

WaterLegacy

Protecting Minnesota's waters and the communities who rely on them



Minnesota Center for
Environmental Advocacy



nmw
northeastern minnesotans *for wilderness*



August 10, 2009

Ms. Tamara Cameron
Chief, St. Paul District Regulatory Branch
US Army Corps of Engineers
Sibley Square at Mears Park
190 5th Street East, Suite 401
St. Paul, MN 55101-1638

RE: Public Notice (33 USCS §1344, 33 CFR 325.3) for the PolyMet Mining Corp.
NorthMet Project

Dear Ms. Cameron:

This letter is submitted on behalf of WaterLegacy, a non-profit organization founded to protect Minnesota water resources and the communities who depend on them; Minnesota Center for Environmental Advocacy; EARTHWORKS; Friends of the Boundary Waters Wilderness; Izaak Walton League of America, Minnesota Division; Minnesota Conservation Federation; National Wildlife Federation and Northeastern Minnesotans for Wilderness.

We are writing to request that the district engineer of the US Army Corps of Engineers ("USACE") issue a supplemental, revised, or corrected public notice, pursuant to the authority granted under 33 CFR §325.2(a)(2), regarding the application for a Section 404 permit submitted by the PolyMet Mining Corp for the proposed NorthMet mining facility ("Project"). As discussed below, significant changes in the Project design and other factors pertinent to determine the nature and magnitude of the Project and its impacts have occurred since the initial public notice was provided by the USACE in May of 2005. These changes, during the past four years, warrant the re-issuance of a public notice for the Section 404 permit. We would suggest that such re-noticing be performed at such time as the applicant has submitted information and resolved design issues sufficient to enable release of a Draft Environmental Impact Statement.

We also believe that circumstances have changed with respect to Minnesota Pollution Control Agency's ability to perform an analysis and make a determination under Section 401 of the Clean Water Act. Providing an up-to-date notice of the Section 404 permit for the PolyMet NorthMet project would ensure that Section 401 water quality certification

proceeds consistent with federal and Minnesota laws and policies.

1. Federal Statutes and Rules Support Re-Noticing the PolyMet Mining Corp. Section 404 Permit.

The intent of Section 404 of the Clean Water Act and implementing rules is both to give early notice of projects that might result in discharge of dredged or fill material to navigable waters and to ensure that the notice provides interested parties with sufficient information to make meaningful comment on the proposed project. The Secretary of the Army, acting through the Chief of Engineers, is required to publish notice within fifteen days of the date when an applicant “submits *all* the information required to complete an application for a permit under this subsection.” 33 USCS §1344(a) (emphasis added).

By Rule, the permit application must include: “a complete description of the proposed activity,” 33 CFR 325.1(d)(1); “all activities which the applicant plans to undertake which are reasonably related to the same project, 33 CFR 325.1(d)(2); a description of the “type, composition and quantity” of any material discharges into waters of the United States, 33 CFR 325.1 (d)(4); and a statement explaining avoidance, minimization and compensatory mitigation of impacts to waters of the United States., 33 CFR 325.3 (d)(7).

Even if the PolyMet Mining Corporation provided such information in its initial application for a USACE permit, the Complete Preliminary Draft Environmental Impact Statement (“CPDEIS”) released for limited public review in December 2008 clearly shows that the PolyMet mining project has undergone substantial changes since it was first proposed and will require additional changes before it can be submitted for permitting. The significant changes to the nature and impact of the proposed Project included in the CPDEIS were not included in the initial application and warrant a re-issuance of the Section 404 permit public notice.

For example, the CPDEIS indicated that the initial design for the Tailings Basin was insufficient to prevent a catastrophic failure and uncontrolled release of impounded flotation tailings and process water to the Embarrass River. (CPDEIS, p. 4.1-65). The Minnesota Department of Natural Resources determined that this design should not be pursued further for potential permitting (CPDEIS, p. 4.1-169).

The CPDEIS also described PolyMet’s proposal to install a “wetland” in the East Pit for treatment of acid mine drainage and to inundate the West Pit to form a “pit lake” after mine closure. These substantial design modifications also change the description of the proposed activities that might have been available in 2005.

The CPDEIS, further, provided new information on the type and composition of discharges into waters of the United States, including discharges that would affect mercury methylation in waters impaired due to excessive mercury concentrations. Mercury in fish is an issue of compelling interest to citizens in Minnesota, and the nature and magnitude of mercury impacts is a matter with a high level of public concern.

In addition, since the initial application was submitted, the United States Fish and Wildlife Services finalized its determination of the boundaries of lynx critical habitat in February 2009, which determination includes the proposed Project mine site.

Rules implementing Section 404 of the Clean Water Act require that the USACE's notice must, "include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment." 33 CFR 325.3(a). The notice must include a plan and elevation drawing showing the specific site location and character of all proposed activities, 33 CFR 325.3(a)(6), and any other available information which may assist interested parties in evaluating the likely impact of the proposed activity on factors affecting the public interest, 33 CFR 325.3(a)(13). In addition, the public notice must include a "statement of the district engineer's current knowledge on endangered species," including the impact of the project on critical habitat of endangered or threatened species. *See* 33 CFR §325.3.

The public notice period for the Section 404 permit authorization and Section 401 certification was concluded in 2005 before the required environmental review proceeded beyond the EAW scoping stage, and prior to the US Fish and Wildlife Services making its final determination regarding the boundaries of critical habitat for lynx. (CPDEIS, p. 4.2-1) The USACE web site confirms that a complete and detailed project description was provided by PolyMet long after the conclusion of this public notice period, as follows:

PolyMet provided a detailed project description of its proposed action on January 22, 2007. A supplemental project description was provided in July 2007 (<http://www.mvp.usace.army.mil/regulatory/default.asp?pageid=1243>)

Even if the USACE's notice was complete and accurate when issued in May of 2005, the project description, design and information pertaining to the nature and magnitude of the PolyMet project and its potential impacts affecting the public interest has changed since the early 2005 stage of the process. As the DEIS is completed and a complete description of the project and design becomes available, it is appropriate under applicable law to re-issue public notices and allow meaningful comment on the current proposal for the PolyMet NorthMet mining project as provided by 33 CFR §325.2(a)(2).

2. Re-Noticing the PolyMet Section 404 Permit Would Support Federal and State Policy to Protect Wetlands and Water Quality.

The public notice for the Section 404 permit was issued by the USACE in May of 2005. The MPCA waived Section 401 certification in May of 2006.

As explained on the MPCA's web site, the waiver of certification in 2006 did not reflect a policy determination, but the severity of budget constraints. Since late 2006, the MPCA has changed its practice of systematically waiving Section 401 authority, and has established criteria to identify projects where Section 401 authority will be exercised to ensure that projects comply with state water quality standards. (<http://www.pca.state.mn.us/water/401.html> as of 7/24/09)

The USACE's re-issuance of notice for the PolyMet mining project permit would more readily permit the MPCA to exercise its authority under Section 401 of the Clean Water Act to protect wetlands and water quality. This exercise of authority would support both federal and Minnesota state policies.

Federal policy favoring an active role for States in wetland decisions is reflected on the U.S. Environmental Protection Agency web site:

In 1988, the National Wetlands Policy Forum recommended that States ‘make more aggressive use of their certification authorities under Section 401 of the CWA to protect their wetlands from chemical and other types of alteration.’ In response, in 1989, EPA issued guidance to States on applying Section 401 certification to protect wetlands. Wetlands water quality standards are important because they are the primary tool used in water quality certification decisions. . . . Section 401 certification allows States to take a more active role in wetland decisions. (<http://www.epa.gov/owow/wetlands/facts/fact24.html>)

It is clear from criteria established by the MPCA in 2007 that MPCA policy would support exercise of Section 401 authority to ensure that the PolyMet NorthMet project would be in compliance with state water quality standards. As the MPCA website explains:

More specifically, the MPCA is now using its Section 401 authority to review Section 404 Corps Individual Permit applications for projects that:

1. Are within areas that directly drain to Impaired Waters (or those close to being impaired), Outstanding Resource Value Waters (ORVWs), or trout waters;
2. Affect more than 3 acres of private project or 5 acres of public road wetlands within 1/2 mile of listed Impaired Waters (smaller projects with special concerns may also be considered);
3. Have the potential to inundate or deepen by excavation greater than 2 acres of wetland or otherwise not regulated by the Wetlands Conservation Act (WCA); and
4. Result in typically large wetland fills or drainage (e.g., linear projects, mining activities, multi-purpose roads with new bed alignments, new judicial ditching that have the potential to affect downstream waters, flood impoundment or diversion projects, large development and projects that may have adverse impacts on the watershed) (<http://www.pca.state.mn.us/water/401.html>, 7/24/09)

The PolyMet NorthMet project clearly meets the MPCA’s criteria for exercise of Section 401 authority. There are 1302 acres of wetlands within the Mine Site (CPDEIS 4.2-3). The proposed Project would impact, at a minimum, an estimated 1,197 acres of wetlands, including 869 acres directly affected and 328 acres indirectly affected. (CPDEIS 4.2-32). Mining activities are also among the activities specifically identified by the MPCA as likely to have adverse impacts on a watershed and require Section 401 review.

As explained by the MPCA, Section 401 review provides important assurance that a Section 404 permit issued by the USACE will contain conditions so that state water quality standards will be met. This review protects wetlands, water quality and the soundness of the permitting decision process.

Projects that fit these criteria are now being reviewed by the MPCA to ensure they will be in compliance with state water quality standards. In particular, the MPCA intends to ensure that no prudent and feasible alternatives to impacting wetlands are available, the project’s impact on wetlands is minimized, and adequate compensatory mitigation will be implemented to protect the designated uses of the wetland and the water quality standards of the affected watershed. Projects in these areas that will be in compliance with the standards will receive an MPCA 401 Certificate, the

conditions of which will be incorporated into the Corps 404 Permit and must be adhered to by the Permittee. Projects that will not be in compliance with state water quality standards cannot be certified. (<http://www.pca.state.mn.us/water/401.html>, 7/24/09)

Conclusion

PolyMet's NorthMet project would create significant impacts on over a thousand acres of wetlands in a watershed where many waters are impaired for mercury and other chemicals. This project is the first non-ferrous sulfide mine to seek a permit in Minnesota and is of concern both to directly affected tribes and to a wide range of community and environmental interests, due to potential impacts on forests, wetlands, surface and ground water quality, rare endangered and tribally significant species, global warming and environmental justice, among other important resources and values.

For these reasons, the NorthMet project is quite controversial, and each step of the process is likely to be scrutinized to ensure that notice has been adequate and that federal and State policies have been closely followed.

In the interest of the public and to protect the natural resources which are of particular concern to us, WaterLegacy, Minnesota Center for Environmental Advocacy, EARTHWORKS, Friends of the Boundary Waters Wilderness; Izaak Walton League of America Minnesota Division, Minnesota Conservation Federation, National Wildlife Federation and Northeastern Minnesotans for Wilderness request that the USACE re-notice the Section 404 permit at such time as the Draft EIS is released for public review.

This re-issuance will ensure that notice is provided for the current project proposed by PolyMet, in conformity with federal rules and policies and will permit the MPCA to more readily exercise the authority by which it ensures that the federal Section 404 permit is consistent with state water quality laws.

Please do not hesitate to contact Paula Maccabee (651-646-8890) if you have any questions regarding the above.

Sincerely,



Paula Goodman Maccabee
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