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Sent: 4/16/2019 11:56:27 AM
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Subject: article

Good morning!

https://insideepa.com/daily-news/top-democrat-says-wheeler-intended-obfuscate-state-permit-review

Top Democrat Says Wheeler 'Intended To Obfuscate' On State Permit Review

April 15, 2019

Rep. Betty McCollum (D-MN), chair of the appropriations panel that oversees EPA's budget, says Administrator Andrew Wheeler "intended to obfuscate" in recent testimony to avoid releasing adverse agency comments on a draft Minnesota mine permit, comments that critics say political appointees suppressed as they work to ease state oversight.

In an April 9 letter obtained by *Inside EPA*, McCollum faults Wheeler's response to her questions during an April 2 budget hearing when she sought Region 5 staff's written comments on the Minnesota Pollution Control Agency's (MPCA) water permit for Polymet's NorthMet Copper-Nickel mine.

According to her letter, Wheeler testified before the House Appropriations interior subcommittee that EPA was searching for records related to Region 5's review of MPCA's Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit issued for the mine.

McCollum also faults the agency's April 1 letter responding to her prior inquiry seeking documents related to the region's critical review, portions of which agency staff read to state officials over the phone but did not provide in writing.

The agency's letter to McCollum, signed by Associate Administrator Troy Lyons, delivered a similar message as Wheeler's testimony, saying staff are reviewing records for documents that respond to McCollum's earlier request and backs regional officials' verbal communications with state regulators as good practice.

"It has long been the practice for EPA staff to have verbal conversations with their regulatory partners, tribal or state, as they work through complex permitting decisions," Lyons says.

"Region 5 Administrator Cathy Stepp has been specifically encouraging EPA staff to work more collaboratively and speak 'face-to-face' with state officials to ensure prompt and accurate exchanges of information," it adds.

But the day after the hearing, EPA acknowledged in an April 3 filing in a Freedom of Information Act (FOIA) suit that the agency drafted and retained written comments on the state's review of the permit.

"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," McCollum says in the letter.

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

McCollum says it is "abundantly clear" that EPA has located the document she requested in a prior Feb. 25 letter and followed up on in her hearing questions to Wheeler.

She asks EPA "to immediately provide this document, as well as any other relevant records" by April 10.

A spokeswoman for McCollum says that she has not received EPA documents responding to her request.

EPA did not respond to a request for comment on McCollum's criticism.

State Oversight

McCollum's criticism appears to undermine Wheeler's directive from late 2018 to boost transparency in the wake of his predecessor Scott Pruitt's departure.

At issue are charges from a former EPA lawyer and a Minnesota tribe that political officials suppressed Region 5 staff's written comments on MPCA's draft NPDES permit for the mine. The critics have urged the agency's Office of Inspector General (IG) to investigate.

Public Employees for Environmental Responsibility (PEER), a wathdog group representing EPA employees, has also filed a FOIA suit to obtain the comments.

The critics say withholding the comments are part of a broader Trump EPA push to streamline reviews of state permitting and improve collaboration with states. For example, Wheeler last year called for EPA to defer to most state decisions but also laid out cases when regulators should intervene to protect human health and the environment.

EPA has also piloted a new framework for reviewing state permits in several regions. Last year, state regulators asked that EPA focus any new process on regions' reviews of states' NPDES permits and targeted Region 5 as an example of why a streamlined policy is needed.

McCollum's most recent letter cites EPA's April 3 response to PEER's FOIA lawsuit, where government lawyers acknowledged that Region 5 staff drafted and retained comments on the MPCA's mine permit, and read them to state regulators over the phone.

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

EPA adds that agency staff relayed part of those comments to state regulators during a phone call last April.

"Defendant admits that it has retained a copy of the draft document that memorializes what was shared verbally with MPCA staff," EPA says in the court filing.

PEER's lawsuit says the allegations that Region 5 -- which covers Minnesota and several other Midwest states -- failed to conduct adequate oversight of MPCA's NPDES permit for the mine is part of broader shortcomings in federal reviews of state permitting that stem from the Trump EPA's push to streamline regional offices' reviews of states' federally delegated environmental programs.

The lawsuit reiterates allegations made by Jeffry Fowley, a retired EPA water attorney, who has requested an EPA IG investigation of the agency's review of the PolyMet permit. The plaintiffs say that recent news media coverage may be a factor in EPA's decision to withhold its public comments on the mine.

On April 4, Fowley filed an addendum to his prior request, highlighting EPA's acknowledgment in the FOIA case that the agency drafted comments on the mine and read portions to state regulators.

Fowley faults EPA's refusal to release at least the portion of the comments read to state regulators, and says the agency's court filing failed to cite any FOIA exemption that might allow for non-disclosure. He also says that EPA's refusal to release the comments could hamper judicial review of the state's approval of the mine's water permit.

"Documents read to a third party as being EPA comments on a permit must be considered final," Fowley says in the addendum. "By not releasing this document, EPA is participating in a cover up -- hiding things from the public -- and also helping the state to mislead the state appeals court which will hear the appeal of the permit." -- *Dave Reynolds* (dreynolds@iwpnews.com)

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