Message

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Sent: 2/5/2019 12:57:18 PM
To: Pickrel, Jan [Pickrel.Jan@epa.gov]; Zobrist, Marcus [Zobrist.Marcus@epa.gov]
Subject: RE: Inside EPA 1/31/2019: Retired EPA Attorney Says Region 5 Chief Withheld NPDES Permit Criticism

Deliberative Process / Ex. 5

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From: Pickrel, Jan
Sent: Friday, February 01, 2019 10:06 AM
To: Zobrist, Marcus <Zobrist.Marcus@epa.gov>; Wilson, Scott <Wilson.Js@epa.gov>
Subject: Inside EPA 1/31/2019: Retired EPA Attorney Says Region 5 Chief Withheld NPDES Permit Criticism

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Retired EPA Attorney Says Region 5 Chief Withheld NPDES Permit Criticism

January 31, 2019

A retired EPA water attorney has filed a complaint with the agency's inspector general (IG) alleging that Region 5 Administrator Cathy Stepp suppressed critical staff comments on a water permit for a controversial Minnesota mine, clearing the way for a permit that environmentalists and a member of Congress say is inadequate.

The claim, if proven, could help critics of the Clean Water Act (CWA) permit challenge it in court by arguing that agency staff had highlighted problems over the permit that Stepp then withheld from the public docket for it.

In a Jan. 31 complaint, Jeffry Fowley, a retired EPA attorney who has consulted for environmental groups, alleges that EPA Region 5 officials deemed a draft Minnesota Pollution Control Agency (MPCA) National Pollution Discharge Elimination System (NPDES) permit for the PolyMet mine inadequate but their input was suppressed. Region 5 covers Minnesota, as well as Indiana, Illinois, Michigan, Ohio, and Wisconsin.

While EPA staff later read portions of their comments to state officials over the phone, no official agency comments were provided for the permitting record, according to the complaint.

"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 PolyMet mining company in the state's federally authorized NPDES program," the complaint to the IG says, adding that the state's mine permit fails to meet CWA requirements.

"Yet, I have been advised that planned EPA staff comments on the permit were suppressed by the Region V Regional Administrator Cathy Stepp," it adds.

EPA did not respond to *Inside EPA*'s request for comment by press time.

The allegation comes after Rep. Betty McCollum (D-MN), the new chairman of the appropriations subcommittee overseeing EPA, and environmental groups who oppose the PolyMet copper-nickel mine have questioned why Region 5 did not provide comment on the state's permit, despite earlier indications that EPA Region 5 staff believed the permit was inadequate, according to published reports.

Criticism of EPA's review of MPCA's permit for the mine comes as EPA and state regulators have recently piloted a new plan for federal review of state permitting and other programs outlined in acting EPA Administrator Andrew Wheeler's Oct. 30 memo that calls for deference to state decision-making.

Late last year, EPA piloted the new review process in three regions and agency officials have said that they are working with state regulators to evaluate the results of the pilot before issuing a final version of the policy.

Fowley's complaint to the IG alleges that EPA's failure to provide comment on MPCA's permit for the mine that would discharge into tribal waters violates the CWA, and that other evidence suggests "an emerging pattern" in Region 5 of not commenting officially on MPCA permit actions in violation of EPA's basic principles of state oversight.

The complaint also alleges that EPA's failure to adequately review and comment on MPCA's NPDES permit for the PolyMet mine allowed the state to issue an inadequate permit and keeps federal reviewers' opinion on the permit from the public and potentially a state court that may review the permit that environmental groups have opposed.

Draft Permit

According to the complaint, MPCA in early 2018 forwarded to EPA a draft permit that failed to adequately analyze whether the mine's discharges might violate water quality standards and did not include strict water quality permitting limits required by federal law.

Fowley writes that under CWA section 301(b)(1)(C) permits must contain not only technology-based limits on what companies' treatment systems can meet, but also "any more stringent limitation" needed to meet water quality standards.

"The Region V staff comments reportedly raised serious issues about whether the State was complying with these basic federal requirements," the complaint says. "However, after she was reportedly 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 EPA staff not send any written comments to the State," the complaint says.

Stine did not respond to *Inside EPA*'s request for comment by press time.

Fowley adds that the EPA was given an opportunity to comment on a subsequent draft of the permit, developed after the public comment period. But after receiving a final draft of the permit in the fall, EPA again did not provide written comments.

Fowley says that in the spring Regional staff did convey some of their concerns to MPCA officials by phone. "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."

The complaint alleges that Region 5's avoidance of providing written comments in reviewing the PolyMet permit is not limited to the single case.

"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 comment on permits," the complaint says. "This could involve continuing to exchange information only in ways that can be hidden from the public and from reviewing courts."

-- *Dave Reynolds* (dreynolds@iwpnews.com)

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