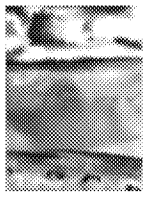


Paula Goodman Maccabee, Esq.
Just Change Law Offices
1961 Selby Ave., St. Paul, Minnesota 55104, pmaccabee@justchangelaw.com
Ph: 651-646-8890, Fax: 651-646-5754, Cell 651-775-7128
http://justchangelaw.com

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.

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.

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.

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.

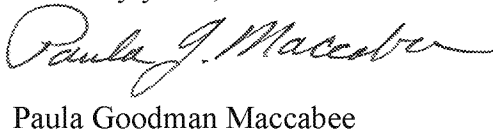
WaterLegacy and the citizens, scientists, conservation groups and community groups with which we are allied would respectfully request your help in securing for the public EPA's comments on the NorthMet mine project Draft NPDES water pollution permit, the annotated or highlighted copy of these comments 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.