Fond du Lac Band of Lake Superior Chippewa

Reservation Business Committee

1720 Big Lake Rd.
Cloquet, MN 55720
Phone (218) 879-4593
Fax (218) 879-4146

Chairman
Kevin R. Dupuis, Sr.

Secretary/Treasurer
Ferdinand Martineau, Jr.

Dist. I Representative
Wally J. Dupuis

Dist. II Representative
Bruce M. Savage

Dist. III Representative
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Executive Director,
Tribal Programs
Miyah M. Danielson

June 18, 2019
Via E-Mail

Cathy Stepp
Regional Administrator
U.S. EPA, Region 5
77 West Jackson Blvd
Chicago, IL 60604-3590
stepp.cathy@epa.gov

Re: PolyMet Mining Inc. NorthMet Mine

Dear Regional Administrator Stepp:

The Fond du Lac Band of Lake Superior Chippewa ("Band") is in receipt of your June 12 letter responding to the Band's May 15 in-person request for documents related to EPA's review of the National Pollutant Discharge Elimination System ("NPDES") permit issued for the NorthMet mining project. The Band appreciates receiving the eight page "Enclosure" document with EPA comments to the Public Notice Draft Permit Received January 17, 2018. Upon review of the disclosure, the Band was disappointed to learn that the disclosure of information EPA provided to it does not contain all of the relevant pages or copies of documents that were provided to WaterLegacy. WaterLegacy received additional information on June 12 as a result of pending litigation over a Freedom of Information Act request.

Based on the documents EPA provided to WaterLegacy, which were shared with the Band, it appears that EPA prepared and was ready to send written comments to the Minnesota Pollution Control Agency ("MPCA") detailing its concerns on the draft NPDES permit. Although your June 12 letter notes that EPA staff are encouraged to work more collaboratively and speak face-to-face with state officials, it is not clear why EPA did not send the written comments to MPCA. The documents provided to WaterLegacy confirm that the comments were in final form and ready to send. Indeed, the handwritten note on the transmittal letter provided to WaterLegacy states that the comments were read word for word over the phone to MPCA. As such, the Band does not agree that those documents were subject to any applicable privilege.

The Band is also concerned about the lack of transparency regarding the EPA's communications with MPCA and its unwillingness to publicly share its concerns related to the NorthMet project throughout the permitting process. Based on recent news articles it also appears that EPA staff developed a memorandum to the file dated December 18, 2018 which documents how many of the issues raised by EPA were not resolved. *See* StarTribune Article dated June 14, 2019 (attached). The Band hereby requests that memorandum be promptly released to the Band. If EPA believes that the memorandum is privileged, we would appreciate a detailed explanation as to EPA's reasoning.

Thank you.

Sincerely,

Kevin R. Dupuis
Chairman

LOCAL

Federal watchdog opens inquiry into EPA handling of Minnesota PolyMet pollution permit

Retired agency attorney calls permit process "unethical" and "bizarre."

By Jennifer Bjorhus (http://www.startribune.com/jennifer-bjorhus/34031274/) Star Tribune

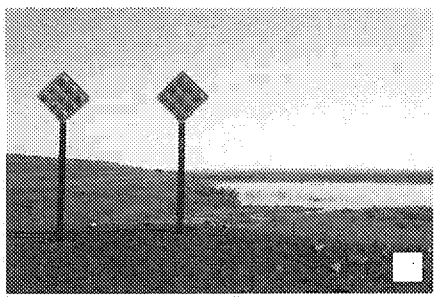
JUNE 14, 2019 — 10:28PM

The Environmental Protection Agency Office of Inspector General has opened an investigation into the agency's handling of a crucial pollution permit for Minnesota's first copper mine after a retired agency attorney raised questions about the episode.

The investigation (https://www.epa.gov/office-inspector-general/notification-hotline-complaint-epa-review-polymet-mining-companys-national) was announced June 12, the same day the Environmental Protection Agency (EPA) released documents related to the water quality permit requested by several parties, including the Minnesota-based advocacy group WaterLegacy and U.S. Rep. Betty McCollum, D-Minn.

Release of the documents shows that written comments by EPA regulators, challenging key parts of the permit, were never formally submitted for the public record and were never sent to officials at the Minnesota Pollution Control Agency (MPCA). Instead, the comments were read to MPCA staff over the telephone last spring, a practice that the retired EPA attorney described as "bizarre."

The Star Tribune has also requested the documents, but the EPA hasn't yet provided them.



ANTHONY SOUFFLE - STAR TRIBUNE

The Polymet tailings ponds could be seen over a small berm.

The documents relate to a crucial state water quality permit issued to PolyMet Mining, a Toronto-based minerals firm that wants to build a $1 billion copper-nickel mine in northeast Minnesota. After years of review, PolyMet cleared most of Minnesota's regulatory hurdles in late 2018. The newly released documents include seven pages of detailed criticism by EPA Region 5 staff in Chicago, which oversees Minnesota's enforcement of federal pollution laws, outlining deficiencies in the permit that the MPCA issued to PolyMet last December. It is the first time the EPA's official comments on the permit, which will regulate dangerous pollutants in effluent from the mine, have been made public.

The written comments note that the permit would "authorize discharges that would exceed Minnesota's federally-approved human health and/or aquatic life water quality standards for mercury, copper, arsenic, cadmium, and zinc." In one core passage, they said the permit lacked specific effluent limits, known as WQBELs, which are numeric limits on how much of a pollutant can be in the effluent pumped out a discharge pipe.

A retired EPA attorney from Boston, Jeffry Fowley, learned of the phoned-in comments from confidential sources in January and filed a complaint with the EPA's Office of Inspector General.

The sources told him EPA leadership in Region 5 were suppressing staff comments. Fowley has called it "serious improper conduct" and "unethical."

"In all my years of experience, I have never heard of a situation where EPA personnel have read written comments on a permit to state personnel over the phone," Fowley said in a sworn declaration filed with the Minnesota Court of Appeals.

MPCA officials told the Star Tribune there was nothing unusual about their exchange with the EPA, and that they did incorporate many of the agency's concerns into the final permit for PolyMet.

In an interview Friday, Fowley said he and Minnesota's Fond du Lac Band of Lake Superior Chippewa, which also filed a complaint, were pleased with the Inspector General's decision.

"I think the fact that they're taking up this one indicates they think there is something seriously wrong," Fowley said.

McCollum, who waged a monthslong public battle to obtain the EPA documents, had only brief comments. In a statement to the Star Tribune she said her role was to "ensure transparency."

"Now the courts and the public have the information needed to determine whether the final permit adequately addresses the many concerns raised by the EPA," said McCollum, who leads a House subcommittee that oversees the EPA.

Differing documents

In a letter to McCollum with the documents, EPA Acting Associate Administrator Joseph Brazauskas said it's common practice for complex permitting decisions to be handled verbally rather than in writing.

"EPA Region 5 Administrator Cathy Stepp has specifically encouraged EPA staff to work more collaboratively and speak 'face-to-face' with state officials," Brazauskas wrote.

Brazauskas also said the EPA hadn't planned to release the written comments because it considers them private under the "deliberative process privilege" exemption to the federal Freedom of Information Act.

However, he said, the agency had given the comments voluntarily to the Fond du Lac tribe, so it could no longer withhold them.

The EPA's written comments were also sent to WaterLegacy, an advocacy group in St. Paul, and the Fond du Lac Band, whose land is downstream from PolyMet's proposed mine near Babbitt.

The parties together have challenged the water permit over its lack of stringent, federally enforceable limits on nearly two dozen pollutants regulated by the Clean Water Act.

The documents received by WaterLegacy, however, differ slightly from those sent to McCollum; they include a separate letter from Kevin Pierard, a senior official in the EPA's Chicago office, to Jeff Udd, the MPCA's director of metallic mining, which underscores the fact that the EPA's concerns were conveyed by phone, not in writing.

Many sections in this copy of the written comments were underlined and numbered; across the top Pierard wrote by hand that the underlined sections were "conveyed verbally" to the MPCA on April 5, 2018, and lists the MPCA staff on the phone call.

The phone conversation occurred several weeks after the public comment period on PolyMet's draft permit closed in March 2018, meaning that the EPA-written criticisms were never entered in the public record.

The EPA's criticisms should have been public from the start, said WaterLegacy lawyer Paula Maccabee.

"They are some of the strongest comments I've ever seen," she said. "It's like one of the most important documents in this entire case, and it's not in the administrative record."

'Rigorous' review

MPCA officials and former MPCA Commissioner John Linc Stine said nothing improper occurred in the episode and that the final PolyMet permit did reflect some of the EPA comments.

In an interview, Stine said nothing requires the EPA to submit written comments during the public comment period. He also said that the concerns the EPA read over the telephone were similar to comments other stakeholders had filed previously.

"It didn't strike me that there was anything that was plowing new ground," he said.

In a statement, MPCA spokesman Darin Broton described the PolyMet permit process as "rigorous" and said the agency discussed technical issues with the EPA frequently.

"Based on those conversations, as well as other comments received ... during the official comment period, the MPCA made substantive changes to the draft permit, including additional limits for arsenic, cobalt, lead, nickel and mercury; and new language was added that clearly states that the discharge must not violate water quality standards," Broton said. "That's why the EPA did not object to the MPCA's final permit."

Several MPCA staff members have filed sworn statements as part of an appeal filed by WaterLegacy, making similar arguments.

Former MPCA staff attorney Michael Schmidt said in his declaration that no one tried to conceal anything. They noted how quickly the EPA staff read the comments on the phone that day, making note-taking difficult.

In an interview Friday, Fowley, the former EPA attorney, accused both the EPA and the MPCA of a "coverup." He said confidential sources told him that the EPA's Region 5 staff were so frustrated about their unheeded concerns that they filed a memo Dec. 18 — just before the permit was issued — documenting the issues that had not been resolved. Fowley said the memo contained sufficient information to justify an EPA objection to the permit.

Fowley characterized PolyMet's permit as weak, and "an end run around the ... requirements of the Clean Water Act."

"It's kind of like if instead of speed limits they told people not to drive too fast," Fowley said. "I've never seen this situation before."

Jennifer Bjorhus is a reporter covering the environment for the Star Tribune. She was a business reporter for much of her career but in recent years focused on criminal justice issues, including police use of force and responses to sexual assault.

jennifer.bjorhus@startribune.com 612-673-4683 jbjorhus