit reportedly still was defective. The final permit issued by the State in December 2018 contains some improvements from the earlier draft, but reportedly still does not adequately address the concerns that were sought to be raised by the Region V staff. In particular, it appears that the final permit still is not backed by an adequate reasonable potential analysis done in accordance with the federal standards and still does not contain any permit limits specifically developed to fully protect water quality. My own examination of the permit and fact sheet¹ has confirmed that the state's supposed reasonable potential analysis does not contain the kind of mathematical calculations needed to fully determine whether water quality standards potentially could be violated. Moreover instead of developing strict discharge limits, the permit relies in part on so-called operating limits to help prevent reasonable potential, which are limits on internal flows "voluntarily" agreed to by the company, which do not necessarily ensure the protection of water quality and, in any event, might not be federally enforceable.

Thus by giving in to state pressure and preventing EPA comments from being sent, it appears that Ms. Stepp allowed a permit to be issued that does not meet the usual standards required by federal law. Moreover, even if the final permits is viewed as somehow being adequate, this does not justify the suppression of the EPA staff comments. Review of at least a few key state permits is a basic EPA responsibility and the EPA staff should have been allowed to do their jobs. Having the EPA comment, with the State then having to respond to the comments, might have removed any doubts about the adequacy of the permit.

While EPA generally has discretion regarding which state water permits it reviews, this was not the case here. Pursuant to 40 C.F.R. § 123.24(d)(2), EPA must review all state water permits where the discharges "may affect the waters of a State other than the one in which the discharge originates." The Fond du lac tribal reservation is downstream close to the planned discharge locations, and the tribe has the status of a state for Clean Water Act purposes. Clearly the tribe's waters will be affected by the discharge. Thus EPA Region V was required to review this permit. Reviewing a permit implicitly includes submitting comments – to say otherwise would put form over substance. Thus assuming that the reports I have received are accurate, the EPA Regional Administrator violated the regulation by suppressing the comments. Moreover, once this permit was reviewed and significant violations of federal requirements were identified, the comments should not have been suppressed whether or not a permit review was initially legally required. It is unethical to suppress the results of a permit review which has found serious violations of law.

¹ I am a former EPA attorney who worked for thirteen years in the water program, and who now is retired.

The Trump Administration recently has moved to disinvest from some permit reviews – as indicated by an Oct. 30, 2018 memorandum from Administrator Wheeler. However, the Office of Inspector General need not get involved in whether there are problems with the Wheeler memorandum, in order to determine whether there has been misconduct in Region V. Ms. Stepp's reported conduct in blocking any written comments falls below even the low bar set by the Wheeler memorandum, which says that the EPA will continue to engage in matter specific consultations with the states to address urgent precedential or high profile matters, to execute EPA obligations established by statute or memorandum of understanding, and to respond to significant violations of federal law. Blocking comments on the high profile Poly Met matter, which were developed pursuant to EPA obligations established by statute, regulation and a memorandum of understanding, and which laid out how the then planned state permit would violate federal law, is contrary to the policies set forth even in the Wheeler memorandum.

Making off the Record Comments Which can be Hidden From the Public and Courts

I have been advised that, in place of sending any written comments, the general nature of the EPA staff concerns about the state permit was related to state personnel by telephone, during the public comment period (ending in March 2018). I further have been advised that state personnel then agreed to have EPA staff read key parts of their written comments to the state personnel over the telephone. This reading reportedly occurred in April 2018, just after the close of the public comment process. The State's apparent purpose in adopting this procedure was to get the benefit of the EPA's comments without having any written comments in the official state record.

By communicating comments only by telephone, having reason to know that state personnel likely intended to not make an official record of the comments, the EPA personnel contributed to there being a non-transparent state process (assuming that the reports I have received are accurate). As noted below, this has enabled state officials to cover up that there were significant EPA concerns about the permit. EPA comments should not be communicated to states in a manner that can be hidden from the public and even from reviewing courts. While Regional Administrator Stepp may not have ordered – or even affirmatively authorized – this procedure, I believe that she is ultimately responsible for the situation (assuming that the reports I have received are accurate). By reportedly preventing EPA staff comments from being forwarded to the State in the normal open and ethical manner, she created a situation where the staff may have felt that this non-transparent procedure needed to be used.

In the response to comments document issued along with the final permit by the State, there is no mention of the State ever having received any EPA comments and no response to the EPA comments that reportedly were received over the phone (either during the comment period or after). The public statement on the permit issued by the State (posted on its website), emphasizes that its permit underwent federal as well as state agency review, without mentioning that there were EPA written comments critical of the permit which the State Commissioner reportedly successfully lobbied to not be sent. The state's press release on the permit similarly states that there were no EPA comments received during the (45 day) period in the fall 2018 allotted for them, without mentioning that there were comments reportedly earlier read to state personnel over the phone.

This is all highly misleading, assuming that the reports I have received are accurate. This is particularly disturbing because a public interest group is challenging the new permit and the state appeals court will rely on the administrative record of permit proceedings when reviewing the case. As a result of Ms. Stepp's reported actions, I am concerned that any EPA critique of the draft permit may be kept out of that record required to be filed with the court.

There is a federal requirement that when issuing permits, States like Minnesota authorized to carry out federal programs must respond on the record to all significant comments filed during a permit's public comment period. 40 C.F.R. §124.17. By not responding to the EPA's initial general statements of concern, given to the state during the comment period over the telephone, and by not responding to the written EPA comments read to state personnel shortly after the comment period, and possibly making no official record of those comments, the State appears to have violated the spirit if not the letter of that provision (assuming that the reports I have received are accurate). Yet Region V has made no effort to stop the State from engaging in such practices.

Instead, rather than intervening to correct the record, the Region has remained silent. In particular, while I have been advised that the EPA staff kept records on its end of the comments read to the state personnel in April, the EPA has thus far failed to provide a copy of those records to a local environmental group in response to a FOIA request. Thus to date, the EPA has been cooperating with the State in covering up what actually happened (assuming that the reports I have received are accurate). There appears to be no legitimate basis for the EPA not to have granted the pending FOIA request.

Failing to Protect Tribal Waters

The EPA also has avoided engaging with the Fond du lac Native American tribe, whose tribal waters are downstream from and will be affected by the proposed mine's discharges. In addition to the EPA's failure to protect tribal waters by reviewing the state water permit, discussed above, EPA Region V is apparently planning not to protect tribal interests in connection with a different (wetlands permit) planned to be issued for the Poly Met mining project by the U.S. Army Corps of Engineers.

The tribe has asked for the EPA to play the role envisioned by subsection 401(a)(2) of the Clean Water Act regarding the wetlands permit. This mining permit was certified by the State under section 401 of the Clean Water Act in December (2018). Under subsection 401(a)(2) of the Act, since the planned discharges (filling of wetlands) "may affect" nearby tribal waters, the EPA was required to formally notify the tribe of the proposed permit within 30 days of the section 401 certification. This starts a process under which, if the tribe then notifies the EPA that the planned discharges will in its view result in violations of the tribe's water quality standards, the EPA then must review the matter and submit comments evaluating the tribe's objections.²

² The tribe has the status of a State pursuant to the Clean Water Act section 518 and thus has the same rights as any other downstream state pursuant to subsection 401(a)(2).

The deadline has passed but EPA has not yet given the tribe the required notice. Also, according to tribal officials, various EPA personnel have indicated that the current EPA administration is unlikely to comply with the law and engage in the required process on behalf of the tribe. There is no legal basis for the EPA not complying. The 401(a)(2) process gives the tribe the right to obtain an EPA evaluation of its concerns. The EPA may not defer the issues to the Corps – the whole purpose of subsection 401(a)(2) is to enable downstream states (including tribes with the status of a state) to receive support directly from the EPA. The 401(a)(2) process also is not duplicative of other permit processes. While the EPA did comment on the Corps permit – during the Obama Administration - these general comments are no substitute for the EPA having to address the tribe's specific concerns. That the tribe also had a chance to comment to the Corps also is not a substitute for its right to involve the EPA in the process. It would seem particularly disingenuous for the Region to claim duplication of effort when to date it has generally failed to address the issues raised by the mining project, including suppressing the written comments developed by its staff on the state water permit.

II. Other Permit Matters

The kind of misconduct that appears to have occurred with respect to the Poly Met permit apparently is not limited to that permit. I have been advised that there have been discussions between the State and EPA Region V about generally finding ways to avoid EPA sending written comments on permits. This could involve continuing to exchange information only in ways that can be hidden from the public and from reviewing courts. For example, I have been advised that state personnel have suggested that the EPA provide any comments on permits to them by screen shots (which presumably would not be downloaded by the state). I am concerned that unless this trend is promptly stopped (by an Inspector General Office investigation or other appropriate actions), the making of off the record comments could become a general trend under the current Regional Administrator in Region V (assuming that the reports I have received are accurate). This reported unethical conduct is likely to spread if not stopped.

Also, Regional Administrator Stepp reportedly has prevented regional staff from sending comments regarding other Minnesota permit actions as well. For example, the Minnesota Pollution Control Agency recently determined that no water permit is needed for a United Taconite mine to dump water from a mining pit into a river. This is clearly contrary to federal law which requires discharges from (dirty) non-jurisdictional waters like a mining pit into (previously cleaner) jurisdictional waters to be subject to a permit which would limit the pollution. Notwithstanding this, Ms. Stepp reportedly has directed that no EPA comments may be sent to the State regarding this matter.

I hope that the Inspector General's Office will examine the general pattern of conduct on permit reviews under the current Region V Regional Administrator, in addition to the particular conduct in connection with the Poly Met matter.

Please feel free to contact me if you need any further information. I may be reached at jfowley@verizon.net and tel: 339-440-3855.

EXHIBIT G

**TO DECLARATION OF PAULA G. MACCABEE IN SUPPORT OF
WATERLEGACY MOTION FOR TRANSFER OR STAY
DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WaterLegacy
1961 Selby Ave.
St. Paul, MN 55104

Plaintiff,

U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW,
Washington, DC 20004

Defendant.

CIVIL ACTION NO. 19-412

COMPLAINT

1. Plaintiff WaterLegacy (“Plaintiff”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, as amended, to compel the U.S. Environmental Protection Agency, (“EPA” or “Defendant”) to disclose records wrongfully withheld in failing to respond within the statutory deadline to Plaintiff’s FOIA request.

PARTIES

2. Plaintiff, WaterLegacy, is a non-profit organization incorporated under the laws of Minnesota.

3. WaterLegacy’s mission is to counter the threat of sulfide mining in Northern Minnesota. It collaborates with partners across the region to protect against the concern that sulfide mining would destroy wetlands, wildlife, habitats and wild rice, contaminate water with toxic metals, increase mercury levels in fish, and impair tribal rights. Since 2009, it has grown to over 9,000 supporters and has

facilitated the filing of over 45,000 citizen comments and other actions to protect the waters of Minnesota.

4. As part of its mission, WaterLegacy is an active participant in environmental review and permitting for proposed mining sites overseen by Defendant.

5. Defendant, EPA, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1). EPA is a federal agency that, *inter alia*, is responsible for review and oversight of state implementation of the National Pollutant Discharge Elimination System and State Disposal System (NPDES/SDS) under § 402 of the Clean Water Act. 33 U.S.C. § 1342.

6. Defendant is charged with the duty to provide public access to records in its possession consistent with the requirements of FOIA. Here, Defendant is denying Plaintiff access to its records in contravention of federal law.

STATEMENT OF FACTS

7. For the last several years, regulatory review has been ongoing for PolyMet Mining's planned copper-nickel mine in northern Minnesota called the "NorthMet" mine. The mine site and processing plant are planned to occupy approximately 19,000 acres (30 mi²) in the St. Louis River basin, 175 river miles upstream from Lake Superior.

8. NorthMet would create a permanent source of effluent contamination in the St. Louis River and Lake Superior and is anticipated to destroy approximately 900 acres of wetlands.

9. For almost a decade, EPA has conducted review of certain regulatory materials prepared by PolyMet and its agents, and by the Minnesota Department of Natural Resources (MDNR), the Minnesota Pollution Control Agency (MPCA), the U.S. Forest Service, and the U.S. Army Corps of Engineers. Throughout this period, and at the request of MDNR and other co-lead agencies in conducting environmental review of NorthMet, EPA, as a cooperating agency, has provided written comments and recommendations to assist co-lead agencies in preparing environmental review materials. EPA stated in a letter confirming the request for EPA's written assistance dated August 7, 2013, that it "expects downstream water quality standards to be considered and protected throughout the NPDES permitting process."

10. On April 7, 2015, EPA memorialized by email an agreement it had reached with MPCA to defer commenting on the Environmental Impact Statement drafts prepared for the NorthMet site until the process of NPDES permitting began. EPA expressed its expectation that any NPDES permit which ultimately issued would comply with the Clean Water Act and regulations. Collected emails between EPA and state regulators are attached as Exhibit A.

11. On November 3, 2016, EPA further explained that any legally sufficient NPDES permit must cover or prohibit all discharges from NorthMet point sources to surface waters, including those through ground water hydrologic connection. These would be the last written comments made by EPA on the record

concerning the NorthMet mine. Ex. A 6-12. Five days later, on November 8, Donald Trump was elected President of the United States.

12. Throughout 2017 and 2018, staff in EPA's Region 5 Office which was overseeing the NorthMet project verbally expressed substantive concerns about the draft NPDES water pollution permit and its ability to protect water quality in Lake Superior watersheds. These concerns were expressed over the phone or in person to employees of MPCA, who memorialized them in handwritten notes, attached in full as Exhibit B.

13. MPCA notes indicate that the Region 5 staff wanted to provide comments in writing in the administrative record for the NPDES permit for NorthMet; yet they repeatedly failed to do so.

14. On November 1, 2017, MPCA staff memorialized one such oral conversation as: "EPA wants to send a letter prior to PN [public notice of the draft permit]," putting its comment in the record. Ex B. But an email from EPA a few weeks later, on November 20, 2017 suggests that something had changed, and that EPA Region 5 staff would not send a letter prior to the Draft NPDES water pollution permit but would wait to send EPA comments "until after we have a chance to review the draft." Ex A 13.

15. The draft NPDES permit was released in January 2018, with a comment period ending on March 16, 2018.

16. MPCA handwritten notes from January through March 2018 document substantial concerns voiced by EPA staff about the draft NPDES permit, including the lack of water quality based effluent limits in the permit. Ex B.

17. MPCA notes also indicate that EPA was concerned that proposed monitoring of pollutants discharged through a groundwater pathway might be inadequate to determine Clean Water Act compliance. Region 5 was, according to those notes, concerned about the effects of increased mercury on downstream communities. Notes dated March 5, 2018 state: “EPA wants to submit comments – Make clear what EPA concerns are. Clarify permit conditions.” Ex B.

18. At the close of the comment period, in a March 16, 2018 email, EPA again put off submitting written comments, but stated that once the *Final* NPDES permit was in its “pre-proposal” stage, Region 5 EPA would have 45 days to “provide written comments” to MPCA. Ex A 14-16.

19. MPCA notes from October 22, 2018 indicate that EPA planned to review the final NorthMet permit during its 45-day oversight period and that “EPA will focus review on proposed language re WQBELs [water quality based effluent limits].” Ex B.

20. On October 25, 2018, MPCA informed the public that the Agency had sent a revised PolyMet NorthMet water pollution permit to EPA “as part of the federal oversight” of state permits, that “EPA will be reviewing the permits in the coming weeks” and that the MPCA would make its decisions on the final permit after considering EPA feedback. Ex A 17-18.

21. Despite assurances that EPA comments would be forthcoming in this period, MPCA received no written EPA feedback on the PolyMet permit, according to an email from MPCA dated December 17, 2018.

22. On information and belief, EPA finalized written comments on the draft NorthMet permit on or about March 2018 but never transmitted them to MPCA.

23. In addition, on information and belief, on or about April 2018, EPA read these finalized written comments to MPCA staff and retained a highlighted or annotated copy memorializing what was read to MPCA.

Plaintiff's FOIA Request

24. On October 19, 2018, Plaintiff requested by email “a copy of the EPA Region 5 final comments on the draft NPDES permit proposed by the Minnesota Pollution Control Agency for the PolyMet project in January 2018 (Minnesota Permit No. MN0071013).” EPA Region 5 counsel informed Plaintiff that the request would be “converted to a FOIA request (that will happen here, you don't need to do anything) and then you will receive a response. i'm not completely sure on timing, but this is a very simple request, so a response should not take very long.” [sic]. Correspondence concerning the FOIA request between Plaintiff and Defendant is attached as Exhibit C.

25. On October 23, 2018, EPA requested that Plaintiff agree to a processing fee commitment of \$25.00, which was agreed to the same day. Ex C 3. At that point the FOIA request was complete and processing should have begun.

26. On December 3, 2018, counsel for EPA informed Plaintiff that they could not locate the fee commitment from October 23 and had not begun processing the request. Plaintiff then replied that it had already agreed to such a commitment and re-delivered the original October 23, 2018 fee commitment. Ex C 5.

27. Later on December 3, 2018, Plaintiff was copied on correspondence between EPA employees discussing whether the materials requested by FOIA could be delivered as an email attachment to Plaintiff immediately and uploaded later to the FOIA Online system which EPA uses to manage its FOIA requests, because staff was “sure there will be no fees associated with this request.” Ultimately Region 5 staff determined that they could not release the materials until after they “go through the regional review process and the FOIA online system.” The FOIAOnline system delivered Plaintiff a confirmation the same day. Ex C 8-11.

28. On January 30, 2019, Plaintiff asked EPA Region 5 staff who had previously corresponded about this request discussed how it could be accelerated. After notifying the “Water Division” who were custodians of the document, EPA counsel informed Plaintiff that “the FOIA is inhouse and was being processed when the shut down interrupted. i don’t have a new due date (the original FOIA was due on january 2, 2019, i believe), and now that the government has reopened, every effort is being made to provide a timely response.” [sic]. Ex C 12-15.

29. Defendant has not produced any documents or issued any further determinations, communications, information, or notices to Plaintiff since the January 30, 2019 email.

30. On information and belief, production in response to Plaintiff's FOIA request is being indefinitely delayed due to its "elevation" to EPA HQ in Washington, DC in response to increasing press attention to the process by which the NorthMet NPDES permit was approved. *See, e.g.,* Jennifer Bjorhus, *Former EPA lawyer challenges regulators on PolyMet water permit*, STAR TRIBUNE (Feb. 6, 2019), <http://www.startribune.com/regulators-challenged-on-polymet-water-permit/505466782/>; Dan Kraker, *Federal judge lifts hold on lawsuits against PolyMet mine; other challenges continue*, MINN. PUB. RADIO NEWS (Jan. 31, 2019), <https://www.mprnews.org/story/2019/01/31/fed-judge-lifts-hold-on-lawsuits-against-polymet-mine>.

CAUSE OF ACTION

31. Plaintiff incorporates and restates the allegations of the preceding paragraphs as though fully set forth herein.

32. The FOIA requires federal agencies to respond to public requests for records, including files maintained electronically, to increase public understanding of the workings of government and to provide access to government information. FOIA reflects a "profound national commitment to ensuring an open Government" and agencies must "adopt a presumption in favor of disclosure." Presidential Mem., 74 Fed. Reg. 4683 (Jan. 21, 2009).

33. The FOIA requires agencies to make a determination on a FOIA appeal within twenty working days after its receipt. 5 U.S.C. § 552(a)(6)(A)(ii). Agencies may extend this twenty-day time period only upon written notice of

“unusual circumstances,” and then for no longer than ten days. 5 U.S.C. § 552(a)(6)(B).

34. To date, Defendant has not indicated that any “unusual circumstances” existed regarding this FOIA request. It has not specified what documents it is reviewing, their volume, or a timetable for any “rolling” review or production.

35. Defendant has instead indicated on multiple occasions that this was a “simple” request that should not take long or incur any processing costs.

36. To date, Defendant has failed to make a final determination on, or produce any documents in response to, Plaintiff’s October 23, 2018 FOIA request.

37. Even assuming it was proper to reset the date on which Plaintiff’s FOIA request was “submitted” to December 3, 2019, when EPA claims to have first received Plaintiff’s commitment to pay a processing fee of \$25.00 (although that commitment was actually sent on October 23, 2018), Ex. C 3-5, Defendant’s twenty-day time period to respond to the request expired on January 2, 2019. See Ex C 12-15; see also FOIAONLINE, EPA-R5-2019-001800 REQUEST DETAILS (last visited February 12, 2019), <https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-R5-2019-001800&type=request>.

38. Defendant’s conduct amounts to a denial of Plaintiff’s FOIA request.

39. Defendant is frustrating Plaintiff’s efforts to inform the public about EPA’s consideration of permitting and regulatory matters and how practices have

changed regarding the submission of written comments critical of state agencies. This refusal to comply with statutory obligations under FOIA is particularly troubling given the substantial public attention which has been paid to the NorthMet mine site in particular, and to EPA's cooperative federalism policies generally under Acting Administrator Andrew Wheeler.

40. Defendant's failure to respond to this FOIA request is also frustrating litigation concerning the NorthMet NPDES permit by withholding documents which litigants claim are necessary to complete the full administrative record considered by MPCA staff when they were related to them verbally by EPA Region 5 staff. The handwritten notes contained in Exhibit B summarize EPA's concerns in brief, but the full prepared comments which were read to and considered by MPCA only appear in the unreleased written EPA comments.

41. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i). Plaintiff constructively exhausted its administrative remedies when EPA failed to produce a determination on January 2, 2019, 20 working days after Defendant's request was finalized within FOIAOnline, and now seeks an order from this Court requiring Defendant to immediately produce the records sought in Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.

JURISDICTION AND VENUE

42. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.

43. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

44. This Court is a proper venue because Defendant is a government agency that resides in the District of Columbia. *See* 28 U.S.C. § 1391(e)(1)(A) (where defendant is the government or a government agency, a civil action may be brought in the district where the defendant resides). Venue is also proper under 5 U.S.C. § 552(a)(4)(B) (providing for venue in FOIA cases where the plaintiff resides, where the records are located, or in the District of Columbia).

45. This Court has the authority to award reasonable costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Enter an order declaring that Defendant wrongfully withheld requested agency records;
- ii. Issue a permanent injunction directing Defendant to disclose to Plaintiff all wrongfully withheld records;
- iii. Maintain jurisdiction over this action until Defendant is in compliance with the FOIA and every order of this Court;

- iv. Award Plaintiff attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Respectfully submitted on February 19, 2018,

/s/ Paula Dinerstein
Paula Dinerstein, DC Bar # 333971
Public Employees for Environmental Responsibility
962 Wayne Ave, Suite 610
Silver Spring, MD 20910
(202) 265-7337
pdinerstein@peer.org

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
WATERLEGACY,)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 19-412 (JEB)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Defendant.)	
)	
_____)	

DEFENDANT’S ANSWER TO PLAINTIFF’S COMPLAINT

Defendant, the United States Environmental Protection Agency (“EPA”), hereby answers the Complaint of WaterLegacy (“Plaintiff”) as follows:

DEFENSES

1. Plaintiff is not entitled to compel the production of records protected from disclosure by one or more of the exemptions to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

2. Defendant respectfully reserves the right to amend, alter, and supplement the defenses contained in this Answer as the facts and circumstances giving rise to the Complaint become known to Defendant through the course of the litigation.

DEFENDANT’S RESPONSES TO THE NUMBERED PARAGRAPHS

All allegations in the Complaint, including relief sought, are denied except when specifically admitted. Defendant responds as follows:

1. Defendant admits that the basis for Plaintiff’s action is the FOIA. The remainder of Paragraph 1 either contains a legal conclusion to which no response is required or characterizes

the Complaint in this lawsuit in which case Defendant refers the Court to the Complaint for the most true and accurate account of its content.

PARTIES¹

2-4. Paragraphs 2-4 contain Plaintiff's characterization of itself and its mission. Defendant is without knowledge or information sufficient to respond to Plaintiff's characterization of itself and its mission.

5. Defendant admits that it is an agency of the federal government of the United States. Plaintiff's characterization of cited statutes is a legal conclusion to which no response is required. To the extent a response is deemed required, Defendant refers the Court to the cited statutes as the most true and accurate representation of their content.

6. This paragraph sets forth legal conclusions regarding Defendant's duties under FOIA to which no response is required. To the extent a response is deemed required, Defendant refers the Court to the referenced statute – FOIA - as the most true and accurate representation of its content.

STATEMENT OF FACTS

7. Defendant admits that the State of Minnesota has been engaged in permitting processes related to the "NorthMet" mine for the last several years which Defendant understands to fit the description provided in this paragraph.

8. Defendant is without knowledge or information sufficient to answer Plaintiff's characterization of the impact of the NorthMet mine.

¹ For ease of reference, Defendant refers to Plaintiff's headings and titles, but to the extent those headings and titles could be construed to contain factual allegations, those allegations are denied.

9. Defendant admits that Defendant carried out its statutory review responsibilities during the drafting of the Environmental Impact Statement (“EIS”) for the NorthMet mine project, and that in June 2011, Defendant entered into a Memorandum of Understanding with the Minnesota Department of Natural Resources (“MDNR”), the U.S. Forest Service and the U.S. Army Corps of Engineers, establishing Defendant as a cooperating agency to consult on the development of a joint Federal-State EIS for the proposed NorthMet mine project. Defendant admits that it reviewed materials provided by the entities listed in Paragraph 9 and provided written comments to “co-lead” agencies to assist with the development of the EIS. Plaintiff cites to an August 7, 2013 letter. Defendant refers the Court to that letter for the most true and accurate statement of its content and denies any allegations inconsistent with that content.

10. This paragraph contains Plaintiff’s characterization of an April 7, 2015 email. Defendant refers the Court to that email for the most true and accurate statement of its content and denies any allegation inconsistent with the content of the email. Defendant admits that Plaintiff attached a collection of emails between EPA and state regulators to its Complaint as Exhibit A.

11. This paragraph contains Plaintiff’s characterization of a November 3, 2016 letter from Kevin Pierard of EPA Region 5. Defendant refers the Court to that letter for the most true and accurate statement of its content and denies any allegation inconsistent with the content of the letter. Plaintiff refers to “comments made by EPA on the record.” Defendant does not know what record Plaintiff is referring to and therefore lacks knowledge or information sufficient to answer the allegation that the November 3, 2016 letter constitutes Defendant’s last written comments “on the record,” and on that basis denies the allegation. Defendant admits that on November 8, 2016, Donald Trump was elected President of the United States.

12. Defendant admits only that at times in 2017 and 2018, EPA Region 5 staff discussed the draft NPDES permit for the NorthMet mine project in person or over the phone with the Minnesota Pollution Control Agency (“MPCA”) staff, and Defendant denies remaining allegations in this paragraph. Plaintiff cites to handwritten notes attached as “Exhibit B.” Defendant refers the Court to Exhibit B for the most true and accurate statement of the content of those notes.

13. This paragraph contains Plaintiff’s characterization of MPCA notes. Defendant refers the Court to those notes for the most true and accurate statement of their content and denies any allegation inconsistent with that content.

14. This paragraph contains Plaintiff’s characterization of MPCA notes and a November 20, 2017 email. Defendant refers the Court to these documents for the most true and accurate statement of their content and denies any allegation inconsistent with their content.

15. Defendant admits that MPCA released a draft NPDES permit in January 2018 with a comment period ending on March 16, 2018.

16. This paragraph contains Plaintiff’s characterization of MPCA handwritten notes. Defendant refers the Court to those notes for the most true and accurate account of their content and denies any allegation inconsistent with that content.

17. This paragraph contains Plaintiff’s characterization of MPCA handwritten notes. Defendant refers the Court to those notes for the most true and accurate account of their content and denies any allegation inconsistent with that content.

18. This paragraph contains Plaintiff’s characterization of March 16, 2018 email. Defendant refers the Court to that email for the most true and accurate statement of its content and denies any allegation inconsistent with that content.

19. This paragraph contains Plaintiff's characterization of MPCA notes. Defendant refers the Court to those notes for the most true and accurate statement of their content and denies any allegation inconsistent with that content.

20. This paragraph contains Plaintiff's characterization of an October 25, 2018 email from MPCA. Defendant refers the Court to that email for the most true and accurate statement of its content and denies any allegation inconsistent with that content.

21. Defendant is without knowledge or information as to what "assurances that EPA comments would be forthcoming in this period," Plaintiff refers to in this paragraph, and on that basis, denies the allegation that such assurances occurred. This paragraph contains Plaintiff's characterization of a December 17, 2018 email from MPCA. Defendant refers the Court to that email for the most true and accurate statement of its content and denies any allegation inconsistent with that content.

22. Defendant denies that it finalized written comments on the draft NorthMet permit. Defendant avers that EPA staff drafted a written document concerning the draft NorthMet permit that was not finalized by Region 5.

23. Defendant admits that EPA staff verbally shared portions of a draft document concerning the NorthMet permit with MPCA staff during a phone call in April 2018. Defendant admits that it has retained a copy of the draft document that memorializes what was shared verbally with MPCA staff. Defendant denies the remaining allegations.

Plaintiff's FOIA Request

24. This paragraph contains Plaintiff's characterization of email communications between Plaintiff and EPA concerning Plaintiff's FOIA request. Defendant refers the Court to

those email communications for the most true and accurate statement of their content and denies any allegation inconsistent with that content.

25. This paragraph contains Plaintiff's characterization of email communications between Plaintiff and EPA concerning Plaintiff's FOIA request. Defendant refers the Court to those email communications for the most true and accurate statement of their content and denies any allegation inconsistent with that content. Paragraph 25 also contains legal conclusions concerning whether Plaintiff's FOIA request was complete and how it should have been processed to which no response is required.

26-28. Paragraphs 26-28 contain Plaintiff's characterization of email communications between Plaintiff and EPA concerning Plaintiff's FOIA request. Defendant refers the Court to those email communications for the most true and accurate statement of their content and denies any allegation inconsistent with the content.

29. Admit.

30. Deny.

CAUSE OF ACTION

31. Defendant reasserts by reference its responses to the preceding paragraphs.

32. This paragraph sets forth legal conclusions regarding requirements of the FOIA to which no response is required.

33. This paragraph sets forth legal conclusions regarding the requirements of the FOIA to which no response is required.

34. Defendant admits that it has not indicated that any "unusual circumstances" exist regarding this FOIA request. Defendant admits that it has not specified what it is reviewing or a timetable for production, but Defendant avers that Plaintiff's request seeks a single document.

35. Defendant admits that in an October 22, 2018 email, EPA staff characterized the FOIA request as “simple” and that in a December 3, 2018 email, EPA staff indicated that no fees would be associated with processing the FOIA request. Both emails are submitted by Plaintiff as Exhibit C. Defendant refers the Court to those emails for the most true and accurate statement of their content and denies any allegation inconsistent with that content.

36. Admit.

37. Admit.

38. This paragraph sets forth legal conclusions concerning constructive denial of Plaintiff’s FOIA request to which no response is required.

39. This paragraph sets forth conclusions of law concerning statutory obligation under FOIA to which no response is required. Defendant is without knowledge or information sufficient to answer the remaining allegations in this paragraph.

40. Defendant is without knowledge of information sufficient to answer Plaintiff’s assertions regarding the impact of this FOIA response on other litigation matters. Plaintiff characterizes the handwritten notes contained in Exhibit B. Defendant refers the Court to those notes for the most true and accurate statement of their content and denies any inconsistent allegations. Defendant denies that full prepared comments were read to MPCA, but Defendant avers that portions of a draft document concerning the NorthMet permit were read aloud to MPCA staff by EPA staff. Defendant is without knowledge or information sufficient to answer allegations concerning what MPCA did or did not consider.

41. This paragraph sets forth legal conclusions regarding exhaustion of administrative remedies to which no response is required. The remainder of the paragraph characterizes Plaintiff’s requested relief to which no response is required.

JURISDICTION AND VENUE

42. This paragraph sets forth legal conclusions regarding the Court's jurisdiction to which no response is required.

43. This paragraph sets forth legal conclusions regarding the Court's authority to provide declaratory relief to which no response is required.

44. This paragraph sets forth legal conclusions regarding the proper venue to which no response is required.

45. This paragraph sets forth legal conclusions regarding the Court's authority to provide costs and attorney's fees to which no response is required.

RELIEF REQUESTED

The allegations contained in this section of Plaintiffs' Complaint constitute a prayer for relief to which no response is required. To the extent a response is deemed required, Defendant denies the allegations contained within this section. Defendant also denies that Plaintiffs are entitled to the relief demanded in the Complaint.

Dated: April 3, 2019

Respectfully submitted,

JESSIE K. LIU
United States Attorney
D.C. Bar #472845

DANIEL F. VAN HORN
Chief, Civil Division
D.C. Bar #924092

By: /s/ Matthew E. Kahn
MATTHEW E. KAHN
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Attachment 3 to Relators' List of Alleged Procedural Irregularities

**STATE OF MINNESOTA
IN COURT OF APPEALS**

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. Case Nos. A19-0112, A19-0118, A19-0124

WATERLEGACY REPLY MEMORANDUM IN SUPPORT OF MOTION FOR TRANSFER TO DISTRICT COURT OR, IN THE ALTERNATIVE, FOR STAY DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS

INTRODUCTION

The PolyMet NorthMet NPDES/SDS permit (“NorthMet permit”) is Minnesota’s first water pollution permit for a new and potentially toxic form of mining. The U. S. Environmental Protection Agency (“EPA”) had serious concerns that the NorthMet permit failed to comply with the Clean Water Act (“CWA”). Yet, evidence suggests that when the Minnesota Pollution Control Agency (“MPCA”) complained to EPA’s Regional Administrator about EPA’s written comments on the draft NorthMet permit, these comments were suppressed. MPCA now admits that EPA staff read their comments to MPCA over the phone. Yet, MPCA “did not retain” the notes MPCA staff took during this critical phone call, even though a Minnesota Government Data Practices Act (“Data Practices Act” request had already been made explicitly requesting any notes of phone conversations with EPA. MPCA also failed to provide any written responses disclosing or answering EPA’s concerns about the NorthMet permit.

Were it not for confidential sources within EPA, inquiries by a retired EPA attorney, and documents revealed through Data Practices Act requests, MPCA would have succeeded in completely concealing EPA's criticisms of the NorthMet permit from the public and the Court. There is evidence of irregular procedures in documents filed with this motion. But, most of the evidence of MPCA's irregular procedure and EPA's permit analysis remains outside the administrative record. Thus, the remedy of transfer to the district court pursuant to Minn. Stat. § 14.68 is requested to safeguard the integrity of the permitting process and ensure that judicial review of the NorthMet permit is based on a full and complete record of EPA oversight under the CWA.¹

BACKGROUND

MPCA's response memorandum confirms, rather than refutes the irregularities in procedure that have plagued the NorthMet permit process and resulted in omissions of critical documents from the administrative record for the permit. In context, these irregularities reflect EPA's longstanding concerns about the NorthMet mine project and MPCA's less rigorous approach to permitting.

EPA's degree of involvement in the development of the PolyMet NorthMet NPDES/SDS permit since the summer of 2016 is not surprising. For years, EPA had a

¹ Minnesota Center for Environmental Advocacy continues to support WaterLegacy's Motion to Transfer or, in the alternative, to Stay. This reply is respectfully submitted according to the original schedule pursuant to Minn. R. Civ. App. P. 127, as explained in the Reply Declaration of Paula G. Maccabee ("Maccabee Reply Decl.") ¶ 2.

high level of concern about the water quality threats posed by the NorthMet copper-nickel mine and the lack of rigor in MPCA's approach to NPDES permitting.

In February 18, 2010, the EPA found the draft environmental impact statement for the NorthMet copper-nickel mine "environmentally unsatisfactory." EPA's written comments explained,

EPA has assigned the EU rating because our review of the DEIS determined that the proposed action will result in environmentally unsatisfactory water quality impacts. . .

EPA determined that the project will result in unacceptable and long-term water quality impacts, which include exceeding water quality standards, releasing unmitigated discharges to water bodies (during operation and in the post-closure period), and increasing mercury loadings into the Lake Superior watershed.

Exh. H at 2-3.²

As the NorthMet project continued, EPA cautioned that analysis used for environmental review was insufficient for NPDES permitting. In 2013, EPA stressed that modeling used in environmental review to evaluate water quality impacts "is not equivalent to how water quality based effluent limits (WQBELs) will be developed for NPDES permitting" and that "appropriate WQBELs must be derived based on water quality standards and implemented in the permit." Exh. H at 12.

In April 2015, despite MPCA's request that EPA defer NPDES comments until permitting, EPA sent an email to memorialize "our understanding of MPCA's anticipated approach to address proposed discharges of pollutants to waters of the United States

² WaterLegacy ("WL") Exhibits A-G were attached with the Declaration of Paula Maccabee ("Maccabee Decl.") filed with the initial motion. Exhibits H and I are attached with the Reply Declaration of Paula Maccabee.

through NPDE permitting.” Exh. A at 1. EPA summarized its requirements for an NPDES permit under the CWA and the importance of a “complete application” from PolyMet to support its request for a permit. *Id.* at 3-4. MPCA Metallic Mining Sector Director Ann Foss countered with an email admonishing that EPA should communicate with MPCA through “conversations,” to which EPA responded that documentation was needed since “there was never any written acknowledgement of agreement, positions or rationale.” Exh. H at 16.

MPCA’s permitting process did not begin well. PolyMet applied for its NPDES permit on July 11, 2016, and MPCA informed PolyMet that its application was approved for processing prior to EPA’s review. Exh. A at 6. In a November 3, 2016 letter, EPA identified serious deficiencies in PolyMet’s NPDES permit application. *Id.* at 6-12. Despite an explicit requirement in the Memorandum of Agreement between EPA and MPCA that “no NPDES application shall be processed” by MPCA until “all deficiencies identified by the EPA are corrected” and MPCA “receives a letter from EPA concurring that the application is complete,” MPCA’s administrative record contains no such letter from EPA. Exh. H at 29.³ By summer 2016, when EPA became “closely involved” with MPCA’s NorthMet permit, the process was already irregular.

MPCA has not disputed the central facts pertaining to MPCA’s irregular conduct set forth in Jeffrey Fowley’s complaint to the EPA Office of Inspector General and in WaterLegacy’s motion papers:

³ MOA sections attached with MPCA’s response to this motion do not include this page.

1. MPCA has provided no evidence disputing that MPCA Commissioner John Linc Stine called EPA Regional Administrator Cathy Stepp to complain about EPA's planned EPA staff written comments on the NorthMet permit.⁴ *See* Exh. F at 2.
2. MPCA has not disputed that EPA's appointed Regional Administrator then directed that EPA professional staff not send any written comments to MPCA after this call by MPCA's Commissioner. *See Id.*
3. MPCA has not disputed that EPA staff stated during the public comment period for the draft NorthMet permit that they intended to submit written comments to make clear EPA concerns, which included the lack of effluent limits to meet water quality standards (WQBELs). Exh. C at 13-14.
4. MPCA has admitted that EPA read its prepared written comments aloud to MPCA staff over the phone on April 5, 2018 and that this call from EPA provided a "compendium of all of all of its previous concerns about the Public Comment draft permit." (MPCA Response ("Resp.)) 5; Declaration of Richard Clark ("Clark Decl.") ¶ 15.
5. MPCA has admitted that two MPCA employees, staff attorney Mike Schmidt and an unnamed member of the Water Permit team, took written notes of the April 5, 2018 call when EPA read its written comments. *Id.*

⁴ Outside counsel states in MPCA's memorandum states generally that MPCA "did not take efforts to keep EPA's written comments out of the administrative record" (MPCA Resp. 17), but no declarations support this assertion.

6. MPCA has not disputed that neither set of MPCA's written notes taken during the April 5, 2018 call (when EPA read its written comments) have been provided to WaterLegacy or placed in the administrative record.

7. MPCA has not disputed that WaterLegacy's first Data Practices Act request for documents, including "meeting notes" and "phone conversation notes" pertaining to "written or oral communications" with EPA, was made on March 26, 2018, before the April 5, 2018 call and notetaking. *See* Maccabee Decl. ¶¶ 3,12, Exh. B at 1.

8. MPCA has admitted that, as of April 5, 2018, issues raised by EPA had not been resolved. Declaration of Jeff Udd (Udd Decl.) ¶ 5; Clark Decl. ¶ 15. In fact, MPCA admits that EPA and MPCA met in September 2018 in an effort to resolve outstanding issues raised by EPA regarding the NorthMet permit. *Id.*, ¶17.

9. MPCA has admitted that neither EPA's written comments on the draft NPDES permit nor the content of those comments read aloud to MPCA on April 5, 2018 are contained in the administrative record. MPCA Resp. 11.

10. MPCA has admitted "the only way that WaterLegacy was aware of those documents - and of the existence of the non-record document it seeks - is because of MPCA's disclosures under the Data Practices Act." *Id.* at 16.

MPCA's practices and the resulting deficiencies in the record are a marked divergence from other Minnesota NPDES permitting cases, where EPA's comments and MPCA's responses to those comments are part of the public record. Maccabee Reply Decl.

¶ 5. For example, MPCA reissued the NPDES/SDS permit for the United States Steel Corp. Minntac tailings basin (“Minntac permit”) just three weeks before MPCA approved the NorthMet permit. *Id.* EPA’s comments on the draft Minntac permit were provided in writing to MPCA, discussed in MPCA’s Findings of Fact on the Minntac permit, and included in the administrative record for the public and this Court to review, along with MPCA’s detailed responses to the substance of EPA’s comments. *Id.*, Exh. I. MPCA’s practices in the NorthMet permit case also diverge sharply from proper procedures in NPDES permitting matters across the country.

MPCA’s irregular practices and the resulting deficiencies in the record are anomalous and improper. Jeffry Fowley is a retired EPA attorney and an expert in NPDES permitting matters. Declaration of Jeffry Fowley (“Fowley Decl.”) at ¶¶ 2-4. Mr. Fowley was employed by the EPA Office of Regional Counsel that serves New England for 37 years, headed that Office’s water section for 13 of those years, and has extensive experience with legal and technical requirements for NPDES permits as well as interactions with states under EPA oversight. *Id.*

Mr. Fowley explains that in his 37 years of experience at EPA, he never heard of any situation where EPA professional staff prepared written comments on an NPDES permit and then read them over the phone. *Id.*, ¶ 11. Even where EPA and a state have phone conversations regarding NPDES permit provisions, when EPA professional staff have comments about a draft permit, EPA sends those comments in writing to the state agency during the public comment period for the permit. *Id.* ¶ 9. Mr. Fowley explains,

[I]t actually is not unusual for an EPA Region and a State to have a series of meetings on complex permit or other complex matters. What is highly unusual is that no written comment in this highly significant and complex matter were ever sent. When the EPA reviews state permits, there can be telephone calls and meetings between federal and state personnel. However, for significant and complicated permits like the Poly Met permit, it has been the consistent EPA practice to send written comments (in cases where it has initiated a permit review). The sending of such comments is necessary to fully communicate EPA concerns, which is hard to do on complex matters in a meeting or over the phone, unaided by a written document. In any event, the sending of written comments is essential in order to carry out the EPA's oversight responsibilities, if in phone calls and meetings, important issues are not resolved. *Id.* ¶ 9.

Based on his expertise, Mr. Fowley stated,

In my opinion, it was improper for the MPCA to in effect receive written comments from the EPA by having them read over the phone. In all of 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. There is no legitimate reason why written comments which could be sent would instead be read over the phone. This clearly is a less effective way to communicate complicated matters than sending the written comments. The apparent purpose for only receiving such comments over the phone would be to obtain them off the record - to avoid the MPCA receiving written comments which it would then need to be put into the administrative record for the permit and to which it would then need to respond. *Id.* ¶ 11.

In addition to confirming procedural irregularities in the NorthMet permitting process, MPCA's response to WaterLegacy's motion raised new factual issues supporting transfer of these cases to the district court. In MPCA's memorandum, counsel alleged that attorney Mike Schmidt and the other unidentified member of the Water Permit team who took notes on April 5, 2018 "did not retain" the notes from this call because there was nothing new or surprising in EPA's comments. MPCA Resp. 5. However, MPCA provided no sworn declarations from any person stating why the records were discarded or destroyed, at whose direction, or even that the records were, in fact, not retained in MPCA's possession. Many handwritten notes of meetings and phone calls with EPA both before

and after April 5, 2018 were retained by MPCA, provided in response to Data Practices Act requests, and later placed in the administrative record. *See* Maccabee Decl. ¶ 4, Exh. C at 1-3, 5-14, 18-25.

Mr. Fowley emphasizes that even if MPCA staff thought there was nothing new or surprising in the EPA comments read in the April 5 call, “this is not a legitimate reason to destroy official government records.” Fowley Decl. ¶ 13. Mr. Fowley opined,

It clearly was improper for the MPCA to not retain these records. In my experience, when there have been meetings or phone calls between the EPA and States on permit or other similar matters, it has been the routine practice across the country to take notes of such meetings or calls. Certainly, when such notes have been taken, it is generally understood that it is improper to destroy them – rather, they must be retained. Such notes are considered to be official government records. When there is a permit or other proceeding, they must then also be included in the administrative record. But, in any event, they must always be retained. *Id.* ¶ 12.

The combination of the MPCA receiving written comments in an off the record manner over the phone, and then not even retaining notes of the comments, together clearly presents very serious ethical violations. During my more than 40 years of legal practice, I never before have come across a situation where a government agency has behaved in this manner. In my opinion, this combination of facts alone would justify this Court finding that there have been “irregularities in procedure” even if this was the only problem with the permit proceeding. *Id.* ¶ 16

MPCA’s response also alleges new extra-record factual issues. MPCA asserts that in the April 5 call, EPA raised a new concern about domestic wastewater and “restated all of the major concerns that EPA had raised throughout the process, all of which MPCA had already heard and taken into consideration.” Declaration of Stephanie Handeland (“Handeland Decl.”) ¶ 7. This statement highlights the deficiency of the administrative record created by MPCA’s irregular procedure. Neither EPA’s concerns about domestic wastewater nor *any* of the “major concerns that EPA had raised throughout the process”

are identified as EPA concerns or responded to as EPA concerns in MPCA's Fact Sheet, Findings, or Responses to Comments. R.5163-5683, 6163-6206. In a marked divergence from normal and proper practice, the public, relators in these case and the Court are left completely in the dark as to both EPA's concerns and MPCA's responses to EPA.

Finally, MPCA's response to this motion claims that after a meeting in late September 2018 between EPA and MPCA on the NorthMet permit, "MPCA and EPA were in fundamental agreement on the required contents of the permit." MPCA Resp. 7; Clark Decl. ¶ 20. But this new claim by MPCA is alleged purely on extra-record declarations with no support in the documentary record. Notes and emails obtained by WaterLegacy under the Data Practices Act confirm that, prior to the September 2018 meeting, at least the following issues with EPA remained unresolved: treatment technology design and operation, the need for WQBELs, permit enforceability and, more generally, "How to move forward on issues raised by EPA?" Exh. H at 30-32.

The record suggests that no agreement was reached between MPCA and EPA after the September 2018 meeting. Confidential sources within EPA dispute MPCA's assertion that EPA's concerns were adequately addressed, and the permit on its face fails to address either the need for WQBELs or the permit enforceability issues on the agenda in September 2018. Fowley Decl., ¶¶ 17, 20-23. Mr. Fowley explains, "In my experience, if the EPA had agreed that all issues were resolved, it would have sent MPCA an email or letter confirming such a key fact." *Id.* ¶ 17. MPCA's new assertions do not appear credible.

Finally, MPCA suggests that the absence of an EPA objection in this record somehow vitiates a need for documentation throughout the oversight process. (MPCA

Resp. 2, 8-9). Mr. Fowley explains why this inference is incorrect. Although the Clean Water Act gives EPA “veto” power over NPDES permits, “EPA seldom goes so far as to start this formal process.” Fowley Decl. ¶ 26. Rather, EPA provides written comments to the state expressing its concerns, and “[t]ypically, this results in the EPA and State reaching agreement on the issues of concern, without the need for any formal EPA objection.” *Id.*

Mr. Fowley explains that written EPA comments and responses are critical to this process:

However, this kind of process only works if the EPA concerns are included by the State in the permit’s administrative record and responded to by the State. In that way, the public and a reviewing court (if the permit is appealed) can see if and how the EPA concerns were resolved. As happened here, a state sometimes can proceed to issue a permit with which the EPA is not in agreement, but which the EPA has chosen not to block by issuing a formal objection. In that circumstance, people count on the fact that the EPA comments – and the state’s response – are in the state’s administrative record and can be reviewed by a state court. It is left to the reviewing court to determine whether the EPA’s unresolved concerns mean that a permit is defective, or if the State has produced an adequate explanation showing why it did not need to follow the EPA’s views. *Id.*, ¶ 27.

Mr. Fowley states that during 2018, in his role as a consultant to a national environmental group reviewing EPA’s new proposal to reduce state permit oversight, he interviewed people around the country regarding experiences with recent state permits. Although Mr. Fowley uncovered concerns regarding other permit reviews under the current federal administration, “the Poly Met permit appeared to present by far the most serious set of improper practices of all of the cases that I studied.” *Id.*, ¶ 5.

ARGUMENT

If a presumption of regularity applies in connection with a motion to transfer pursuant to Minn. Stat. § 14.68, the evidence in this record and the extra-record evidence

brought forward in this motion have long rebutted it. Even where a presumption of regularity applies to an official's decision, "that presumption is not to shield his action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (citations omitted). *See also White v. Minnesota Dep't of Natural Resources*, 567 N.W.2d 724, 735 (Minn. Ct. App. 1997) (allegations that an agency "swept 'stubborn problems or serious criticism. . .under the rug,' raise issues sufficiently important to permit the introduction of new evidence in the District Court, including expert testimony with respect to technical matters").

The Court in *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 173-74 (Minn. App. 2001) did not cite a "presumption of regularity" before determining that transfer to the district court pursuant to Minn. Stat. § 14.68 was required on review of the evidence. In this case, as in *Hard Times Café*, the extra-record materials presented to this Court demonstrate that there is "extensive documentation of alleged irregularities in procedures" and that transfer of the NorthMet NPDES cases to the district court is necessary to "untangle these improper influences from respondent's final decision." *Id.*

I. MPCA's procedures in developing and documenting the NorthMet permit were highly irregular, improper and inconsistent with applicable law.

Rather than rebut evidence that NorthMet permit procedures were irregular and improper, MPCA's responses strengthened this evidence. MPCA supplied no declaration disputing that MPCA's leadership sought to keep EPA's written comments out of the administrative record. In fact, MPCA's motion response, rather than demonstrating the

absence of irregularity,⁵ provided new evidence that staff violated Minnesota law either by destroying official records or failing to release them despite Data Practices Act requests. And MPCA still fails to act with complete truthfulness, accuracy, disclosure, and candor in connection with the NorthMet permit.

A. MPCA affirmatively sought to exclude from the administrative record EPA comments on the draft NorthMet permit and MPCA responses to EPA concerns.

WaterLegacy's initial motion papers cited reports in Mr. Fowley's complaint to the EPA Office of Inspector General that MPCA Commissioner John Linc Stine's call to EPA's Regional Administrator Cathy Stepp complaining about EPA comments on the draft NorthMet permit had resulted in her direction to staff not to send these comments. (WL Motion ("Mot.") 6). MPCA has submitted no contrary declarations.

Emails between Assistant Commissioner Shannon Lotthammer and staff to Regional Administrator Stepp in March 2018 confirm that MPCA had been working with EPA to "find a solution," which resulted in the oral reading of EPA's prepared written comments on the draft permit. *Id.*, Exh. C at 15-16. MPCA's long-standing effort to block EPA written comments, in favor of extra-record "conversations" is also documented in the April 9, 2015 email from Metallic Mining Sector Director Foss to EPA. Exh. H at 16-17.

In addition, although it is undisputed that EPA expressed concerns about deficiencies in the draft NorthMet permit during and after the public comment process and

⁵ The plain meaning of "irregularity" in Minn. Stat. § 14.68 is "an act or practice that varies from the normal conduct of an action." Black's Law Dictionary (10th ed. 2014). It does not require a violation of law.

read to MPCA on April 5, 2018 a detailed compendium of criticisms of the permit, MPCA provided no responses to EPA's comments. (*supra* 10).

MPCA is well aware how an NPDES permitting record should be created and preserved. In the recent Minntac tailings basin permit case, for example, MPCA included EPA's written comments on the draft permit and MPCA's responses to these comments in the administrative record. Exh. I. Minnesota precedent takes the creation of a complete administrative record for granted. *See White v. Minnesota Dep't of Natural Resources*, 567 N.W.2d at 734 (“Had concerns been raised during the comment period, they would have become part of the administrative record”).

Federal regulations require states issuing NPDES permits to provide written responses to comments accessible to the public. 40 C.F.R. §§ 124.17(a)(2),(c); 123.25(a)(31) (applying this specific regulation to states issuing NPDES permits). In concluding that this provision need not be followed by MPCA,⁶ respondents may have misread *In re Wash. Aqueduct Water Supply Sys.*, NPDES Appeal No. 03-06, 2004 WL 3214486, 2004 EPA App. LEXIS 28 *57-58 (EPA Env'tl. App. Bd., July 29, 2004). In that case, where the EPA Environmental Appeals Board remanded an NPDES permit due to failure to respond to comments, EPA Region 3 was the permitting authority and an environmental group made comments critical of the analysis denying the need for WQBELs. EPA Region 3 stood in the same position as the MPCA does today.

⁶ MPCA Resp. 14-15, PolyMet Response (“Resp.”) 7.

MPCA not only sought to keep EPA criticisms of the draft NorthMet permit out of the administrative record, but failed to comply with CWA regulations requiring public written responses to comments on NPDES permits. As a result, but for confidential sources and WaterLegacy Data Practices Act requests, the fact that EPA had any concerns at all about the NorthMet permit would have remained secret.

B. MPCA either destroyed official records already requested pursuant to the Minnesota Data Practices Act or failed to disclose them in violation of Minnesota law.

WaterLegacy's initial motion papers suggested that MPCA took notes when EPA read its comments aloud on the phone. MPCA's responses provide troubling new admissions related to this procedural irregularity. An MPCA attorney and an unnamed member of the permitting staff took notes when EPA read its comments on April 5, 2018. Clark Decl. ¶ 5. Outside counsel represents that MPCA "did not retain" these notes, MPCA Resp. 5, but provides no declaration attesting to the fate of these critical records.

Whether MPCA destroyed the records from EPA's reading of its comments or failed to release them despite Data Practices Requests, MPCA's actions were highly irregular. It is a violation of state law to destroy official records or government data, and it is a violation of state law to refuse to release such records if they, in fact, still exist.

All state agencies are required to "make and preserve all records necessary to a full and accurate knowledge of their official activities" pursuant to Minn. Stat. §15.17:

Subdivision 1. **Must be kept.** — All officers and agencies of the state, counties, cities, towns, school districts, municipal subdivisions or corporations, or other public authorities or political entities within the state, hereinafter "public officer," shall make and preserve all records necessary to a full and accurate knowledge of their official activities. (emphasis in original)

See Westrom v. Minn. DOL & Indus. 686 N.W.2d 27, 32 (Minn. 2004)

All government data must also be preserved under Minnesota’s Data Practices Act, which defines “government data” as “all data *collected, created, received, [or] maintained* . . . by any government entity,” Minn. Stat. § 13.02, subd. 7 (emphasis added) and requires that such data must “keep records containing government data in such an arrangement and condition as to make them easily accessible.” Minn. Stat. § 13.03, subd. 1.

The Data Practices Act also imposes affirmative obligations upon the government to disclose this data. “The responsible authority or designee shall provide copies of public data upon request.” Minn. Stat. § 13.03, subd. 3 (c). *See Webster v. Hennepin Cnty.*, 910 N.W.2d 420, 431 (Minn. 2018). While agencies may discard records after a final action is taken according to a records retention schedule, it is highly improper to do so here when a major action is still pending. Moreover, it is always improper to discard records after they have been specifically requested under the Data Practices Act. The Minnesota Supreme Court recently held that even data that might otherwise be shielded from view must be maintained as public data once a Data Practices Act request has been made. *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 349-50 (Minn. 2016).

Whether MPCA destroyed its April 5, 2018 notes or retained and failed to release them despite Data Practices Act requests beginning before these notes were taken, MPCA violated Minnesota law and assured the secrecy of the NorthMet permit process. As Mr. Fowley explained in his declaration, when notes have been taken of meetings or phone calls between the EPA and States on permit matters “it is generally understood that it is

improper to destroy them. . Such notes are considered official government records. . they must always be retained. Fowley Decl. ¶ 12. In his opinion, MPCA’s handling of the notes from its key phone call with EPA on April 5, 2018 “would justify this Court finding that there have been ‘irregularities in procedure’ even if this was the only problem with the permit proceeding.” *Id.* ¶ 16.

C. MPCA breached its duty to act in good faith and with complete truthfulness, accuracy, disclosure, and candor.

Minnesota rules require that MPCA act “in good faith and with complete truthfulness, accuracy, disclosure, and candor” in all communications, proceedings, and other dealings. Minn. R. 7000.0300. Rather than cure the defects in this record, MPCA’s responses to WaterLegacy’s motion perpetuate them.

The *post hoc* characterization by MPCA’s counsel of the email (MPCA Resp. 9) to relator Minnesota Center for Environmental Advocacy denying that any “feedback” had been received by EPA on the permit as relating only the permit’s October 25, 2018 version is neither supported by evidence nor demonstrative of MPCA’s candor.

MPCA hasn’t even attempted to explain away its misleading responses to comments made by the Fond du Lac Band of Lake Superior Chippewa, where MPCA implied that the NorthMet permit complied with all CWA requirements identified by EPA. (R.5512-13, 5521-22). In fact, MPCA has argued that it is sufficient in responses to comments to make general statements on issues without disclosing that EPA had criticisms and concerns similar to those of relators and other members of the public. (MPCA Resp. 13). The failure to disclose EPA’s involvement and concerns about an NPDES permit is “misleading” both

because “EPA has special expertise” other commenters lack and because it can’t be determined whether MPCA’s responses address the specific concerns raised by EPA. Fowley Decl. ¶ 25.

Finally, the assertion by MPCA counsel that MPCA “did not retain” its April 5, 2018 notes documenting EPA’s comments on the draft NorthMet permit, “because” MPCA found nothing new or surprising in these comments (MPCA Resp. 5) is troubling. Even in these legal proceedings, where the duty of complete truthfulness is at its highest, MPCA has failed to disclose what evidence, if any, supports its claims.

II. Transfer to the district court is the appropriate remedy to discover whether MPCA’s NorthMet permit decision was tainted by improprieties and to preserve the integrity of the permitting process.

Based on the new admissions and extra-record evidence contained in MPCA’s response to this motion, WaterLegacy believes that transfer of these NorthMet permit cases to district court pursuant to Minn. Stat. § 14.68 would be the most effective remedy to investigate and cure the harm done as a result of the procedural irregularities demonstrated on this record.

A. District court inquiry is needed to determine facts pertaining to the irregular procedures in which MPCA engaged and the content of the comments provided by EPA regarding the NorthMet permit.

Transfer to the district court is needed to determine at least the following facts pertaining to MPCA’s irregular procedures and the content of the EPA comments that would have been in the administrative record but for MPCA’s improper conduct:

1. What actions did MPCA take to request, encourage or otherwise affect the decision of EPA Regional Administrator Stepp to prevent EPA Region 5 professional staff from sending the written comments they had prepared on the draft NorthMet permit in March 2018?
2. Was the purpose of these actions to prevent the creation of a written record disclosing EPA's criticism of the NorthMet permit and the legal and policy basis for EPA's concerns?
3. What was the content of the EPA's comments on the draft NorthMet permit read over the phone to MPCA on April 5, 2018? What were EPA's concerns about the NorthMet permit? What were the legal and policy bases for these concerns?
4. What happened to the notes from April 5, 2018 created by MPCA attorney Mike Schmidt and the unnamed member of MPCA's water permitting team? Were they actually destroyed? If so, when, by whom, at whose direction, and for what reasons?
5. If the April 5, 2018 notes were not destroyed, where are they being kept, and why have they not been released?
6. Are there other MPCA notes of phone conversations or meetings with EPA regarding the NorthMet permit that were created but not retained? If so, on what dates were the notes taken, by whom, when were they destroyed, at whose direction, and for what reasons?

7. Were MPCA staff directed at any time not to create or retain notes of phone conversations or meetings with EPA regarding the NorthMet permit?

If so, on what dates, by whom, and for what reasons?

8. Did MPCA at any time after November 3, 2016 prepare or receive from EPA draft or final emails or letters memorializing conversations or meetings and describing the resolution or failure to resolve EPA's concerns regarding the NorthMet permit? If so, were these drafts or final documents destroyed or retained but not disclosed?

9. Did MPCA receive at any time a letter from EPA stating that the deficiencies in PolyMet's NPDES permit application identified by EPA on November 3, 2016 had been cured so that the application was complete?

10. Did MPCA discuss internally what its obligations were in terms of responding to the comments received orally from EPA on the draft NorthMet permit in writing accessible to the public? What were the nature of these discussions?

Transfer to the district court would allow discovery, including depositions, to disclose the nature of the NorthMet permit process, the content of documents not contained in the administrative record, and the degree to which the desire to protect the NorthMet permit from public and judicial scrutiny and ensure the project would move forward may have affected the nature of the administrative record and MPCA's final decision.

The absence of a formal EPA objection to the permit after October 2018 is not material to determine nature of EPA's concerns and how MPCA failed to document any

response to those concerns. EPA objections are rarely used, and the written comment process and creation of an administrative record is vital to ensure that this process works. Fowley Decl. ¶ 27. The extraordinary failure to preserve a record of EPA's comments in this case interferes with court review of whether "unlawful factors have tainted the agency's exercise of its discretion" not to veto a permit. *Save the Bay, Inc. v. Administrator of Environmental Protection Agency*, 556 F.2d 1282, 1296 (5th Cir. 1977).

Transfer of these NorthMet permit cases for district court proceedings could also allow EPA employees to come forward and place evidence on the record. Although the Clean Water Act provides whistle-blower protection from retaliation, this protection is limited to the situation where an employee has filed a proceeding under this Act or "has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act." 33 U.S.C. § 1367(a). Absent a legal proceeding, EPA employees with critical information as to EPA's comments on the NorthMet permit and the reasons why these comments were not sent to MPCA in written form would be at risk of termination or discrimination if they were to publicly disclose this information.

Transfer to the district court pursuant to Minn. Stat. § 14.68 is necessary to provide the factual evidence that would already be in the written administrative record in this case but for MPCA's irregular conduct.

B. This Court's transfer of the NorthMet cases to district court for a factual inquiry is necessary to preserve the integrity of the permitting process in these and future cases.

It is a fluke that relators and this Court know anything at all about EPA's comments and criticisms of the NorthMet permit. WaterLegacy doesn't routinely make Data Practices

Act requests after issuance of every draft permit. Requests were made in the NorthMet permit case based on confidential sources informing counsel in March 2018 that there was something irregular about the EPA comment process. Maccabee Decl. ¶ 3. Without these Data Practices Act requests, there would be no evidence of EPA's non-record comments or even of EPA's concerns.

In addition, neither the public nor the Court can count on the presence of a retired EPA Regional Counsel who conducted an independent national investigation of EPA oversight practices, earned the trust of EPA professional staff, and then documented his findings in a citizen complaint to the EPA Office of Inspector General. Similarly, it could not be anticipated either that EPA counsel would tell WaterLegacy to request the final written comments on the draft NorthMet permit prepared by EPA or that EPA professionals would care enough about CWA protections and trust Mr. Fowley enough to confidentially disclose the irregularities and suppression of information related to the NorthMet permit.

Without any one of these unique occurrences, relators and this Court would remain in the dark. The relief requested from this Court is critical to ensure that MPCA or other state agencies don't again take the gamble that they will not get caught if they prevent the creation of a complete and accurate administrative record.

“Even the possibility that there is here one administrative record for the public and [the] court and another for the [agency] and those ‘in the know’ is intolerable.” *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54, (D.C. Cir. 1977). It is the court's obligation to test administrative actions for “arbitrariness or inconsistency with delegated authority. . . agency secrecy stands between [the court] and fulfillment of [its] obligation.” *Id.*

Accordingly “the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings.” *Id.*; *see also Bar MK Ranches v. Yuetter*, 994 F. 2d 735, 739 (10th Cir. 1993) (“An agency may not unilaterally determine what constitutes the Administrative Record.”). While a party must prove “actual” bad faith in order to prevail on a claim that a decision was arbitrary, “a preliminary showing of ‘bad faith’ can entitle a plaintiff to discovery on the question.” *New York v. U. S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 634-635 (S.D.N.Y. 2019).

WaterLegacy respectfully requests that this Court transfer these NorthMet permit cases to district court to find the truth and protect the integrity of the permitting process in these important cases pertaining to Minnesota’s first proposed copper-nickel mine and in any future cases where an agency might find it inconvenient to allow the creation of a complete written record.

III. WaterLegacy and other relators would be severely prejudiced in presenting their claims that the NorthMet permit violates the Clean Water Act absent this Court’s relief.

The Court’s stay of these appeals would not reveal the nature and extent of irregular conduct, but it would at least prevent respondents from benefitting from the suppression of EPA’s written comments on the draft NorthMet appeal.⁷ It is troubling that, despite the admission that EPA’s written comments were read aloud to MPCA staff, and the fact that

⁷ WaterLegacy is also pursuing litigation to secure EPA’s written comments on the draft NorthMet permit. Maccabee Decl. ¶ 10.

the document in EPA's possession actually memorializes what was shared orally with MPCA, Exh. G at 17, respondents still argue that these comments cannot be admitted as part of the record in these NorthMet cases. (MPCA Resp. 23, PolyMet Resp. 13). If MPCA destroyed its notes from the April 5, 2018 call, EPA's marked up document may be the only record of comments that were actually made to the State. Mr. Fowley opines that "such a document – if and when obtained from the EPA – should be included in the administrative record for this permit. This would at least partially rectify the ethical violations that have occurred and enable this Court to fully consider the EPA's concerns." Fowley Decl. ¶ 31.

WaterLegacy's certiorari appeal and those of other relators would be severely prejudiced if neither EPA's written comments, MPCA's notes, nor other evidence reflecting the content of these comments are produced for this record. WaterLegacy's claims state that MPCA erred by issuing the NorthMet permit without WQBELs, concluding there was no reasonable potential for the NorthMet discharge to cause or contribute to exceedance of water quality standards, and issuing an unenforceable permit that would serve as a "permit shield" for PolyMet. Maccabee Reply Decl. ¶ 6. The few pages of handwritten notes obtained from MPCA through the Data Practices Act suggest that EPA shared these concerns. EPA's detailed written comments are critical to WaterLegacy's presentation of these substantive claims on their merits.

In addition, WaterLegacy's appeal claims that MPCA's issuance of the NorthMet permit was procedurally unlawful. *Id.*, ¶ 7. EPA's comments on the draft permit, MPCA's notes from the April 5, 2018 phone conference when these comments were read to MPCA,

as well as discovery regarding MPCA's failure to acknowledge and respond to EPA's comments are necessary to avoid prejudice and adequately prosecute this claim. *Id.*, ¶ 7.

This Court's relief would prevent severe prejudice to relators as well as upholding the integrity of the process and the administrative record in these NorthMet permit cases and in future Minnesota permitting cases.

CONCLUSION

On the files, records and proceedings herein, WaterLegacy respectfully requests the Court's transfer of this matter to district court pursuant to Minn. Stat. § 14.68 due to the substantial procedural irregularities and potential violations of law in the NorthMet permitting process that affected the administrative record and, possibly, MPCA's final permit decision. In the alternative, WaterLegacy respectfully requests the Court's stay of this matter pursuant to Minn. Stat. § 14.65 to allow time to secure EPA comments on the draft NorthMet permit improperly withheld from the administrative record.

Dated: June 5, 2019

Respectfully submitted,

/s/ Paula G. Maccabee

Paula G. Maccabee (#129550)
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Attorney for Relator WaterLegacy

Attachment 4 to Relators' List of Alleged Procedural Irregularities

**STATE OF MINNESOTA
IN COURT OF APPEALS**

In the Matter of the Denial of Contested	Case Nos.
Case Hearing Requests and Issuance of	A19-0112, A19-0118, A19-0124
National Pollutant Discharge Elimination System/ State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis County Hoyt Lakes and Babbitt Minnesota.	REPLY DECLARATION OF PAULA G. MACCABEE

I, PAULA G. MACCABEE, in accordance with section 38.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

1. I am an attorney licensed in Minnesota, and I represent WaterLegacy in Case No. A19-0118 appealing the Minnesota Pollution Control Agency's ("MPCA") issuance of NPDES/SDS permit MN0071013 ("NorthMet permit") to Poly Met Mining, Inc. ("PolyMet") for the proposed NorthMet copper-nickel mine project ("NorthMet project").

2. I received respondents' response to WaterLegacy's Motion for Transfer or in the Alternative, for Stay on Friday, May 31, 2019. Since MPCA provided no evidence in its declarations for which rebuttal was required and since WaterLegacy did not receive the Court's Order granting the request for extension until after the Reply Memorandum and supporting declarations were drafted, although we appreciate the Court's consideration, we determined it would better serve WaterLegacy's interests to submit the Reply according to its original schedule pursuant to Minn. R. Civ. App. P. 127.

3. I've represented WaterLegacy for ten years, working on environmental review and permitting for the NorthMet project as well as working on numerous matters involving Minnesota water quality rulemaking and review of Minnesota NPDES permits.

4. Documents attached to this declaration as Exhibit H are true and correct copies of the following: U.S. Environmental Protection Agency ("EPA") letter comments on the NorthMet Project Draft Environmental Impact Statement ("EIS") (Feb. 18, 2010); EPA letter comments on the NorthMet Project Preliminary Supplemental Draft EIS with attachment excerpt pertaining to water quality (Aug. 7, 2013); Emails between Ann Foss, MPCA and Kevin Pierard, EPA re PolyMet NPDES Requirements (Apr. 7-9, 2015); EPA letter comments on the NPDES Application for PolyMet Mining Corporation's NorthMet Mine (Nov. 3, 2016) with attachment; Memorandum of Agreement between EPA and MPCA for the Approval of the State NPDES Permit Program, excerpt (May 7, 1974); Email from Richard Clark, MPCA to MPCA Staff re Discussion items for next week (Sept. 18, 2018) with US EPA Region 5/MPCA Meeting Agenda for Sept. 26, 2018.

5. In my experience working on MPCA permit cases, the lack of a record of EPA comments and MPCA responses to EPA comments in the NorthMet permit case presents a marked divergence from normal procedure. In other cases, EPA comments were referenced in MPCA fact sheets and findings and provided both in response to Minnesota Government Data Practices Act requests and in the administrative record of the case on appeal. For example, MPCA reissued the NPDES/SDS permit for the United States Steel Corp. Minntac tailings basin three weeks before the MPCA issued the NorthMet permit. In the Minntac case, EPA's comments on the draft permit were provided in writing to MPCA,

discussed in MPCA's Findings of Fact on the Minntac permit, and included in the administrative record for the public and the court to review along with MPCA's detailed responses to the substance of EPA's comments. Exhibit I attached with this declaration is a true and correct copy of excerpts from MPCA's Findings and responses to comments in the Minntac case reflecting discussion of EPA comments on the Minntac permit.

6. WaterLegacy's Statement of the Case appealing the NorthMet permit included claims that MPCA erred by issuing the NorthMet permit without WQBELs; by concluding there was no reasonable potential for the NorthMet discharge to cause or contribute to exceedance of water quality standards; and by issuing an unenforceable permit that would serve as a "permit shield" for PolyMet. WaterLegacy's certiorari appeal and appeals of other relators making similar claims would be severely prejudiced if neither EPA's written comments, MPCA's notes, nor other evidence reflecting the content of these comments are produced for this record.

7. In addition, WaterLegacy's appeal claims that MPCA's issuance of the NorthMet permit was procedurally unlawful. EPA's comments on the draft permit, MPCA's notes from the April 5, 2018 phone conference at which these comments were read to MPCA, and discovery regarding MPCA's failure to respond to EPA's comments are necessary to adequately prosecute this claim without prejudice to WaterLegacy.

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

Dated: June 5, 2019


PAUCA G. MACCABEE

EXHIBIT H

**TO REPLY DECLARATION OF PAULA G. MACCABEE IN SUPPORT
OF WATERLEGACY MOTION FOR TRANSFER OR STAY
DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

FEB 18 2010

REPLY TO THE ATTENTION OF:

E-19J

Colonel Jon L. Christensen
District Engineer
St. Paul District
U.S. Army Corps of Engineers
190 Fifth Street East
St. Paul, Minnesota 55101

Re: NorthMet Project – Draft Environmental Impact Statement
CEQ# 20090387

Dear Colonel Christensen:

The United States Environmental Protection Agency (EPA) has reviewed the NorthMet Project Draft Environmental Impact Statement (DEIS) in accordance with our authorities under Section 309 of the Clean Air Act and the National Environmental Policy Act.

The project, located in St. Louis County, Minnesota, is a copper sulfide ore open pit mine and processing plant. The U.S. Army Corps of Engineers (USACE) is the lead federal agency for this project, which requires a permit pursuant to Section 404 of the Clean Water Act (CWA). USACE is a co-lead with the Minnesota Department of Natural Resources (MDNR), which is preparing an environmental impact statement for compliance with state environmental law. The Fond du Lac Band of Chippewa and the Bois Forte Band of Chippewa are cooperating agencies.

The project is the first non-ferrous mine on the Mesabi Iron Range and includes three open pits and a related hydrometallurgical processing plant which will produce copper metal and precipitates of nickel and platinum group minerals. The processing facilities are located on the old LTV Steel Mining Company (LTVSMC) site, and the PolyMet Corporation proposes to use the existing LTV tailings basin. The mine site is within the Superior National Forest. The U.S. Forest Service has determined that a land exchange or sale is necessary for the mining operation to take place and will prepare a separate DEIS for this action (the USACE NorthMet Project DEIS presumes a successful land exchange). The project is within land ceded by American Indian tribes to the U.S. by treaty, known as the 1854 Ceded Territory, upon which tribes exercise reserved rights.

According to the DEIS, all waste rock at the site is acid generating, and acidic water moving through the waste rock and tailings will mobilize metals and sulfates, leaching them into groundwater and surface water. The DEIS projects that water quality standards will be exceeded

for sulfates and other contaminants and describes mitigation measures that include tailings basin seepage collection, wastewater collection and recycling into process water, and various barrier methods for waste rock, tailings and exposed rock faces. The proposed project would fill approximately 1,000 wetlands acres, largely high quality and forested, and indirectly affect approximately 500 more acres.

Based on our review of the DEIS, EPA has rated the DEIS as Environmentally Unsatisfactory – Inadequate, or EU-3. Environmentally Unsatisfactory (EU) indicates that our review has identified adverse environmental impacts that are of sufficient magnitude that EPA believes the proposed action must not proceed as proposed. The numeric portion of the rating indicates the DEIS does not present adequate information for the EPA to fully assess the environmental impacts that should be avoided in order to fully protect the environment or EPA identifies reasonably available alternatives which could reduce the environmental impacts of the action. This rating applies to the Proposed Action, the Mine Site Alternative and the Tailings Basin Alternative. Our summary of ratings definitions is enclosed.

EPA has assigned the EU rating because our review of the DEIS determined that the proposed action will result in environmentally unsatisfactory water quality impacts. Specifically, EPA believes that the project will exceed water quality standards because of discharges during the life of the mining operation and on a long-term basis, including the post-closure period. These water quality impacts are largely related to water that contacts acid-generating waste rock and mine faces and to wastewater escaping the tailings basin through seeps and in groundwater. EPA also finds the wetlands mitigation plan environmentally unacceptable because it does not provide mitigation for all impacts to wetlands, particularly for indirect impacts.

EPA has assigned the Inadequate (3) rating to the DEIS because EPA believes that the analyses of the hydrogeological profiles at both the mine and processing sites are inadequate to determine the full extent of impacts or to justify mitigation options. Consequently, we believe that the DEIS likely underestimates water quality impacts and that the project is likely to have additional unmitigated long-term discharges. EPA has identified information gaps relating to groundwater impacts, groundwater-surface water interaction, tailings basin stability and containment, and groundwater discharges to surface water. EPA believes the DEIS should evaluate alternatives to avoid mine pit overflow and explore additional mitigation for discharges and waste rock management, some of which are identified briefly in the document. Furthermore, EPA does not agree with the compensation described for wetlands impacts and proposes alternative mitigation ratios. The DEIS did not provide information on financial assurance, which EPA believes critical to the decision-making process when long-term impacts and mitigation are involved.

We have enclosed detailed comments outlining our issues more completely and offer recommendations as a starting point for discussion. Our main issues are summarized below.

Water Quality

EPA determined that the project will result in unacceptable and long-term water quality impacts, which include exceeding water quality standards, releasing unmitigated wastewater

discharges to water bodies (during operation and in the post-closure period), and increasing mercury loadings into the Lake Superior watershed.

EPA believes the information about the project's estimation of acid generation needs to be updated. The project's proposed operation and post-closure management plan for acid-generating waste rock and wastewater is inadequate and needs to be improved. The proposed approaches to manage acid generation are untested or unproven at the proposed scale. EPA believes the tailings basin will contribute to water quality impacts by leaking contaminants into groundwater that may be hydraulically connected to surface water. EPA believes the Environmental Impact Statement (EIS) needs to include adequate hydrogeological and hydrological analyses for the tailings basin and surrounding area and for the mine site. Tailings basin and mine site water management needs to be based on adequate hydrogeological/hydrological information.

Wetlands

EPA finds this project may have substantial and unacceptable adverse impacts on aquatic resources of national importance (ARNI). EPA believes the coniferous and open bogs, comprising a large percentage of the approximately 33,880 total wetland acres, within the Partridge River Watershed to be an ARNI due to the values they provide in terms of unique habitat, biodiversity, downstream water quality, and flood control specifically, to the Lake Superior Watershed and the Great Lakes Basin.

With impacts to over 1,000 acres of wetlands, the DEIS provides incomplete and inadequate compensation for the loss of wetlands and their function. Indirect impacts to wetlands are not completely identified or compensated for in the mitigation plan. EPA also believes that some of the mitigation offered for direct impacts is inadequate, given that the type and function of wetlands impacted is difficult to replace. EPA's preferred mitigation ratios for the project's impacts are described in the attached detailed comments. Insofar as the DEIS for this project is the chief environmental document supporting the issuance of the USACE CWA Section 404 permit, a revised or supplemental DEIS should identify and describe mitigation for all impacts. It should also include wetland monitoring plans and adaptive management plans, especially related to indirect impacts to mine site wetlands. The Section 404(b)(1) Guidelines, 40 CFR Section 230.10(b), prohibit discharges that will result in a violation of the water quality standards. If water quality standards cannot be met in conjunction with this project as described within the DEIS, U.S. EPA would not support the issuance of a permit for this project. If our concerns are not addressed prior to the issuance of the Section 404 permit, EPA may elevate pursuant to Part IV, paragraph 3(a) and 3(b) of the August 1992 CWA Section 404(q) of the Memorandum of Agreement between EPA and the Department of Army.

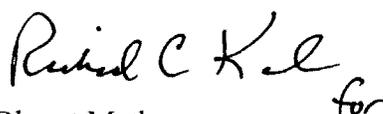
Financial Assurance

Long-term post-closure treatment will be necessary to protect water quality; therefore, EPA believes financial assurance information should have been included in the DEIS. The amount and viability of financial assurance are critical factors in determining the effectiveness of these activities, and EPA believes it is necessary to analyze and disclose financial assurance

factors in the DEIS to determine the significance of the impacts and inform decisions about the project. Financial assurance information includes a description of State and/or federal agency requirements, closure costs, estimated bond amounts needed for each closure and reclamation activity, and how the bonds should be modified should additional temporary, long-term, or perpetual treatment and/or remediation needs be determined during operations.

EPA believes that because of deficiencies in the DEIS, additional information, alternatives, and mitigation measures should be evaluated and made available for public comment in a revised or supplemental DEIS. EPA will continue to work with USACE and the cooperating agencies to resolve the issues we have identified. If we are unable to resolve our concerns, this matter may be a candidate for referral to the Council on Environmental Quality (CEQ) for resolution. We appreciate the opportunity to review the DEIS. Please feel free to contact me at 312-353-2000 or Kenneth Westlake of my staff at 312-886-2910 should you desire a meeting to discuss these comments.

Sincerely,

Handwritten signature of Richard C. Kel in cursive, with the word "for" written below the signature.

Bharat Mathur
Acting Regional Administrator

Enclosures: NorthMet Project DEIS Detailed Comments
Summary of Ratings Definitions

cc:

Tamara Cameron, Environmental Review Manager, USACE St. Paul.
Jon Ahlness, Project Manager USACE St. Paul
Jim Sanders, Forest Supervisor, USFS Superior National
Jim McDonald, Regional NEPA Contact, USFS
Mark Holsten, Director, Minnesota Department of Natural Resources
Marty Vadis, Land & Minerals Director, Minnesota Department of Natural Resources
Stuart Arkley, Project Manager, Minnesota Department of Natural Resources
Karen Diver, Chairwoman, Fond du Lac Band of Lake Superior Chippewa
Kevin Leecy, Chairman, Bois Forte Band of Chippewa
Paul Eger, Commissioner, Minnesota Pollution Control Agency
Rebecca Flood, Asst. Commissioner for Water, Minnesota Pollution Control Agency
Ann Foss, Mining Coordinator, Minnesota Pollution Control Agency



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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AUG 07 2013

REPLY TO THE ATTENTION OF:

E-19J

Timothy Dabney
Deputy Forest Supervisor
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8901 Grand Avenue Place
Duluth, Minnesota 55808

Barbara Naramore
Assistant Commissioner
Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, Minnesota 55155-4040

Tamara Cameron
Chief, Regulatory Branch
U.S. Army Corps of Engineers – St. Paul District
180 5th Street East, Suite 700
St. Paul, Minnesota 55101-1678

**Re: Preliminary Supplemental Draft Environmental Impact Statement for the
NorthMet Mining Project and Land Exchange, Hoyt Lakes, St. Louis County,
Minnesota**

Dear Mr. Dabney, Ms. Naramore, and Ms. Cameron:

The United States Environmental Protection Agency (EPA) has reviewed the Preliminary Supplemental Draft Environmental Impact Statement (PSDEIS) for the NorthMet Mining Project and Land Exchange, which was prepared by Environmental Resources Management (ERM), consultant to the U.S. Army Corps of Engineers (USACE), U.S. Forest Service (USFS), and the Minnesota Department of Natural Resources (MDNR). These agencies are collectively referred to as the “co-lead agencies.” EPA’s review was conducted pursuant to our authorities under the National Environmental Policy Act (NEPA), Council on Environmental Quality regulations (40 CFR Parts 1500-1508), Section 309 of the Clean Air Act, Section 404 of the Clean Water Act (CWA), and our June 27, 2011 agreement to participate as a cooperating agency.

The PSDEIS, along with the additional information provided to EPA during its review, reflects significant progress in designing and clearly documenting the project. EPA appreciates the collaborative and constructive discussions we have had with the co-lead agencies since receiving the PSDEIS. In these discussions, we have covered all of the areas where EPA had

questions or comments. You have asked that we provide written comments and recommendations confirming our previous discussions to bring any remaining issues to closure. Enclosed are a number of recommendations to assist the co-lead agencies in preparing a supplemental draft EIS (SDEIS) for public review and comment that will clearly and adequately describe the project.

EPA is committed to working with the co-lead and cooperating agencies during development of the SDEIS. Please feel free to contact me at 312-353-8894 or Kenneth Westlake of my staff at 312-886-2910 to schedule this discussion.

Sincerely,



Alan Walts
Director, Office of Enforcement and Compliance Assurance

Encl: NorthMet Project PSDEIS Detailed Comments

cc: Rose Berens, Bois Forte Band of Lake Superior Chippewa (email copy)
Doug Bruner, U.S. Army Corps of Engineers – St. Paul District (email copy)
Erik Carlson, Minnesota Pollution Control Agency (email copy)
Esteban Chiriboga, Great Lakes Indian Fish and Wildlife Commission (email copy)
John Coleman, Great Lakes Indian Fish and Wildlife Commission (email copy)
Randall Doneen, Minnesota Department of Natural Resources (email copy)
Lisa Fay, Minnesota Department of Natural Resources (email copy)
Ann Foss, Minnesota Pollution Control Agency (email copy)
Shirley Frank, U.S. Forest Service – Superior National Forest (email copy)
Tom Hingsberger, U.S. Army Corps of Engineers – St. Paul District (email copy)
Andrew Horton, U.S. Fish and Wildlife Service (email copy)
Bill Johnson, Minnesota Department of Natural Resources (email copy)
Tyler Kaspar, 1854 Treaty Authority (email copy)
Shannon Lotthammer, Minnesota Pollution Control Agency (email copy)
Nancy Schuldt, Fond du Lac Band of Lake Superior Chippewa (email copy)
Margaret Watkins, Grand Portage Band of Lake Superior Chippewa (email copy)
Ross Vellacott, ERM (email copy)
Darren Vogt, 1854 Treaty Authority (email copy)

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- Ground water
- Waste rock management
- Wastewater and stormwater management
- Bedrock fractures in the Duluth Complex
- Spilled ore

B. Plant Site

- Surface water
- Ground water

C. Water Quality Standards**D. National Pollutant Discharge Elimination System****II. Wetlands**

- Wetland compensatory mitigation
- Wetland and stream monitoring
- Surface water/ground water and wetland interaction: Mine Site
- Indirect wetland impacts

III. Air Quality

- Asbestos-like minerals
- Anti-idle policy

IV. Financial Assurance**V. Other Topics**

- Impacts to Tribal Resources and the 1854 Ceded Territory
- Noise impacts
- EPA's role as a cooperating agency
- GoldSim
- Public availability of documents and clarity of SDEIS for public review
- Material disposal during reclamation

EPA DETAILED COMMENTS

NORTHMET PROJECT – PRELIMINARY SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT

I. Water Quality

A. Mine Site

Ground water

Figure 5.2.2-13: A combined sample mean is used for water quality samples from surficial wells that terminate at bedrock, and for wells that are strictly 10 meters deep. Because of different chemical interactions at and near the C-R soil horizon contact (e.g. bedrock-soil contact zone), water quality data from those wells will vary from wells that encounter surficial soils no deeper than the B soil horizon (e.g. 10-meter-deep wells).

Recommendation: Documentation of sample results in the SDEIS should not merge sample data from both well types into a single mean for each chemical parameter. Each type of well should exhibit a separate mean value for each chemical parameter.

Waste rock management

Section 5.2.14: While the evaluation of the sulfur content of overburden and waste rock appears consistent with a state-of-the-art approach, it may be difficult to clearly distinguish each category of waste rock (categories 1,2,3, and 4) during open pit operations.

Section 3.3.3: The assumption that Category 1 waste rock can be classified as non-acid generating rock with no potential to leach metals is overly broad. Such rock may have a low potential to leach metals, but all rock leaches metals to some degree over time.

Recommendation: The SDEIS should identify life-of-mine waste rock and tailings metal mobility testing and monitoring, as recommended and further explained in the global acid rock drainage guide, as a project component that will be addressed in permitting. EPA and the Minnesota Pollution Control Agency (MPCA) have agreed that the details of such testing and monitoring should be addressed in permitting.

Wastewater and stormwater management

5.2.2-85: The PSDEIS is unclear whether the East/West equalization basins will be designed to assure that they always have a minimum of two feet of freeboard.

Recommendation: The SDEIS should explain if the east and west equalization basins will always contain a minimum of two feet of freeboard.

Bedrock fractures in the Duluth Complex

Page 5.2.2-27: Fractures are known to commonly occur in the bedrock of the Duluth Complex. (See Foster, M.E. (1986). "Fracture cleavage" in the Duluth Complex, northeast Minnesota, *Geological Society of America Bulletin*, 97:1, 85-96.)

Recommendation: The SDEIS should acknowledge the potential occurrence of fractures, and note that appropriate engineering controls will be put into place if fractures are encountered during active mining.

Spilled Ore

Page 5.2.2-86: The PSDEIS notes that a spilled ore plan with monitoring and mitigation measures will be developed.

Recommendation: When developed, the spilled ore plan should include measures to mitigate fugitive dust. To the extent that these measures are already known, they should be briefly identified in the SDEIS.

B. Plant Site

Surface water

Page 5.2.2-40, 1st paragraph: The text cites U.S. Geological Survey (USGS) gauging station 04017000 as being located just downstream of PM-12.3.

Recommendation: The SDEIS should include the location of USGS gauging station 04017000 in Figure 5.2.2-6 (Page 5.2.2-37).

Ground water

Page 5.2.2-39, 1st paragraph states that "the estimated total discharge rate of flowpath groundwater into the Embarrass River is 292 gpm [gallons per minute]." However, the discharge rate to tributaries is not included.

Recommendation: The SDEIS should state the groundwater discharge rate to tributaries of the Embarrass River.

Figure 5.2.2-6, and Figure 5.2.2-11: These figures do not provide the applicable units for groundwater elevation contours. Additionally, contour data are presented to the hundredths digit. Providing contour data to this many significant figures implies a knowledge and level of precision of the groundwater elevation system that is not likely accurate. The level of precision also makes it difficult to quickly evaluate contour intervals.

Recommendation: The SDEIS should provide groundwater contours for the above-named figures. The contour intervals depicted should be revised to reflect an appropriate

level of understanding of the groundwater elevation system and should include a unit of measurement.

C. Water Quality Standards

Pages 5.2.2-81 through 5.2.2-100 describe how solute contaminated water moves from the Mine Site via groundwater to the Partridge River. Mine Site sources of wastewater with elevated concentrations of solutes due to mine activities include the West Pit (which eventually includes the East Pit overflow), Category 1 Stockpile, Category 2/3 Stockpile, Overburden Storage and Laydown Area, Ore Surge Pile, reverse osmosis (RO) concentrate from Plant Site wastewater treatment plant (WWTP), wastewater equalization basins, and seepage through liners. Taken together, Tables 5.2.2-21 and 22 suggest that much lower concentrations reach the Partridge River than leave the Mine Site. However, the PSDEIS does not identify how this reduction in concentration occurs.

Recommendation: For pollutants that leave the mine property via groundwater at concentrations greater than those projected to enter the Partridge River, the SDEIS should provide a more detailed explanation of the processes responsible for the reduction in concentration; or identify the relevant supporting technical document containing this explanation (and ensure that this document is available to the public during the SDEIS comment period). This explanation does not need to be at the level of detail that will be required for National Pollutant Discharge Elimination System (NPDES) permitting in order to determine water quality-based effluent limits and establish control and mitigation measures that ensure attainment of Minnesota's water quality standards in the Partridge River and other downstream surface. However, it should be sufficiently detailed for the reader to understand what processes are responsible for the reduction in concentration.

The PSDEIS concludes that concentrations of solutes reaching the Partridge River will be acceptable using groundwater evaluation criteria. However, surface water evaluation criteria apply when the contaminated groundwater enters the Partridge River and should be considered as well. In some cases the surface water criteria are more stringent than the groundwater criteria (e.g., sulfate [10 mg/L vs. 250], arsenic [53 ug/L but 2 µg/L downstream in Colby Lake vs. 10], copper [9.3 µg/L vs. 1000 or 1300], lead [3.2 µg/L vs. 15], mercury [1.3 ng/L vs. 2000], silver [1.0 µg/L vs. 100], and zinc [120 µg/L vs. 5000]). Also, in some cases surface water criteria exist where there are no groundwater criteria (e.g., hardness, cobalt and specific conductance). The surface water criteria would be used for any NPDES permitting of groundwater discharges that are hydrologically connected to surface waters.

Recommendation: The SDEIS should consider surface water criteria applicable to the Partridge River as evaluation criteria for the contaminated groundwater entering the Partridge River due to activities at the mine, in addition to the groundwater criteria used in the PSDEIS.

Page 5.2.2-5: “The evaluation criteria for these three solutes [beryllium, manganese, and thallium], where background levels naturally exceeded the water quality standard, were developed in accordance with USEPA guidance”

Recommendation: Include a specific reference to the EPA guidance used to develop these evaluation criteria.

Table 5.5.5-1: The computations provided in this table assume that the concentrations of beryllium, manganese, and thallium solutes are naturally occurring. However, the PSDEIS does not support this assumption with evidence that these concentrations are truly natural and not anthropogenic. Natural background must be based on conditions independent of anthropogenic impacts. Computing a 95th percentile value from existing monitoring data is not adequate for this purpose, since it does not discount anthropogenic sources from past and current uses of this area. Any site-specific criteria based on natural background will need to be established during NPDES permitting.

Recommendation: Evaluation criteria in the SDEIS should be set at Minnesota’s water quality standards (WQS) unless an evidence-based analysis shows that levels are due solely to natural background and not anthropogenic sources. The SDEIS should also recognize that any site-specific water quality criteria based on natural background will need to be developed, adopted by Minnesota, and approved by EPA before being used in the context of NPDES permitting.

Page 6-56, Section 6.2.3.7.4: The PSDEIS concludes that no cumulative effects on aquatic resources are expected because the NorthMet Project is not predicted to result in any short- or long-term exceedances of surface water evaluation criteria in the Partridge River, Colby Lake, and the Embarrass River (as discussed in Section 5.2.6.2). The GoldSim does predict that the proposed project will increase levels of several contaminants above the current baseline or “no action” conditions (Table 5.5.5-29, e.g., antimony, arsenic, cadmium, cobalt, copper, lead, and nickel). Chapter 6 does not consider how the increased contaminant concentrations caused by the NorthMet Project, combined with all other past, present, and reasonably foreseeable future actions as tabulated in Chapter 6, may cumulatively affect aquatic resources. The lower projected stream flows could also potentially affect this analysis.

Recommendation: The SDEIS should acknowledge and consider how the modeled impacts of the NorthMet Project, including projected increased contaminant concentrations above baseline or “no action” levels, in combination with other past, present and reasonably foreseeable actions, may cumulatively impact aquatic resources. Consider also including the concomitant effect of projected lower stream flows in this analysis. EPA and the co-leads have agreed to further discuss this recommendation before issuance of the SDEIS.

D. National Pollutant Discharge Elimination System

As we have discussed, the co-leads will include a more complete description of NPDES requirements in the SDEIS, starting from their “Draft Outline for Additional Information on Permitting in SDEIS.” This section of EPA’s comments discusses some of those requirements in more detail, and recommends approaches to addressing them in the SDEIS. EPA will review NPDES permit applications, draft permits, and supplemental information in accordance with our Memorandum of Agreement with MPCA. At that time, EPA and MPCA will determine compliance with water quality standards.

NPDES permitting requirements include compliance with Minnesota’s nondegradation provisions for surface waters (Minn. R. §§ 7050.0180 and 7052.0300) and groundwater (Minn. R. § 7060.0500). The co-lead agencies and MPCA will address nondegradation during the permitting phase of the project. However, some further discussion of nondegradation in the SDEIS is appropriate since additional mitigation may be needed to develop a successful nondegradation demonstration and permit, and since the proposed project is projected to increase concentrations of several contaminants above existing levels. As we have discussed, the co-leads should coordinate closely with the MPCA to ensure compliance with nondegradation requirements.

Recommendation: The SDEIS should discuss the need for compliance with Minnesota’s nondegradation water quality standards provisions; and should note that compliance (including any necessary additional mitigation) will be addressed during NPDES permitting.

The co-lead agencies are using a 90th percentile (P90) projection to evaluate whether or not evaluation criteria are being met. As we have discussed, this is not equivalent to how water quality based effluent limits (WQBELs) will be developed for NPDES permitting. Rather, appropriate WQBELs must be derived based on water quality standards and implemented in the permit. Discharges will be evaluated during the NPDES permitting stage and WQBELs applied according to 40 CFR 122.44(d). The procedures for conducting a reasonable potential analysis and calculating WQBELs are found at 40 CFR 132 and Minn. R. § 7052.

Recommendation: The SDEIS should note these NPDES permitting requirements and should be clear that the evaluation criteria used are not equivalent to WQBELs.

Page 3-71: *“As a requirement of the NPDES stormwater permit and/or reclamation plan for the facility, discharges from these outlet control structures would be monitored as necessary to ensure that runoff to the Partridge River meets water quality discharge limits.”* This appears to be describing a discharge that is subject to the federal effluent limitations guidelines.

Recommendation: This portion of the SDEIS should describe how the federal effluent limitations guidelines found at 40 CFR 440 will apply to this project, and should reference portions of the SDEIS that describe how stormwater management is designed

into the project. In addition, the SDEIS should discuss how the project plans to address any stormwater associated with industrial activity (see 40 CFR 122.26(b)(14)).

The PSDEIS discusses the existing permit applicable to the Plant Site, but does not describe whether an NPDES permit would be required to ensure that discharges from the Mine Site which impact surface waters will be in compliance with the CWA.

Implementation of Effluent Limitations Guidelines (ELGs): Discharges from the Mine Site which impact surface waters would be subject to effluent limitation guidelines (ELGs) found at 40 CFR 440 Subparts G, J, and K. These ELGs apply to discharges from mine drainage. Mine drainage is defined at 40 CFR 440.132 as “any water drained, pumped, or siphoned from a mine.” A mine is defined as “an active mining area, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method, including secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps and mill tailings derived from the mining, cleaning or concentration of metals ores.” Based on these definitions, all drainage from the Mine Site collected as stormwater is subject to these ELGs. It is expected that the ELGs will be implemented in an individual NPDES permit for the Mine Site.

Implementation of water quality standards: Section 301 of the CWA prohibits point source discharge to surface waters, either directly or via directly connected ground water, unless the discharge complies with a NPDES permit. Section 502(12)(A) of CWA defines “discharge of a pollutant” as any addition of any pollutant to navigable waters from any point source. Further, at CWA § 502(7), “navigable waters” are defined as “the waters of the United States, including the territorial seas.” The definition of “Waters of the United States” includes lakes, rivers, streams, creeks, and wetlands, etc, and applies to all surface waters on the NorthMet Project site. See 40 CFR 122.2.

The PSDEIS seems to anticipate that there will be discharges from the Mine Site to the Partridge River as well as other surface waters such as the West Pit Outlet (aka Unnamed Creek), and on-site and off-site wetlands, but does not conclude that the Mine Site will require an individual NPDES permit. Based on currently available information we believe that an NPDES permit is required at both the Mine and Plant Sites, with limits and monitoring requirements applied at the points of discharge. To comply with the CWA, the permit will need to have been issued when the discharge occurs. WQBEL’s must be developed based on water quality standards, including downstream standards, and standards applicable to wetlands. WQBEL’s must be calculated based on low flow (7Q10) conditions in the receiving waters.

Recommendation: The SDEIS text should be revised to reflect the understanding that one or more NPDES permit(s) will be required for the Mine Site in order for this project to comply with the CWA, and to discuss how the project is designed to comply with NPDES permits and applicable water quality based effluent limits. The document should also indicate how parameters of concern will be identified for the purposes of NPDES permitting.

Although Yelp Creek is in close proximity to the Category 1 stockpile we have not found any discussion in the PSDEIS of whether there will be a discharge from Mine Site features to Yelp Creek (taking into account measures to prevent discharge from the Category 1 stockpile).

Recommendation: Identify whether there will be discharges to Yelp Creek; and if so indicate that these discharges will be addressed through NPDES permitting.

Additional information provided to EPA on July 1 indicates that MPCA plans to transfer the NPDES permits for the tailings basin (MN0042536, MN0054089) from Cliffs Erie to PolyMet. Since PolyMet proposes significant changes to the tailings basin, significant changes would have to be made to the existing permits. Based on the information provided with the PSDEIS, the character of the wastewater discharge will be altered from its current composition because the tailings will be from a different type of mining and processing operation. If this occurs, different effluent limitations guidelines would apply. Physical attributes of the basin will also be altered to include the hydrometallurgical residue disposal facility and the additional pumping and recirculation system which will impact site hydrology over existing conditions.

Recommendation: The SDEIS should include a discussion outlining the permitting actions that will be taken to address proposed changes to the tailings basin.

In the following sections, the PSDEIS draws conclusions about the existing discharges at the Plant Site in relation to surface water quality standards. Additional relevant data can be found in discharge monitoring reports, and in the documentation provided by Cliffs Erie to the MPCA in support of its application for NPDES permit reissuance. We expect that MPCA will evaluate this information relative to water quality standards during the permit reissuance process as part of its analysis to determine which pollutants in the discharge have a reasonable potential to cause or contribute to violation of a water quality standard (the “reasonable potential analysis”).

Page 4.2.2-64, “*Water quality monitoring from 2006 to 2008 as part of the MPCA-issued NPDES Permit MN0042536 (SD026), as shown in Figure 4.2.2-9, shows that Seeps 32 and 33 were generally consistent with surface water standards with the exception of hardness and Total Dissolved Solids (TDS) (NTS 2009). Table 4.2.2-20 summarizes the surface water quality monitoring data for Station SD026.*”

Page 4.2.2-96-97: “*Several of these seeps have been, or are being monitored for water quality pursuant to NPDES/SDS permit MN0054089 (Table 4.2.2-34). The monitoring data indicate that these seeps generally met surface water quality standards other than for mercury at several stations, although the mercury concentrations were well below those found in local precipitation (approximately 10 ng/L).*”

Recommendation: The SDEIS should reflect that a reasonable potential analysis will be conducted as part of NPDES permitting.

EPA expects downstream water quality standards to be considered and protected through the NPDES permitting process. While discharges at the Mine Site and Plant Site may be to wetlands that are connected to streams and rivers, as well as directly to streams and rivers, all

applicable water quality standards need to be considered, including Minnesota's wetlands standards. In addition, the PSDEIS is unclear as to how certain specific standards are being considered:

Mercury: The PSDEIS refers to 1.3 ng/L as the relevant numeric standard for mercury. However, the PSDEIS notes that the St. Louis River downstream is not meeting the 0.77 ng/L standard that applies at that segment of the River.

Sulfate: The water quality standard for the protection of wild rice is applicable in the Partridge River. There is an associated numeric standard for sulfate at 10 mg/L. The PSDEIS does not address this standard, presumably because the wild rice is located downstream.

Recommendation: The SDEIS should discuss how downstream water quality standards (including wetlands standards, standards applicable in the rivers and streams immediately adjacent to the sites, and the mercury and sulfate standards) will be considered and protected through NPDES permitting.

Water from Colby Lake will be withdrawn via an existing pumping station and pipeline to augment flows to streams and wetlands outside of the tailings basin containment system. If water withdrawn from Colby Lake will be subject to an intervening industrial, municipal, or commercial use prior to its discharge to surface waters, it should be evaluated during the permitting process.

Recommendation: The SDEIS should acknowledge that MPCA will determine during permitting how the project will comply with the Water Transfer Rule. (See http://www.epa.gov/npdes/regulations/water_transfers_finalrule.pdf.)

The PSDEIS does not appear to discuss biological or habitat conditions of the immediate receiving waters, other than noting that some of them are not on the CWA §303(d) list. According to EPA's ATTAINS database, none of the receiving waters immediately adjacent to the Mine Site, including the Partridge River, Yelp Creek, Unnamed Creek, have been assessed. Biological data consists of measuring community health by sampling and characterizing macroinvertebrates and fish. Minnesota does not have numeric water quality standards based on aquatic life for parameters known to be present in the discharge for many mining and mining related operations. However, the state does have a narrative water quality standard of no toxics in toxic amounts.

Recommendation: The SDEIS should acknowledge that the narrative water quality standard – no toxics in toxic amounts – is relevant to NPDES permitting for the NorthMet project and its receiving waters, and that how to address that narrative standard will be considered in the NPDES permitting process. EPA will consult with MPCA in the context of permitting regarding approaches to protecting aquatic life and habitat in receiving waters.

Subject: RE: Polymet NPDES Requirements
Date: Thursday, April 9, 2015 at 4:43:34 PM Central Daylight Time
From: Pierard, Kevin
To: Foss, Ann (MPCA)
CC: Flood, Rebecca (MPCA), Hyde, Tinka

Ann – as I stated in my original email our intent was to document what we believe were verbal agreements made concerning the likely approaches PCA would take to permitting and addressing primary concerns raised, which had not been otherwise documented. Some of these topics were addressed some time ago but to my knowledge there was never any written acknowledgment of agreement, positions or rationale which is important for informing permitting staff and managers rather than relying on recollections. Once the permit application is provided I am sure we will be evaluating these concepts again and make any needed adjustments but the basic principles will likely remain constant. The note was not intended to renew discussions on Northmet permitting as we did not believe that this action was likely in the near future but we look forward to discussing the correspondence with you and your staff to alleviate any concerns. I will ask Krista to work with Stephanie to get this set up.

From: Foss, Ann (MPCA) [mailto:ann.foss@state.mn.us]
Sent: Thursday, April 09, 2015 3:46 PM
To: Pierard, Kevin
Cc: Flood, Rebecca (MPCA); Hyde, Tinka
Subject: RE: Polymet NPDES Requirements

Kevin,

As we discussed when I called you today, it has been quite some time since we have had conversations related to permitting (6-12 months). If you felt it was time to renew discussions about potential permitting of the Northmet why wouldn't you first convey that to me. If you had conveyed the need for such discussions, I would have suggested a meeting/conference call to refresh everyone's memory on previous discussions and how topics have evolved. Some of the discussions mentioned in your email were several years ago.

It is important to note that the state has not started in depth permitting conversations with the company and does not yet have a timeframe for doing that.

I propose that we set up a conference call to discuss your email and attachments. Your email and attached memo have inaccuracies and outdated information. We can discuss this in detail during the call. MPCA participants will be Richard Clark, Stephanie Handeland and myself. Please have Krista work with Stephanie to set something up. We should plan on a minimum of 2 hours.

As we discussed, typically at the start of a permitting process, we have a conversation of what issues need to be worked through and develop a process and schedule for doing that. Typically there is some documentation of this process. Right now, it is too early to start the permitting process but we could start a list of issues that will need to be worked through during permitting. This would be documented and saved.

Once we start permitting, we would have a kick-off conversation to refresh memories again, dust off the list of issues and add, delete, edit as appropriate and move forward.

I understand your wish to document future discussions, summarizing both areas of agreement and also points where we may choose to agree to disagree. I assume that documentation would occur shortly after conversations to ensure accuracy and that each party would ensure the accuracy of any documentation..

In the future, if either of us has an issue, I would suggest the following process:

- Contact each other by phone to discuss
- Set up a future conference call with others, if needed
- At end of call, summarize discussion and discuss need to document
- If it is agreed that documentation of certain items is needed, agree who will draft and by when.
- Recognize that approaches and projects evolve, sometimes rapidly

As noted above, please have Krista work with Stephanie to set up a call.

Thanks, Ann

From: Pierard, Kevin [<mailto:pierard.kevin@epa.gov>]
Sent: Tuesday, April 07, 2015 11:33 AM
To: Foss, Ann (MPCA)
Subject: Polymet NPDES Requirements

Hi Ann,

During our review of the proposed Polymet - Northmet (Northmet) project related documents and Environmental Impact Statement (EIS) drafts we had several conversations concerning EPA's comments relative to the Clean Water Act (CWA) and specifically to future National Pollutant Discharge Elimination System (NPDES) permitting for the proposed Northmet project. The Minnesota Pollution Control Agency (MPCA) requested that specific responses to our comments on NPDES related issues be deferred to the permitting phase of the project rather than during the EIS development phase. EPA accommodated that request. Since many decisions concerning NPDES were not specifically summarized in writing I thought it would be helpful to do so to assure shared understanding of the issues and documentation of decisions and approaches we agreed upon. Accordingly, I am writing this note to document our understanding of MPCA's anticipated approach to address proposed discharges of pollutants to waters of the United States through NPDES permitting, and to explain EPA's position regarding the applicability of NPDES permit requirements for point source discharges of pollutants to surface waters, including those that occur via subsurface flow. We note that because these issues were deferred to permitting during the process to develop the EIS, we do not anticipate that the information in the EIS will necessarily be sufficient to address the concerns we have enumerated, and we anticipate that MPCA will be working with Northmet to ensure the development of a sufficient record to support NPDES permit issuance.

Discharges are proposed for the Northmet site which require NPDES permit coverage in order to be in compliance with the CWA. The project proponent has a duty to submit an NPDES permit application to seek coverage for all proposed pollutant discharges, so that the permit can be in place when the proposed pollutant discharges occur. The MPCA is responsible for issuing an NPDES permit, where appropriate, that contains conditions and limits which assure compliance with all applicable requirements of the CWA and regulations, including limitations controlling all pollutants which are determined to cause or have reasonable potential to cause or contribute to an excursion from any state WQS. The enclosure highlights the more significant issues that we have identified to date for this facility and that must be addressed during the NPDES permitting process.

Although we have spoken many times regarding these concerns please let me know if you have any questions or would like to discuss further. In addition, we look forward to working with you to assure timely decisions on new and expired mining permits consistent with our joint priority.

Please see the attachment for some more information on the NPDES applicability to the Northmet project.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

NOV 03 2016

REPLY TO THE ATTENTION OF:

WN-16J

Ms. Ann Foss
Metallic Mining Sector Director
Minnesota Pollution Control Agency
520 Lafayette Road
St. Paul, MN 55155-4194

Re: NPDES Permit Application for Polymet Mining Corporation's Northmet Mine

Dear Ms. Foss:

On July 11, 2016, Polymet Mining Corporation (Polymet) submitted an application for a National Pollutant Discharge Elimination System and State Disposal System (NPDES/SDS) permit to the Minnesota Pollution Control Agency (MPCA) for discharges related to the proposed Northmet project ("Application"). The U.S. Environmental Protection Agency obtained the Application via the MPCA's website. On August 2, 2016 MPCA informed Polymet that the application is complete for processing but also indicated that MPCA may have additional information requests as MPCA further processes the application. EPA appreciates the significant effort that went into MPCA's review of this application, and we hope you find this letter useful as you continue to review and process the application materials submitted by Polymet.

As you know, Section II of The Memorandum of Agreement (MOA) between MPCA and EPA describes the process by which EPA reviews NPDES permit applications that have been submitted to the MPCA. The MOA states that:

If the EPA determines that the NPDES application form is not complete the deficiencies shall be identified by letter to the Director. No NPDES application shall be processed by the Agency until the deficiencies are corrected and it has been advised in writing by the EPA that the NPDES application form is complete. *MOA, Part. II, Section 124.23 Transmission of Data to Regional Administrator, Paragraph 1.*

Consistent with the MOA, EPA has conducted a focused review of the application materials for that portion related to the NPDES coverage sought for the proposed Northmet project, specifically the information submitted on and referenced in the EPA Form 3510-2D (Rev.8-90) for new industrial discharges. The enclosure to this letter describes the deficiencies¹ EPA has found regarding the application materials and identifies additional concerns raised by the application materials, including:

¹ We use the term "deficiencies" because that is the term used in the MOA. We interpret "deficiencies" to refer to omissions, inconsistencies, mistakes, and other circumstances where we believe the information provided by the applicant is not responsive to the directions given on the application form. As used in the MOA, the term does not refer to any deficiencies in MPCA's application review process.

- Antidegradation requirements, and
- Federal effluent limitations guidelines as they pertain to the proposed Northmet project.

In addition, EPA notes that although: 1) the Final Environmental Impact Statement (FEIS) for the Northmet project details discharges to surface waters predicted to occur at the mine site²; and 2) the permit application contains numerous references to the FEIS³, the applicant specifically does not request NPDES permit coverage for these discharges⁴.

EPA's position, as we explained previously during the development of the FEIS, is that the incorporation of the FEIS into the Application without ensuring that NPDES permit coverage is fully consistent with the information presented in the FEIS could create potential enforcement and permit shield issues under Section 402(k) of the Clean Water Act (CWA). If the application is not revised to either request NPDES permit coverage for the specific discharges proposed in the FEIS or to remove all references to the FEIS and supporting documentation, then any draft permit must include a prohibition on discharges from mine site point sources to surface waters, including those discharges that occur via a direct hydrologic connection, as documented in the FEIS.

EPA's position as explained above is consistent with EPA's past interpretation that the CWA applies to discharges of pollutants from a point source to waters of the United States, including those made through a ground water hydrologic connection.⁵ The CWA defines point sources as follows:

The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. *33 U.S.C 1362(14)*

The need for an NPDES permit is highly dependent on the facts surrounding each situation. *66 Fed. Reg.* at 3015; *63 Fed. Reg.* at 7881. As EPA has explained:

The determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations. The time and distance by which a point source discharge is connected to surface waters via hydrologically connected [ground] waters will be affected by many site specific factors, such as geology, flow, and slope. . . *66 Fed. Reg.* at 3017.

Finally, we emphasize that it is important that the content of the application be fully documented and that the record before the permitting Agency be complete and transparent. As MPCA continues to receive supplemental information from the applicant (including, any materials provided by the

² For example, Page 5-35, Figure 5.2.2-7, Table 5.2.2-8, of the FEIS.

³ Including references to the project description, modeling results, monitoring data, effluent, ambient and downstream water quality predictions, and including predicted point source discharges to surface waters from the mine site including Figure 5.2.2-7 of the FEIS.

⁴ Application, Vol. 1, Chap. 2.0 states that, "The Mine Site will not discharge mine water or process water to surface waters from a point source; therefore, no NPDES permit is required and only SDS coverage is requested."

⁵ See, Proposed National Pollutant Discharge Elimination System Regulations for Concentrated Animal Feeding Operations, *66 Fed. Reg.* 2960, 3015 (Jan. 12, 2001); NPDES General Permits for Storm Water Discharges from Construction Activities, *63 Fed. Reg.* 7,858, 7,881 (Feb. 17, 1998).

applicant to MPCA after July 11), we strongly recommend that this information be added to the permitting record and be made available to the public and to EPA in a timely manner.

Again, we appreciate MPCA's efforts in reviewing the Polymet application and we look forward to working with you to resolve the issues identified in this review as MPCA moves forward to draft the NPDES permit for this proposed facility. We will conduct a formal review of any draft permit that MPCA proposes to issue consistent with our MOA. Please contact me or Krista McKim of my staff at (312) 353-8270 or mckim.krista@epa.gov with any technical questions. For legal questions please contact Barbara Wester of the Office of Regional Council at (312) 353-8514 or wester.barbara@epa.gov.

Sincerely



Kevin M. Pierard, Chief
NPDES Programs Branch

Enclosure

U.S. EPA's Review of the Polymet – Northmet NPDES permit application to MPCA

This enclosure presents issues identified in EPA's October 2016 focused review of the Northmet NPDES/SDS permit application. EPA looks forward to working with MPCA to obtain additional information and/or clarification to fully address these issues prior to MPCA's proposal of a draft permit for the project, consistent with the MOA.

Deficiencies Found EPA's Review of Form 2D

The deficiencies¹ identified below are organized by referencing the specific Item number or Part in "EPA Form 3510-2D (Rev. 8-90)." The Applicant submitted this form as part of its application. Unless otherwise stated, when referring to the application instructions, EPA is referring to the specific instructions for each Item or Part identified in the above-referenced form. The information requested through this form is based on the federal requirements found in 40 C.F.R. Part 122.

Item I. The applicant has provided locational information for three outfalls, SD002, SD003 and SD004. Latitude and longitude coordinates are provided for each. However, for SD003, the applicant has indicated that the "coordinates represent the average of six surface water discharge outfalls". This is not an appropriate manner for describing the outfall locations. The application should describe each outfall and its actual location. In addition, when the application is revised to include all six proposed discharge locations, please be sure to name the immediate receiving water for each outfall. In some cases, the immediate receiving water may be wetlands.

In addition, we noticed that the application materials contain conflicting or inconsistent information in some places. For example, the locations given for SD002, SD003 and SD004 elsewhere in Volume I are inconsistent with the information on the Federal form. We did not attempt to identify every instance where the applicant provided locational information for the outfalls but the applicant should ensure correct information regarding the outfall locations throughout the application.

It is important to resolve this issue with the applicant as incorrect or inconsistent locational information could result in (1) confusion for regulators and the public regarding where discharges will occur; (2) failure to identify appropriate water quality standards for the receiving waters; and (3) inability to enforce discharge limits in a final permit.

Item III-A. The application instructions require the applicant to list the average flow contributed by each outfall. For SD003 2,400 gallons per minute [gpm] is given. In providing information regarding each specific outfall location, the applicant should update this section to include an estimated average flow rate for each outfall. At this time, it is unclear if 2,400 is meant as an average flow for the 6 outfalls or a total. The applicant should provide any needed recalculations at this time as well.

It is important to provide detailed flow information because it is needed to ensure that the permit includes limits necessary to meet applicable water quality standards. Additionally, this information is needed to provide an estimate, along with the expected pollutant concentrations, of pollutant loading to

¹ We use the term "deficiencies" because that is the term used in the MOA. We interpret "deficiencies" to refer to omissions, inconsistencies, mistakes, and other circumstances where the information provided by the applicant is not responsive to the directions given on the application form. As used in the MOA, the term does not refer to any deficiencies in MPCA's application review process.

the receiving waters, and to inform decisions the permitting authority needs to make regarding implementation of federal regulations for new source performance standards.

Item III-B. The application instructions require a line drawing

... depicting the water flow through the facility. Indicate sources of intake water, operations contributing wastewater to the effluent, and treatment units labeled to correspond to the more detailed descriptions in Item III-A. Construct a water balance on the line drawing by showing average flows between intakes, operations, treatment units, and outfalls. If a water balance cannot be determined (e.g., for certain mining activities), provide a pictorial description of the nature and amount of any sources of water and any collection or treatment measures.

For this requirement, the applicant referenced “Large Figures” 2 and 3 in Volume III of the application as the response to this item. We believe the information provided in the applicant’s line drawings as depicted in these two figures is incomplete in the following respects:

- Source of water was not provided.
- Each operation contributing wastewater was not provided or identified.
- Estimation of flow – The application depicts “Average P90 Flows”. However, the applicant should clarify whether this represents the average flow rate that is expected.
- Flow diagrams do not depict the complete route taken by water from intake to discharge as required by the instructions. Figures 2 and 3 taken together are limited to only the route taken by water through the Wastewater Treatment Facility and the Wastewater Treatment Plant. The applicant should clarify and revise the line drawing as necessary to depict the route taken by water through the entire facility.
- The diagrams do not identify receiving waters. Figure 2 and 3 provide as endpoints “Stabilized effluent for discharge or potential reuse ...” or “final effluent”. The specific discharge location and receiving waters should be specifically identified.

A revised line drawing is needed to address these issues. We note that several other water flow diagrams were included in the application materials, but we did not locate any figure that contains the necessary information described above. If the applicant wishes to reference a different water flow diagram in Form 2D (and which does address all of the above information), please provide the specific reference to that flow diagram (and the form should be updated accordingly). In addition, if water management is expected to change over the course of the entire project, we recommend that the applicant submit line drawings to represent each project phase, as necessary, to illustrate how water will be managed throughout the lifetime of the project.

The complete flow diagram is needed for many parts of the application. This information assists the permitting authority and the public to understand the processes of the facility's operations and the nature of all of the materials with which the water will be in contact, including any additives. This information also assists in describing the extent to which wastewater streams may be mingled with each other and the extent to which water is reused in the facility's process(es).

The permitting authority will need this information to ensure appropriate limits and conditions are included in the permit, including the implementation of federal new source performance standards.

Item V. Effluent Characteristics. The application instructions require the applicant to report levels of pollutants as concentration and as total mass for each outfall for certain pollutants, and for others only if they are believed to be present in the discharge. The applicant has submitted data for several parameters, but only concentration data have been submitted, and only one result, not one result for each outfall, is reported. The data must also be expressed as a total mass, or pollutant load. It is unclear to which outfall the data applies as no outfall number is provided. Additionally, “Year 10” has been stamped onto the form. The significance of providing data for “Year 10”, is not explained nor is it sufficient for permitting purposes to rely on information provided for one year whose significance is not explained. We recommend that if the character of the effluent is expected to change with time and or phase of the project that the applicant provide sufficient information so that each phase of the project is represented.

Additionally, the applicant has listed what appear to be incomplete references in the space provided to identify the sources of information used to derive the effluent quality information provided on the Form. We understand that these sources may be shortened titles for documents listed in a separate collection of support documents submitted by the applicant, but we are unsure where to find the information or if it is available for public review. The specific documents and locations within those documents where the information can be located must be provided. Please ensure that these materials become part of the permit record and are made available for public review in a timely manner.

It is important to make sure that this issue is resolved with the applicant so as to provide a transparent means of verifying the source of information that was used to provide the estimates, as well as to document the basis the permitting authority will use to develop permit requirements.

Item VI. Engineering Report on Wastewater Treatment.

A. reference is made to “Waste Water Treatment System: Design and Operation Report”. We did not find this report attached to the application. It is listed in the references section of the application with an indication that it was estimated to be submitted in July 2016. The applicant should revise the application and MPCA should ensure that this report is timely available to the public for review along with the rest of the application materials in a timely manner.

B. the location of existing plants does not need to be limited to plants located in the State of Minnesota. This section could be expanded to include information from similar operations regardless of their location. This information is normally used by the permit issuing authority to assess the applicant’s information in relation to similarly situated facilities that may be discharging wastewater that is similar to the proposed discharge(s) in order to ensure adequate characterization of anticipated future loadings.

Antidegradation.

We are concerned that the antidegradation analysis submitted with the application materials pertains only to the plant site. As the mine site would be constructed as part of the same project for which the discharges from the plant site are proposed, and as there will be discharges from the mine site to Waters of the U.S., we would like to discuss with you the scope and timing of the antidegradation analysis that includes the construction of the mine site. After further analysis of the issue, EPA will provide additional comments on this matter including whether the lack of such information is a deficiency in the application.

New Source Performance Standards.

Federal regulations at 40 C.F.R. § 440 include restrictions on discharges from mills that use froth-floatation for beneficiation of copper and other ores. No discharge is allowed to occur from such process with the following exception:

In the event that the annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility exceeds the annual evaporation, a volume of water equal to the difference between annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility and annual evaporation may be discharged subject to the limitations set forth in paragraph (a) of this section. *40 C.F.R. § 440.104(b)(2)(i)*

Appendix D of Volume I of the application contains a lengthy discussion on this “zero discharge” requirement and how the proposed project might comply with it. In addition, MPCA has recently raised questions to EPA as to how to apply this requirement in the permit. We believe that a complete water flow diagram or diagrams, as required by Item III-B of the application and discussed above, will help illustrate the water management proposed for the facility and, therefore, highlight how the discharge would or would not be in compliance with the requirements at 40 C.F.R. § 440. From what we understand, the Northmet operation will manage water pumped from the mine pits, process water, and precipitation falling on the facility. The process water that will be discharged will be comingled with water pumped from the mine pits and the precipitation falling on the facility, which together will be treated before it is discharged, subject to applicable standards. In this case, we believe it may be appropriate to apply the exemption to the zero discharge requirement, and that the facility may discharge a volume of water equal to the difference between annual precipitation and annual evaporation subject to the standards provided in 40 C.F.R. § 440.104(a). EPA notes that 40 C.F.R. § 440.132(b) provides:

“Annual precipitation” and “annual evaporation” are the mean annual precipitation and mean annual lake evaporation, respectively, as established by the U.S. Department of Commerce, Environmental Science Services Administration, Environmental Data Services or equivalent regional rainfall and evaporation data.

In regard to the multi-year approach proposed by the applicant in Appendix D, Volume I, we disagree that the regulations in 40 C.F.R. § 440 do not include a timeframe for calculating the allowable discharge or evaluating the actual discharge. The regulations repeatedly utilize the word annual. While the term “annual” is not specifically defined in the regulations, it is defined in several other commonly used sources including the Miriam-Webster Dictionary as “covering the period of a year”, and there is no basis on which to interpret EPA’s intended use of the word annual to mean anything other than “covering a period of a year”.

We are available to discuss the details of how to implement 40 C.F.R. § 440 with you after the revised application materials are submitted to the MPCA and as you move forward to draft permit conditions that implement 40 C.F.R. § 440.

MEMORANDUM OF AGREEMENT BETWEEN THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
AND THE MINNESOTA POLLUTION CONTROL AGENCY FOR THE
APPROVAL OF THE STATE NPDES PERMIT PROGRAM

I. RECITALS

(1) Parties. The parties to this agreement (hereinafter, the Agreement) are the United States Environmental Protection Agency (hereinafter, the EPA) and the Minnesota Pollution Control Agency (hereinafter, the Agency).

(2) Purpose. It is the purpose of this Agreement to provide the terms and conditions for approval by the EPA of the State of Minnesota's National Pollutant Discharge Elimination System (hereinafter, NPDES) permit program under the Federal Water Pollution Control Act Amendments of 1972 (hereinafter, the Act) and the EPA's guidelines for "State Program Elements Necessary for Participation in National Pollutant Discharge Elimination System" (hereinafter, the Guidelines) promulgated in the Federal Register, Vol. 37. No. 247, Friday, December 22, 1972, 40 C.F.R. Part 124. Various sections of the Guidelines require the Chief Administrative Officer of a state water pollution control agency and the Regional Administrator of EPA to reach agreement on the manner in which the Guidelines are to be implemented. To satisfy the requirements of the Guidelines, the following procedures are hereby agreed to by the Director of the Agency (hereinafter, the Director), the Agency, and the Regional Administrator of the EPA for Region V (hereinafter, the Regional Administrator). The Sections of this Agreement are numbered in accordance with the Sections of the Guidelines.

II. AGREEMENT

General

Section 124.4 (Authority for State program procedures).

(1) The Agency adopted on March 19, 1974, WPC 36, an Agency regulation relating to NPDES permit procedures consistent with the Guidelines.

(2) The Agency shall employ the procedures of WPC 36 pending its becoming properly filed and thus having the force and effect of law. The Agency expects that WPC 36 will have the force and effect of law on or before May 1, 1974.

Acquisition of Data

Section 124.22 (Receipt and Use of Federal Data).

(1) The purposes of this section are: (a) to provide for the transfer of data bearing on NPDES permit determinations from the EPA to the Agency, and (b) to insure that any deficiencies in the transferred NPDES forms shall be corrected prior to issuance of a NPDES permit.

(2) Commencing immediately after the effective date of this Agreement the Regional Administrator shall transmit to the Director a list of all NPDES permit applications received by EPA. This list shall include the name of each discharger, SIC Code, application number, and indicate whether EPA has determined which applications are complete.

(3) After receipt of the list, the Director shall identify

the priority order to be used by the EPA to transmit the application files to him. The application file shall include the NPDES permit application and any other pertinent data collected by EPA. The application files shall be transmitted to the Director according to the priority order identified, and the EPA shall retain one copy of each file transmitted to the Director.

(4) For an application identified as incomplete or otherwise deficient by the EPA, the Director shall obtain from the discharger the information identified by the EPA as being necessary to complete the application. The Director, at his discretion, may also obtain additional information for those applications identified by the EPA as complete or incomplete to update or process the application.

(5) Once the Director determines that an application is complete, he shall transmit two copies of the completed application and a cover letter indicating that the application has been determined to be complete to the Regional Administrator, Attention: Permit Branch. If the EPA concurs that the application is complete, one copy shall be routed to the Regional Data Management Section, Surveillance Division, through the Compliance Section, Enforcement Division, for processing into the National Data Bank and the other copy shall be placed in the NPDES Permit Branch file.

(6) The Director shall be timely advised by letter that the Regional NPDES Permit Branch concurs with his determination and that a copy of the application has been transmitted to the Data Management Section. If the EPA determines that the application is not

complete, the Regional NPDES Permit Branch shall identify the deficiencies by letter to the Director. The Director shall attempt to resolve all deficiencies within 20 days of date of receipt of notification.

(7) The Regional Administrator shall provide written comment on an application for a NPDES permit no later than 20 days from the date of receipt of application from the Agency. The Regional Administrator may within this 20 day period request additional time not to exceed a total of 40 days. The Director may assume, after verification of receipt of the application, that no comment is forthcoming if he has received no response from the Regional Administrator at the end of 20 days.

(8) No NPDES application shall be processed by the Agency until all deficiencies identified by the EPA are corrected and the Director receives a letter from the EPA concurring with the Director that the application is complete.

Section 124.23 (Transmission of Data to Regional Administrator).

(1) The Director shall transmit to the Regional Administrator copies of completed NPDES application forms submitted by the applicant to the State. When the State determines that the NPDES application forms received from the discharger are complete, two copies of the forms with a cover letter indicating that the forms are complete shall be transmitted to the Regional Administrator, Attention: Permit Branch. If EPA concurs with the Director, one

Subject: Discussion items for next week
Date: Tuesday, September 18, 2018 at 4:03:28 PM Central Daylight Time
From: FYDIBOHF23SPDLT on behalf of Udd, Jeff (MPCA)
To: Clark, Richard (MPCA), Handeland, Stephanie (MPCA), Kyser, Scott (MPCA), Schweiss, Brian (MPCA), Schmidt, Michael R (MPCA)
CC: Smith, Jeff J (MPCA), Lotthammer, Shannon (MPCA)
Attachments: image001.jpg

Proposed agenda for the EPA meetings next week so we 1) have an idea of the issues EPA is thinking about, and 2) we can start thinking about materials that may be helpful for the meeting. I'll put a formal agenda together later this week.

Steph – can you set up a short check-in on Thursday for those on the “To” line so we can discuss any issues/ideas?

Thanks, Jeff

Discussion items for Tuesday (9/25) - EPA/PolyMet/MPCA

- Treatment technology design and operation (PolyMet lead/Brian and Scott can add as needed)
 - How does the system work
 - Water quality expected at the discharge
 - Data from similar system (Eagle Mine)
- Limits development and monitoring approach (Scott?)
 - RP and WQBELS
 - Application of ELGs
- Permit enforceability (EPA)
 - General concerns of EPA
- Decision making process and permit modification (Richard/Steph)
 - Adaptive management approach
 - When are permit modifications required?
 - Process should be clear in the permit
- Permitting approach to legacy issues (Richard/PolyMet)
 - Discuss the proposed regulatory approach
 - Clarify who would be doing what

Discussion items for Wednesday (9/26) – EPA/MPCA

- Follow up items/concerns from Tuesday meeting
- Plan for responding to comments from EPA (given verbally prior to public notice)
 - How many were addressed in Tuesday meeting?
- General overview of permit revisions based on comments received
- Process and timing for permit issuance (including 401 certification)

EPA attendees:

Linda Holst
 Kevin Pierard
 Candice Bauer
 Barbara Wester
 Krista McKim

Mark Akerman

Jeff Udd, P.E. | Manager
Minnesota Pollution Control Agency (MPCA)
Industrial Division
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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

EXHIBIT I

**TO REPLY DECLARATION OF PAULA G. MACCABEE IN SUPPORT
OF WATERLEGACY MOTION FOR TRANSFER OR STAY
DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS**

STATE OF MINNESOTA**MINNESOTA POLLUTION CONTROL AGENCY**

<p>In the matter of the reissuance of an NPDES/SDS Permit to United States Steel Corporation (U.S. Steel) for its Minntac facility and response to Contested Case Hearing requests filed by U.S. Steel and the Minnesota Center for Environmental Advocacy (“MCEA”)</p> <p>And</p> <p>In the matter of the Application for Variance from Water Quality Standards in the proposed NPDES/SDS permit, MPCA’s Preliminary Determination to Deny the Variance Request and U.S. Steel’s Contested Case Hearing request on the Variance denial.</p>	<p style="text-align: center;">FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER</p>
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FINDINGS OF FACT

The above-entitled matter came before the Minnesota Pollution Control Agency (MPCA) Commissioner on November 30, 2018 following public notice of a proposed reissuance of NPDES/SDS permit MN0057207 (proposed permit) to U.S. Steel Corporation, Inc. (U.S. Steel). The proposed permit governs discharges from the tailings basin at its Minntac ore processing operation (facility). Based on the MPCA staff review, comments and information received during the comment period, and other information in the record of the MPCA, the Commissioner makes the following Findings of Fact, Conclusions of Law, and Order:

BACKGROUND

1. The facility is located in multiple Sections of Township 59 North, Ranges 18 and 19 West, Mountain Iron, St. Louis County, Minnesota. The facility covers approximately 8,700 acres (13.6 square miles).
2. The principal activity at the facility is taconite processing. At the maximum operating rate, the facility will generate 15 million long tons of taconite pellets per year. The Minntac plant consists of a series of crushers and screens, a crusher thickener, a concentrator, an agglomerator, and various auxiliary facilities. The concentrator utilizes a series of mills,

the MPCA does not believe that this technology is capable (if it works) of addressing more than discrete areas of pollution for short time periods.

PROCEDURAL HISTORY

33. On December 5, 2014, the MPCA provided a pre-public notice draft permit to U.S. Steel, U.S. EPA Region 5, and tribal governments. The review period before the official public notice provides an opportunity for stakeholders to help shape the permit that will be placed on public notice. The MPCA has found this process engages stakeholders in the permit development, allows more time for stakeholders to review permit terms, and results in a more useful draft for the public to review and comment on.
34. On December 19, 2014, the MPCA received feedback from U.S. Steel, U.S. EPA, tribes, and the environmental group WaterLegacy on the pre-public notice draft.
35. The MPCA reviewed the feedback on the pre-public notice draft and decided to reevaluate some conditions of the permit.
36. On November 15, 2016, the MPCA published a proposed reissued permit for the Tailings Basin (Draft 2016 Permit) for public notice and comment. The Draft 2016 Permit would have required U.S. Steel to reduce the concentration of pollutants in its Tailings Basin wastewater because that is the major source of the pollutants entering the groundwater and surface water.
37. The Draft 2016 Permit would have required U.S. Steel to reduce sulfate concentrations in tailings basin pool water to 800 mg/L within 5 years, 357 mg/L in 10 years (or an alternative MPCA-approved concentration based on new research), and to determine what pollutant concentrations in the basin will result in downstream surface waters and groundwater meeting applicable water quality standards. The Draft 2016 Permit would have required U.S. Steel to begin construction of basin pool treatment/mitigation system within 49 months of issuance, but did not dictate the type of treatment/mitigation to implement.
38. The MPCA based the target concentration on the concentration that U.S. Steel predicted would result in compliance with groundwater standards at its property boundary. The MPCA finds that, if this standard is met, surface waters affected by the basin would also experience significant reductions in pollutants over time.
39. In addition to the requirement to reduce sulfate concentrations in the Tailings Basin pool water, the Draft 2016 Permit would have required U.S. Steel to continue to monitor the surface waters near the basin and investigate pollutant sources and flowpaths, with the goal of determining the dates by which affected surface water bodies would meet applicable water quality standards as a result of the determined mitigation strategy.

40. The Draft 2016 permit would have required U.S. Steel to install a system to recapture basin seepage on the west side of the basin by December 31, 2017. After this system was installed, U.S. Steel would no longer have any outfalls authorized to discharge basin water to the surface waters. As a result, the Draft 2016 Permit contained only temporary effluent limits applicable to the seepage discharge.
41. On December 23, 2016, U.S. Steel and the Minnesota Center for Environmental Advocacy submitted comments to the MPCA and requested a contested case hearing on the Draft 2016 Permit.
42. Approximately 1350 other persons, including the U.S. EPA, Tribal Authorities, and individuals also commented.
43. The MPCA has prepared responses to the comments received. These comments are attached as the following and are hereby incorporated into and made a part of these findings:
 - a. **Attachment A** - "MPCA Response to Comments and Contested Case Hearing Requests received on Draft NPDES/SDS Permit MN0057207 – U.S. Steel Minntac Tailings Basin". The MPCA incorporates its responses to the comments received into these findings.
 - b. **Attachment B** – "Categorical Responses to Comments".
44. The MPCA has included its responses to particular comments below, beginning at Paragraph 52. The MPCA revised the Draft 2016 Permit based on the public comments. These revisions resulted in the Final 2018 Permit. The revisions based on the comments are described in Paragraphs 55-68.
45. In addition to submitting comments and a contested case hearing request on the Draft 2016 Permit, on December 21, 2016, U.S. Steel submitted an Application for Variance for many of the water quality standards referenced in the Draft 2016 Permit.
46. U.S. Steel applied for variances from the sulfate and total dissolved salts (TDS) water quality standards in Minn. R. 7050.0221 designed to protect the Class 1 (drinking water) beneficial use in groundwater, and also for sulfate, specific conductance, TDS, hardness, and bicarbonate water quality standards in Minnesota Rule 7050.0222 and 7050.0224 designed to protect the Class 1B (drinking water), 3 (industrial) and 4 (agriculture and wildlife) beneficial uses in surface waters.
47. For the surface water variances, U.S. Steel claims that it meets the criteria in 40 C.F.R. § 131.10(g) subsections 2, 3, and 6. The criteria are flow conditions preventing the attainment of the use (item 2), human-caused conditions (item 3), and economic feasibility (item 6).

48. Upon preliminary review of the variance applications and supporting materials, and in consideration of comments and anticipated changes to the Draft 2016 Permit based on public comments, the Commissioner determined that U.S. Steel had not satisfied the conditions necessary to grant the requested variances and the Commissioner therefore made the Preliminary Determination to deny the applications.
49. The MPCA issued public notice of the Preliminary Determination to Deny the Variance Request on December 7, 2017, consistent with Minnesota Rule 7000.7000, subpart 4. The MPCA made the notice available to the public consistent with Minnesota Rule 7000.7000, subparts 5 through 7. The MPCA also held a public meeting to receive comment on this action in Mountain Iron, Minnesota, on January 23, 2018, as required by Minn. R. 7050.0190, subp. 6.
50. On January 24, 2018, U.S. Steel submitted comments on the Preliminary Determination to Deny the Variance Request and requested a contested case hearing.
51. In addition to U.S. Steel, the MPCA received comments from approximately 50 other persons, including the U.S. EPA, Tribal Authorities, and individuals regarding the variance request.

MPCA responses to specific comments on the Draft 2016 Permit

52. The MPCA considered each of the comments received on the Draft 2016 Permit. A number of these comments led to revisions of the Draft 2016 Permit as described below.
53. U.S. Steel incorporated all of its comments into its request for a contested case hearing. These comments are addressed below and in the Contested Case Hearing heading.
54. The findings below summarize the detailed findings made in Attachment A.

Comments Triggering Revisions to the Draft 2016 Permit

55. The MPCA carefully considered the comments on the Draft 2016 Permit and revised the permit based on those comments.
56. The MPCA regularly lists surface waters that receive shallow seepage discharge in NPDES permits. The Draft 2016 Permit listed one receiving water, the Dark River. Commenters identified that there are other points around the tailings basin where surface water flows away from the basin. The Final 2018 Permit includes the additional waters where MPCA has evidence of a surface discharge from the facility, including Timber Creek, and unnamed wetlands to the west and north of the basin. This rationale is further addressed in Attachment A, Responses 4-2 to 4-4, 5-1, 5-4, 8-2, and 11-1, and Attachment B - Item B.

77. The MPCA finds that the Final 2018 Permit takes into consideration the potential for future changes to the applicable standards and that U.S. Steel's requests would not significantly impact the basis and development of permit conditions.
78. First, no limits are imposed immediately. Instead, within 48 months (37 months in Draft 2016 Permit) after permit issuance (Permit part 5.29.53(d)), the permittee is required to determine, based on studies required under the permit, when compliance with water quality standards can be achieved through the chosen means. The dates for meeting these limits will ultimately be determined by the progress that the permittee is making on reduced loading or through other means.
79. As a result, there is adequate time for U.S. Steel and the MPCA to resolve issues involving changes to the Class 3 and 4 water quality standards, and for new "wild rice" sulfate standard rulemaking to be completed. This was noted in the Fact Sheet supporting the Draft 2016 Permit: *"The MPCA has begun rulemaking to revise class 3 & 4 surface water quality standards. MPCA expects to complete this rulemaking during the period of investigation and mitigation planning outlined in the schedule of compliance. Any changes to surface water quality standards for pollutants for which there are limits specified in this permit may require modification to the permit to reflect the conclusions of the rulemaking."*
80. Second, the MPCA proposed statewide changes to the Class 3 and 4 water quality standards similar to the requests submitted by U.S. Steel. The U.S. EPA emphasized in comments on the Class 3 and 4 water quality standard revisions proposed by the MPCA that the MPCA must identify numeric limits that are protective of aquatic life, because the Class 3 and 4 standards are the only standards in which certain substances are addressed, such as bicarbonate and hardness. The U.S. EPA must approve water quality standards changes made by states. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.21. Given EPA's stated position and oversight role, it is unlikely that MPCA will be able to adopt changes to the Class 3 and 4 water quality standards that remove all standards for these parameters. Thus, U.S. Steel will likely need to reduce and control the discharges from the tailings basin, and to decrease the current loading to reverse the increasing concentration trajectory.
81. Third, the MPCA has been actively working with U.S. Steel on its Site Specific Standard (SSS), Use Attainability Analysis (UAA), and Use and Value Demonstration (UVD) submittals. The MPCA requested that U.S. Steel provide additional data on the aquatic life impacts of its current discharges. Initial data suggest that there are impacts to aquatic life on the west side of the basin that are likely due to the levels of sulfate and/or total dissolved solids.
82. For the reasons set forth above, the MPCA finds that the Final 2018 Permit accommodates the pending rule change requests and administrative processes.
83. The MPCA specifically finds that it is not reasonable for the MPCA to delay issuance of this permit on the assumption that certain water quality rules will be changed.

Comment Number	Commenter Name	Summary of Comment	MPCA Response
3-7A	Water Legacy	The final Minntac Tailings Basin Permit should reconcile and disclose the chemical composition, volume and aquatic toxicity of process additives, including flocculants and flotation reagents, the use of which is implicitly authorized in the permit.	The additives have been updated in the facility description. All chemical additives used at the facility have been reviewed by MPCA toxicology staff.
3-7B	Water Legacy	The final Minntac Tailings Basin Permit should set a whole effluent toxicity limit of 1.0, require toxicity testing of undiluted effluent from both the east and the west sides of the tailings basin and conduct testing using at least one invertebrate species in Minnesota ecoregion streams known to be sensitive to conductivity and the major anions and cations in Minntac Tailing Basin discharge.	Items M & N
3-8	Water Legacy	Monitoring and pollution reduction mechanisms in the Minntac Tailings Basin Draft Permit should be revised to reflect impacts of excessive sulfate discharge on mercury methylation and phosphorus release from sediments. - The final Minntac Tailings Basin Permit and Fact Sheet should include a comprehensive analysis of the multiple factors in receiving waters that make discharge of elevated sulfate to the Sand River and Dark River sub-watersheds and the Little Fork River and Rainy River watersheds a high-risk situation for mercury in fish tissue, eutrophication and turbidity impairments.	See Item K in the "Categorical Responses to Comments"
3-8A	Water Legacy	The final Minntac Tailings Basin Permit should require monitoring for methylmercury, reactive phosphorus and total phosphorus in both effluent and receiving waters, with similar monitoring in unimpacted background waters.	See Item K in the "Categorical Responses to Comments"
3-8B	Water Legacy	The final Fact Sheet and Minntac Tailings Basin Permit schedule of compliance should discuss whether proposed treatment technologies and pollution reduction requirements are appropriate and sufficient to reduce risks of mercury methylation and phosphorus release from sediments affecting receiving waters.	See Item K in the "Categorical Responses to Comments"
4-1	EPA	The draft permit does not address, under MPCA's approved NPDES program and accordance with the CWA, all discharges to surface waters (Specifically including via groundwater) from this tailings basin. MPCA acknowledges in the fact sheet that discharges from this 8,700 acre tailings basin are causing exceedances of surface water quality standards. Based on this and facts supporting this conclusion, the CWA requires all such discharges to surface waters from the tailings basin be authorized by an NPDES permit.	See Item A in the "Categorical Responses to Comments"

Comment Number	Commenter Name	Summary of Comment	MPCA Response
4-2	EPA	The Sand River is not listed among the receiving waters authorized to receive discharges under the draft NPDES permit. Failing to include the Sand River as a receiving water to which U.S. Steel is authorized to discharge under the NPDES permit would constitute a discharge of pollutants to surface waters in the absence of NPDES permit coverage, a violation of the Clean Water Act.	See Item B in the "Categorical Responses to Comments"
4-3	EPA	Timber Creek is not listed among the receiving waters to which U.S. Steel would be authorized to discharge to under this NPDES permit.	See Item B in the "Categorical Responses to Comments"
4-4	EPA	There is evidence, based on aerial imagery that the tailings basin is creating ponding in wetlands immediately adjacent to the basin on both the east and west sides. However, the permit would not authorize these discharges, as wetlands are not among the surface waters to which the permittee would be authorized to discharge and, if confirmed, would constitute a discharge of pollutants to surface waters in the absence of NPDES permit coverage, a violation of the Clean Water Act.	See Item B in the "Categorical Responses to Comments"
4-5	EPA	None of the compliance schedules comport with 40 C.F.R. 122.47, as they do not contain dates by which the permittee must attain compliance with final effluent limits, and do not contain enforceable milestones that ensure that the permittee is attaining compliance as soon as possible.	See Item F in the "Categorical Responses to Comments"
4-6	EPA	The draft permit includes schedules that require submittals of plans and schedules that then would become part of the permit. It appears that these submittals would constitute permit modifications that do not follow the procedures for modifying permits, including issuing public notice, in 40 C.F.R. 124.	See Item F in the "Categorical Responses to Comments"
4-7	EPA	The Sand River and Twin Lakes are downstream waters receiving discharges from the tailings basin and it appears that wild rice production is an existing use in these water bodies as defined by 40 C.F.R. § 131.3(e). Therefore, MPCA needs to include the Sand River in the draft NPDES permit including water quality based limits that will meet all applicable water quality standards [including the state's wild rice standard based on the documented wild rice stands in the Sand River and Twin Lakes, or explain why this standard does not apply].	See Item J in the "Categorical Responses to Comments"

Comment Number	Commenter Name	Summary of Comment	MPCA Response
4-8	EPA	<p>Dark River at (SD001) - MPCA calculated WQBELs, shown in the fact sheet, for sulfate at 1221 mg/L daily maximum and monthly average of 1080 mg/L. The Draft Permit incorrectly expresses the monthly average limit as 1221 mg/L and does not contain the necessary daily maximum limit. Similarly, for specific conductance the fact sheet says that the daily maximum limit should be 1197 mg/L and the average monthly limit should be 1072 mg/L, but MPCA has only included an incorrect monthly average limit at 2430 mg/L. In addition, the fact sheet indicates that MPCA's calculation of the average monthly limit is based on 2x per month monitoring, but the permit only requires 1x per month monitoring. No justification for the discrepancy is included in the Fact Sheet.</p>	<p>Completion of the SCRS under the permit compliance schedule will eliminate surface discharge at this location. The permit does not assign limits to Station SD001 for the period prior to the completion of the Dark River SCRS because the MPCA has determined that treatment during this interim period is not feasible.</p>
4-9	EPA	<p>Class 1B Reach of the Dark River (AUID 09030005-525) - the fact sheet states that discharges from the tailings basin are contributing to an exceedance of water quality standards (sulfate) that applies in the section of the Dark River downstream of the tailings basin that is designated as a Class 1B water. MPCA is proposing to implement a limit based on the criteria that apply in the Class 1B reach at a compliance monitoring station upstream, rather than at a compliance point in the Class 1B segment. MPCA appears to be applying a rationale that the concentration of sulfate at the upstream location ("SW003") can be approximately double the criteria that must be met in the downstream Class 1B segment of the River, based in part on available dilution. It is unclear how MPCA can authorize a discharge, to a surface water that is not meeting criteria, and limit sulfate to more than double the concentration necessary to protect the criteria.</p>	<p>Monitoring for parameters related to the Class 1B use for the portion of the Dark River that is a designated trout reach will now be at the SW004 surface water station, located where County Road 65 crosses the Dark River. The permit contains a compliance schedule that requires elimination of the SD001 discharge as soon as possible. In addition, the permit contains a schedule to reduce discharges to groundwater sufficient to meet water quality standards at this monitoring location in the shortest reasonable period of time.</p>
4-10	EPA	<p>MPCA should conduct the reasonable potential analysis with the information that it has, and in addition should add monitoring requirements to the draft permit, for all of the surface water and discharge monitoring stations, monthly monitoring for at least the following parameters that have been detected in the discharge: Selenium, Arsenic, Cobalt, Copper, Manganese, and Thallium.</p>	<p>Reported concentrations of selenium, arsenic, cobalt, copper and thallium do not indicate that reasonable potential to cause or contribute to an exceedance of a water quality standard exists. For manganese, see the section in the Fact Sheet titled "iron and manganese monitoring."</p>

Comment Number	Commenter Name	Summary of Comment	MPCA Response
4-11	EPA	In a few paragraphs in the permit, MPCA requests that the company apply for permit modifications. As you are aware, the permit may be modified during its term for cause under 40 C.F.R. § 122.62. MPCA need not wait for the permittee to submit an application for permit modification, if, for example, MPCA promulgates and EPA approves new water quality standards that need to be applied in the permit, as this would be a cause for permit modification under 40 C.F.R. § 122.62(a)(2).	The requirement for U.S. Steel to apply for permit modification has been removed from the permit. MPCA will rely on its existing legal authority to amend the permit. See Minn. R. 7001.0170.
4-12	EPA	Federal Effluent Limitations Guidelines at 40 C.F.R § 440.10 - It is unclear how MPCA is implementing the zero discharge requirements at 40 C.F.R. § 440.12(c) which requires that the facility not discharge wastewater from mills ... with the exception of "a volume of water equivalent to the difference between annual precipitation falling on the treatment facility and ... the annual evaporation ... ". In this case the processing facility is located at the adjacent mining area which is covered under NPDES Permit No. MN0052493. In order to evaluate compliance with 40 C.F.R. § 440.12(c), discharges from the mining area permit and the tailings basin area permit would have to be considered. The permit would have to require monitoring and reporting of all of the discharges from the tailings basin rather than limiting the monitoring, reporting, and therefore the estimation of the volume of discharge, to just that which passes through the monitoring station at SD001.	The Development Document for Effluent Limitations Guidelines and Standards for the Ore Mining and Dressing Point Source Category, as well as 40 C.F.R. § 440.10, clearly separate "mining" and "milling" operations. 40 C.F.R. § 440.12(c) applies only to the mill, which is in the same watershed as the tailings basin, not the adjacent mining area. For the purpose mentioned here, the ELG Development Document classified the Minntac Tailings Basin as a "zero discharge" facility. The monthly precipitation and potential evaporation monitoring is included in the permit, along with the requirement that annual surface discharge from the tailings basin not exceed precipitation minus potential evaporation over that area.

Comment Number	Commenter Name	Summary of Comment	MPCA Response
4-13	EPA	<p>Construction of Dark River Seep Collection and Return System - It is unclear why MPCA is requiring the permittee to build a Seep Collection and Return System on the west side of the basin. There is no basis for this requirement provided in the fact sheet, and to our knowledge there is limited information as to how the system is predicted to resolve outstanding water quality standards exceedances in the Dark River. In a letter from EPA to the St. Paul District Army Corps of Engineers dated September 16, 2015 regarding the pending CW A Section 404 application for the construction of the Dark River Seepage Collection and Return System (SCRS), we articulated concerns regarding the substantial changes in hydrology and loss of function to wetlands within the project boundary as well as adjacent wetlands; specifically the effect the proposed discharges will have on water circulation, fluctuation, water chemistry, as well as secondary effects on aquatic ecosystems. The wetlands and open water complexes within the project footprint, as both conduits and storage basins for mine tailings seep water, will be subjected to increased concentrations of mine tailings constituents (e.g. hardness, total dissolved solids, specific conductance, alkalinity and sulfate), thus resulting in lower quality wetlands with diminished functional capabilities. In the fether, EPA objected to the construction of the Dark River SCRS because of a lack of compliance with the 404(b)(1) Guidelines. As such, EPA recommended a comprehensive monitoring plan and additional compensatory mitigation be required to address our concerns regarding the determination of wetland impacts and compensatory mitigation requirements.</p>	See Item C in the "Categorical Responses to Comments"
4-14	EPA	<p>We recommend that you provide latitude-longitude coordinates in the monitoring station identification descriptions to improve the precision of this information in the permit and fact sheet</p>	Decimal degree coordinates have been included in the revised permit, where available.
4-15	EPA	<p>Throughout the draft permit MPCA interchanges different names for monitoring stations. For example, "CR668" is sometimes used to refer to SW003 or D-1. To improve the clarity of the permit, we suggest MPCA revise the permit to refer to monitoring stations by the same name throughout the permit.</p>	The final permit uses consistent names where possible. Due to the long history of the site, there are many older documents and references that use other names for monitoring stations.

Comment Number	Commenter Name	Summary of Comment	MPCA Response
4-16	EPA	Internal outfall monitoring stations WS002, WS003, WS004, WS005, WS006 and WS007 were all removed from this permit when compared to the previous draft. Please provide an explanation as to why monitoring at these locations is no longer needed or desired.	Stations WS002, WS003, WS004, and WS005 were added to the permit after a 2008 Stipulation Agreement to monitor for conditions related to the requirement that there be no net increase in calcium and sulfate loading to process wastewater due to the operation of the Line 3 Scrubber Blowdown System. Since these conditions have been satisfied by offsetting the loading by utilizing Sump 6 as a source of replacement water, this monitoring is no longer required, and these stations will not be included in a reissued permit. Stations WS006 and WS007 were utilized to monitor for potential amine toxicity in the fine tailings wastestream to the basin. Since amine toxicity has not been an issue over decades of monitoring and because Whole Effluent Toxicity Testing will be conducted at the SD001 discharge station, monitoring at stations WS006 and WS007 will not be included in the reissued permit.
4-17	EPA	Please provide an explanation as to why the limit for oil and grease and monitoring for dissolved oxygen at SD001 have been removed from this draft permit when compared to the previously issued permit.	Oil and Grease is not a required parameter under Part 440 Categorical Standards. Monitoring was originally included due to concerns of utilizing petroleum contaminated materials in the grinding mills. New information (in the form of extensive monitoring) has not shown any evidence of these materials entering basin effluent in detectable quantities.
4-18	EPA	Please provide an explanation as to why dissolved oxygen monitoring requirements were removed from the surface water monitoring stations in the draft permit.	Although this information would be useful in completing site investigation activities, it is not a parameter that is expected to be significantly impacted by facility operations.
4-19	EPA	Please explain why the monitoring station SW004, which was proposed in the pre-public notice draft of the permit that EPA reviewed in 2014 to be located in the Class 1B reach of the Dark River has been removed completely from this draft of the permit.	Monitoring station SW004 has been included in the permit.
4-20	EPA	Please explain why monitoring for sulfate was removed for monitoring station SW005 during the final period.	The permit includes monitoring for sulfate at SW005 during the final period.
4-21	EPA	MPCA has included a schedule in the draft permit to require the permittee to reduce the concentration of sulfate in the basin pool water ultimately to 357 mg/L "within ten years of permit issuance, or the shortest reasonable period of time ... ". If MPCA intends for this schedule to end after ten years, the language should be revised to be clear that ten years is the maximum amount of time allotted to the permittee in this schedule. Also, neither this schedule nor any other included in the draft permit comports with 40 C.F.R. § 122.47.	See Items F and G in the "Categorical Responses to Comments". The MPCA has revised the schedule in question.

Comment Number	Commenter Name	Summary of Comment	MPCA Response
4-22	EPA	Aside from this schedule also failing to meet the requirements of 40 C.F.R § 122.47 because it lacks enforceable milestones, and a final compliance date, the schedule also appears to remove from MPCA the ability to approve any of the plans and schedules that the permittee would submit under the schedule. We recommend that the language be changed to provide the permittee with explicit plan requirements, specifications, quality assurance and milestones for any plan to allow the permittee to move forward in implementation of the plan once it is developed in accordance to those requirements. Such plans should be provided to MPCA 30 days prior to implementation. The permit should contain explicit, enforceable milestones that require the permittee to make progress toward and ultimately achieve compliance with water quality standards.	See Item F in the "Categorical Responses to Comments". The MPCA has revised the schedule in question.
4-23	EPA	While this schedule does require the permittee to construct and operate the Seep Collection and Return system by a date certain, and the text refers to monitoring requirements at SW003, there is no link to any "Final Period" or date at which the sulfate limit that is effective in the final period would come into effect. Therefore, this schedule also fails to comport to 40 C.F.R. § 122.47.	See Item F in the "Categorical Responses to Comments" and Response to Comment 1-29.
4-24	EPA	The schedule indicates that the permittee or MPCA would be evaluating the "mathematical relationship" of results from samples taken at "CR668" and "CR65" for 12 months. The text does not explain what the mathematical relationship should be compared to or evaluated against. There are no monitoring requirements in the permit at "CR65" (a.k.a. SW004), so it is unclear how the permittee is supposed to compare new data taken from the crossing of CR65 at the Dark River to data taken at SW003 (a.k.a. "CR668"). It is also not clear what MPCA is requiring the permittee to request in terms of a permit modification in this paragraph. As stated earlier, MPCA can modify the permit for cause under 40 C.F.R § 122.62, and would not necessarily need the permittee to apply for a permit modification if one of the causes listed in 40 C.F.R. § 122.62(a) are present.	See response to comment 1-27. The final permit does not include the mathematical relationship between sampling points.
4-25	EPA	Whole Effluent Toxicity (WET) testing is required by the draft permit in the Sand River watershed at SW005, which is over a mile from the basin. WET testing should be conducted on the effluent, and therefore on a sample taken from a monitoring station closer to the basin so that the sample can be as representative of the effluent as possible.	See Item M in the "Categorical Responses to Comments". The revised permit includes WET testing at SD001 and does not require WET testing at SW005.

Attachment 5 to Relators' List of Alleged Procedural Irregularities

**STATE OF MINNESOTA
IN COURT OF APPEALS**

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.	Case Nos. A19-0112, A19-0118, A19-0124 DECLARATION OF JEFFRY FOWLEY
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I, JEFFRY FOWLEY, in accordance with section 38.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

Background

1 – I am acting as a citizen hereby presenting to this Court information about improper practices that I believe have occurred in connection with the recent issuance of a permit for the Poly Met mining project (I take no position on the project itself). I submit this Declaration based on my personal knowledge. My statements in this Declaration are based on written materials that are in the administrative record or have otherwise been presented to this Court, except in those instances where I note that I am referencing information that I have obtained from confidential sources. While I think that the information I have obtained from these sources is extremely troubling, and could be grounds for a court to order an investigation, I believe that there is proof of improper practices based solely on the written records before this Court. I have applied my expertise as a long-time Clean Water Act attorney (documented below) to explain how these records alone show serious improper conduct.

2 – I am a retired attorney who worked for the U.S. Environmental Protection Agency (EPA) in the Office of Regional Counsel in the Region I (Boston) office from 1980 – 2017. From 1982 – 1995, I specialized in Clean Water Act (CWA) matters and headed the office’s water section. In that capacity, I provided legal advice regarding the issuance of many CWA National Pollutant Discharge Elimination System (NPDES) permits – Region I continues to directly issue such permits to dischargers in Massachusetts and New Hampshire, as those two states have not been authorized by EPA to administer the Clean Water Act program. Although I did not personally work on the reviews of state NPDES permits (conducted by Region I for the other New England States that have been authorized to administer the NPDES program), I have spoken on various occasions with EPA staff who conducted such reviews and am familiar with how such reviews are properly done. I am thoroughly familiar with the legal and technical requirements for NPDES permits – which must be followed whether a permit is being issued by an EPA Region or by an authorized State – and with the proper procedures that must be followed when issuing such permits. In addition to my experience within Region I, during my time at the EPA, I participated in many conference calls and meetings with managers and staff in the other EPA Regional offices, and thus also gained familiarity with how permits are issued and reviewed in the other Regions across the country.

3 – From 1996 – 2017, I worked as the senior Region I counseling attorney for Resource Conservation and Recovery Act (RCRA) – hazardous waste – matters. In this capacity, I principally worked on the reviews of state RCRA regulations that must be updated regularly by the States authorized to carry out the federal RCRA program. This

gave me further insights into how interactions between the EPA Regional offices and States generally are properly conducted, including how to ensure that such interactions are ethical and transparent. I am the principal author of the 2005 EPA national policy on State Equivalency (for RCRA), which sets guidelines for allowing the States more flexibility in *how* they carry out federal requirements, while still ensuring that there is meaningful federal oversight and the public health and environmental remain fully protected. I worked closely with senior officials in the Bush Administration, who supported the flexible but balanced approach that I had developed.

4 - In addition, during 1996 – 2017, I continued to be called upon by the EPA Region I management to advise on various NPDES permit matters (including handling NPDES permit appeals). This was in addition to my RCRA work. I thus maintained my expertise regarding the NPDES permits practice area. Since retiring, I have continued to keep up on developments in this area.

5 - During 2018, I worked part time as a consultant to the Environmental Integrity Project (EIP), a national environmental group. As one of my assignments, I drafted a letter which was sent to the EPA Deputy Administrator Henry Darwin, protesting about his plans to reduce the EPA's reviews of state permits. Mr. Darwin responded by asking if there were examples we could provide of recent state permits where more EPA involvement had been needed. In response, I interviewed people around the country regarding experiences with recent state permits. As a result of those discussions, I became aware of serious alleged problems with the NPDES permit being issued by the Minnesota Pollution Control Agency (MPCA) to Poly Met Mining, Inc. (Poly Met). While I uncovered concerns

regarding other permit reviews (or lack thereof) under the current federal administration, the Poly Met permit presented by far the most serious set of improper practices of all of the cases that I studied.

Irregularities Regarding Poly Met Permit Issuance

6 – After talking with various persons with knowledge of the situation, I filed a complaint on January 31, 2019 with the EPA Office of Inspector General (Inspector General) documenting what I had been told about the improper practices relating to the Poly Met permit (which by then had been issued). My contract with the EIP had expired, so I filed the complaint as an individual. As generally set out in my complaint, I have been told by various persons that (a) the EPA staff and career management had significant concerns about the planned permit which were not resolved in phone calls and meetings and thus they wrote comments in March 2018 which were finalized and ready to be sent; (b) the MPCA management then went over the heads of the career staff and got the EPA Regional Administrator (through her chief of staff) to direct that written comments not be sent; (c) the EPA and State then agreed to have the EPA staff read some of the key comments to State staff over the phone (in April 2018), in a manner that seemed designed to enable State staff to hear the comments but not to keep records of those comments, thus hiding them from the public and this Court; (d) the key problem with the permit – the lack of an adequate “reasonable potential” analysis and the resulting lack of pollutant specific and enforceable water quality based permit limits – was not fixed by the state in the final permit developed by the fall 2018 – yet the EPA again did not send any written comments to the State; and (e) When issuing the final permit, the MPCA created a record seemingly

designed to mislead the public and this Court by not mentioning or responding to the EPA comments which had been presented to them both in discussions during phone calls and meetings and by the April 2018 reading of the EPA comments. I acknowledge that parts of my complaint are based on information passed along from other persons. Moreover, to prevent possible retaliation against my sources, I have promised them confidentiality, so I cannot reveal their identities. However, the persons I have talked to all seem credible and I believe that the information provided in my Inspector General complaint is accurate. Certainly, I think that even the confidential information I have obtained is enough to justify investigations to determine the truth. The purpose of my complaint was not to finally settle the matters, but to alert the proper authorities of the need to investigate the matters.

7 – The Inspector General’s Office has found my information to be sufficiently credible to justify a preliminary investigation. They have interviewed me and several persons within EPA Region V. I understand that the Inspector General currently is considering whether to broaden the inquiry into a full investigation. I also am alerting this Court about the situation, since one of my concerns is that by not including key information regarding what happened in the administrative record, the MPCA is misleading this Court. As noted below, I am not suggesting that this Court determine at this time that there have been “irregularities in procedure” based on the confidential information that I have obtained. Rather, I believe that this Court could determine that there are such “irregularities in procedure” based solely on the written record before it, and an analysis of what this means (see below). On the other hand, I do think that there is a compelling need for

someone to look into all of my allegations – e.g., by taking live testimony from state officials – which I understand could occur if this matter was sent to a district court.

8 - Applying my knowledge regarding the Clean Water Act and NPDES permits, I believe that there is clear evidence of “irregularities in procedure,” based on the written record before this Court. I describe what I believe are violations of normal and proper procedures below.

Suppression of EPA Comments

9 – First, the fact that EPA did not send written comments to the State on this permit, after preparing them in March 2018, is itself evidence of misconduct. In paragraph 22 of its Answer to the Freedom of Information Act (FOIA) complaint filed by the Water Legacy group, the EPA has admitted that such written comments were prepared, although it says they were not “final.” Contrary to the MPCA’s assertions about what they say is an unusual number of phone calls and meetings that occurred regarding the Poly Met permit, it actually is not unusual for an EPA Region and a State to have a series of meetings on complex permit or other complex matters. What is highly unusual is that no written comment in this highly significant and complex matter were ever sent. When the EPA reviews state permits, there can be telephone calls and meetings between federal and state personnel. However, for significant and complicated permits like the Poly Met permit, it has been the consistent EPA practice to send written comments (in cases where it has initiated a permit review). The sending of such comments is necessary to fully communicate EPA concerns, which is hard to do on complex matters in a meeting or over the phone, unaided by a written document. In any event, the sending of written comments is essential in order to carry out

the EPA's oversight responsibilities, if in phone calls and meetings, important issues are not resolved. I think that it can be fairly inferred that the EPA prepared written comments in March 2018 because it had been determined (at the staff and career management level) that interacting with the MPCA through meetings and phone calls was not proving sufficient to resolve the permit issues. No legitimate explanation has been offered for why no written comments were sent.

10 – As noted in my complaint to the Inspector General, this misconduct is certainly attributable to the EPA. However, the MPCA also bears responsibility if it sought to have the written comments suppressed. As shown by a series of emails obtained by Water Legacy from the MPCA (attached as Exhibit 1), it does appear that Shannon Lotthammer of the MPCA had been communicating with the EPA Regional Administrator's Chief of Staff Kurt Thiede in March 2018 to prevent EPA written comments from being sent at that time. While the resulting "agreement" provided that EPA could instead send comments later after a final draft permit had been prepared by the State, no such EPA comments were later sent.

Receiving EPA Comments Off the Record and Failing to Keep Notes of Such Comments

11 – Second, in its response to the current motion, the MPCA has acknowledged that in April 2018, EPA comments were read to MPCA staff over the telephone. The EPA also has acknowledged this in paragraph 23 of its Answer to the FOIA complaint. In my opinion, it was improper for the MPCA to in effect receive written comments from the EPA by having them read over the phone. In all of 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. There is no legitimate reason why written comments which could be sent would instead be read over the phone. This clearly is a less effective way to communicate complicated matters than sending the written comments. The apparent purpose for only receiving such comments over the phone would be to obtain them off the record - to avoid the MPCA receiving written comments which it would then need to be put into the administrative record for the permit and to which it would then need to respond. In its response to the current motion, the MPCA has not pointed to any other reason why it participated in such a bizarre and unusual process.

12 – Third, in its response to the current motion, the MPCA has admitted that notes were taken of the April 2018 call. But it says that they were not retained. As a result, there are no notes of this call in the administrative record for the permit. Richard Clark states in his Declaration par. 15 that notes were taken by MPCA attorney Mike Schmidt and by an unnamed member of the Water Permit team. The MPCA’s outside counsel Richard Schwartz states in his brief/Response to the current motion (p. 5) that, “[b]ecause MPCA staff found nothing new or surprising in EPA’s comments, all of which had been covered and discussed in previous meeting and conference calls, ... it did not retain notes from the call.” It clearly was improper for the MPCA to not retain these records. In my experience, when there have been meetings or phone calls between the EPA and States on permit or other similar matters, it has been the routine practice across the country to take notes of such meetings or calls. Certainly, when such notes have been taken, it is generally understood that it is improper to destroy them – rather, they must be retained. Such notes

are considered to be official government records. When there is a permit or other proceeding, they must then also be included in the administrative record. But, in any event, they must always be retained.

13 – Even if the MPCA staff thought that there was nothing new or surprising in the EPA comments read to them during the April 2018 call, this is not a legitimate reasons to destroy official government records. Experienced personnel like the state personnel who listened to the call should have understood this. Certainly any attorney like Mike Schmidt should have known better (assuming that he actually destroyed his notes). In addition, it is misleading for the MPCA to characterize the April 2018 call as covering nothing new. My confidential sources have told me that this was the key call designed to address the unresolved permit issues. Even if this confidential information is disregarded, I think it can be inferred that there is something new and different occurring when detailed written comments are actually being provided (albeit by being read) as opposed to the earlier discussions which were unaided by having the detailed comments. Moreover, in par. 17 of his Declaration, Richard Clark notes that some of the issues presented by EPA during the April 2018 call were not resolved at that time – he says (erroneously) that they were resolved later in September 2018. That the call was addressing unresolved issues would have been a particularly compelling reason for retaining the notes of the call, although it would have been improper to destroy them even if all issues had been resolved. It also is puzzling that the MPCA has provided notes of various prior meetings and calls – through early March 2018 – although some of those notes record discussions on issues that were

not new – but says that because the April call did not cover new issues, it has destroyed the notes of that call.

14 -It is also puzzling that in response to requests from Water Legacy, MPCA has provided notes of calls through early March 2018 and from the fall, but with a gap between early March and September. Presumably during that time period, the State and EPA were continuing to have calls (in addition to the April call discussed above). This raises a fact question whether the MPCA stopped taking notes of calls, or whether notes from other calls have also not been retained.

15 – In my opinion, the misconduct by the MPCA has been compounded in the papers filed with this Court in response to the current motion. There is no sworn statement from anyone that the notes have in fact been destroyed – this statement is only made in an unsworn statement by the MPCA’s outside counsel. There is no Declaration at all from attorney Schmidt. In the Declaration from Richard Clark, he says that notes were taken by a member of the water permit team, but does not name the person. There are serious ethical violations that have occurred assuming that the notes actually have been destroyed (or worse, still exist but are not being produced), but the MPCA and its outside counsel seem to be making light of the situation. No information has been presented as to when and how the records were destroyed and at whose direction. There is no apparent effort underway to make sure that this kind of conduct does not continue to occur.

16 – The combination of the MPCA receiving written comments in an off the record manner over the phone, and then not retaining notes of the comments, together clearly presents very serious ethical violations. During my years of legal practice, I never before

have come across a situation where a government agency has behaved in this manner. In my opinion, this combination of facts alone would justify this Court finding that there have been “irregularities in procedure” even if this was the only problem with the permit proceeding.

Issuance of a Defective Permit that did not Address the key EPA Concern

17 – The final permit is defective. It is not backed by the federally required “reasonable potential” analysis used to determine whether strict water quality based limits are needed in a permit, and does not have the kind of federally required pollutant specific and enforceable water quality based limits that should have resulted from doing this right kind of analysis. My confidential sources have advised me that this was the key issue raised by the EPA (e.g., in the April 2018 call), and that it was never adequately addressed by the MPCA. My own analysis of the permit has confirmed that it is defective (see below). There also is other evidence that the permit did not resolve the key EPA concern. While the MPCA has submitted declarations in response to the current motion claiming that, in the declarants’ views, all issues were resolved, it is noteworthy that there is nothing in the administrative record from the EPA confirming that all issues were resolved. In my experience, if the EPA had agreed that all issues were resolved, it would have sent MPCA an email or letter confirming such a key fact.

18 - Under the federal Clean Water Act, it is not sufficient for permits to contain only technology based limits based on what companies' treatment systems generally are capable of meeting. Rather, pursuant to section 301(b)(1)(C) of the Act, any permit also must contain "any more stringent limitation . . . necessary to meet water quality

standards." Water quality based permit limits typically are needed when there are planned significant discharges into waterways with limited flow such as the creeks and wetlands into which the Poly Met company plans to discharge. The EPA regulations (which authorized states must follow in their own regulations) specify that any permit issuer must examine whether any pollutants planned to be discharged have the "reasonable potential" to cause water quality violations, and then must include water quality based permit limits for each pollutant for which there is such a reasonable potential. 40 C.F.R. § 122.44.

19 – There is a supposed “reasonable potential” analysis in the permit’s fact sheet. But my analysis of the fact sheet has confirmed that it does not contain the kind of mathematical calculations for each pollutant of concern needed to determine whether water quality standards potentially could be violated by the planned discharges (and thus whether additional controls are needed). These mathematical calculations are supposed to be done pollutant by pollutant to determine whether particular discharges (if not more strictly controlled) will cause violations of standards that have been set for the surrounding waters. If the surrounding waters are small creeks and wetlands (as here), there may be little dilution offered by the waters – thus meaning that even small amounts of pollutant discharges may cause exceedances of the water quality standards. Thus, a good reasonable potential analysis often results in the imposition of standards that are far more stringent than the otherwise applicable technology based standards. No such good reasonable potential analysis was done here.

20 - My analysis of the permit also has confirmed that it does not contain any pollutant specific water quality based permit limits. Instead, the permit according to the

fact sheet relies in part on so-called operating limits to help prevent reasonable potential, which are limits on internal flows “voluntarily” agreed to by the company, which do not necessarily ensure the protection of water quality. They also might not be federally enforceable, since they govern internal flows rather than the federally regulated discharges into surface waters. With respect to the federally regulated discharges, the permit has only technology based limits for the specific pollutants planned to be discharged.

21 - In MPCA’s brief (p. 6) and in the Declaration of Jeff Udd (par. 8), the MPCA indicates that it resolved the EPA concern about the lack of water quality based permit limits by adding a requirement to the permit “prohibiting discharges from violating water quality standards.” This is misleading. There are provisions that were included in the permit stating in general terms only that water quality standards should not be violated – see, e.g., conditions 5.1191 at p. 65, and 5.120.31 at p. 68. Such general provisions typically are included in NPDES permits in addition to having any required water quality based limits for particular pollutants (e.g., mercury, copper). In this permit, the MPCA included this general language *instead of* having the required specific limits, rather than *in addition to* the specific limits. This is insufficient to meet federal requirements and significantly weaker than what I have seen in permits issued by the EPA itself and other states.

22 - Also, the specific effluent limits that are in the permit for various pollutants to be discharged are technology based limits, which typically are far less stringent than what would be required by water quality based permit limits. It will be difficult to take

enforcement action against the company for violating general conditions, if it is complying with the technology based permit limits, even if meeting the water quality standards would require the company to do more. In the specific provisions, this permit seems to be telling the company that it is sufficient to meet technology based limits. The MPCA failed in this permit to tell the company what are the more stringent limits that must be complied with to meet the permit's general language and the water quality standards. Putting only general requirements into the permit was rather like telling people not to drive too fast rather than setting specific speed limits for each road.

23 - The permit also has a general prohibition against discharging toxic pollutants in violation of federal requirements at 5.183.251 (at p. 111). It states that “[w]hether or not this permit includes effluent limitations for toxic pollutants, the Permittee shall not discharge a toxic pollutant except according to Code of Federal Regulations, Title 40, sections 400 to 460 and ...[various state requirements].” However, like the provisions discussed above, this provision again contains only general and difficult to enforce language. In addition, the federal requirements referred to state only technology-based requirements. These general terms do not resolve the need for water quality based effluent limits and an enforceable permit.

Producing a Misleading Administrative Record

24 – The administrative record filed by the MPCA with this Court is misleading. In addition to not containing any record of the key April 2018 EPA – State call, it contains no responses to any of the EPA comments that the State received – in various other telephone calls and meetings as well as in the April call. I have personally examined the MPCA’s response to comments document – it reads as if there had been no EPA involvement in this permit at all.

25 – In its brief (p.13), the MPCA asserts that it adequately responded to comments made by the EPA in its responses to other commenters. However, the MPCA never said that it was responding to concerns shared by the EPA. Since the EPA has special expertise, I think it is misleading to produce an administrative record that does not mention that the EPA shared some of the other commenters’ concerns. Also, while the various responses to comments cited in the brief do seem to address some of the issues raised by the EPA, in the absence of any record of the key April 2018 call, I am unable to conclude that they address all of the EPA comments that were made. For example, response to comment Water-729 says that the MPCA conducted a reasonable potential analysis, but does not address what I understand were specific EPA concerns that the State’s analysis was not done correctly.

26 – The MPCA’s brief misunderstands how the EPA actually conducts most permit reviews. It is true that the EPA has special rights under subsection 402(d)(2) of the Clean Water Act to “object[] in writing” to a proposed state NPDES permit, in which case the state may not issue the permit until the EPA objection is resolved. This is known as the

EPA's "veto" authority. If the EPA objection is not resolved, the EPA has the right to take over issuance of the permit. CWA subsection 402(d)(4). But the EPA seldom goes so far as to start this formal objection process. Rather, when it reviews a state permit, the EPA generally sends written comments to the State, expressing its concerns without saying that it is posing a formal objection. Typically, this results in the EPA and State reaching agreement on the issues of concern, without the need for any formal EPA objection.

27 – However, this kind of process only works if the EPA concerns are included by the State in the permit's administrative record and responded to by the State. In that way, the public and a reviewing court (if the permit is appealed) can see if and how the EPA concerns were resolved. As happened here, a state sometimes can proceed to issue a permit with which the EPA is not in agreement, but which the EPA has chosen not to block by issuing a formal objection. In that circumstance, people count on the fact that the EPA comments – and the state's response – are in the state's administrative record and can be reviewed by a state court. It is left to the reviewing court to determine whether the EPA's unresolved concerns mean that a permit is defective, or if the State has produced an adequate explanation showing why it did not need to follow the EPA's views.

28 – Of course, this kind of transparent process was circumvented here when the MPCA received EPA's written comments by having them read over the phone, and then did not retain the notes showing what those comments were, and also did not respond to those comments.

29 – In its brief (p. 15), the MPCA also misinterprets 40 C.F.R. § 124.17, the federal requirement mandating that authorized states must respond to comments. When the EPA

files written comments on state permits or other matters (such as the state RCRA regulations that I reviewed), the typical and correct process is for the states to respond to those comments along with any other comments. To interpret section 124.17 as not requiring this is absurd. This would give EPA fewer rights than other commenters, and undercut the ability of EPA to work cooperatively with States without always needing to file formal permit objections.

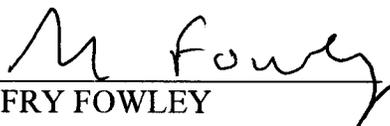
30 – Finally, the MPCA in its brief misunderstands the nature of a key EPA document that Water Legacy is trying to obtain and then get included in the administrative record for the permit. In paragraph 23 of its Answer to the FOIA complaint filed by Water Legacy, the EPA has admitted that its staff verbally shared portions of its written comments with State personnel during the April 2018 phone call, and that the EPA has retained a copy of a document “that memorializes what was shared verbally with MPCA staff.” This EPA document does not contain internal comments not shared with the State – rather the marked up document is a record of comments that were actually made to the State. Since MPCA (through its outside counsel) has stated that the MPCA records of the April 2018 call were not retained, the EPA document may be the only record of that call.

31 - In my opinion, such a document – if and when obtained from the EPA – should be included in the administrative record for this permit. This would at least partially rectify the ethical violations that have occurred and enable this Court to fully consider the EPA’s concerns. It also would level the playing field since when EPA comments are made on permits in other states, they are included in their administrative records. The many state

environmental agencies that act honorably retain records of their various interactions with the EPA.

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

Dated: June 5, 2019
Essex County
Marblehead, MA


JEFFRY FOWLEY

Subject: RE: Polymet Draft Permit Discussion
Date: Friday, March 16, 2018 at 2:39:32 PM Central Daylight Time
From: Udd, Jeff (MPCA) (sent by FYDIBOHF23SPDLT </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP /CN=RECIPIENTS/CN=E2EA3D7349CD4899865CE8C41466294E-JUDD>)
To: Clark, Richard (MPCA), Handeland, Stephanie (MPCA)

And I just got off the phone with Kevin. He would like to continue with the routine check-in meetings every few weeks as we go through the comments and any permit revisions. He would like to have one the first week of April to walk through what the comment letter would have said if it were sent.....

From: Udd, Jeff (MPCA)
Sent: Friday, March 16, 2018 2:06 PM
To: Clark, Richard (MPCA) <richard.clark@state.mn.us>; Handeland, Stephanie (MPCA) <stephanie.handeland@state.mn.us>
Subject: FW: Polymet Draft Permit Discussion

Here's the plan.....

From: Lotthammer, Shannon (MPCA)
Sent: Friday, March 16, 2018 2:00 PM
To: Thiede, Kurt <thiede.kurt@epa.gov>
Cc: Korleski, Christopher <korleski.christopher@epa.gov>; Pierard, Kevin <pierard.kevin@epa.gov>; Nelson, Leverett <nelson.leverett@epa.gov>; Holst, Linda <holst.linda@epa.gov>; Stepp, Cathy <stepp.cathy@epa.gov>; Stine, John (MPCA) <john.stine@state.mn.us>; Smith, Jeff J (MPCA) <jeff.j.smith@state.mn.us>; Udd, Jeff (MPCA) <jeff.udd@state.mn.us>; Schmidt, Michael R (MPCA) <michael.r.schmidt@state.mn.us>
Subject: RE: Polymet Draft Permit Discussion

Hi Kurt –

Thank you for your message. We concur with your characterization below of what we have agreed to for the Polymet draft permit next steps.

Thank you also for your demonstrated commitment to continued dialogue and cooperation, which we share. I have made a note of the suggestion for a face-to-face meeting, and will work with our team to determine when we've reached a good point to get that set up. In the meantime, if you have any questions, please let me know.

Kind regards,
Shannon

Shannon Lotthammer
Assistant Commissioner
Minnesota Pollution Control Agency
Shannon.lotthammer@state.mn.us
651/757-2537

Working to protect and improve the environment and human health.

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From: Thiede, Kurt [<mailto:thiede.kurt@epa.gov>]
Sent: Friday, March 16, 2018 12:44 PM
To: Lotthammer, Shannon (MPCA) <shannon.lotthammer@state.mn.us>
Cc: Korleski, Christopher <korleski.christopher@epa.gov>; Pierard, Kevin <pierard.kevin@epa.gov>; Nelson, Leverett <nelson.leverett@epa.gov>; Holst, Linda <holst.linda@epa.gov>; Stepp, Cathy <stepp.cathy@epa.gov>
Subject: Polymet Draft Permit Discussion

Shannon,

Thanks once again for working with us to find a solution to this matter. Here is our understanding of what EPA and MPCA have agreed to.

Once MPCA completes their response to public comments, it will develop a pre-proposed permit (PPP) and provide the PPP to EPA Region 5. Region 5 EPA will have up to 45 days to review the PPP and MPCA's responses to public comments and provide written comments on the PPP to MPCA. This would occur prior to MPCA submitting a proposed permit to EPA, which, according to the current MOA, would continue to give EPA 15 days to comment upon, generally object to, or make recommendations with respect to the proposed permit. In accordance with the current MOA and as specified in CWA Section 402(d)(2)(B) and 40 C.F.R. 123.44(b)(2), EPA still may raise specific objections within the 90 day period from receipt of the "final" proposed permit, but we are hopeful our discussions and the additional review will allow us to come to an agreement and avoid objections.

Again, it is our hope and intent to continue a dialog between MPCA staff and R5 EPA WD staff prior to receipt of the PPP and during EPA's review of the PPP as we work toward a NPDES permit that both parties

can support. In fact, I would like to suggest setting up a face-to-face meeting when appropriate to discuss the draft permit and EPA observations. It is also our intent to turn around our review and comments on the PPP as soon as possible.

Please let me know if you have any questions.

Sincerely,

Kurt A. Thiede
Chief of Staff
U.S. EPA, Region 5
Office of the Regional Administrator
77 W Jackson Blvd
Chicago, IL 60604
Email: thiede.kurt@epa.gov
Office: (312) 886-6620

Attachment 6 to Relators' List of Alleged Procedural Irregularities

**STATE OF MINNESOTA
IN COURT OF APPEALS**

In the Matter of the Denial of Contested Case Nos.
Case Hearing Requests and Issuance of A19-0112, A19-0118, A19-0124
National Pollutant Discharge Elimination
System/ State Disposal System Permit No.
MN0071013 for the Proposed NorthMet
Project St. Louis County Hoyt Lakes and
Babbitt Minnesota.

**FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA’S NOTICE OF
JOINDER IN RELATOR WATERLEGACY’S MOTION TO TRANSFER TO
THE DISTRICT COURT OR FOR A STAY**

Relator Fond du Lac Band of Lake Superior Chippewa (“Fond du Lac”) respectfully provides notice that it hereby joins Relator WaterLegacy’s motion to transfer this matter pursuant to Minn. Stat. § 14.68 to the District Court for the County of Ramsey, due to irregularities in procedure, or alternatively for a stay.¹

On May 17, 2019, WaterLegacy moved this Court pursuant to Minn. Stat. § 14.68 to transfer this matter to the District Court due to irregularities in procedure or alternatively for a stay pursuant to Minn. Stat. § 14.65 (“Transfer Motion”). Respondents Minnesota

¹ Fond du Lac initially supported the Transfer Motion and indicated its intent to join as noted in Relators’ Motion for Extension of Time to File a Reply and Extend the Opening Briefing Schedule, at 1 n.1 (May 24, 2019). Fond du Lac explained it had an interest in joining “given MPCA’s representations that they will need to present facts and evidence outside the administrative record, which could impact issues in these appeals.” *Id.* In joining the Transfer Motion, Fond du Lac does not raise any new issues or arguments. Bichler Dec. ¶ 3. As such, Fond du Lac does not believe that its joinder will affect the submission and processing of the Transfer Motion. *Id.*

Pollution Control Agency (“MPCA”) and Poly Met Mining, Inc. (“PolyMet”) opposed the Transfer Motion and filed their responses on May 31, 2019. WaterLegacy filed its reply in support of the Transfer Motion on June 5, 2019.

After reviewing the papers and evidence submitted for the Transfer Motion, Fond du Lac is alarmed over the extra-record evidence of irregularities in this matter, including the irregularities detailed by Jeffrey Fowley in his declaration provided in WaterLegacy’s reply. Mr. Fowley’s declaration speaks for itself regarding the substantial evidence of irregularities. Mr. Fowley alleges, *inter alia*, that “it was improper for the MPCA to in effect receive written comments from the EPA by having read them over the phone. In all of my years of experience, I have never heard of a situation [like this].” Fowley Decl. ¶ 11. Mr. Fowley has 37 years of experience as an attorney for the U.S. Environmental Protection Agency’s (“EPA”) Office of Regional Counsel in Region I. Fowley Decl. ¶ 2. Mr. Fowley “take[s] no position on the project itself,” but is “acting as a citizen . . . presenting to this Court information about improper practices” he believes occurred in connection with MPCA’s issuance of a National Pollutant Discharge Elimination System permit to PolyMet. Fowley Decl. ¶ 1.

Fond du Lac is particularly concerned that MPCA does not offer any evidence to dispute Mr. Fowley’s allegations that MPCA Commissioner John Linc Stine called Regional Administrator Cathy Stepp to “complain[] about the planned comments” and “Region [V] cooperated with the State in helping to keep such comments off the state record, in ways that seem designed to hide the concerns from the public and even from the Minnesota state appeals court that is expected to review the permit.” Transfer Motion at

6. For these allegations, WaterLegacy notes that MPCA “submitted no contrary declarations” in its response to the Transfer Motion. WaterLegacy Reply at 13.

MPCA’s failure to rebut these allegations with evidence demonstrates the need for additional factfinding in the District Court to resolve these issues. On the record detailed in documents supplied by WaterLegacy and by Mr. Fowley, MPCA is alleged to have pressured an EPA political appointee to suppress written comments of career EPA staff; carried out a plan to keep those comments off the record; manufactured a record to obfuscate EPA’s concerns; and destroyed its notes documenting these efforts. Mr. Fowley explains, in his expert opinion, why this all matters and is irregular. *See* Fowley Decl. ¶¶ 24-31.

MPCA’s irregular conduct should not be ignored and Relators should have the opportunity for additional factfinding. The issues raised by the Transfer Motion directly impact Fond du Lac’s issues on appeal due to procedural irregularities. Bichler Dec. ¶ 2. Fond du Lac therefore believes that it would be severely prejudiced if this Court denies the Transfer Motion. *Id.* Accordingly, Fond du Lac respectfully joins the Transfer Motion for the reasons set forth by WaterLegacy and in the declaration of Jeffry Fowley.

Dated: June 6, 2019

Respectfully submitted,

/s/ Seth Bichler

Sean Copeland (#0387142)

Tribal Attorney

Seth Bichler (#0398068)

Staff Attorney

Fond du Lac Band of Lake Superior Chippewa

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

Attachment 7 to Relators' List of Alleged Procedural Irregularities

**STATE OF MINNESOTA
IN COURT OF APPEALS**

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.	Case Nos. A19-0112, A19-0118, A19-0124
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**RELATORS' NOTICE OF WITHDRAWAL OF MOTION FOR A STAY AND
CONTINUING REQUEST FOR TRANSFER TO DISTRICT COURT
DUE TO IRREGULAR PROCEDURE**

Relators WaterLegacy and Fond du Lac Band of Lake Superior Chippewa (“Relators”) respectfully provide notice that they hereby withdraw their motion for stay pursuant to Minn. Stat. § 14.65. On May 17, 2019, WaterLegacy moved this Court pursuant to Minn. Stat. § 14.68 for transfer to the district court due to procedural irregularities or, in the alternative, for a stay under Minn. Stat. § 14.65 pending receipt of written comments of the U.S. Environmental Protection Agency (“EPA”) on the PolyMet NorthMet project draft National Pollutant Discharge Elimination System/State Disposal System permit. Relators withdraw their motion for stay because it is now moot due to Relators’ receipt on June 12, 2019 of EPA’s written comments on the draft permit, including an annotated copy of the comments indicating what was read verbatim to Minnesota Pollution Control Agency (“MPCA”) staff on April 5, 2018, attached hereto as Attachment A.

Because the motion for stay is now moot, Relators respectfully request the Court to rule solely on Relators’ Motion for Transfer to the district court pursuant to Minn. Stat.

§ 14.68 on the grounds stated in our Motion for Transfer and Reply and to resolve additional disputed questions of fact raised by EPA's comments and in MPCA's sur-reply.

Dated: June 13, 2019

Respectfully submitted,

/s/ Paula G. Maccabee

Paula G. Maccabee (#129550)
JUST CHANGE LAW OFFICES
1961 Selby Avenue
St. Paul, Minnesota 55104
(651) 646-8890
pmaccabee@justchangelaw.com

Attorney for Relator WaterLegacy

/s/ Matthew L. Murdock

Sean Copeland (#0387142)
Tribal Attorney
Seth Bichler (#0398068)
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Matthew L. Murdock (*Pro Hac Vice*)
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& Perry, LLP
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Washington, D.C. 20005
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mmurdock@sonosky.com

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

ATTACHMENT A

Subject: FW: WaterLegacy v. EPA (19-412) Discretionary Production and Proposed Stay
Date: Wednesday, June 12, 2019 at 2:23:47 PM Central Daylight Time
From: Kevin Bell
To: Paula Maccabee
Attachments: (1) Annotated Copy.pdf, (2) Clean Copy, Enclosure.pdf, Waterlegacy Joint Motion To Stay.docx

the agency rolled over and gave us the comments, so hooray we win! I'm going to agree to the motion to stay the case for now and we'll work on settlement negotiations in the next two weeks

Kevin

From: Bermes, Peter <Bermes.Peter@epa.gov>
Sent: Wednesday, June 12, 2019 2:50 PM
To: Kevin Bell <kbell@peer.org>
Cc: Kahn, Matthew (USADC) <Matthew.Kahn@usdoj.gov>
Subject: WaterLegacy v. EPA (19-412) Discretionary Production and Proposed Stay

Hello Kevin,

Attached is the single document at issue in this case, both the annotated version and a clean copy, as requested. The Agency is providing these records as a discretionary release. As the only two records at issue in this case are now provided in full, the Agency proposes to vacate the briefing schedule and allow two weeks to discuss any outstanding issues. Also attached is a proposed joint motion to stay.

Please review, and if the language in the proposed joint motion is acceptable to you, we will file it today. If you'd like to discuss, we are happy to have a call. As you know, we have a filing due with the Court today, so please let us know as soon as possible how you would like to proceed.

Thank you,

Peter

Peter Bermes
Attorney-Advisor, Office of General Counsel
United States Environmental Protection Agency
312-886-6631 | Room R1325



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

The information underlined in the
attachment to this letter was

REPLY TO THE ATTENTION OF:

conveyed verbally to MPCA
on April 5, 2018. This was read

WN-15J

word-for-word to PCA participants Richard Clark, Mike Schmidt, Jeff Udd,
Jeff Udd and Stephanie Handeland. EPA participants Mark Compton, Krista McKim,
Metallic Mining Director Barbara Wester, Candice Bauer, Mark Ackerman &
Minnesota Pollution Control Agency Kevin Pierard.
525 Lake Avenue South, Suite 400
Duluth, MN 55802

Wm. J. D. 4.5.18

Re: U.S. Environmental Protection Agency Review of the Public Notice Draft NPDES Permit,
PolyMet Mining, Inc., NorthMet Project, Permit No. MN0071013

Dear Mr. Udd:

The U.S. Environmental Protection Agency (EPA) has reviewed the Public Notice Draft National Pollutant Discharge Elimination System (NPDES) Permit, fact sheet, and supporting documents for the proposed PolyMet Mining, Inc., NorthMet Project, Permit No. MN0071013 received from the Minnesota Pollution Control Agency (MPCA) on January 17, 2018.

EPA would like to recognize the progress that has been made regarding the design of the NorthMet project over the duration of the environmental review process. PolyMet is proposing advanced water treatment and project design components that include a tailings basin seepage capture system. Specifically, as part of the NorthMet project, the proposed seepage capture system, as described in the fact sheet on pages 17 and 70, is designed to capture the existing discharge from the tailings basin owned by Cliffs Erie, LLC that currently discharges to receiving waters surrounding the basin. EPA would also like to note that the proposed water capture systems for the mine site, plant site, and other associated areas is designed to be integrated into the project's overall water management system. The advanced water treatment technology is a step forward toward protecting water quality and we commend both MPCA and PolyMet for their effort to require and utilize this technology.

Enclosed for your consideration are our comments on the Public Notice Draft Permit. We hope that these will be helpful to MPCA as it works to prepare a proposed permit. EPA will continue to work with MPCA in our review of the proposed permit for this facility to ensure the permit issued by MPCA is consistent with the Clean Water Act (CWA) and implementing regulations. Please note that the comments below are abbreviated, and additional details are included in the Enclosure to this letter.

1. **Water Quality Based Effluent Limitations** – The draft permit does not include water

quality based effluent limitations except as described in the fact sheet (p. 41) for pH or any other conditions that are as stringent as necessary to ensure compliance with the applicable water quality requirements of Minnesota, or of all affected States, as required of all state programs by CWA Section 402(b), 33 U.S.C. § 1342(b); and 40 C.F.R. §§ 122.4(d), 122.44, and 123.44(c)(1), (8)-(9). Furthermore, the permit includes technology based effluent limitations that are up to a thousand times greater than applicable water quality standards.

2. **Effluent Limitations Guidelines Calculation** – The draft permit does not include all the requirements of 40 C.F.R. 440, Subparts G, J, and K that apply to this proposed project, including a restriction on discharge volume that is in conformance with 40 C.F.R. § 440.104(b)(2)(i) and that is equivalent to the annual net precipitation for the site.
3. **Permit Enforceability Concerns** – Several sections of the draft permit present enforcement issues that should be revised to ensure compliance with 40 C.F.R. §§ 122.4(a) and (d) (see also 40 C.F.R. § 123.44(c)). For example, the permit as written may preclude enforcement per CWA Section 402(k), 33 U.S.C. § 1342(k), for pollutants disclosed during the application process but for which there are no limitations, or for water quality standards excursions where the limitation provided in the permit appears to be greater than the applicable state water quality criterion. Additionally, the permit contains “operating limits” on an internal outfall that may not be enforceable by EPA, citizens, and potentially MPCA and, thus, may be ineffective at protecting water quality under the Clean Water Act (see 40 C.F.R. §§ 122.4(a), (d)).
4. **Decision Making Procedures** – The draft permit states that certain plans, reports, and other actions are effective parts of the permit upon submittal by the permittee, making them de facto permit modifications that, in some instances, are likely to be major modifications subject to 40 C.F.R. § 122.62 (for example, see permit section 6.10.38). EPA is concerned that the permit allows both the permittee and MPCA to modify the permit without following the public process for major permit modifications under 40 C.F.R. § 122.62. Permit modifications that do not follow federal regulations may be unenforceable, may cause confusion for regulators and public over what is covered by the permit, and therefore would not ensure compliance with the CWA (see 40 C.F.R. § 122.4(a)).

The above concerns must be addressed to ensure that the permit will achieve compliance with all applicable requirements of the CWA, including water quality requirements of Minnesota and of all affected states. If unaddressed, the above concerns may result in an EPA objection to a proposed permit. See 40 C.F.R. §§ 123.44(c)(1), (5), (7), and (9). In addition to the issues identified above, we also recommend that you consider and address the additional comments and recommendations provided in the Enclosure.

We look forward to working with you as we conduct a formal review of the permit consistent with Section II of our Memorandum of Agreement. When the proposed permit is prepared, please forward a copy, any significant comments received during the public notice period, and MPCA’s responses thereto, to r5npdes@epa.gov. Please include the EPA permit number, the facility name, and the words “Proposed Permit” in the message title. If you have any questions

related to EPA's review, please contact Mark Ackerman at (312) 353-4145 or at ackerman.mark@epa.gov. Thank you for your cooperation during the review process and your thoughtful consideration of our comments.

Sincerely,

Kevin M. Pierard, Chief
NPDES Programs Branch

Enclosure

cc: Richard Clark, electronically
Stephanie Handeland, electronically

bcc: Barbara Wester, ORC
Jillian Rountree, ORC
Krista McKim, NPDES

Path and File Name:

https://Usepa.Sharepoint.Com/Sites/R5/Wd/NPDES/R5miningteam/Shared Documents/Polymet-Northmet/Draft Permit Comment Letter/MN0071013_Polymet Northmet_Draftperltr_2018_03-14.Docx

Enclosure

U.S. Environmental Protection Agency
Public Notice Draft Permit Received January 17, 2018
PolyMet NorthMet
Permit No. MN0071013

Comments and Recommendations to Ensure Consistency with the Clean Water Act**Water Quality Based Effluent Limitations**

The draft permit does not include water quality based effluent limitations (WQBELs) except as described in the fact sheet (p. 41) for pH or any other conditions that are as stringent as necessary to ensure compliance with the applicable water quality requirements of Minnesota, or of all affected States, as required of all state programs by CWA Section 402(b), 33 U.S.C. § 1342(b); and 40 C.F.R. §§ 122.4(d), 122.44, and 123.44(c)(1), (8)-(9). Furthermore, the permit includes technology based effluent limitations (TBELs) that are up to a thousand times greater than applicable water quality standards.

1. We acknowledge MPCA's consideration in the draft permit of the federal regulations at 40 C.F.R. Part 440 Subparts G, J, and K, including TBELs. See permit sections 6.10.44 and 8.1.1. However, the permit does not include WQBELs for key parameters and appears to 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. This concern would be resolved if the permit included WQBELs for these parameters. (1)
2. The permit lacks clear narrative effluent limitations such as an unqualified general prohibition on discharges that would cause exceedances of water quality standards (WQS). For example, at paragraph 6.16.4, the permit prohibits toxic discharges, but the condition also includes an exception for situations in which TBELs apply, as is the case with several of the parameters covered by the draft permit. EPA's concern could be resolved if MPCA establishes WQBELs for the authorized discharge and, additionally, removes the qualifying language from paragraph 6.16.4 to clearly prohibit discharges that would cause exceedances of water quality standards. (2) (3) (3b)
Hg, Cu, As, Cd, Zn
3. The permitting record does not appear to demonstrate that MPCA considered all the pollutants that were disclosed in the permit application as being present in the proposed discharge when evaluating the need for WQBELs. Thus, in the absence of WQBELs, there is no assurance that the discharge will meet applicable water quality standards. (4)
MPCA should, therefore, consider in its analysis all the pollutants that were presented in the application materials as potentially present in the proposed discharge to determine those WQBELs that are needed in the permit. Further, if MPCA considers a particular parameter to be the key to ensuring the facility will meet all applicable water quality standards, e.g., copper at monitoring station WS074 (permit section 6.10.40) or sulfate at monitoring station WS074 (permit section 6.10.31), the permit should include appropriate WQBELs at monitoring location SD001 to ensure that these internal operating limits result in meeting applicable water quality standards at the point where the discharge is sent to receiving waters (see also comment 6, below). (4b)

Enclosure

U.S. Environmental Protection Agency
Public Notice Draft Permit Received January 17, 2018
PolyMet NorthMet
Permit No. MN0071013

4. The fact sheet's reasonable potential analysis relies on the assumption that data provided in the application are maximum values without taking into account the potential variability and uncertainty in the discharge from this new source. Under the Addendum to the EPA-MPCA National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement for the GLI (Great Lakes Initiative) (May 8, 2000), Minnesota committed to "use only alternative statistical procedures for deriving PEQ¹ that meet the standard in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2."² To resolve EPA's concern, MPCA should consider that the data provided in the application materials are estimates based on assumptions and modeling outputs and ensure that its reasonable potential analysis is consistent with the procedures in 40 C.F.R. Part 132, Appendix F, Procedure 5. (5)
5. At pages 34-37 of the fact sheet,³ MPCA states that its decision that WQBELs are not needed in the permit relies on the operational limits for sulfate (in milligrams per liter) and copper (in micrograms per liter) at internal outfall WS074. Although these limits are set to low values, including the copper limit that is set to the water quality standard, (calculated by assuming a hardness value of 100 mg/L), there is nothing definitive in the permit or supporting information that justifies a conclusion that meeting these operational targets will result in meeting water quality standards for all the parameters in the permit application. This is especially a concern for mercury, for which the standard is specified in nanograms per liter and the pilot study⁴ states that the effectiveness of the treatment system to remove mercury is unknown. (6)
6. The permit requires that no sulfate or copper be added to the discharge after monitoring station WS074, but does not prohibit the addition of any other additives between monitoring station WS074 and the final outfalls. In fact, the permit record shows that the effluent of the water treatment system will require mineral addition prior to its discharge to surface waters to reduce the toxicity due to the low ionic strength of the treated water. This raises two concerns. First, the permitting record includes information showing that available local sources of lime contain aluminum in levels that, if used, will likely result in a discharge that exceeds the applicable water quality standard for aluminum.⁵ While MPCA appears assured that higher cost lime containing lower levels of aluminum is available and will be used, to ensure that likely variability in the quality and price of available lime does not result in exceedances of the applicable water quality standard, the (7)

¹ "Projected Effluent Quality," (PEQ) is described in 40 C.F.R. Part 132, Appendix F, Procedure 5 Paragraph B.2.

² "EPA and MPCA agree that MPCA will use only alternative statistical procedures for deriving PEQ that meet the criteria in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2. EPA and MPCA further agree that EPA retains the authority to review any specific statistical procedures Minnesota intends to use for deriving PEQs and to object to permits that have been developed using statistical procedures that do not meet the requirements of Paragraph B.2. of Procedure 5."

³ "To ensure the WWTS is operating as designed and to remain consistent with the assumptions made in the FEIS, the permit includes an internal performance monitoring point (Station WS074) where an Operating Limit of 10 mg/L sulfate applies. The Operating Limit at WS074 is an enforceable permit limit but is neither a water quality based permit limit nor a technology based permit limit because there is no Reasonable Potential." (p. 35).

⁴ See page 43 of "Final Pilot-testing Report" dated June 2013.

⁵ See page 31 of the "Final Pilot-testing Report" dated June 2013.

Enclosure

U.S. Environmental Protection Agency
Public Notice Draft Permit Received January 17, 2018
PolyMet NorthMet
Permit No. MN0071013

75
permit should include a WQBEL for aluminum at the final discharge points or an internal outfall after mineral addition. Second, in light of the potential for whole effluent toxicity to occur, the permit should include whole effluent toxicity limits at the final discharge points or an internal outfall after mineral addition. 8
86

7. EPA is concerned that the permit and supporting materials do not include sufficient information to explain how downstream water will be protected consistent with CWA Section 402(b)(5), 33 U.S.C. § 1342(b)(5), based upon the following considerations, including: (1) downstream receiving waters exceed the applicable state and downstream state human health and wildlife water quality standard for mercury, and (2) the pilot study states that the effectiveness of the treatment system to remove mercury is unknown. 9
We note that a downstream tribe, that has "Treatment as a State" and federally approved WQS, has notified EPA that the project is likely to contribute to exceedances of its downstream WQS, including for mercury. MPCA should ensure that its permit will ensure compliance with downstream state WQS.

In summary, EPA recommends that MPCA include WQBELs in the permit for those parameters identified in the application that are expected to be in the discharge and for which Minnesota has applicable WQS. We note that as this is a new discharger, the inclusion of WQBELs for these parameters would be prudent and provide a basis for measuring the performance of the new treatment technology proposed by the applicant. We also note that in subsequent permit cycles, after the facility has achieved full operation, such limits could be modified or deleted if no reasonable potential to exceed water quality standards is demonstrated.

Effluent Limitations Guideline Calculation

The draft permit does not include all the requirements of 40 C.F.R. 440, Subparts G, J, and K that apply to this proposed project, including a restriction on discharge volume that is in conformance with 40 C.F.R. § 440.104(b)(2)(i) and that is equivalent to the annual net precipitation for the site. 10

Permit sections starting at 6.10.1 include a formula that retrospectively calculates the allowable discharge flow and includes a "carryover" amount defined as "the difference between the allowable annual discharge volume and the actual volume discharged" which acts as a "credit" that the permittee is allowed to apply to the following calendar year. This "carry over credit" appears to be in contradiction to the applicable regulatory definitions of "annual precipitation," "annual evaporation," and "mine drainage" at 40 C.F.R. § 440.132(b), (h). We recommend setting a numeric limit on flow, including this limit in the permit, and ensuring that it is consistent with 40 C.F.R. § 440.104(b)(2)(i). 105

In addition, we recommend that MPCA consider the applicability of – and inclusion of – effluent limitations contained in 40 C.F.R. § 440.12, and 40 C.F.R. Part 440, subpart A (iron ore), as the project discharge could include legacy pollutants. 11
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Permit Enforceability Concerns

MPCA should address the following concerns.

1. The permit as written may preclude enforcement per CWA Section 402(k), 33 U.S.C. § 1342(k), for pollutants disclosed during the application process but for which there are no limitations, or for water quality standards excursions where the limitation provided in the permit appears to be greater than the applicable state water quality criterion. 12
2. The permit contains "operating limits" on an internal outfall that may not be enforceable by EPA, citizens, and potentially MPCA and, thus, may be ineffective at protecting water quality under the Clean Water Act (see 40 C.F.R. §§ 122.4(a), (d)). Specifically, the permit includes an internal outfall operating "target" and "limit" for sulfate based on a voluntary commitment by PolyMet to meet a 10 mg/L sulfate limit (permit sections 6.10.34-35) and an internal operating "limit" for copper that MPCA states will ensure compliance with the chronic water quality standard for copper (permit section 6.10.43). We understand that MPCA's authority to enforce such a provision may rest on state authority, outside the scope of the CWA. MPCA should revise the permit as necessary to ensure that all NPDES requirements are enforceable under the CWA. 13
13b

Additionally, the internal "operating limit" for copper, at 9.3 micrograms per liter at permit section 6.10.43, is equivalent to the water quality criterion for copper. However, permit section 6.10.44 appears to authorize higher discharge concentration for copper, based on the TBEL that appears to apply at outfall SD001 (permit section 8.1.1). This creates a conflict as to which limit is applicable and enforceable against the permittee. MPCA should revise the permit to include a WQBEL for copper. Xtra

3. MPCA plans to transfer the administratively continued, expired Cliffs Erie, LLC permit (and associated enforcement documents) for the existing tailings basin to an affiliated corporate entity of PolyMet. It appears that this arrangement could result in the permittee holding multiple permits covering the same discharge for some time after the effective date of the NorthMet permit. This creates confusion over which discharges are covered by each permit and may complicate or preclude enforcement of permit requirements under either permit, for example if legacy pollutants do not attenuate as predicted (permit section 6.10.45). 14

Additionally, the Permit Fact Sheet (p. 17) acknowledges continuing seep discharges from the tailing basin. As such, the draft permit and/or supporting documentation should clearly assign responsibility for seep discharges by specifying those applicable portions of the Cliffs Erie, LLC permit (MN0054089), the Cliffs Erie, LLC Consent Decree with MPCA, and the draft NorthMet permit. Specifically, the permit should include: (a) a list of known seeps (including coordinates and/or sections) that are authorized to discharge from the tailings basin, (b) a map identifying seeps and their relationship to the planned containment system, (c) monitoring and applicable limits for these seeps, because, as 14b

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noted in the fact sheet (p. 17), seep discharges “contributed to exceedances of permit effluent limitations established in the NPDES/SDS permit,” and (d) appropriate interim authorization, limits, and requirements for tailings basin seeps until such a time as seeps are fully contained and cease to reach surface waters.

4. MPCA plans to issue general permit coverages for construction stormwater discharges prior to commencement of construction. Neither the draft individual permit, nor any supporting documentation clearly delineates what activities are excluded from coverage under a general permit. Further, the stormwater general permit would authorize discharge from the draining of over 900 acres of wetlands, which are dominated by peat bogs. This activity is expected to release significant amounts of mercury into downstream navigable waters. While MPCA has acknowledged and addressed such discharges in its peat mining permits (and in verbal comments regarding this project), nothing in the permitting record demonstrates that this issue has been addressed or even considered. There is no provision in the construction stormwater general permit for addressing specific water quality standards issues. Thus, the draft permit (and associated permitting scheme) appears to leave mercury from this aspect of the project wholly unregulated. We suggest identifying what is intended to be covered under the stormwater general permit and evaluate whether there is reasonable potential for discharges from activities covered under the stormwater general permit to cause or contribute to excursions from water quality standards. If there is such reasonable potential, coverage under the stormwater general permit would not be appropriate. Rather this discharge, with appropriate WQBELs, could be covered under the NorthMet permit or another individual permit. 15
5. Permit section 6.10.17 does not allow the permittee to discharge any process wastewater from the mine site to the surface waters. However, it is not clear how compliance with this condition will be evaluated. Under 40 C.F.R. § 122.44(i), NPDES permits must include monitoring requirements “to assure compliance with permit limitations,” which include, among other things, “the mass (or other measurement specified in the permit) of each pollutant limited in the permit” and “the volume of effluent discharged from each outfall.” We recommend that the permit include monitoring requirements and conditions against which compliance can be objectively measured. We have similar concerns with other provisions at permit sections 6.10.26, 6.10.78, 6.11.2, 6.11.9, 6.12.2, and 6.15.11. 15b
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Decision Making Procedures

The draft permit states that certain plans, reports, and other actions are effective parts of the permit upon submittal by the permittee, making them de facto permit modifications that, in some instances, are likely to be major modifications subject to 40 C.F.R. § 122.62 (for example, see permit section 6.10.38). EPA is concerned that the permit allows both the permittee and MPCA to modify the permit without following the public process for major permit modifications under 40 C.F.R. § 122.62. Permit modifications that do not follow federal regulations may be unenforceable, may cause confusion for regulators and public over what is covered by the 17

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permit, and therefore would not ensure compliance with the CWA (see 40 C.F.R. § 122.4(a)).

Although MPCA may wish to require the permittee to undertake immediate corrective action in appropriate circumstances, EPA recommends that MPCA eliminate those permit provisions that make permittee-submitted plans, reports, and other actions immediately-effective parts of the permit. We recommend that, instead, MPCA employ appropriate enforcement responses and its authority to modify permits under Minn. R. 7001.0170 and 40 C.F.R. § 122.62, as necessary.

Other Recommendations

EPA recommends that MPCA consider and address the following comments to improve the clarity and accuracy of the permit.

1. The draft permit contains no limits for CBOD, TSS, pH, fecal, ^{coliform} percent BOD/TSS reductions at the sewage treatment stabilization pond/~~internal waste stream monitoring location~~ WS009. Also, the permit contains no limits for CBOD, fecal coliform, or percent BOD/TSS reductions at Outfall SD001. We also note that there does not appear to be a reasonable potential discussion regarding the stabilization pond. MPCA should evaluate whether effluent from the stabilization pond will cause or contribute to excursions from water quality standards. We also recommend including reporting requirements, such as weekly maintenance observations, for the stabilization pond. 18 18b
2. The permit (at p. 9 and Table 2.1) states that the WWTS discharge will be distributed to various tributaries to minimize hydrologic or ecologic impacts, but the permit does not clearly describe the relationship between the flow in these outfalls and the allowable discharge (permit section 6.10.1 - 6.10.9). MPCA should include provisions in the permit that show how the permittee and MPCA will determine the distribution of flows to Outfalls SD002-SD0011. 19 19b
3. The permit (at p. 11) discusses the "controlled discharge" from the stabilization pond to the floatation tailings basin (FTB). The permit should explain how the controls on this discharge will function as enforceable requirements of the permit. 20 20b
4. Permit section 6.10.12 does not allow cells 2E and 1E to be combined until the floatation tailings basin seepage collection system is "fully operating" but it is not clear how this term is defined. MPCA should define "fully operating" to ensure that these permit requirements can be adequately monitored and enforced. 21 21b
5. Permit section 6.10.27 requires the permittee to maintain a system of paired monitoring wells and piezometers (one internal and one external to the FTB seepage containment system). If these are established monitoring points already included in the permit, MPCA should include references to the monitoring numbers here. If these monitoring points have not yet been established, MPCA should create and include them in the monitoring table along with the type and frequency of data collection. 22 22b

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6. Permit section 6.10.26 says "Direct discharge to surface waters from the FTB Seepage Containment System is prohibited." It is unclear to EPA how MPCA would implement the prohibition of "direct discharge." EPA recommends that the permit be clarified to prohibit any "discharge of pollutants to surface waters" consistent with the Clean Water Act. 23 ~~23~~ 235
7. Permit section 6.10.49 requires sampling at SW003, SW005, SW006, SW007, and SW020 to begin 18-months following initial operation of the WWTS. MPCA should begin sampling upon permit issuance so that a baseline can be established at these locations. 24 245
require *to begin*
8. Permit section 6.11.11 prohibits the discharge of PCBs. As this is a legacy mine site, we recommend that MPCA work with the permittee to determine whether the site contains PCBs. If it is determined that the site does not contain PCBs, MPCA should have the permittee certify this finding. Similarly, if PCBs are present on site, then MPCA should revise the permit to include monitoring requirements to evaluate compliance with the prohibition. 25 256
9. We recommend that the permit include at the beginning (for example, p. 1) a citation to the federal and state authorities pursuant to which the discharges from the facility are allowed. 26
10. There are several references in the permit and fact sheet where the reader is directed to the permit application for more information. For example, one reference to the 3d volume of the October 2017 permit application references a document over 500 pages long (see permit p. 8). We suggest including a location for references such as these throughout the permit to facilitate the reader's ability to access the information. 27 275
11. Permit section 6.10.21 allows "agency pre-approved adaptive management or mitigation measures." We recommend including a link or reference to where these measures can be located. 28 285
12. The maps and figures in the permit and fact sheet are often difficult to read. If clearer versions of these cannot be included, we suggest including a reference to where the original maps and figures can be viewed in hard copy or on line. 29 295

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Comments and Recommendations to Ensure Consistency with the Clean Water Act

Water Quality Based Effluent Limitations

The draft permit does not include water quality based effluent limitations (WQBELs) except as described in the fact sheet (p. 41) for pH or any other conditions that are as stringent as necessary to ensure compliance with the applicable water quality requirements of Minnesota, or of all affected States, as required of all state programs by CWA Section 402(b), 33 U.S.C. § 1342(b); and 40 C.F.R. §§ 122.4(d), 122.44, and 123.44(c)(1), (8)-(9). Furthermore, the permit includes technology based effluent limitations (TBELs) that are up to a thousand times greater than applicable water quality standards.

1. We acknowledge MPCA's consideration in the draft permit of the federal regulations at 40 C.F.R. Part 440 Subparts G, J, and K, including TBELs. See permit sections 6.10.44 and 8.1.1. However, the permit does not include WQBELs for key parameters and appears to 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. This concern would be resolved if the permit included WQBELs for these parameters.
2. The permit lacks clear narrative effluent limitations such as an unqualified general prohibition on discharges that would cause exceedances of water quality standards (WQS). For example, at paragraph 6.16.4, the permit prohibits toxic discharges, but the condition also includes an exception for situations in which TBELs apply, as is the case with several of the parameters covered by the draft permit. EPA's concern could be resolved if MPCA establishes WQBELs for the authorized discharge and, additionally, removes the qualifying language from paragraph 6.16.4 to clearly prohibit discharges that would cause exceedances of water quality standards.
3. The permitting record does not appear to demonstrate that MPCA considered all the pollutants that were disclosed in the permit application as being present in the proposed discharge when evaluating the need for WQBELs. Thus, in the absence of WQBELs, there is no assurance that the discharge will meet applicable water quality standards. MPCA should, therefore, consider in its analysis all the pollutants that were presented in the application materials as potentially present in the proposed discharge to determine those WQBELs that are needed in the permit. Further, if MPCA considers a particular parameter to be the key to ensuring the facility will meet all applicable water quality standards, e.g., copper at monitoring station WS074 (permit section 6.10.40) or sulfate at monitoring station WS074 (permit section 6.10.31), the permit should include appropriate WQBELs at monitoring location SD001 to ensure that these internal operating limits result in meeting applicable water quality standards at the point where the discharge is sent to receiving waters (see also comment 6, below).

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4. The fact sheet's reasonable potential analysis relies on the assumption that data provided in the application are maximum values without taking into account the potential variability and uncertainty in the discharge from this new source. Under the Addendum to the EPA-MPCA National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement for the GLI (Great Lakes Initiative) (May 8, 2000), Minnesota committed to "use only alternative statistical procedures for deriving PEQ¹ that meet the standard in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2."² To resolve EPA's concern, MPCA should consider that the data provided in the application materials are estimates based on assumptions and modeling outputs and ensure that its reasonable potential analysis is consistent with the procedures in 40 C.F.R. Part 132, Appendix F, Procedure 5.
5. At pages 34-37 of the fact sheet,³ MPCA states that its decision that WQBELs are not needed in the permit relies on the operational limits for sulfate (in milligrams per liter) and copper (in micrograms per liter) at internal outfall WS074. Although these limits are set to low values, including the copper limit that is set to the water quality standard, (calculated by assuming a hardness value of 100 mg/L), there is nothing definitive in the permit or supporting information that justifies a conclusion that meeting these operational targets will result in meeting water quality standards for all the parameters in the permit application. This is especially a concern for mercury, for which the standard is specified in nanograms per liter and the pilot study⁴ states that the effectiveness of the treatment system to remove mercury is unknown.
6. The permit requires that no sulfate or copper be added to the discharge after monitoring station WS074, but does not prohibit the addition of any other additives between monitoring station WS074 and the final outfalls. In fact, the permit record shows that the effluent of the water treatment system will require mineral addition prior to its discharge to surface waters to reduce the toxicity due to the low ionic strength of the treated water. This raises two concerns. First, the permitting record includes information showing that available local sources of lime contain aluminum in levels that, if used, will likely result in a discharge that exceeds the applicable water quality standard for aluminum.⁵ While MPCA appears assured that higher cost lime containing lower levels of aluminum is available and will be used, to ensure that likely variability in the quality and price of available lime does not result in exceedances of the applicable water quality standard, the

¹ "Projected Effluent Quality," (PEQ) is described in 40 C.F.R. Part 132, Appendix F, Procedure 5 Paragraph B.2.

² "EPA and MPCA agree that MPCA will use only alternative statistical procedures for deriving PEQ that meet the criteria in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2. EPA and MPCA further agree that EPA retains the authority to review any specific statistical procedures Minnesota intends to use for deriving PEQs and to object to permits that have been developed using statistical procedures that do not meet the requirements of Paragraph B.2. of Procedure 5."

³ "To ensure the WWTS is operating as designed and to remain consistent with the assumptions made in the FEIS, the permit includes an internal performance monitoring point (Station WS074) where an Operating Limit of 10 mg/L sulfate applies. The Operating Limit at WS074 is an enforceable permit limit but is neither a water quality based permit limit nor a technology based permit limit because there is no Reasonable Potential." (p. 35).

⁴ See page 43 of "Final Pilot-testing Report" dated June 2013.

⁵ See page 31 of the "Final Pilot-testing Report" dated June 2013.

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permit should include a WQBEL for aluminum at the final discharge points or an internal outfall after mineral addition. Second, in light of the potential for whole effluent toxicity to occur, the permit should include whole effluent toxicity limits at the final discharge points or an internal outfall after mineral addition.

7. EPA is concerned that the permit and supporting materials do not include sufficient information to explain how downstream water will be protected consistent with CWA Section 402(b)(5), 33 U.S.C. § 1342(b)(5), based upon the following considerations, including: (1) downstream receiving waters exceed the applicable state and downstream state human health and wildlife water quality standard for mercury, and (2) the pilot study states that the effectiveness of the treatment system to remove mercury is unknown. We note that a downstream tribe, that has “Treatment as a State” and federally approved WQS, has notified EPA that the project is likely to contribute to exceedances of its downstream WQS, including for mercury. MPCA should ensure that its permit will ensure compliance with downstream state WQS.

In summary, EPA recommends that MPCA include WQBELs in the permit for those parameters identified in the application that are expected to be in the discharge and for which Minnesota has applicable WQS. We note that as this is a new discharger, the inclusion of WQBELs for these parameters would be prudent and provide a basis for measuring the performance of the new treatment technology proposed by the applicant. We also note that in subsequent permit cycles, after the facility has achieved full operation, such limits could be modified or deleted if no reasonable potential to exceed water quality standards is demonstrated.

Effluent Limitations Guideline Calculation

The draft permit does not include all the requirements of 40 C.F.R. 440, Subparts G, J, and K that apply to this proposed project, including a restriction on discharge volume that is in conformance with 40 C.F.R. § 440.104(b)(2)(i) and that is equivalent to the annual net precipitation for the site.

Permit sections starting at 6.10.1 include a formula that retrospectively calculates the allowable discharge flow and includes a “carryover” amount defined as “the difference between the allowable annual discharge volume and the actual volume discharged” which acts as a “credit” that the permittee is allowed to apply to the following calendar year. This “carry over credit” appears to be in contradiction to the applicable regulatory definitions of “annual precipitation,” “annual evaporation,” and “mine drainage” at 40 C.F.R. § 440.132(b), (h). We recommend setting a numeric limit on flow, including this limit in the permit, and ensuring that it is consistent with 40 C.F.R. § 440.104(b)(2)(i).

In addition, we recommend that MPCA consider the applicability of – and inclusion of – effluent limitations contained in 40 C.F.R. § 440.12, and 40 C.F.R. Part 440, subpart A (iron ore), as the project discharge could include legacy pollutants.

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Permit Enforceability Concerns

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Additionally, the internal “operating limit” for copper, at 9.3 micrograms per liter at permit section 6.10.43, is equivalent to the water quality criterion for copper. However, permit section 6.10.44 appears to authorize higher discharge concentration for copper, based on the TBEL that appears to apply at outfall SD001 (permit section 8.1.1). This creates a conflict as to which limit is applicable and enforceable against the permittee. MPCA should revise the permit to include a WQBEL for copper.

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Other Recommendations

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7. Permit section 6.10.49 requires sampling at SW003, SW005, SW006, SW007, and SW020 to begin 18-months following initial operation of the WWTS. MPCA should begin sampling upon permit issuance so that a baseline can be established at these locations.
8. Permit section 6.11.11 prohibits the discharge of PCBs. As this is a legacy mine site, we recommend that MPCA work with the permittee to determine whether the site contains PCBs. If it is determined that the site does not contain PCBs, MPCA should have the permittee certify this finding. Similarly, if PCBs are present on site, then MPCA should revise the permit to include monitoring requirements to evaluate compliance with the prohibition.
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