



Via email USACE-PolyMet-401a2@usace.army.mil

June 6, 2022

U.S. Army Corps of Engineers
St. Paul District
180 5th St. E., Suite 700
St. Paul, MN 55101

RE: Fond du Lac Band's Objection to the Proposed Clean Water Act Section 404 Permit for the NorthMet Mine Project

Colonel Jansen,

Public Employees for Environmental Responsibility (PEER) is a nonprofit organization that assists federal, state, and local public employees in fighting for the ethical management of natural resources, strong environmental laws and policies, and accountability and transparency in government actions. PEER respectfully submits these comments on the U.S. Army Corps of Engineers (the Corps) regarding the open comment period on the Fond du Lac Band of Lake Superior Chippewa's ("Fond du Lac" or "the Band") objection to the Corps's Section 404 Clean Water Act permit for PolyMet Mine project (PolyMet permit).

Consistent with the views expressed by Fond du Lac and the U.S. Environmental Protection Agency (EPA),¹ PEER encourages the Corps to not reinstate the suspended PolyMet permit. Unless and until the state of Minnesota can cure its deficient National Pollutant Discharge Elimination System (NPDES) permit for the project, and unless and until the Corps fully consults with Fond du Lac to assuage all of its Clean Water Act (CWA) and treaty-derived concerns, it is simply premature to reissue the permit.

¹ See generally EPA Region 5, Clean Water Act Section 401(a)(2) Evaluation and Recommendations with respect to the Fond du Lac Band's Objection to the Proposed Clean Water Act Section 404 Permit for the NorthMet Mine Project (Apr. 29, 2022) <https://www.epa.gov/system/files/documents/2022-05/EPA%20CWA%20401a2%20Evaluation%20and%20Recommendations%20to%20the%20Corps%20on%20NorthMet%204-29-22.pdf>.

The Corps should not shirk its consultation duties

Considering that Fond du Lac has the same standing as a state in its CWA regulatory role, as well as a status of an independent nation with unique treaty rights under treaties with the United States dating back to the 1800s, the Corps has a weighty duty to fully consult with Fond du Lac and hear all the Band's critiques. As EPA explained: "The Band has repeatedly voiced concerns that its members are at risk from elevated mercury levels in fish and have further raised concerns regarding mercury impacts to fish and aquatic-dependent resources within reservation waters. EPA does not observe that these concerns have been either acknowledged or addressed."² The Corps would not treat a state with this level of neglect, and it has no reason to differentiate between any state and a Tribe with full authority to set its own water quality standards.

By failing to consult, the Corps has blinded itself to useful information demonstrating that the permit fails to protect human health and the environment. "EPA is unaware of any CWA Section 404 permit conditions that would ensure compliance with the Band's water quality requirements for the protection of fish and other aquatic-dependent resources in reservation waters, given current project design and discharges outside the CWA Section 404 permitted activities."³ It is only by working with water quality experts at Fond du Lac that the Corps can hope to alleviate identified issues and respect the Band's sovereignty over its resources.

The Corps has a duty to uphold treaties

Stepping back from the PolyMet permit's reissuance will allow the Corps to reassess and improve its analysis of treaty rights that are likely to be violated by issuing another PolyMet permit. Along with several other Ojibwe Tribes, the Band has retained many rights over lands it ceded, and there are significant overlapping issues between maintaining water quality in ceded lands and the concerns about pollution from the project site within the Fond du Lac reservation. As EPA explained:

EPA notes that the Corps, as the CWA Section 404 permit issuing authority, and as a signatory to the 2021 MOU, has an independent obligation to consider impacts the Band's treaty rights in making its

² *Id.* at 41.

³ *Id.* at 41-42.

decision regarding permit issuance. EPA further notes that the Corps' ROD for the NorthMet project contains little information regarding the consideration of treaty rights and, further, that the Corps concludes that the co-lead agencies were able to learn "little specific information concerning recent-historic subsistence use and [identified] no information regarding contemporary subsistence activity at the Mine Site, Transportation and Utility Corridor, or Plant Site." Aside from this lack of information gathering, EPA does not observe that there was an attempt to understand resource use within the Fond du Lac Reservation where the Band's water quality requirements specifically protect the Band's designated uses of reservation waters, including the protection of fish and aquatic dependent species upon which Band members rely for subsistence, but also because of the Band's commitment to protect these resources for their ecological and cultural values. EPA also does not observe that there was an attempt to understand how increased mercury impacts from the CWA Section 404 permitted activities would specifically impact and bioaccumulate in those species upon which Band members rely.⁴

Beyond the treaty rights held by Fond du Lac, it is also worth the Corps's further consideration that any increased pollution load passing through the Fond du Lac reservation will ultimately also pass downriver to Lake Superior, which is a boundary water with Canada. As such, the pollution flowing from the PolyMet permit site will have a gradual but long-term impact on waters subject to the environmental protections of Article IV⁵ of the 1909 Boundary Waters Treaty.⁶ Since the Boundary Waters Treaty has been recognized to be self-executing for

⁴ *Id.* at 39-40.

⁵ "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." The Boundary Waters Treaty of 1909, 36 Stat. 2448, Art. IV (Jan. 11, 1909), <https://ijc.org/sites/default/files/2018-07/Boundary%20Waters%20Treaty%20of%201909.pdf>.

⁶ "The Boundary Waters Treaty of 1909 is perhaps the most important bilateral agreement between Canada and the United States. Over the past century, it has provided a foundation for cooperation on shared natural resources on the basis of equality between the two countries." U.S. ARMY CORPS OF ENGINEERS DETROIT DISTRICT, GREAT LAKES UPDATE VOL. 176, THE BOUNDARY WATERS TREATY OF 1909: 100 YEARS OF COOPERATION (July 2009) <https://www.lre.usace.army.mil/Portals/69/docs/GreatLakesInfo/docs/UpdateArticles/Update176.pdf>.

more than a century,⁷ the Corps cannot reissue a PolyMet permit that increases pollutants such as mercury and specific conductance without some consideration of bio-accumulative long-term health or property impacts within downstream boundary waters like the Great Lakes.

The project's NPDES permit is legally questionable and tainted with irregularities

Currently the PolyMet project's NPDES permit issued by the state of Minnesota is subject to court review, having been appealed to the state Supreme Court.⁸ On appeal the Court will determine whether proven irregularities and unlawful conduct in issuing the permit were prejudicial to parties who challenged it. Considering the cloud of irregular and illegal permit issuance, it would be appropriate for the Corps to step back from its own PolyMet permit and reassess any assumptions based on other agencies' actions in the permitting process.

The CWA relies on a model of cooperative federalism to protect the water resources of stakeholders – Section 404 permits work hand-in-hand with Section 401 state water quality certifications. But the EPA Inspector General found serious irregularities in the NPDES review process, where a failure to consider downstream effects stripped the Band of its powers to object to the permit under Section 401.⁹ This process has not lived up to the purposes of the CWA, and the inherent uncertainty shrouding the legitimacy of the NPDES permit should be more than enough reason for the Corps to decline to reissue the suspended permit until all other proceedings are resolved or redone.

⁷ *Canadian Boundary Waters*, 30 Op. Att'y Gen. 351, 354 (1915) ("It is, therefore, in my opinion, the duty of the officials, whose function it is to administer the laws and regulations relating to commerce upon the Great Lakes, to fulfill, by proper administrative action, the requirements of the [Boundary Waters] treaty[.]")

⁸ The case is currently at the briefing stage and a final opinion of the Court is not likely to come out for some time.

⁹ U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF INSPECTOR GENERAL, REPORT NO. 21-P-0122, IMPROVED REVIEW PROCESSES COULD ADVANCE EPA REGIONS 3 AND 5 OVERSIGHT OF STATE-ISSUED NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PERMITS, at 1 (Apr. 21, 2021), https://www.epa.gov/sites/default/files/2021-04/documents/_epaog_20210421-21-p-0122.pdf.



Conclusion

Because it is apparent that the suspended PolyMet permit will not protect Fond du Lac's water resources up to the Band's standards, it should not be reissued. Additionally, no permit for the project should be issued until there is a full consultation process that respects Fond du Lac's treaty rights as well as the Corps's independent duty to protect boundary waters from pollution. Consistent with the opinions of the Band and EPA, PEER encourages the Corps to not reissue a permit that cannot be said to protect the environment, and which may be based in part on other agency approvals that have turned out to be irregular and legally questionable.

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