UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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MAR 08 2016

REPLY TO THE ATTENTION OF:
WN-16J

Paula Goodman Maccabee, Esq.
Just Change Law Offices
1961 Selby Ave
St. Paul, MN 55104

Re: Final Protocol for Responding to Issues Related to Permitting and Enforcement presented in the WaterLegacy Petition for Withdrawal of Program Delegation from the State of Minnesota for NPDES Permits Related to Mining Facilities

Dear Ms. Maccabee:

Thank you for your comments on the draft Protocol for Responding to Issues Related to Permitting and Enforcement presented in the WaterLegacy Petition for Withdrawal of Program Delegation from the State of Minnesota for National Pollutant Discharge Elimination System Permits Related to Mining Facilities (Protocol). We have reviewed your comments and addressed them as appropriate. The final version is enclosed.

If you have any questions, please contact me. Legal questions should be directed to Barbara L. Wester, Associate Regional Counsel, at wester.barbara@epa.gov or 312.353.8514.

Sincerely,

Kevin M. Pierard, Chief
NPDES Programs Branch

Enclosures

Cc: Rebecca Flood, MPCA

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Final Protocol for Responding to Issues Related to Permitting and Enforcement

Summary of Allegations and draft proposal to investigate those allegations:

Allegation 1: The Minnesota Pollution Control Agency (MPCA) Has Failed to Provide an Adequate Regulatory Program for Metallic Mining Facilities:

1.a: The MPCA has Failed to Issue Timely NPDES Permits for Minnesota Mining Facilities Despite a Joint Priority Agreement with the U. S. Environmental Protection Agency (EPA) to Eliminate the MPCA's Mining Permit Backlog;

The petitioner alleges that:

- MPCA has not reissued expired NPDES permits in a timely manner,
- MPCA has allowed expired permits to be administratively continued contrary to the CWA,
- expired permits do not contain necessary water quality based conditions,
- agreements and plans jointly agreed to by MPCA and EPA to update NPDES permits for the mining sector have not resulted in timely permit reissuances, and
- failure to timely reissue permits falls under the requirements listed in 40 CFR 123.63 dealing with provisions for withdrawing a State's NPDES program.

EPA Staff will Review:

- MPCA's permitting records relating to the timely reissuance of permits. This review will consist of file reviews at State Headquarters and/or the Duluth Regional Office, interviews with state staff and may include written information requests to the State. EPA will specifically review files for expired and/or administratively continued NPDES permits. Because it will be infeasible to review every permit MPCA has issued, and because the petitioner is specifically focused on mining related permits, EPA will conduct a review of at least each mining related permit. Because EPA cannot consider the withdrawal of only a portion of a state's authorized program, EPA may include in its review selected non-mining permits as well.
- For expired permits, whether or not the permittee submitted complete permit applications before the statutory deadline for re-applying for NPDES permits. This review shall consider what information is considered by MPCA to be a complete application and whether that information (including water chemistry and flow information) meets CWA requirements to set WQBELs for compliance with numeric and narrative standards.
- How MPCA has administered permits which are expired. Including to what extent administratively continued permits reflect current operating conditions; what process MPCA has followed if modifications were made to expired and administratively continued permits and extent to which such modifications substantively change permit conditions; to what extent MCPA has procedures in place to provide effective oversight of permittees operating under expired/administratively continued permits.
- The steps MPCA has taken to reissue and or modify permits and the outcome, including whether or not MPCA determined if applications for reissuance were complete and the time frame within which MPCA subsequently reissued or modified such permits.

EPA Staff will Determine:

- Whether there is a significant backlog of expired NPDES permits (both major and minor)

and whether MPCA has the capability, including staff, technical expertise, and other resources, to effectively reissue expired permits. EPA staff will consider the number of expired permits, along with the duration for which the permits have been expired, and timeframes for reissuance.

- What, if any, deficiencies exist that require action by MPCA and a description of those actions, and if possible, the underlying cause for the permit backlog.

1.b: The MPCA Consistently Fails to Conduct a Reasonable Potential Analysis to Determine whether Mining Pollutants Have the Potential to Cause or Contribute to a Violation of Minnesota's Narrative Water Quality Standards;

The petitioner alleges that:

- MPCA does not conduct reasonable potential (RP) analyses in order to determine the need for permit conditions to protect aquatic life with respect to narrative criteria,
- there are scientific bases available upon which the MPCA would be able to identify specific parameters in mining discharges should be evaluated,
- such an evaluation is required by 40 CFR 122.44(d),
- if a finding of RP is made by the MCPA, permit conditions designed to protect water quality criteria are required is required by 33 U.S.C. 1313(b)(1)(C), 1313(e)(3)(A).

EPA Staff will Review:

- Records relating to instances, if any, where MPCA has conducted an RP analysis directed at the implementation of narrative criteria, the methods used, and the available methods that could have been used. In addition, we will specifically ask for any examples of MPCA attempting to develop a numeric interpretation of narrative criteria for the protection of aquatic life. We will also review instances of MPCA implementing and enforcing narrative criteria in permits generally. As the petitioner raises specific pollutants, EPA staff will also review available scientific basis in peer-reviewed literature, promulgated standards applicable to aquatic life that may be applicable to Minnesota waters and present in mining discharges.
- Whether applicant data contains needed information to make RP determinations and whether MPCA has made RP determinations that accurately reflect anticipated discharges.
- The procedures MPCA follows when conducting an RP analysis. The review will include a review of the forms MPCA is using for permit applications. The RP analysis review will include a review of how MPCA calculates WQBEL's and determines appropriate monitoring requirements. Monitoring requirements include frequency, location, and determination of which parameters to include in the monitoring requirements for each facility.
- Metallic mining discharge data and compare with water quality standards as well as with any effluent limitations provided in NPDES permits.
- Records pertaining to how MPCA has considered impaired waters in permit development.

EPA Staff will Determine:

- Whether or not MPCA is implementing narrative criteria in permits.
- Whether or not MPCA's current approach, if applicable, is sufficient to protect water quality and aquatic life.
- Whether or not MPCA has considered implementation of narrative criteria in the permitting process.
- If MCPA has found aquatic life impairments in water bodies where numeric water quality standards are not being exceeded, the steps MPCA has done to ensure a permit does not

authorize a permittee to cause or contribute to such an impairment, and whether such steps are adequate or timely to address aquatic life impairments.

- Whether, during the course of an application review or inspection, MPCA has found whether all of the discharges from facility has been disclosed in the permit application and are contemplated in the NPDES permit.

1.c: The MPCA Uses Variances and Compliance Schedules to Issue Mining Facility Permits that Do Not Comply with the Clean Water Act;

The petitioner alleges that:

- MPCA has used variances and schedules of compliance to avoid control of pollutants,
- MPCA has granted variances that do not protect existing or designated uses,
- Variances may not remove an existing use, or a designated use unless a UAA demonstrates that attaining the designated use is not feasible,
- MPCA has issued permits with schedules of compliance that do not meet the requirements of 40 CFR 122.47. Specifically, that includes:
  - schedules may not be used for WQS adopted before July 1, 1977, and where
  - schedules do not consist of a sequence of enforceable actions leading to compliance.

EPA Staff will Review:

- MPCA's files pertaining to variances that are currently in effect, and/or implemented in an effective permit. EPA staff will review the request for variance, and the grounds for variance approval and the duration of variances. We will review the EPA's records regarding EPA approval of each variance currently in effect and MPCA's responses to EPA actions with respect to variances. We will also review MPCA's practice of seeking EPA approval of variances in relation to its issuance of NPDES permit coverage, including the calculation of effective dates. We will also review MPCA's provision of public notice and comment opportunities and the degree to which MPCA has considered information developed in the public comment process.
- MPCA's process for utilizing schedules of compliance, how such schedules are integrated into MPCA's permit management process, and the degree to which such schedules of compliance have led to actual compliance.

EPA Staff will Determine:

- If variances that have been issued by MPCA have been issued according to applicable statutes and regulations.
- If they have remained in effect beyond appropriate duration limits.
- If they have been approved by EPA, and if they have been disapproved by EPA what action has subsequently been taken by MPCA.
- Whether or not schedules of compliance, if present, comports to 40 CFR 122.47.

1.d: The MPCA has Failed to Act on Violations of Permits and Clean Water Act Violations by Mining Facilities;

The petitioner alleges that:

- MPCA has not appropriately addressed violations of permits or compliance with water quality standards

EPA Staff will Review:
As presented under separate cover, EPA intends to use the State Review Framework process to evaluate how MPCA has enforced NPDES permits. See attached "Preliminary Investigation Plan for WaterLegacy Petition Review – Compliance and Enforcement Area of Concern.

1.e: The MPCA has Said it Will Not Regulate Tailings Seepage under the Clean Water Act even where there is a Hydrologic Connection to Surface Waters

The petitioner alleges that:

- MPCA has stated that it will not use NPDES authority to regulate seepage from tailings basins even where there is a hydrologic connection to surface waters,
- The US Steel Minntac NPDES tailings basin pre public notice draft fact sheet indicates that MPCA will use a State Disposal System permit to regulate such seepages,
- The CWA applies to discharges to surface waters that occur due to a hydrological connection between groundwater and surface water.

EPA Staff will Review:

- For permits issued as NPDES permits EPA staff will focus on mining sector permits, and review the file information regarding the hydrology of each site.
- Where documented discharges to surface waters that occur via groundwater or subsurface flow exist, whether or not MPCA considered this discharge when issuing the permit, whether or not the discharge was identified in the permit application, and whether or notthe discharge is appropriately covered under the NPDES permit.
- For permits issued as State Disposal System (SDS)-only and pertaining to the mining sector, EPA will reviewwhether or not NPDES authority should have been used when issuing permit coverage, based on the permit application and other relevant documents available to MPCA.

EPA Staff will Determine:

- Whether MPCA has been issuing NPDES permit coverage where appropriate, based on information found in the permit application or otherwise available to MPCA at the time of permit drafting.
- Whether MPCA has been requiring applicants to provide information sufficient to determine the location, effluent concentration and volume where subsurface discharge connects with or "daylights" to surface water.

Allegation 2: The Minnesota Legislature has Deprived the MPCA of Legal Authority Needed to Implement the Clean Water Act.

The Petitioner alleges that:

- The State of Minnesota has enacted laws that prevent MPCA from implementing their federally approved water quality standard for the protection of wild rice in NPDES permits
- Pursuant to state legislation promulgated in June 2015, MPCA is prohibited from requiring permittees to expend money to treat wastewater discharges to meet the current federally approved water quality criterion for sulfate. Unless the permittee itself requests conditions, "the agency shall not require permittees to expend money for design or implementation of sulfate treatment technologies or other forms of sulfate mitigation." "Wild Rice Water Quality Standards," Laws of Minnesota 2015, 1st Spec. Sess. chapter 4, article 4, section 136.

- This legislation also prohibits the MPCA from complying with section 303(d) of the Clean Water Act, 33 U.S.C. §1313(d), stating, "the agency shall not list waters containing natural beds of wild rice as impaired for sulfate" until rulemaking to change the wild rice water quality standard is completed.

EPA Staff will Review:

- The extent to which MPCA's implementation of the NPDES permit program has been limited by legislation which prevents the Agency from incorporating effluent limitations to address the sulfate water quality criterion in permits.
- MPCA's capability to develop effective effluent and other limitations in permits, in compliance with the State's federally approved program.
- MPCA's capability to implement the NPDES program in light of limiting legislation.

EPA Staff will Determine:

- Whether Minnesota retains sufficient authority to implement the NPDES program in compliance with the CWA where the Agency is precluded from implementing certain federally approved state WQS in its permitting actions.

Allegation 3: Mining Interests Unduly Influence Minnesota in Setting and Enforcing Water Quality Standards.

The Petitioner alleges that:

- Influence of mining interests has affected MPCA's ability to impose regulatory requirements on the mining industry, and that
- Specifically this influence has affected:
  - The state's ability to interpret scientific research relating to the wild rice water quality standard, and that
  - "mining special interests can dictate whether they will comply with water quality standards, what standards will apply, and even whether administrative entities will remain standing if they dare to question mining projects"

EPA Staff will Review:

- As part of the permit file review undertaken in response to Allegations 1 and 2, whether there has been pressure on MPCA from mining interests to influence permitting actions.
- Whether there has been pressure on MPCA to prevent application of standards, and prevent the control of pollutants and the protection of aquatic resources and wild rice.

EPA Staff will Determine:

- The effect such pressure, if present, has had on the permitting process, including:
  - failure to reissue expired permits and variances,
  - delays in compliance, and,
  - failure to establish and enforce effluent limitations.

Schedule:

In FY 2016, we expect to visit the MPCA's offices in St. Paul along with the District Office in Duluth. Prior to the visit, we will send a letter to MPCA explaining the purpose of and schedule for the visit, asking that the information be made available, and arranging for scanning or copying as necessary. For each session, there will be an entrance interview with State managers and staff (participation by MPCA personnel is at the State's discretion) and an exit interview during which preliminary findings will be outlined. In addition to the file reviews, the audit team will pose questions to MPCA staff involved in responding to inquiries from potential permit applicants or reviewing permit applications and drafting permits.

Findings and Next Steps:

EPA may determine at any time, irrespective of the planned course of the informal investigatory process, whether sufficient information exists to order the commencement of proceedings pursuant to 40 CFR 123.64(b). Such findings would include any of the criteria for program withdrawal under 40 CFR § 123.63, and specifically in this case, whether sufficient information exists to:

- demonstrate that MPCA lacks the capacity to provide an effective NPDES regulatory program,
- indicate that Minnesota's current laws and regulations are contrary to the CWA or federal implementing regulations,
- indicate that MPCA, through policy or practice is implementing their NPDES program in a manner inconsistent with federal regulations.

EPA will make its findings available for public comment as expeditiously as possible.