

PolyMet permit: Secrecy, manipulation and a low bar for Minnesota agencies

Counterpoint: The full story on the MPCA's procedures.

By Janet Keough and Paula Maccabee | SEPTEMBER 10, 2020 — 5:43PM

Last week, the Star Tribune [reported \(https://www.startribune.com/minnesota-pollution-control-agency-largely-cleared-in-decision-to-issue-water-permit-to-polymet-mine/572312532/\)](https://www.startribune.com/minnesota-pollution-control-agency-largely-cleared-in-decision-to-issue-water-permit-to-polymet-mine/572312532/) that the Minnesota Pollution Control Agency (MPCA) was “largely cleared” of “procedural irregularities” in its issuance of the water pollution permit for the controversial proposed PolyMet copper-nickel mine (front page, Sept. 4).

But the real story of this case is one of secrecy, manipulation and the low ethical bar for Minnesota agencies.

The district court found facts that confirmed the claims made by environmental groups, tribes and whistleblowers. What are these facts? 1) The MPCA knew that the U.S. Environmental Protection Agency intended to send written comments on the draft PolyMet permit. 2) The MPCA asked the EPA to withhold these comments. 3) When EPA professional staff did not agree to withhold their comments, MPCA Commissioner John Linc Stine and Assistant Commissioner Shannon Lotthammer lobbied political appointees.

The judge found that “Ms. Lotthammer’s goal was to procure an agreement from the EPA to forgo sending comments during the public comment period.” The judge found that Lotthammer stated that if the EPA sent its written comments “it would confuse the public” and “create a good deal of press.”

The MPCA’s manipulation of the Clean Water Act permitting process was not only unusual, it was consequential. The EPA informed the MPCA that the EPA’s written comments on the PolyMet permit were highly critical. EPA scientists and lawyers had concluded that the PolyMet permit would result in pollution harming aquatic life and human health and violate the Clean Water Act. The PolyMet permit would be unenforceable. Even worse, the permit would not protect downstream communities, including the Fond du Lac reservation, from increased mercury contamination of fish.

These are the EPA comments the MPCA didn’t want the public to see. And the MPCA’s pressure on EPA to keep its comments about a water pollution permit hidden from the press and the public was completely unprecedented.

But the judge applied a very narrow and highly disputed definition of the legal standard for “irregularities.” He said that because no specific law or manual prevented the MPCA from deviating from its customary and regular practice, the MPCA’s actions to block EPA comments were not “irregular.”

We strongly disagree.

We didn’t learn about the EPA’s withheld comments through the MPCA’s permitting processes. These comments were revealed only due to confidential sources and Freedom of Information Act (FOIA) lawsuits filed by WaterLegacy and settled by the federal government.

The MPCA got awfully close to keeping the EPA’s comments secret from all of us.

The MPCA greeted last week’s decision with self-congratulation, but failed to admit that the ruling in this PolyMet permit case represented a historic milestone. Although the judge did not find all of the MPCA’s PolyMet permit manipulations irregular under the law, for the first time in our state’s history, a Minnesota court found that a state agency



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A former iron ore processing plant near Hoyt Lakes, Minn., that would become part of a proposed PolyMet copper-nickel mine.

had engaged in “procedural irregularities.” The judge found that the MPCA’s action in “destroying exhibits 58 and 333 was an irregularity in procedure not shown in the record.”

These destroyed exhibits were e-mails from Commissioner Stine and Assistant Commissioner Lotthammer. They are the “smoking guns” that prove the MPCA asked EPA political appointees to withhold EPA’s written comments on the draft PolyMet permit. And again, this evidence was found only because of a leak by the EPA employees’ union and our FOIA requests and lawsuits.

WaterLegacy’s path forward in litigation is clear. We will appeal from the judge’s narrow view of the law and present to the Court of Appeals critical evidence admitted in the hearings. This evidence shows that the MPCA got the EPA to suppress its conclusion that the draft PolyMet permit was inadequate. And then the MPCA tried to hide not only the EPA’s comments but the MPCA’s efforts to keep them from the press, the public and the courts.

We and our allies will then make our case that the PolyMet water pollution permit violates state law and the Clean Water Act, and must be reversed to protect water quality, aquatic life, wild rice and the health of downstream communities.

This time, in the PolyMet water pollution permit case, we had the benefit of staff notes, whistleblowers and FOIA lawsuits to reveal the truth. But what about next time? Have we set such a low ethical bar for our state agencies that they can manipulate permitting processes, but “get off” on a legal technicality? What guardrails must we now raise to prevent Minnesota state agencies from hiding threats to natural resources and human health from the press and from the public?

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