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SENT ELECTRONICALLY

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Re: Petition for Withdrawal of Minnesota NPDES Program Authority - Update

Dear Ms. Hyde and Mr. Pierard,

WaterLegacy understands from review of the U.S. Environmental Protection Agency (EPA) website pertaining to WaterLegacy's Petition for NPDES Program Withdrawal in Minnesota¹ that the EPA has recently raised several concerns about the authority and intent of the Minnesota Pollution Control Agency (MPCA) to comply with the Clean Water Act in timely reissuance and enforcement of NPDES mining permits. We believe that, to date, neither WaterLegacy's Petition nor the EPA's robust response has had any salutary effect on Minnesota's commitment to control mining pollution in compliance with the Act.

In this letter, we provide an update of issues raised in the EPA's investigation and highlight a new concern; the level of MPCA staff resources that would be consumed to consider the NPDES permit application filed this week by the PolyMet Mining Company. In light of our Petition and the evidence to date, WaterLegacy believes that resources must not be diverted from regulating existing mines to address PolyMet's permit request. After summarizing recent developments regarding NPDES mining permits in Minnesota, we provide our recommendations for action.

In recent weeks, the EPA requested an Attorney General's statement as to whether the "Wild Rice Water Quality Standards" law enacted during the 2015 Special Session of the Minnesota Legislature,² limits the MPCA's authority to include necessary water quality based limits in permits where the wild rice criteria apply (EPA letter of April 5, 2016). The EPA requested an additional Attorney General's statement after Minnesota's Governor signed a measure this year

¹ EPA, NPDES Petition for Program Withdrawal in Minnesota, <https://www.epa.gov/mn/npdes-petition-program-withdrawal-minnesota>

² Laws of Minnesota 2015, 1st Spec. Sess. Chapter 4, Article 4, Section 136.

entitled “Sulfate Effluent Limit Compliance,”³ despite EPA’s ongoing investigation of MPCA’s authority to control mining pollution under the Clean Water Act. This measure seems to invalidate water quality based effluent limits and compliance schedules for sulfate that were included in NPDES permits for mining facilities (EPA letter of June 28, 2016). EPA explained,

[T]his legislation appears to be a legislative action that strikes down or limits MPCA's authority under its approved NPDES program. Pursuant to 40 C.F.R. 123.63 (a)(ii), such an action may constitute grounds for EPA's determination that the MPCA's legal authority no longer meets the requirements of a federally approved program . . . Accordingly, we ask that MPCA provide an additional updated Attorney General's statement to explain whether the current scope of MPCA's authority remains adequate to enforce all conditions in those NPDES permits to which the law is expected to apply.

In addition to investigating the effects of new legislation on the Minnesota NPDES program, the EPA has expressed concern about the lack of progress, asking whether or not the MPCA intends to timely reissue expired mining permits (EPA letter of June 22, 2016). This letter states,

The U.S. Environmental Protection Agency has received several reports that the Minnesota Pollution Control Agency (MPCA) does not intend to reissue expired National Pollutant Discharge Elimination System (NPDES) permits for metallic mining operations so that it can concentrate staff resources on developing a new water quality criterion for the protection of wild rice. We received these reports from news media, stakeholders, and in statements made by representatives of the MPCA in meetings with EPA.

WaterLegacy finds it troubling that the MPCA would assert that altering Minnesota’s wild rice sulfate standard would take priority over timely reissuance of expired mining permits. As reflected in our comments on MPCA’s draft plan to eliminate the wild rice sulfate rule,⁴ WaterLegacy is convinced that recent research conducted by the University of Minnesota under contract with MPCA demonstrates there is no valid scientific or technical basis to develop a new water quality criterion for the protection of wild rice. Independent experts in statistics, mathematics and ecology have agreed that the MPCA’s proposal to replace the wild rice sulfate standard with an equation cannot be justified. Prior to political interference, MPCA’s staff had concluded that the existing wild rice sulfate standard was needed and reasonable.

As stated in our Petition to withdraw Minnesota’s NPDES program authority, WaterLegacy believes MPCA’s continuing efforts to change the wild rice sulfate limit as well as the MPCA’s failure to timely reissue mining permits result from undue influence of mining interests over every aspect of Minnesota mining rulemaking and regulation.

WaterLegacy was notified by the MPCA that on July 11, 2016 PolyMet submitted its application for an NPDES/SDS permit for its NorthMet mining project. PolyMet’s application takes up seven volumes and is 1,884 pages long. Even if PolyMet’s consultants and the state agencies that relied on their work had rigorously analyzed all of the issues required to be considered for an NPDES permit, MPCA would require substantial staff resources to read and evaluate the PolyMet application and determine whether a draft permit should issue.

³ Laws of Minnesota 2016, Chapter 165, Section 1.

⁴ WaterLegacy’s Comments Opposing State Plan to Eliminate Wild Rice Sulfate Rule (December 18, 2015) with exhibits and expert opinions, <http://www.waterlegacy.org/saving-wild-rice-sulfide-mining-pollution>.

In fact, NPDES permitting for PolyMet may consume yet more resources because the analysis done to date is insufficient to support a permitting decision. WaterLegacy has identified many deficiencies in the PolyMet Final Environmental Impact Statement (FEIS)⁵ that must be addressed before an NPDES permit can be considered, including the following: failure to analyze or model methylmercury production and export from project features and impacted wetlands, failure to assess impacts of mine site and tailings site fractures on water quality, reliance on unsubstantiated assumptions for seepage collection at unlined mine site and tailings site waste facilities, failure to analyze potential water quality impacts from mine site northward flow, failure to specify quantity and concentration of chemical constituents - including toxic and reactive materials - at the hydrometallurgical residue facility, failure to consider degradation of water quality at the mine site and tailings site, and failure to analyze the concentration of pollutants at the nearest wetland or stream where mine site and tailings site seepage daylight to jurisdictional surface water.

EPA raised concerns throughout the PolyMet environmental review process about the lack of modeling pertaining to impacts of polluted seepage on the closest surface waters protected under the Clean Water Act. EPA's December 21, 2015 comments on the PolyMet FEIS underscore the need for substantial new monitoring and analysis of environmental impacts before NPDES permitting decisions can be made. Several of EPA's comments and recommendations are excerpted below:

Recommendation 1: Given the possibility of a northward flow path, analyses of environmental impacts associated with this possibility should be conducted and evaluated during the permitting process. These analyses should include anticipated direct and indirect environmental impacts that may occur if one or more of the proposed contingency mitigation measures are implemented.

The following points and recommendations related to monitoring and the contingency mitigation measures should be addressed during the permitting process to inform permit decisions:

1. The trigger(s) for implementing contingency mitigation measures should be defined.
2. Because each contingency mitigation measure, if implemented, would result in other impacts to the project and/or to the environment, each measure requires additional study before approval.

Recommendation 5: The permitting agencies should involve a specialized expert to inform the permitting agencies' review of a comprehensive monitoring and modeling program at the Mine Site.

WaterLegacy is concerned that pressure from mining lobbyists and their political supporters may now operate to prioritize the PolyMet NPDES permit application over MPCA's unfinished business updating expired permits for leaking mine pits and tailings dumps.

⁵ Comments of WaterLegacy on PolyMet NorthMet Mining Project and Land Exchange FEIS, http://www.waterlegacy.org/sites/default/files/PolyMet_FEIS/WaterLegacy-Comments_PolyMet-NorthMet_FEIS.pdf

We've reluctantly come to believe that neither the MPCA nor the Minnesota Legislature yet take seriously the State's obligation to administer our NPDES program for mining facilities in compliance with the Clean Water Act. So far, each attempt to secure compliance -- EPA's Joint Priority PPA, WaterLegacy's Petition, even the EPA's current investigation -- has been unsuccessful. No expired mining permits have been noticed for public comment, let alone reissued. It seems to us that additional action is needed.

Recommended Actions

- WaterLegacy recommends that the EPA request MPCA to disclose the staff resources it has devoted to changing Minnesota's existing wild rice sulfate standard, the staff resources committed to reissuance of expired NPDES mining permits to comply with the Clean Water Act, and the staff resources the Agency plans to divert in order to respond to PolyMet's application for an NPDES permit.
- WaterLegacy further recommends that the EPA advise the MPCA that EPA will require that pertinent water quality analysis and modeling left undone in PolyMet's environmental review process must be completed prior to EPA's review of any NPDES draft permit.
- WaterLegacy also recommends that the EPA inform MPCA that an analysis of discharge from existing mining facilities based on their operation under *updated and reissued* NPDES permits is necessary to determine whether the PolyMet project will cause or contribute to degradation of water quality, toxicity to aquatic life, and/or violation of the water quality standards of downstream states and tribes.
- Finally, WaterLegacy recommends that the EPA now proceed to inform the State of Minnesota that cause exists to commence NPDES program authority withdrawal proceedings under 40 C.F.R. §§123.63(a)(1)-(2) and 123.64(b)(1).

From our perspective, copper-nickel mining in the wetlands and headwater streams of the St. Louis River -- Lake Superior's largest United States tributary -- would pose a huge risk to water quality, wild rice, aquatic life, mercury contamination of fish, and the developing brains of downstream infants and children. A state, like Minnesota, that fails to administer its NPDES program in conformity with the Clean Water Act should not be trusted to protect natural resources or human health from sulfide mining in Minnesota's sensitive watersheds.

Respectfully submitted,



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Advocacy Director/Counsel for WaterLegacy