Message

From: Nelson, Leverett [nelson.leverett@epa.gov]
Sent: 2/7/2019 5:05:04 PM
To: Frey, Bert [frey.bertram@epa.gov]; Lupton, Jane [lupton.jane@epa.gov]; Klassman, Debra [klassman.debra@epa.gov]; Wester, Barbara [wester.barbara@epa.gov]
Subject: FW: A couple PolyMet stories today

FYI

From: Kelley, Jeff
Sent: Thursday, February 07, 2019 8:35 AM
To: Thiede, Kurt <thiede.kurt@epa.gov>; Nelson, Leverett <nelson.leverett@epa.gov>; Holst, Linda <holst.linda@epa.gov>; Newton, Cheryl <Newton.Cheryl@epa.gov>
Subject: A couple PolyMet stories today

FYI, a couple PolyMet stories today:

- Star Tribune: Former EPA lawyer challenges regulators on PolyMet water permit
- Tower Timberjay: Complaint alleges EPA suppressed comments on PolyMet permit

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http://m.startribune.com/regulators-challenged-on-polymet-water-permit/505466782/

Former EPA lawyer challenges regulators on PolyMet water permit

Jennifer Bjorhus
Star Tribune

A retired attorney with the U.S. Environmental Protection Agency (EPA) has requested an internal investigation into the agency's handling of a water-quality permit in Minnesota for PolyMet Mining, saying career staffers in the Chicago office may have been muzzled to clear the permit.

The EPA's Chicago office effectively cleared the Minnesota Pollution Control Agency (MPCA) to issue the permit in December, one of the final state regulatory hurdles for PolyMet's proposed $1 billion copper-nickel mine in northeastern Minnesota.

"There's enough smoke here that they ought to be seeing if there's a fire," the attorney, Jeffry Fowley, said in an interview.

In a letter to the EPA's inspector general, Fowley, a retired water attorney for agency's Boston office, said he had information from several sources that the head of the Region 5 office "suppressed" written comments from her staff about whether Minnesota was complying with basic federal requirements for the PolyMet permit. He said that "significant EPA concerns" about the permit were improperly discussed over the telephone, and so hidden from the public. As a result, he said, the EPA "failed to meet its basic oversight responsibilities."

Fowley's letter also asserts that last March, Cathy Stepp, head of the Region 5 office, directed her staff not to send written comments to Minnesota on the permit following a phone call from John Linc Stine, then head of the MPCA, in which Stine "complained about the planned comments."

Stepp, a Wisconsin businesswoman and cabinet official under Gov. Scott Walker, was named Region 5 administrator by the Trump administration in December 2017.

The resulting water permit has been challenged by a Minnesota advocacy group, WaterLegacy, over its lack of stringent, federally enforceable limits on nearly two dozen pollutants that are regulated by the Clean Water Act.

Officials in the EPA's Chicago office declined to discuss the permit specifically, but a spokeswoman issued a statement saying agency staff thoroughly reviewed the PolyMet project in several meetings and conversations with Minnesota regulators and decided not to issue formal written comments because their concerns were addressed along the way.

"EPA leadership in no way limited EPA staff's ability to openly share all questions and/or concerns with their counterparts at MPCA," the statement said. "All significant concerns, observations or questions ... regarding the PolyMet permit were communicated to MPCA."

In Minnesota, Shannon Lotthammer, the MPCA's assistant commissioner for water policy, said in a statement that EPA's comments were delivered in multiple phone calls and meetings, including an in-person meeting in St. Paul. Minnesota staff, she said, made changes to the permit based on those comments.

"The Minnesota Pollution Control Agency did not, at any time, ask EPA to suppress or withhold comments on the PolyMet [water] permit," Lotthammer said.

An MPCA spokesman said the agency is confident it addressed all the EPA's comments before the permit was issued. "This is supported by the fact EPA did not comment on the proposed permit during their final review period," said spokesman Dave Verhasselt.

In an interview, former MPCA Commissioner Stine said he and the head of Region 5 spoke on the phone about PolyMet several times but that he never complained about planned comments. Stine said he has "no idea" why the EPA never filed formal written comments on the permit. The lack of written comments is "pretty routine," he said.

McCollum steps in

WaterLegacy, in addition to challenging the content of the PolyMet water permit, has raised concerns about transparency at the EPA. In a Jan. 15 letter to Rep. Betty McCollum, and two other members of Congress, the group's advocacy director, Paula Maccabee, said she was unable to get the written comments from EPA's Chicago office through a Freedom of Information Act request and asked for lawmakers' help.

"We have reason to believe that EPA Region 5 staff prepared final written comments on the draft ... permit, 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," Maccabee wrote.

The Star Tribune has also filed a Freedom of Information Act request with the EPA.

E-mails and meeting notes taken by MPCA staffers, obtained by Maccabee and the Star Tribune, show the EPA staff repeatedly expressing concern that the PolyMet permit lacked stringent federal pollution limits, known as water quality-based effluent limits, or WQBELs.

A handwritten note by one of the Minnesota regulators, dated Oct. 22, shows that the EPA planned to do a final review of the permit and that "EPA will focus review on proposed language re: WQBELs."

An MPCA e-mail dated Dec. 17, says: "We did not get any feedback from EPA on the PolyMet permit."

On Tuesday, a spokeswoman for McCollum said the Minnesota Democrat is asking the EPA to release any PolyMet-related comments drafted by its staff.

"The PolyMet copper-nickel mine project has the potential to significantly damage water quality affecting surrounding communities, the Fond du Lac Tribal Nation, and the Lake Superior watershed," McCollum said in a statement responding to Maccabee's letter. "It is remarkable that the EPA did not comment before the issuance of water pollution permits by the State of Minnesota."

'Radio silence'

PolyMet's proposed mine would use a taconite site formerly operated by LTV Steel Corp. near Hoyt Lakes, upstream from the Fond du Lac Reservation, whose officials have followed the permitting process closely. Nancy Schuldt, the tribe's water projects coordinator, declined to comment on concerns about the EPA staff comments.

However, Schuldt said the tribe has written to EPA Region 5 twice since October requesting due process under the federal Clean Water Act and been met with "radio silence." They are writing a third request, she said.

The controversy has also drawn the attention of the Environmental Integrity Project, a nonprofit watchdog in Washington, D.C., because of the size of the PolyMet project and the importance of rigorous EPA permitting, said the group's director, Eric Schaeffer, a former EPA official.

Schaeffer said he's seen Fowley's request for an internal investigation. The situation "seems weird," he said, and justifies an inquiry by the EPA inspector general.

"There are some things that can only come from interviewing staff," Schaeffer said. "There is definite cause for concern if the permit doesn't meet federal standards."

Jennifer Bjorhus • 612-673-4683

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http://timberjay.com/stories/complaint-alleges-epa-suppressed-comments-on-polymet-permit,14803?

Complaint alleges EPA suppressed comments on PolyMet permit

Posted Wednesday, February 6, 2019 5:45 pm
Marshall Helmberger

REGIONAL—A former attorney with the Environmental Protection Agency has told a government watchdog that officials with the Minnesota Pollution Control Agency, and Trump administration appointees in the EPA's Midwest office, may have worked in concert to keep the concerns of EPA professionals over the MPCA's water quality permit for PolyMet under wraps.

Jeffry Fowley, who spent his legal career with the EPA office that serves New England, cites unnamed sources within the agency in a Jan. 31 complaint to the EPA's Inspector General, Kathlene Butler.

Fowley's report to the Inspector General indicates that career staff in the EPA's Region V [Midwest] office had concerns that the water discharge permit (known as an NPDES permit) that the MPCA proposed to issue to PolyMet for its proposed copper-nickel mine near Hoyt Lakes, was not in compliance with federal law.

Fowley said he has also been advised that the regional office "cooperated with the state [of Minnesota] 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."

Fowley and others believe that MPCA officials did not want critical EPA comments included as part of the agency's administrative record, given that the agency anticipated that litigation over the permit was likely. When courts review agency decisions, they rely almost exclusively on the information in the administrative record in formulating their decisions, so scrubbing a record of critical comments could potentially help an agency defend a controversial decision.

According to Fowley, a conversation between then-MPCA Commissioner John Linc Stine and Trump-appointed EPA Region V Administrator Cathy Stepp appears to have been the impetus for the apparent suppression of EPA's written comments.

That's a claim that MPCA officials vehemently deny. "The MPCA did not, at any time, ask EPA to suppress or withhold comments on the PolyMet NPDES permit," said Shannon Lotthammer, MPCA Assistant Commissioner for Water. "We knew that following the public comment process our permitting staff would be making revisions to the draft permit based on public comments, so we recommended that EPA share their comments after that revision. This is not outside the norm of the MPCA-EPA relationship, and has happened with other permits."

The EPA is considered a cooperating agency in the PolyMet environmental review and permitting process, so the lack of EPA written comments during the permit review process was unusual. For years, the agency had routinely provided highly detailed and authoritative comments as the project has advanced. The lack of comments was unusual enough that the MPCA mentioned their absence in a press release announcing the issuance of the PolyMet permit. An attorney for the MPCA, Michael Schmidt, also informed an attorney with the Minnesota Center for Environmental Advocacy on Dec. 17 that "we did not get any feedback from the EPA on the PolyMet permit."

It turns out, however, that those statements may have been misleading. Emails obtained through a public information request to the MPCA reveal plans for a conference call in April 2018 between staff from both the MPCA and the EPA, during which EPA staff would read portions of the written comments they had prepared but were being told not to submit.

A March 16, 2018, email from the MPCA's Jeff Udd references a phone call with Kevin Thiede, who serves as chief of staff for regional administrator Stepp. "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……."

Fowley said he has confirmed that the April conference call took place and that Udd, attorney Schmidt, and mining program supervisor Richard Clark took part representing the MPCA.

While MPCA officials maintained for months that the EPA had not provided comments on the permit, that position shifted dramatically on Jan. 31, when a news organization, called Inside EPA, inquired about the situation while reporting on Fowley's complaint to the Inspector General.

"Although EPA did not send written comments during the public comment period, EPA staff and MPCA permitting staff were in regular contact before, during and after the drafting and issuance of the permit," said MPCA's Lotthammer. "There were five meetings," continued Lotthammer, "including an in-person meeting in St.Paul, as well as multiple phone calls. During these meetings, EPA did engage and comment, and MPCA did make changes to the permit based on those comments."

If so, notes Fowley, the MPCA is required to have documented the EPA comments and provided responses to them, something which he said it appears they failed to do.

Fowley concurs that the final version of the permit, released for comment in late summer of 2018, appears to have been an improvement over the initial draft, but said the even the final version "reportedly was still defective."

Fowley, who worked for decades on EPA permit issuance and review of state permits, said the PolyMet permit lacks key components that are normally part of major permits, including calculations of the potential to exceed water quality

standards. He said those calculations, which must be done for each type of pollutant, are normally included in the background attachments to a permit but are nowhere to be found with the PolyMet permit. He said given that the mining operation will discharge to small streams, with very limited flow at times, the company's water discharge permits need to be fairly stringent.

MPCA officials have suggested that PolyMet has agreed to voluntary internal measures to limit discharges as necessary, but Fowley said voluntary measures are no substitute for actual water quality standards in part because they likely aren't enforceable at the federal level.

Congressional inquiry

Fowley's complaint to the Inspector General, if verified, bolsters suspicions first raised by Water Legacy legal counsel Paula Maccabee last month after MPCA documents she obtained through a public records request hinted that written EPA comments may have been suppressed by top agency officials.

The documents are consistent with Fowley's contention that EPA officials had several concerns with the permits being proposed by the MPCA, including questions about the water quality standards being applied to the company's water discharge permit. The notes also indicated that EPA officials had expected to provide their usual written comments, yet they never did.

"What happened?" asked Minnesota Fourth District Congresswoman Betty McCollum, who now has oversight over the EPA, in a press statement on the issue last month. "The public deserves to know," she added. "I intend to work with my congressional colleagues on the relevant House committees on this matter, because if the EPA is hiding information related to PolyMet, what other critical information is being kept from the American people? We must ensure that the EPA operates in a transparent manner and that EPA scientists and professional staff can do their job of protecting human health and safety without political interference."

McCollum's public statement came along with a request to the EPA for the comments developed by staff, which were apparently suppressed. McCollum's office said this week that their request letter to the agency is still being formulated.

Maccabee said the latest revelations are disturbing. She noted that the EPA has traditionally served as a backstop for states that fall too much under the thumb of major industries. That makes the suggestion that the EPA may now be coordinating with state regulators to suppress critical views from its own staff troubling.

Maccabee said it appears that the EPA's career staff are continuing to try to do their jobs even under an administration that appears hostile or indifferent, at times, to environmental protection .

"It seems like the career professionals were playing by the rules," she said. "I think we owe them a debt of gratitude. They did their job despite enormously difficult conditions."

Administrator seen as pro-industry

Cathy Stepp, who President Trump appointed as EPA's Region V administrator in early 2018, is no stranger to controversy.

Wisconsin Gov. Scott Walker appointed Stepp, a longtime home builder, to head that state's Department of Natural Resources back in 2010. According to Minnesota Public Radio, by the time she left that job seven years later, critics charged she had left her agency "in tatters following a tenure that included declines in environmental enforcement actions, increased fees for state parks, cuts to the agency's science personnel and two incidents of federal authorities intervening after manure from dairy farms began to contaminate drinking water in the northeastern part of the state."

Fowley said some of the same trends are now being seen at the EPA, including a sharp drop in enforcement actions against polluters.

In its first year under the Trump administration, the EPA, in its annual enforcement report, revealed that polluters were fined just $1.6 billion in penalties in fiscal year 2017 — about a fifth of the $5.7 billion EPA penalties collected the year prior, under President Obama.

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