

Exhibit 1:

Letter from EPA to the Army Corps (March 4, 2021)

Via Electronic Mail

Colonel Karl Jansen
District Engineer
St. Paul District,
U.S. Army Corps of Engineers
180 5th St. East, Ste. 700
St. Paul, MN 55101-1678
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Re: *Fond du Lac Band of Lake Superior Chippewa v. Cheryl L. Newton, et al.* (Case No. 0:19-cv-02489-PJS-LIB)

Dear Colonel Jansen:

I write to inform you that the U.S. Environmental Protection Agency intends to seek a voluntary remand in the above-referenced case. Specifically, EPA will seek a remand of EPA's lack of notice to the Fond du Lac Band of Lake Superior Chippewa (the "Band") under Section 401(a)(2) of the Clean Water Act. 33 U.S.C. § 1341(a)(2). EPA's lack of notice has been challenged in the second and third causes of action in Plaintiff's Amended Complaint in the above-referenced case.¹

As you know, this case arose in connection with permits issued for PolyMet Mining, Inc.'s ("PolyMet's") proposed NorthMet mining project, including the Clean Water Act Section 404 Permit issued by the Corps, and a state certification issued by the Minnesota Pollution Control Agency ("MPCA"). Pursuant to CWA Section 401(a)(2), the Corps is required to provide EPA with notice of any CWA Section 404 permit application and CWA Section 401 state certification for discharges from a project. The statute then states that "[w]henver such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State" the Administrator shall "so notify such other State" within 30 days of receiving notice. 33 U.S.C. § 1341(a)(2).

In this case, EPA received notice of PolyMet's 404 Permit Application and MPCA's CWA Section 401 state certification on December 20, 2018. EPA did not notify the Band within 30 days of receipt of that notification.

¹ EPA's motion for a voluntary remand will be accompanied by a request to stay the remaining claims in the litigation, including those against the Corps during the pendency of the remand.

The Band challenged the lack of notification by EPA in this litigation, and EPA moved to dismiss the Band's claims, arguing that EPA had discretion not to make a "may affect" determination. On February 16, 2021, the U.S. District Court issued an Order in this case, denying EPA's motion to dismiss these causes of action and concluding that "EPA had a legal duty" to make a "may affect" decision under Section 401(a)(2). Order at 31. While not a decision on the merits of the claim, the Court observed that the Band's complaint "is sufficient to state a plausible claim that EPA abused its discretion or otherwise acted contrary to law when it decided not to notify the Band under § 1341(a)(2)." *Id.* at 32.

A voluntary remand allows an agency "to reconsider its previous position." *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Accordingly, if EPA's motion for voluntary remand is granted by the Court, the remand would allow EPA to make a determination, in light of any additional information it may receive, as to whether discharges "may affect" the Band's water. EPA intends to make this determination within 90 days after issuance of a remand order by the Court.

EPA's review on remand of the CWA Section 404 Application and the Section 401 Certification may result in additional proceedings before the Corps. That is, should EPA, upon remand, make an affirmative "may affect" determination, EPA would be required under Section 401(a)(2) to so notify the Band. The Band could then notify the Corps of any objections to the Permit and "request a public hearing on such objection." *Id.*

EPA understands that the Corps' District Engineer has the authority to suspend a permit where it is "in the public interest" to do so. *See* 33 C.F.R. § 325.7(c). Suspending the PolyMet CWA Section 404 Permit while EPA undertakes its review under Section 401(a)(2) would allow for meaningful additional Section 401(a)(2) proceedings before the Corps should EPA—after its "may affect" review—provide notice to the Band. Accordingly, EPA requests that the Corps consider suspending PolyMet's CWA Section 404 Permit if EPA's motion for a voluntary remand is granted.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Tera L. Fong
Division Director, Water Division

cc: Mr. Chad Konickson, Chief, Regulatory Division, St. Paul District, U.S. Army Corps of Engineers