



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

***Hotline Report:  
Ensuring clean and safe water***

## **Improved Review Processes Could Advance EPA Regions 3 and 5 Oversight of State-Issued National Pollutant Discharge Elimination System Permits**

Report No. 21-P-0122

April 21, 2021



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## Abbreviations

C.F.R.	Code of Federal Regulation
CWA	Clean Water Act
EPA	U.S. Environmental Protection Agency
NPDES	National Pollutant Discharge Elimination System
OIG	Office of Inspector General
U.S.C.	United States Code

**Cover Photo:** Wild rice lake in the Fond du Lac Band of the Lake Superior Chippewa Reservation. The Fond du Lac Band tribal lands are located along the St. Louis River in northeastern Minnesota, 125 miles downstream from a proposed mine and processing site. (EPA OIG photo)

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# At a Glance

## Why We Did This Audit

The Office of Inspector General for the U.S. Environmental Protection Agency sought to determine whether the EPA's reviews of state-proposed National Pollutant Discharge Elimination System, or NPDES, permits verify that the permits adhere to Clean Water Act, or CWA, requirements. This audit was initiated based on three complaints submitted to the OIG Hotline about the Agency's oversight of state-issued NPDES permits in EPA Regions 3 and 5.

The EPA has federal authority over the implementation and oversight of CWA and NPDES regulations. As of August 2020, 46 states and one territory were authorized by the EPA to implement their own state NPDES programs.

### This audit addresses the following:

- *Ensuring clean and safe water.*

### This audit addresses these top EPA [management challenges](#):

- *Overseeing states implementing EPA programs.*
- *Integrating and leading environmental justice.*

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## ***Improved Review Processes Could Advance EPA Regions 3 and 5 Oversight of State-Issued National Pollutant Discharge Elimination System Permits***

### What We Found

In Regions 3 and 5, the EPA did not follow all relevant CWA and NPDES regulations and guidelines while reviewing permits.

Region 3 did not adequately perform its oversight responsibilities to ensure that NPDES permits issued by the State of West Virginia meet CWA and NPDES regulatory requirements. Specifically, West Virginia reissued 286 NPDES mining permits to reflect revisions made to its water quality regulations in 2015, but it is unclear whether Region 3 took steps to verify that the CWA's anti-backsliding provisions were met. In addition, Region 3 experienced permit review delays, and states within the region issued permits without addressing the EPA's comments.

Region 5 did not address all CWA and NPDES regulations during its review of a draft NPDES permit for a mine and processing facilities to be built by PolyMet Mining Inc. along the St. Louis River in northeastern Minnesota. Despite its concerns about the NPDES permit, Region 5 did not provide written comments to Minnesota, contrary to the region's standard operating procedures and per common EPA practice. In addition, Region 5 repeatedly declined to make a formal determination under CWA § 401(a)(2) regarding whether discharges from the PolyMet NorthMet project may impact the quality of waters within the jurisdiction of the Fond du Lac Band of Lake Superior Chippewa, whose tribal lands are 125 miles downstream from the site of the PolyMet NorthMet project. The tribe was therefore unable to avail itself of the NPDES permit objection process set forth in CWA § 401(a)(2).

**Improved EPA oversight could ensure that state NPDES programs are protecting human health and the environment.**

### Recommendations and Planned Agency Corrective Actions

We make a total of five recommendations to the regional administrators for Regions 3 and 5, including that Region 3 review West Virginia's reissued NPDES mining permits to ensure that no backsliding has occurred and that they contain appropriate limits for pollutant discharges; that Region 3 develop a formal internal operating procedure for its NPDES review process; that Region 5 provide written input regarding any resubmitted NPDES permit for the PolyMet NorthMet project; and that Region 5 commit to making formal determinations regarding downstream water quality impacts, pursuant to the CWA. Region 5 agreed with our two recommendations specific to that region; those recommendations are resolved with corrective action pending. Region 3 did not agree with our three recommendations specific to that region; those recommendations therefore remain unresolved.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

April 21, 2021

**MEMORANDUM**

**SUBJECT:** Improved Review Processes Could Advance EPA Regions 3 and 5 Oversight of State-Issued National Pollutant Discharge Elimination System Permits  
Report No. 21-P-0122

**FROM:** Sean W. O'Donnell

A handwritten signature in blue ink that reads "Sean W O'Donnell".

**TO:** Diana Esher, Acting Regional Administrator  
Region 3

Cheryl Newton, Acting Regional Administrator  
Region 5

This is our report on the subject audit conducted by the Office of Inspector General of the U.S. Environmental Protection Agency. The project number for this audit was [OA&E-FY19-0340](#). This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

Regions 3 and 5 are responsible for the recommendations discussed in this report.

In accordance with EPA Manual 2750, Region 5 provided acceptable corrective actions in response to Recommendations 4 and 5. These recommendations are resolved, with corrective actions pending. A final response pertaining to these recommendations is not required; however, if you submit a response, it will be posted on the OIG's website, along with our memorandum commenting on your response.

**Action Required**

Recommendations 1, 2, and 3, which are directed to Region 3, are unresolved. The resolution process, as described in the EPA's Audit Management Procedures, begins immediately with the issuance of this report. Furthermore, we request a written response to the final report within 60 days of this memorandum. Your response will be posted on the OIG's website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal along with corresponding justification.

We will post this report to our website at [www.epa.gov/oig](http://www.epa.gov/oig).

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# Chapter 1

## Introduction

### Purpose

The U.S. Environmental Protection Agency’s Office of Inspector General conducted this audit to determine whether the EPA adhered to the requirements of the Clean Water Act, or CWA, and National Pollutant Discharge Elimination System, or NPDES, regulations and applicable guidance while reviewing state-issued NPDES permits. Specifically, we worked to determine whether the EPA met its oversight responsibilities under the CWA and NPDES regulations. This audit was initiated based on complaints submitted to the OIG Hotline regarding the EPA’s oversight of state-issued NPDES permits in Regions 3 and 5.

#### Top Management Challenges

This audit addresses the following top management challenges for the Agency, as identified in OIG Report No. [20-N-0231](#), *EPA’s FYs 2020–2021 Top Management Challenges*, issued July 21, 2020:

- Overseeing states implementing EPA programs.
- Integrating and leading environmental justice.

### Background

Water pollution degrades water quality, making surface water unsafe for drinking, fishing, swimming, and other activities. As authorized by the CWA, the EPA implements the NPDES permit program to control water pollution by regulating point sources that discharge pollutants into waters of the United States.

**Point source** is defined in the CWA to mean “any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged,” such as a pipe, ditch, channel, tunnel, conduit, discrete fissure, or container.

**Pollutant** includes but is not limited to dredged spoil; solid waste; sewage; chemical wastes; biological materials; radioactive materials; heat; and industrial, municipal, and agricultural waste discharged into water.

Under the CWA, the EPA may authorize state, tribal, and territorial governments to implement the permitting, administrative, and enforcement aspects of the NPDES program. As of August 2020, 46 states and one territory are authorized to implement their own NPDES programs. For the purpose of this report, we refer to these authorized programs as *state NPDES programs* and the permits these state NPDES programs issue as *state-issued NPDES permits*.

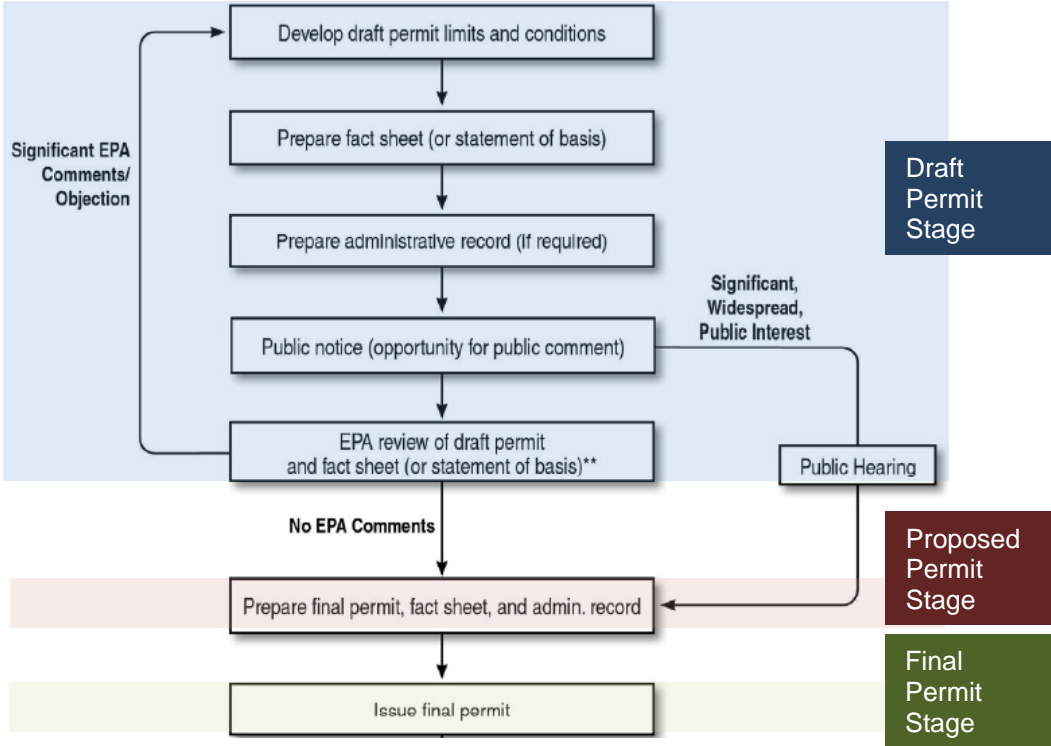
Each authorized state has a designated state permitting authority—typically the state environmental department or agency—that manages the state NPDES program. The EPA retains oversight responsibility for state NPDES programs and state-issued NPDES permits.

Each authorized state must have a memorandum of agreement in place with the relevant EPA region that outlines components of the state’s implementation of the NPDES program. NPDES regulations require that these memorandums of agreement contain certain provisions, including provisions specifying which

classes and categories of permit applications, draft permits, and proposed permits the authorized state will send to the EPA region for review; comment; and, if applicable, objection.

While the federal rules distinguish between “draft” and “proposed” permits, not all permit writers and managers use the terms consistently. A *draft permit* comprises the pre-public notice and public notice versions of the permit. A *proposed permit* comprises not only the post-public notice version of the permit but also any post-public hearing versions, versions undergoing administrative appeals, and the version intended to be adopted as a final permit. A *final permit* comprises the official EPA- or state-issued license for a facility to discharge a specified amount of a pollutant or pollutants into a receiving water under certain conditions (Figure 1). A *modified permit* is a permit that has been changed or updated since its original issuance.

**Figure 1: Typical administrative process for state-issued NPDES permits\***



Source: *EPA NPDES Permit Writers’ Manual*, dated September 2010. (EPA image with EPA OIG modifications)

\*State statutes and regulations govern the specific steps of the state administrative process, which may differ from the process outlined in this exhibit.

\*\*Under the memorandum of agreement between the state and EPA, the EPA may review draft or proposed permit.



## NPDES Permit Requirements

NPDES regulations require that each NPDES permit contain limitations adequate to achieve the water quality standards of the water body or bodies receiving the discharge. These are known as *effluent limitations* in NPDES permits and are the primary mechanism for controlling the amount of pollutants discharged to receiving waters. Effluent limitations must control all pollutants or pollutant parameters that a state has determined will be or may be discharged at a level that will cause, has the *reasonable potential* to cause, or will contribute to an unpermitted discharge—that is, an excess of pollutants—above the state’s water quality standards.

Permit writers for state NPDES programs derive appropriate effluent limitations based on applicable water quality standards. The effluent limitations must be adequate to achieve the water quality standards that the state established under CWA § 303. Water quality standards define the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses. States may set *numeric water quality criteria* or *narrative water quality criteria* to protect the designated use of a water body (Table 1). NPDES permits can specify the numeric and narrative water quality criteria relevant to the receiving water, or they can incorporate the criteria established in federal and state law by reference.

**Table 1: Types of water quality criteria**

<b>Numeric</b>	Criteria expressed as concentrations of chemicals in or properties of water that should protect a designated use.
<b>Narrative</b>	Criteria expressed in concise statements, generally in a “free form” format. General statements of attainable or attained conditions of water quality for a given use designation.

Source: EPA, *Water Quality Standards Glossary*, updated 1997. (EPA OIG table)

For each NPDES permit they issue, state NPDES programs must conduct a *reasonable potential analysis* to determine appropriate effluent limitations for pollutants in discharges. NPDES regulations at 40 C.F.R. § 122.44 specify that for each pollutant determined to have the reasonable potential to cause an excursion—in other words, an excess of pollutant—above a state’s water quality standard, the state must include water-quality-based effluent limitations in the permit to control the discharge of such pollutant. Any reasonable potential analysis conducted becomes part of the record documentation for the NPDES permit.

Once an NPDES permit has been issued, the CWA “anti-backsliding” provision requires that the permit not be renewed, reissued, or modified to contain effluent limitations that are less stringent than comparable effluent limitations in the previous permit.<sup>1</sup>

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<sup>1</sup> 33 U.S.C. § 1342(o).

## ***NPDES Oversight***

The CWA and NPDES regulations also establish the EPA's oversight responsibility for NPDES permits. There is no CWA or regulatory requirement for the EPA to provide input on each draft or proposed NPDES permit; permit review is discretionary. However, the EPA has the responsibility to oversee state NPDES programs. At the time of our audit, the EPA employed two primary mechanisms to oversee state-issued NPDES permits:

- *Real-time reviews* of selected draft permits.
- Historical reviews, called *permit quality reviews*, of final permits.

### **Real-Time Reviews**

EPA regional staff conduct real-time reviews of selected draft or proposed NPDES permits that authorized states intend to issue. During our audit, we were told by the then-EPA assistant deputy administrator and chief operating officer that there was no national policy for conducting real-time permit reviews; instead, EPA regions used the EPA's permit-quality-review guidance or region-specific templates to guide their real-time reviews.

During a real-time review, the authorized state sends the appropriate EPA region a draft or proposed permit selected for review, and the region identifies any issues regarding the permit's consistency with federal requirements and communicates these issues to the state. The EPA region can object to the draft or proposed permit if it identifies significant issues. If the state does not satisfactorily address the points of objection, the EPA regions have the exclusive authority to issue the permit directly. The specific process for EPA real-time reviews varies by EPA region and state, pursuant to the memorandums of agreement between an EPA region and authorized state.

In December 2020, the EPA issued its *National Permitting Oversight Policy* to standardize and improve the EPA's oversight of NPDES permits and permitting authorities. This policy establishes a framework to "identify emerging issues, track trends, inform National Program workplans and guide periodic adjustments to the oversight of individual permitting authorities." It applies to both annual reviews of states' permitting programs, like the permit quality reviews, and the real-time review of draft NPDES permits. The EPA plans to begin implementing the policy in 2021.

### **Permit Quality Reviews**

The EPA conducts permit quality reviews to assess whether previously issued state-issued NPDES permits meet the applicable CWA and regulatory requirements. EPA regions are expected to conduct permit quality reviews every five years for each authorized state NPDES program. During a permit

quality review, the EPA reviews a sample of at least ten NPDES permits issued by the state that reflect a cross-section of its permitting authority. Permit quality reviews enable the EPA to promote national consistency among and identify successes, challenges, and areas for improvement within state NPDES programs.

### ***EPA Policies to Engage Tribal Communities***

Tribal communities are located in every EPA region and can be affected by EPA decisions to issue NPDES permits. The *EPA Policy on Consultation and Coordination with Indian Tribes*, published in May 2011, establishes national guidelines and institutional controls for consultation between the EPA and tribal governments when EPA actions and decisions “may affect tribal interests.” The policy specifically lists permits as an EPA activity appropriate for consultation if the permits may affect a tribe.

The *EPA Policy on Consultation and Coordination with Indian Tribes* tasks regional administrators with overseeing the consultation process with tribes in their respective regions. The criteria that the EPA uses to identify matters appropriate for consultation include tribal government requests for consultation. The policy states:

Tribal officials may request consultation in addition to EPA’s ability to determine what requires consultation. EPA attempts to honor the tribal government’s request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.

Additionally, the *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*, published in 2014, affirms the EPA’s commitment to provide federally recognized tribes with fair treatment and meaningful involvement in EPA decisions that may affect their health or environment. According to this policy, *meaningful involvement* denotes that:

(1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their human health or environment; (2) the public’s input can influence the regulatory agency’s decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected.

## **Responsible Offices**

The Office of Water is the primary EPA headquarters office that manages the NPDES program. The Office of Water delegates oversight responsibility to EPA

regional offices for states in their region with NPDES authorization; this responsibility includes real-time review of draft permits.

## Scope and Methodology

We performed our work from September 2019 through February 2021. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

As detailed in Appendix A, we assessed the internal controls necessary to satisfy our audit objective.<sup>2</sup> In particular, we assessed the internal control components and underlying principles—as outlined in the U.S. Government Accountability Office’s Green Book—significant to our audit objective. Any internal control deficiencies we found are discussed in this report. Because our audit was limited to the internal control components and underlying principles deemed significant to our audit objective, it may not have disclosed all internal control deficiencies that may have existed at the time of the audit.

Our work was initiated based on complaints submitted to the OIG Hotline regarding the EPA’s oversight of state-issued NPDES permits in Regions 3 and 5:

- ***Region 3: NPDES Review Process Hotline Complaint.*** The OIG received a hotline complaint in August 2019 concerning Region 3’s oversight of state NPDES programs. This complaint alleged that regional management implemented a real-time permit review process that hampered Region 3 staff’s ability to review and comment on NPDES permits within the allowed comment period.
- ***Region 5: PolyMet Mining Inc. Hotline Complaint.*** The OIG received a hotline complaint in January 2019 alleging several issues with Region 5’s oversight of a state NPDES program. The allegation centered on the EPA’s real-time permit review of Minnesota’s development and issuance of an NPDES permit for PolyMet’s NorthMet project, which comprises a mine and processing facilities along the St. Louis River in northeastern Minnesota. The NorthMet project would mine copper-nickel-platinum group elements.

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<sup>2</sup> An entity designs, implements, and operates internal controls to achieve its objectives related to operations, reporting, and compliance. The U.S. Government Accountability Office sets internal control standards for federal entities in GAO-14-704G, *Standards for Internal Control in the Federal Government* (also known as the “Green Book”), issued September 10, 2014.

- **Region 5: Fond du Lac Band of Lake Superior Chippewa Hotline Complaint.** The OIG Hotline received a complaint in February 2019 regarding EPA responsibilities related to the NPDES permit and CWA § 404 permit for the NorthMet project. The EPA notes that the tribal lands of the Fond du Lac Band are located 125 miles downstream from the site of the NorthMet project. The Fond du Lac Band has “Treatment as a State” status and, as such, has established its own set of federally approved water quality standards under the CWA.<sup>3</sup> The tribe’s concern is that the PolyMet NPDES permit is not in compliance with its or the State of Minnesota’s water quality standards, especially for sulfate limits. High levels of sulfate could dramatically affect the Fond du Lac Band’s ability to grow wild rice. Furthermore, the Fond du Lac Band made several written requests to Region 5 asking that the region make a determination pursuant to CWA § 401(a)(2) regarding whether discharges related to an applied-for CWA § 404 permit may impact the quality of tribal waters.

**CWA § 404 permits** are issued by the U.S. Army Corps of Engineers for dredging and filling activities. CWA § 401(a)(2) requires that, as part of the CWA § 404 permit issuance process, the EPA notify downstream states and tribes of the proposed discharge if the EPA determines the discharge may impact the downstream state’s water quality.

After assessing the hotline complaints regarding Regions 3 and 5, we selected an additional region to further examine regional variations in oversight of state NPDES programs. We selected Region 10 to broaden our geographical representation across the country.

Our audit reviewed regional EPA oversight of state NPDES programs and included detailed reviews of the processes used by Regions 3, 5, and 10 to conduct real-time reviews of state-issued NPDES permits. During our audit, we interviewed management and staff in the Office of Water. We also interviewed staff in the Office of Enforcement and Compliance Assurance and the Office of International and Tribal Affairs, as well as the then-EPA assistant deputy administrator and chief operating officer, who signed the EPA’s *National Permitting Oversight Policy*. In Regions 3, 5, and 10, we interviewed staff and management in the regions’ Water Protection Divisions. In Region 5, we also interviewed management in the regional administrator’s office.

We analyzed key background and criteria documents, including documents relating to state-issued NPDES permits, from the initial permit application to the issuance of the final permit; emails; written communications between interested parties and stakeholders; memorandums of agreement; standard operating procedures; administrative records; court records; and legal proceedings.

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<sup>3</sup> The CWA authorizes the EPA to treat eligible federally recognized Indian tribes as a state for the purpose of implementing and managing certain environmental programs and functions, as well as for grant funding.

Lastly, we conducted an anonymous survey of EPA staff from January to February 2020. Because of the disproportionate geographic distribution of the responses received, we were unable to identify national, overarching NPDES oversight issues. In addition, our staff interviews and document reviews in Region 10 did not identify oversight concerns. As a result, this report does not draw conclusions on national trends in the national NPDES program or on Region 10 oversight of state NPDES programs.

## Prior Reports

OIG Report No. [10-P-0224](#), *EPA Should Revise Outdated or Inconsistent EPA-State Clean Water Act Memoranda of Agreement*, issued on September 14, 2010, found that NPDES memorandums of agreement between the “EPA and States do not ensure Agency management control and effective oversight over a national program administered by States that is capable of providing equal protection to all Americans.” We recommended that the EPA revise outdated memorandums of agreements to improve NPDES oversight. The EPA told the OIG in a closeout memorandum that it completed all corrective actions.

OIG Report No. [12-P-0113](#), *EPA Must Improve Oversight of State Enforcement*, issued December 9, 2011, found that the EPA needed to improve oversight of state enforcement. The EPA told the OIG in a closeout memorandum that it completed all corrective actions.

OIG Report No. [18-P-0221](#), *Management Weaknesses Delayed Response to Flint Water Crisis*, issued July 19, 2018, found that the EPA should strengthen its oversight of state drinking water programs to improve the efficiency and effectiveness of the Agency’s response to drinking water contamination emergencies. The EPA still had some corrective actions pending as of April 2021.

## Chapter 2

### Region 3 Needs to Improve Its Oversight to Ensure NPDES Permits Meet CWA and NPDES Regulatory Requirements

EPA Region 3 did not adequately perform its oversight role to ensure that West Virginia’s modified state-issued NPDES permits for mining facilities, also referred to as *NPDES mining permits*, meet the requirements of CWA and NPDES regulations. From July 2019 through December 2019, the West Virginia Department of Environmental Protection, which is the state permitting authority for West Virginia, issued 286 modified NPDES mining permits to reflect revisions made to its water quality regulations in 2015. It is unclear whether Region 3 took steps to verify that West Virginia conducted a reasonable potential analysis to ensure that the CWA’s anti-backsliding provisions were met. In addition, Region 3 approved revisions to West Virginia’s NPDES program in March 2019, which eliminated an express requirement that permitted discharges not violate applicable water quality standards and which prohibited the incorporation of water quality standards by reference. As a result, some pollutants that were previously regulated and enforced via NPDES permits that incorporated water quality standards by reference—such as ionic pollution, which is commonly found in mine discharges—are no longer regulated by the modified NPDES permits. The approved changes to West Virginia’s NPDES program may also shield permittees from enforcement action by the EPA or the State regarding the discharge of pollutants not specified in the modified permits. We also identified three deficiencies in the Region 3 review process for state-issued NPDES permits. These deficiencies resulted in state-issued NPDES permits that do not meet the requirements of NPDES regulations and that potentially violate the anti-backsliding provision of the CWA.

#### **EPA Approval of West Virginia’s Request to Make State Program Modifications Hinders Achieving Water Quality Standards**

In 2015, the State of West Virginia enacted House Bill 2283, or HB 2283, amending the West Virginia Code of State Regulations. This state legislation deleted an express requirement from West Virginia’s regulations that all state-issued NPDES mining permits contain conditions to ensure that permitted discharges do not cause a violation of water quality standards. Specifically, the State deleted the narrative water quality standard provision from its mining regulations. This provision served as a catch-all requirement to regulate discharges of pollutants not specifically listed in NPDES permits. The previous state regulation stated that “discharges covered by a [West Virginia NPDES] permit are to be of such quality so as not to cause a violation of applicable water quality standards promulgated by [state regulation].”

In addition, the State of West Virginia enacted Senate Bill 357, or SB 357, amending statutory text in the West Virginia Code to expand the scope of the “permit shield” and prohibit the incorporation of water quality standards by reference in state NPDES mining permits. The term *permit shield* refers to the notion that, pursuant to Section 402(k) of the CWA, compliance with an NPDES permit amounts to compliance with applicable NPDES requirements for enforcement purposes. As such, facilities discharging pursuant to their permits may be shielded from enforcement action by the EPA or a state regarding discharges that, in fact, violate water quality standards.

After the State enacted these regulatory modifications, the West Virginia Department of Environmental Protection submitted relevant revisions to the state NPDES program to Region 3 for approval. Among the revisions proposed was deleting the state NPDES program’s requirement that narrative water quality criteria be incorporated in state-issued NPDES permits. The EPA considered West Virginia’s NPDES program revisions to be “substantial,” which required the EPA to issue a public notice regarding the revisions in the *Federal Register* and provide 30 days for public comment. The EPA published the notice and began the public comment period on September 17, 2018 (83 Fed. Reg. 46945). After the comment period, Region 3 compiled the public comments in a *Response to Comments* document.

Previously, on two occasions in 2015, Region 3 did not approve requests by the West Virginia Department of Environmental Protection to modify or remove the requirement that permitted discharges not cause a violation of water quality standards. The EPA said then that the removal of that requirement would make state law inconsistent with federal law and weaken the state NPDES program. Even so, on March 27, 2019, Region 3 approved the deletion of the requirement and the revision of the state NPDES program, attaching the public comments received to its approval letter. When we asked about this apparent reversal, Region 3 staff stated that Region 3 had never formally disapproved the program change in 2015 but sought additional information from the State.

On July 5, 2019, the West Virginia Department of Environmental Protection began the process of submitting state-issued NPDES mining permits for modification and reissuance based on the EPA’s approved revisions to the state NPDES program. As of January 2020, 286 state-issued NPDES permits had been submitted for modification by the State of West Virginia.

The deletion of the requirement that permitted discharges not cause a violation of water quality standards had two major implications on West Virginia’s NPDES mining permits. First, in its March 2019 approval letter, the EPA stated that the West Virginia Department of Environmental Protection should, for any permit reissued, ensure that the permit “does not run afoul of the Clean Water Act’s



‘anti-backsliding’ provisions (33 U.S.C. § 1342(o)).”<sup>4</sup> To accomplish this, the EPA instructed the West Virginia Department of Environmental Protection to:

include in its record documentation that it has performed a **rigorous reasonable potential analysis** for numeric and narrative water quality criteria and that the terms and conditions of the permit, including any WQBELs [water-quality-based effluent limitations] (numeric or narrative), will be protective of designated uses and numeric and narrative water quality criteria, and are thus not “less stringent” than the general narrative condition in the previous permit. [emphasis added]

These instructions meant that, for even those state-issued NPDES permits for which a reasonable potential analysis was previously performed and included in the record documentation, an additional reasonable potential analysis should be performed and included in the record documentation if these permits were reissued after the removal of the narrative criteria. This would help ensure that the reissued permits are not less stringent than the original permit.

Second, deleting the requirement that permitted discharges not cause a violation of water quality standards meant that some pollutants previously regulated under state-issued NPDES permits will no longer be regulated in modified permits. One such pollutant that is no longer regulated, and one of particular concern for NPDES mining permits, is ionic pollution. The EPA’s Office of Research and Development has observed that high conductivities, which indicate a high level of ionic pollution, in streams below surface coal mining operations are associated with impairment of aquatic life. In addition, because West Virginia arguably expanded the scope of the “permit shield” with SB 357 to provide that compliance with an NPDES mining permit is considered compliance with water quality standards, facilities that are discharging pursuant to their modified NPDES mining permits may be shielded from enforcement action by the EPA or the State regarding discharges that in fact violate water quality standards. We discuss the impact of these changes further in the “Ionic Pollution Is Not Addressed in Modified NPDES Mining Permits in West Virginia” section below.

Mine drainage deposits significant amounts of ions into the receiving water. **Ionic pollution**, measured by conductivity, occurs when these deposits contain excessive levels of ions, which can cause the receiving waters to become impaired.

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<sup>4</sup> The anti-backsliding provision establishes that a permit that has been issued may not be renewed, reissued, or modified to contain effluent limitations that are less stringent than comparable effluent limitations in the previous permit (33 U.S.C. § 1342(o)).

## Reasonable Potential Analysis May Not Have Been Performed for Modified NPDES Mining Permits in West Virginia

Documentation provided by Region 3 during our audit did not include evidence that the West Virginia Department of Environmental Protection performed a reasonable potential analysis for each modified NPDES permit, even though the State was instructed to do so in the EPA's March 2019 approval letter.

On July 5, 2019, Region 3 received three modified permits submitted by the West Virginia Department of Environmental Protection for reissuance. Region 3 permit reviewers found that the permit documentation did not include the required reasonable potential analysis. In a July 25, 2019 letter to the West Virginia Department of Environmental Protection, the Region 3 Water Protection Division NPDES Permit Branch provided written comments to the State outlining this deficiency in the permits. The letter noted that for two of the permits:

[I]t is unclear whether [the West Virginia Department of Environmental Protection] has performed a rigorous reasonable potential analysis for numeric and narrative water quality criteria or demonstrated that the terms and conditions of the proposed reissued permit, including any WQBELs [water-quality-based effluent limitations] (numeric or narrative), will be protective of designated uses and numeric and narrative water quality criteria, and are thus not “less stringent” than the general narrative condition in the previous permit. EPA recommends that [the West Virginia Department of Environmental Protection] include such analysis of available monitoring data in the permit fact sheet.

The 1982 memorandum of agreement between West Virginia and the EPA, which authorizes the State to operate its NPDES program, requires that the State provide complete NPDES permit documentation to the EPA for review. Without complete documentation and analysis from the State regarding its reasonable potential analysis, Region 3 could not verify that no backsliding would occur. It is unclear whether the State addressed these written comments before West Virginia issued the modified permits. As a result, these permits may be less stringent than prior permits and may violate the CWA anti-backsliding provision.

On April 9, 2021, one business day before this report was originally due to be issued, Region 3 provided us with additional information in an effort to clarify the discussion on reasonable potential analysis for these permits. This information was not provided during the course of our audit; in response to our discussion document; in response to our February 17, 2021 draft report; or during our March 25, 2021 exit conference. The region asserted that the modified permits did not actually require a reasonable potential analysis because they were submitted for administrative changes. However, this directly contradicts the official comment letter that the region submitted to the State on July 25, 2019, which

stated that “the documentation and analysis ... as to backsliding appears to be incomplete ... it is unclear whether [the West Virginia Department of Environmental Protection] has performed a rigorous reasonable potential analysis.” The additional information submitted to us from the region, therefore, did not clarify the actions the Agency took to ensure that the modified permits would not violate the anti-backsliding requirement of the CWA. In addition, when Region 3 personnel provided this additional information to us, they did not explain why we were not granted timely access to the information during the course of our audit; in response to our discussion document; in response to our February 17, 2021 draft report; or during our March 25, 2021 exit conference.

## **Ionic Pollution Is Not Addressed in Modified NPDES Mining Permits in West Virginia**

We found that ionic pollution may no longer be regulated under the parameters of the state-issued modified NPDES mining permits in West Virginia. This change may affect the 286 modified NPDES mining permits reissued by West Virginia. Ionic pollution was previously regulated via the regulatory requirement that permitted discharges not cause a violation of water quality standards, which was incorporated into NPDES mining permits by reference; however, with West Virginia’s removal of the regulatory requirement and corresponding references in NPDES mining permits, ionic pollution may not be incorporated into effluent limitations in the modified permits.

Based on the requirement established in 40 C.F.R. § 122.44(d)(1)(iii),<sup>5</sup> state-issued NPDES mining permits should include water-quality-based effluent limitations for ionic pollution where permitted discharges would cause, have the reasonable potential to cause, or contribute to an excursion above water quality standards applicable to ionic pollution. Since West Virginia’s water quality standards are no longer incorporated into its NPDES mining permits and no effluent limitations or parameters have been established for pollutants previously covered by incorporation of these standards, permitted operations could discharge harmful levels of ionic pollution. Additionally, because the reference to water quality standards has been removed, permittees could be shielded under CWA § 402(k) from enforcement action by the EPA or the State regarding certain discharges that may cause a violation of water quality standards.

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<sup>5</sup> As discussed in Chapter 1, 40 C.F.R. § 122.44(d)(1)(iii) states, “When the permitting authority determines ... that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.” See also 40 C.F.R. § 123.25(a)(15).

## **Lack of Formal Permit Review Procedure Caused Delays and Issuance of Permits That Do Not Address Region 3 Comments**

We found that Region 3 lacks a formal internal operating procedure for real-time permit reviews that provides instructions, establishes milestones, and outlines procedures for Region 3 to coordinate with states and the EPA's Office of Water. Such an operating procedure would serve as an internal control to help the EPA ensure that the permits it oversees meet CWA requirements. The U.S. Government Accountability Office's *Standards for Internal Control in the Federal Government* states that control activities in government programs should be effective and efficient in accomplishing an agency's control objectives.

The lack of a formal permit review procedure led to delays in the EPA's review process and to permits issued by West Virginia that did not address EPA comments. We identified three examples of NPDES permit review issues that negatively impacted Region 3's oversight of state NPDES programs:

- Region 3 reviewers prepared comments on the modified NPDES mining permits, but Region 3 management did not always relay those comments to West Virginia.
- Region 3 did not always provide its comments regarding proposed NPDES permits within the allotted time frame. For example, per West Virginia's memorandum of agreement, if there are no comments about or objections to a permit provided within 30 days, the State can finalize and issue the permit.
- The West Virginia Department of Environmental Protection did not always address EPA comments on the draft modified NPDES mining permits before reissuing the permits.

As a result, not all the modified permits that Region 3 received for review were reviewed in a timely manner or adhered to NPDES requirements. Developing a formal internal operating procedure in Region 3 for this process could improve overall permit quality and verify that state-issued NPDES permits meet the requirements of the CWA and NPDES regulations.

### ***EPA Comments Not Relayed to State***

Before Region 3 approved West Virginia's request to delete the reference to water quality standards from the state NPDES mining regulations, the region's permit reviewers worked directly with states when conducting real-time reviews of NPDES permits. Specifically, the permit reviewers would communicate with the states to resolve issues regarding the review comments. However, after the region's permit reviewers provided written comments, which outlined the requirement for reasonable potential analysis documentation, to West Virginia in

July 2019, Region 3 management changed this collaborative process via new informal instructions. On August 1, 2019, after consulting with West Virginia, Region 3 management emailed its permit reviewers, instructing them to compile all written comments, especially for permits modified based on HB 2283, into an issue paper. This issue paper was to be provided to regional management through the Water Division section chief and branch chief. Regional management would then work with the State to resolve permit issues.

Under management's new informal instructions, Region 3 permit reviewers were no longer allowed to provide comments to states directly to resolve permit issues without approval from managers. These informal instructions led to confusion among the permit reviewers as to when they could directly contact the state.

We also found instances where the EPA permit reviewers had comments that were not effectively relayed to West Virginia. For example, a regional permit reviewer forwarded the following detailed written comments to Region 3 management to improve a permit's enforceability for selenium:

The draft permit attempts to incorporate the 8 mg/kg [milligram per kilogram] WQC [water quality criterion] as an effluent limit, but this construction does not establish a valid and enforceable effluent limit. Development of a selenium WQBEL [water-quality-based effluent limitation] from a fish-tissue based WQC requires calculation of a Bioaccumulation Factor and a Protective Water Column Concentration (PWCC), as provided in [the West Virginia Department of Environmental Protection's] WVDEP's selenium criteria implementation guidance as well as EPA's promulgated fish-tissue based selenium WQC criteria recommendation. Please re-evaluate reasonable potential based on PWCCs for selenium and, if appropriate, incorporate concentration-based effluent limits for selenium.

**Selenium** is a naturally occurring element present in sedimentary rocks, shales, coal, and phosphate deposits and soils. Selenium can be released into water resources by natural sources via weathering and by anthropogenic sources, such as surface mining. Selenium bioaccumulates in the aquatic food chain and chronic exposure in fish and aquatic invertebrates can cause reproductive impairments (for example, larval deformity or mortality). Selenium can also adversely affect juvenile growth and mortality.

—EPA [website](#), *Aquatic Life Criterion - Selenium*

However, a Region 3 manager provided only these comments to the State:

This permit is being modified to incorporate selenium monitoring and it is our understanding the permit made [*sic*] be revised based on monitoring results. We do not offer any additional comments at this time.

While the EPA has discretion regarding what comments to provide to states, in this case, all staff views regarding water quality limits were not provided to West Virginia before the State issued the permit. A calculated protective water column concentration value included in the final permit before issuance would ensure compliance with the CWA and satisfy the EPA's promulgated fish-tissue-based selenium water quality criteria recommendation. The comments provided by EPA management to the State, however, allow the permittee to discharge 8 milligrams per kilogram without establishing protective water column concentration values until sometime in the future. This level of selenium may be harmful, and monitoring would allow the discharge to continue until any harm could be measured and action taken.

Agency policy, as established in a 2011 memorandum,<sup>6</sup> instructs regions to conduct a reasonable potential analysis to establish water-quality-based effluent limitations in permits, as well as:

to ensure that limitations are as stringent as necessary to meet water quality standards, consistent with NPDES regulations, permitting authorities should not defer reasonable potential analyses until after permit issuance. Under the CWA and its implementing regulations, an NPDES permit must contain limits as stringent as necessary to meet applicable water quality standards.

### ***Additional Coordination Impacted Timeliness of EPA Comments***

In July 2017, the EPA's Office of Water began requiring the regions to notify headquarters of all proposed objections to NPDES permits. This added a layer of coordination that impacted Region 3's ability to review and comment within the allotted comment period.

For example, for a draft permit submitted for review from the Pennsylvania Department of Environmental Protection, a Region 3 permit reviewer indicated in an email to the State of Pennsylvania that the EPA had run out of time and would not be able to make an objection to the permit, as intended:

Yes, my understanding is that the review clock has expired for this permit. We removed the interim objection when we felt the package was finally complete, and when we received PADEP's response in October we did not subsequently issue a specific objection during the little (if any) time remaining in the review period. In this case, it would have been logistically impossible to arrange the management briefings and notification to EPA Headquarters now required to issue an objection to this permit before the close of the permit review period.

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<sup>6</sup> EPA, *Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order*, July 21, 2011.

## ***EPA Comments Not Addressed by State***

We identified instances where regional staff reviewed permits and prepared and submitted comments to West Virginia but where the State did not address the EPA's comments before issuing the permit. By not addressing EPA comments, the State missed the opportunity to improve permit quality and ensure that all the requirements of the CWA and NPDES regulations were met. For example, as previously mentioned, Region 3 permit reviewers provided written comments for the initial two permits submitted for modification based on West Virginia's HB 2283, but we found no evidence that those comments were addressed by West Virginia before the permits were issued. Region 3 did not issue an objection for these permits, and the State issued them.

## **Conclusions**

Region 3 has not taken steps to ensure that the 286 modified NPDES mining permits submitted for its review met all the requirements of the CWA and NPDES regulations. More specifically, the region must ensure that the record documentation for each state-issued NPDES mining permit demonstrates that the reasonable potential analysis has been performed, for the purpose of verifying adherence to the anti-backsliding requirements of CWA § 402(o). These modified NPDES mining permits should include effluent limitations for ionic pollution where permitted discharges would cause, have the reasonable potential to cause, or contribute to an excursion above water quality standards applicable to ionic pollution. Additionally, Region 3's permit review process can be improved with a formal internal operating procedure to ensure that the region's reviews are completed within the allotted time frame and that comments are conveyed in a timely manner to the relevant state. These enhancements would improve the quality of state-issued NPDES permits, which in turn would help protect water quality, human health, and the environment.

## **Recommendations**

We recommend that the regional administrator for Region 3:

1. Review the modified National Pollutant Discharge Elimination System mining permits issued by West Virginia based on the 2019 revisions to its National Pollutant Discharge Elimination System program to ensure that no backsliding has occurred, including for discharges of ionic pollution, in accordance with EPA Region 3's approval letter dated March 27, 2019. If a permit does not contain record documentation for the reasonable potential analysis or otherwise allows backsliding, alert West Virginia of the permit inadequacies.
2. Review the modified National Pollutant Discharge Elimination System mining permits issued by West Virginia based on the 2019 revisions to its

National Pollutant Discharge Elimination System program to determine whether the permits contain effluent limits for ionic pollution and other pollutants that are or may be discharged at a level that causes, has the reasonable potential to cause, or contributes to an excursion above any applicable water quality standard, as required by Clean Water Act regulations. If a permit lacks required effluent limits, take appropriate action to address such deficiencies.

3. Develop a formal internal operating procedure to facilitate timely permit reviews and transmission of EPA comments to states.

## **Agency Response and OIG Assessment**

Region 3 did not agree with our recommendations. In response to Recommendations 1 and 2, Region 3 stated that it would review draft permits to ensure they meet federal statutes and regulations. Region 3 stated that it will include a review of reasonable potential for mining permits in the next permit quality review for West Virginia in fiscal year 2024. Additionally, Region 3 stated that it plans to finalize the real-time review document by the end of March 2021. While selecting a sample in fiscal year 2024 will allow Region 3 to assess some of the West Virginia mining permits of concern, these corrective actions do not address the universe of 286 permits that the OIG identified as risks for backsliding because of their lack of record documentation for the reasonable potential analysis. As previously noted, one business day before this report was originally due to be issued, Region 3 provided us with additional information in an effort to clarify the discussion on the reasonable potential analyses for the modified permits. However, this additional information did not clarify the actions the Agency took to ensure that the modified permits would not violate the anti-backsliding provisions of the CWA. Recommendations 1 and 2 remain unresolved.

In response to Recommendation 3, Region 3 stated that it previously shared the 2019 internal standard operating procedure with the OIG. In fact, during an interview, Region 3 personnel told us that no standard operating procedure for NPDES permit reviews existed and that Region 3 did not have a target date for developing a standard operating procedure. In an exit conference held after we received Region's 3 response to our draft report, we requested documentation of the 2019 internal standard operating procedure, but the documentation Region 3 provided did not show a finalized standard operating procedure. Recommendation 3 remains unresolved. Region 3's response to the draft report is in Appendix B.



## **Chapter 3**

### **Region 5 Needs to Improve Oversight and Address Tribal Concerns for PolyMet NPDES Permit**

EPA reviewers determined that the draft NPDES permit reviewed by EPA Region 5 for PolyMet’s NorthMet project did not address all CWA and NPDES requirements. Despite the concerns about the draft PolyMet NPDES permit, Region 5 management did not transparently exercise its oversight authority, choosing instead to not provide written comments summarizing those concerns. In addition, Region 5 repeatedly declined to make a formal determination under CWA § 401(a)(2) regarding whether federally permitted discharges from the NorthMet project may impact the water quality of the Fond du Lac Band, whose lands are located downstream. Region 5’s interpretation of CWA § 401(a)(2) allowed the EPA to deny a potential administrative remedy to the tribe simply by neglecting to assess downstream affects, despite repeated requests. In addition, the EPA arguably did not meet the intent of its tribal and environmental justice policies, including its *Policy on Consultation and Coordination with Indian Tribes* and *Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*, which aim to ensure consultation, fair treatment, and meaningful involvement of tribes in EPA decisions affecting their health or environment.

#### **Region 5 Did Not Follow Its Standard Operating Procedure for Reviewing the PolyMet NPDES Permit**

We found that Region 5 did not follow its standard operating procedure for NPDES permit reviews or common EPA practice when it decided to not convey comments in writing regarding its review of the draft PolyMet NPDES permit.

The Region 5 NPDES permit review standard operating procedure, published in 2012, outlines the region’s administrative process for providing comments to states, as well as the process to follow when EPA comments are not fully addressed by states. Per the standard operating procedure:

Though discussions may continue to resolve issues and answer questions about the permit, the Permit Reviewer must provide an appropriate comment review transmittal letter to the State within 30 days of the date that a Proposed Permit (or, in some cases, Draft Permit) was received.

Once the permit review process is complete, according to the standard operating procedure, the region is to prepare and send a letter, even if only to indicate that the region has no objection to the permit.

In addition, although the EPA’s decision to provide input on a draft NPDES permit is discretionary under CWA, when the Agency chooses to review an NPDES permit, it is common EPA practice to provide written comments at the draft permit stage to reduce the need to comment on the proposed permit. Specifically, CWA § 402(d)(2), 40 C.F.R. § 123.44(a)(1), 40 C.F.R. § 123.44(b)(1), and the 1974 memorandum of agreement between Region 5 and Minnesota authorizing the state NPDES program indicate that the region should provide comments, recommendations, and objections regarding a draft or proposed NPDES permit in writing. For example, pursuant to 40 C.F.R. § 123.44(a)(1), the EPA “shall send a copy of any comment, objection or recommendation to the permit applicant.” Sending a copy of comments, objections, or recommendations would require that such communications be written. The extensive comments that the EPA provided to the Minnesota Pollution Control Agency pertained to the draft PolyMet NPDES permit were provided orally.

## **Region 5 Provided Only Oral Comments on Draft PolyMet NPDES Permit**

Region 5 had three opportunities to review the draft PolyMet NPDES permit before the Minnesota Pollution Control Agency, the state permitting authority for Minnesota, approved the final permit in December 2018:

- Region 5 received what it referred to as a “pre-public notice” draft PolyMet NPDES permit from the Minnesota Pollution Control Agency on January 17, 2018.
- Region 5 received what it referred to as the “pre-proposed” PolyMet NPDES permit from the Minnesota Pollution Control Agency on October 25, 2018.
- Finally, Region 5 received the proposed final PolyMet NPDES permit on December 4, 2018.

Region 5 used two different terms to describe the draft NPDES permit versions discussed above: *pre-public notice* and *pre-proposed*. In this chapter, we refer to both of these versions simply as the *draft permit*, as they were not yet finalized by the Minnesota Pollution Control Agency.

In March 2018, Region 5 identified numerous substantive issues in the draft permit and prepared a comment letter addressed to the Minnesota Pollution Control Agency. The Minnesota Pollution Control Agency requested that the comments be provided orally instead of in writing, and the region’s then-chief of staff agreed with that approach, even though the approach did not follow the region’s standard operating procedure. As a result, during an April 5, 2018 conference call, Region 5 orally conveyed the contents of the seven-page comment letter, including four major categories of concern (Table 2), 29 specific

concerns, and additional recommendations for the Minnesota Pollution Control Agency regarding the permit.

**Table 2: Excerpts of EPA’s comments on the draft PolyMet NPDES permit**

Area of Concern	Description
<b>Water-quality-based permit limits</b>	<ul style="list-style-type: none"> <li>• “The draft permit does not include water quality based effluent limitations,” with limited exceptions, or “other conditions that are as stringent as necessary to ensure compliance with the applicable water quality requirements” of “all affected States,” as required by CWA § 402(b); 33 U.S.C. § 1342(b); and 40 C.F.R. §§ 122.4(d), 122.44, and 123.44(c)(1), (8)-(9).</li> <li>• Instead, the permit included technology-based effluent limits that allow pollution at a concentration “up to a thousand times greater than applicable water quality standard.”</li> </ul>
<b>Effluent guidance calculation</b>	<ul style="list-style-type: none"> <li>• The draft permit did “not include all the requirements of 40 C.F.R. 440, Subparts G, J, and K that apply to this proposed project, including a restriction on discharge volume that is ... equivalent to the annual net precipitation for the site.”</li> </ul>
<b>Permit enforceability concerns</b>	<ul style="list-style-type: none"> <li>• “The permit contains ‘operating limits’ on an internal outfall that” are not clearly enforceable by the EPA or the Minnesota Pollution Control Agency “and, thus, may be ineffective at protecting water quality,” per 40 C.F.R. §§ 122.4(a) and (d).</li> <li>• The permit functions as a shield from CWA enforcement for pollutants disclosed during the application process, per 33 U.S.C. § 1342(k).</li> </ul>
<b>Decision-making procedures</b>	<ul style="list-style-type: none"> <li>• “The draft permit states that certain plans, reports, and other actions are effective parts of the permit upon submittal by the permittee, making them de facto permit modifications that, in some instances, are likely to be major modifications” subject to “the public process” associated with “permit modifications under” 40 C.F.R. § 122.62.</li> <li>• “Permit modifications that do not follow federal regulations” create compliance and enforceability concerns as to the scope of “what is covered by the permit,” per 40 C.F.R. § 122.4(a).</li> </ul>

Source: OIG analysis of Region 5’s comment letter, which was orally conveyed to the Minnesota Pollution Control Agency on the draft PolyMet NPDES permit. (EPA OIG table)

## NPDES Permit Concerns Remained Unresolved

Following the April 5, 2018 conference call, Region 5 and the Minnesota Pollution Control Agency held multiple meetings. During these meetings, the Minnesota Pollution Control Agency provided updates on the status of the permit but did not provide responses to the EPA comments that it had received. The Region 5 NPDES branch chief summarized the EPA’s oral comments and the State’s responses in a document, indicating areas where the region and State continued to disagree. The branch chief memorialized this information in an internal memorandum to file dated December 18, 2018, one day before the expiration of the EPA’s 15-day comment period on the final permit. This memorandum detailed:

- The 29 comments and multiple recommendations that had been read to the Minnesota Pollution Control Agency over the telephone.
- The permit revisions, if any, made in response, to these comments and recommendations.
- Whether the EPA’s comment was addressed by the revisions made, if any.

The memorandum identified 12 EPA comments as “Comment was not addressed,” “Comments were not addressed,” or “Comment was not addressed fully” (emphasis in original). Also in the memorandum, the NPDES branch chief expressed skepticism of the Minnesota Pollution Control Agency’s use of “operating limits” rather than “water quality-based effluent limitations,” referring repeatedly to operating limits as “arguably” enforceable (emphasis in original). The branch chief noted that “federal enforceability of these operating limits is less certain and more complex than if these limits were established as [water-quality-based effluent limitations].”

Despite Region 5 senior management’s knowledge of the unaddressed NPDES permit concerns, Region 5 chose to not exercise its oversight authority to ensure that all deficiencies in the PolyMet NPDES permit were addressed. Pursuant to its CWA authority, the EPA could have formally objected to the permit when it did not address the region’s oral comments, but the EPA chose not to do so. Per the memorandum of agreement between Minnesota and the EPA, if the concerns raised by an EPA objection were not satisfied, the EPA would then have had “exclusive authority” to issue the permit. In the case of the PolyMet NPDES permit, absent any objection from the EPA, the Minnesota Pollution Control Agency issued the final PolyMet NPDES permit on December 20, 2018.<sup>7</sup>

## **Region 5 Declined to Determine Downstream Impacts and Engage Tribe**

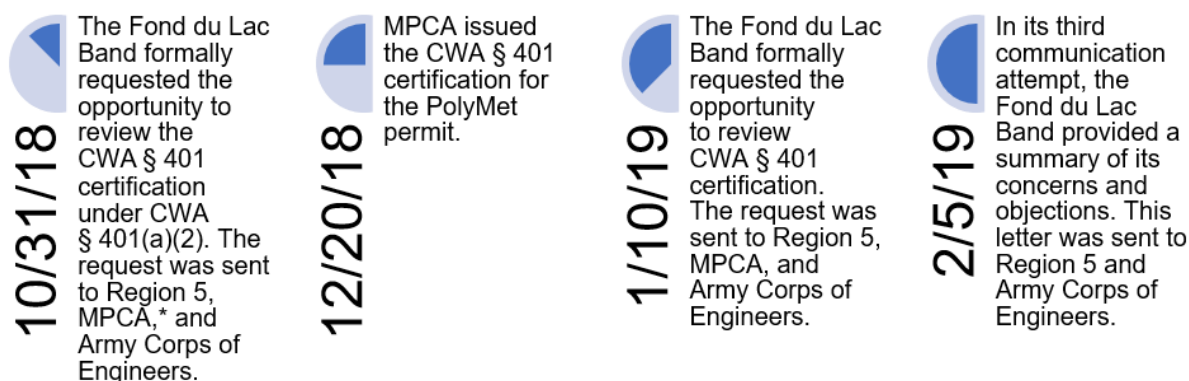
In addition to needing an NPDES permit for its planned NorthMet project, PolyMet needed a CWA § 404 permit to lawfully engage in dredging and filling activities related to the project. CWA § 404 permits are issued by the Army Corps of Engineers. Pursuant to CWA § 401(a)(1), prior to the issuance of a federal permit resulting in a discharge to a water of the United States, the state in which the discharge will originate must certify that the proposed discharge will not violate water quality standards. Additionally, CWA § 401(a)(2) requires that the EPA notify downstream states of the proposed discharge if the EPA determines the discharge “may affect” the downstream state’s water quality standards.

The Minnesota Pollution Control Agency issued a CWA § 401(a)(1) certification for the NorthMet project on December 20, 2018. The Fond du Lac Band, based on its “Treatment as a State” status, formally requested on three occasions that the EPA provide notice to the tribe regarding the downstream water quality impacts of discharges associated with the CWA § 404 permit, pursuant to CWA § 401(a)(2) (Figure 2). The Fond du Lac Band’s requests included assertions that the permit would have downstream impacts to tribal water quality. Pursuant to CWA § 401(a)(2), the EPA has a responsibility to “determine[]” whether the downstream water quality may be impacted and to notify downstream states or tribes, if applicable.

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<sup>7</sup> As of December 15, 2020, the PolyMet NPDES permit is stayed pending resolution of litigation in state court.

**Figure 2: Timeline of dates surrounding the Fond du Lac Band's requests**



Source: OIG analysis of Fond du Lac Band communication to Region 5. (EPA OIG image)

\* MPCA stands for Minnesota Pollution Control Agency.

CWA § 401(a)(2) states:

Whenever such a discharge [resulting from federally permitted activity] may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant.

Section 401(a)(2) then discusses a process by which the affected state may object to the issuance of the permit and request a hearing, at which it may present evidence to support its objection. That is, the administrative process of CWA § 401(a)(2) is available only after—and if—the EPA administrator or regional administrator, as delegated, makes a determination regarding whether the discharge at issue may affect the waters of the downstream state. Without an affirmative determination, the notification, objection, and hearing do not occur.

The Fond du Lac Band informed Region 5 on multiple occasions of the tribe's belief that its water quality would likely be affected by the discharge from the NorthMet project associated with the CWA § 404 permit. The tribe requested that the region make the relevant CWA § 401(a)(2) determination and issue the corresponding notification, presumably so the Fond du Lac Band could formally object. However, Region 5 never made the determination, thereby precluding the tribe from formally raising and pursuing a potential objection, pursuant to CWA § 401(a)(2).

The Region 5 Office of Regional Counsel asserted that the phrase “as determined by the Administrator” in CWA § 401(a)(2) indicates that it is within the EPA's discretion whether to make such a determination at all, irrespective of requests from downstream states. The Army Corps of Engineers issued the CWA § 404 permit for PolyMet's NorthMet project on March 21, 2019.

Region 5’s interpretation of CWA § 401(a)(2) allowed the region to deny a potential administrative remedy to the tribe simply by neglecting to assess downstream effects, despite repeated requests. The tribe challenged the EPA’s interpretation of CWA § 401(a)(2) in federal court, leading the U.S. District Court for the District of Minnesota to rule in February 2021 that the Agency has a legal duty to make a “may affect” determination under CWA § 401(a)(2) and notify the tribe of its determination.<sup>8</sup> Following the decision, the court granted a motion by the EPA seeking a voluntary remand of its lack of notice to the tribe to “reconsider, re-review, or modify” the lack of notice and make a “may affect” determination.

As mentioned in Chapter 1, the EPA’s *Policy on Consultation and Coordination with Indian Tribes* tasks regional administrators with overseeing the consultation process with tribes in their respective regions, including analyses for potential consultation. The policy specifically lists permits as an EPA activity normally appropriate for consultation if they may affect a tribe. In addition, the *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples* notes that to facilitate meaningful involvement for potentially affected communities, the decision-makers should seek out and facilitate the involvement of those potentially affected.

We found that Region 5’s failure to make a determination about the potential downstream effects per CWA § 401(a)(2) barred the Fond du Lac Band’s access to the administrative process by which it could formally voice its concerns. In addition, the EPA arguably did not meet the intent of its tribal and environmental justice policies, including its *Policy on Consultation and Coordination with Indian Tribes* and *Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*, which aim to ensure consultation, fair treatment, and meaningful involvement of tribes in EPA decisions affecting their health or environment.

## Conclusions

Despite Region 5’s concerns with the draft PolyMet NPDES permit, the region chose to not exercise its oversight authority to ensure that the final permit met CWA and NPDES requirements. Regional management did not ensure that its comments were conveyed to Minnesota in a transparent and timely manner per the region’s standard operating procedure, and the permit issued by the State did not address all of the EPA’s concerns. In addition, by not making a determination regarding the potential downstream impacts of proposed discharges related to the NorthMet project, Region 5 limited the Fond du Lac Band’s ability to formally voice the tribe’s concerns in accordance with the process outlined in CWA § 401. Furthermore, the EPA did not meet the intent of its tribal and environmental justice policies, which aim to ensure that tribes receive consultation, fair

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<sup>8</sup> *Fond Du Lac Band of Lake Superior Chippewa v. Wheeler*, No. 19-CV-2489 (PJS/LIB), 2021 WL 603754, at \*10 (D. Minn. Feb. 16, 2021).

treatment, and meaningful involvement in decisions affecting tribal health or the environment.

## Recommendations

We recommend that the regional administrator for Region 5:

4. Review and provide written input on any National Pollutant Discharge Elimination System permit prepared for reissuance by the Minnesota Pollution Control Agency for the PolyMet Mining Inc. NorthMet project, if applicable, as appropriate pursuant to the requirements of the Clean Water Act, National Pollutant Discharge Elimination System regulations, the Region 5 National Pollutant Discharge Elimination System permit review standard operating procedure, and the memorandum of agreement between EPA Region 5 and the Minnesota Pollution Control Agency.
5. Pursuant to Clean Water Act § 401(a)(2), commit to making a determination regarding the downstream water quality impacts of pertinent discharges whenever available information, including information provided by downstream states or tribes, indicates reasonable grounds to conclude that the discharges may impact downstream water quality.

## Agency Response and OIG Assessment

Region 5 agreed with our recommendations. In response to Recommendation 4, Region 5 stated that if the Minnesota Pollution Control Agency reissues the PolyMet NPDES permit, EPA comments and recommendations will be transmitted in writing. Regarding Recommendation 5, Region 5 plans to make a determination under CWA § 401(a)(2) in light of the February 2021 court decision and related remand,<sup>9</sup> and it will “reconsider, re-review, or modify” its lack of notice to the Fond du Lac Band. Region 5 plans to report the status of these actions to the court within 90 days of the relevant court order and agreed to provide this same information at that time to the OIG. This meets the intent of Recommendation 5. Recommendations 4 and 5 are resolved with corrective actions pending. Region 5’s response to the draft report is in Appendix C.

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<sup>9</sup> *Fond Du Lac Band of Lake Superior Chippewa* at \*10.

# **Status of Recommendations and Potential Monetary Benefits**

## RECOMMENDATIONS

Rec. No.	Page No.	Subject	Status <sup>1</sup>	Action Official	Planned Completion Date	Potential Monetary Benefits (in \$000s)
1	17	Review the modified National Pollutant Discharge Elimination System mining permits issued by West Virginia based on the 2019 revisions to its National Pollutant Discharge Elimination System program to ensure that no backsliding has occurred, including for discharges of ionic pollution, in accordance with EPA Region 3's approval letter dated March 27, 2019. If a permit does not contain record documentation for the reasonable potential analysis or otherwise allows backsliding, alert West Virginia of the permit inadequacies.	U	Region 3 Regional Administrator		
2	17	Review the modified National Pollutant Discharge Elimination System mining permits issued by West Virginia based on the 2019 revisions to its National Pollutant Discharge Elimination System program to determine whether the permits contain effluent limits for ionic pollution and other pollutants that are or may be discharged at a level that causes, has the reasonable potential to cause, or contributes to an excursion above any applicable water quality standard, as required by Clean Water Act regulations. If a permit lacks required effluent limits, take appropriate action to address such deficiencies.	U	Region 3 Regional Administrator		
3	18	Develop a formal internal operating procedure to facilitate timely permit reviews and transmission of EPA comments to states.	U	Region 3 Regional Administrator		
4	25	Review and provide written input on any National Pollutant Discharge Elimination System permit prepared for reissuance by the Minnesota Pollution Control Agency for the PolyMet Mining Inc. NorthMet project, if applicable, as appropriate pursuant to the requirements of the Clean Water Act, National Pollutant Discharge Elimination System regulations, the Region 5 National Pollutant Discharge Elimination System permit review standard operating procedure, and the memorandum of agreement between EPA Region 5 and the Minnesota Pollution Control Agency.	R	Region 5 Regional Administrator	11/30/23	
5	25	Pursuant to Clean Water Act § 401(a)(2), commit to making a determination regarding the downstream water quality impacts of pertinent discharges whenever available information, including information provided by downstream states or tribes, indicates reasonable grounds to conclude that the discharges may impact downstream water quality.	R	Region 5 Regional Administrator	6/7/21	

<sup>1</sup> C = Corrective action completed.

R = Recommendation resolved with corrective action pending.

U = Recommendation unresolved with resolution efforts in progress.



## **Internal Control Assessment**

This table identifies which internal control components and underlying principles are significant to our audit objective.

<b>Which internal control <u>components</u> are significant to the audit objective?</b>		<b>Which internal control <u>principles</u> are significant to the audit objective?</b>	
<b>X</b>	<b>Control Environment</b> The foundation for an internal control system. It provides the discipline and structure to help an entity achieve its objectives.		1. The oversight body and management should demonstrate a commitment to integrity and ethical values.
			2. The oversight body should oversee the entity's internal control system.
		<b>X</b>	3. Management should establish an organizational structure, assign responsibilities, and delegate authority to achieve the entity's objectives.
			4. Management should demonstrate a commitment to recruit, develop, and retain competent individuals.
			5. Management should evaluate performance and hold individuals accountable for their internal control responsibilities.
<b>X</b>	<b>Risk Assessment</b> Management assesses the risks facing the entity as it seeks to achieve its objectives. This assessment provides the basis for developing appropriate risk responses.		6. Management should define objectives clearly to enable the identification of risks and define risk tolerances.
			7. Management should identify, analyze, and respond to risks related to achieving the defined objectives.
			8. Management should consider the potential for fraud when identifying, analyzing, and responding to risks.
			9. Management should identify, analyze, and respond to significant changes that could impact the internal control system.
<b>X</b>	<b>Control Activities</b> The actions management establishes through policies and procedures to achieve objectives and respond to risks in the internal control system, which includes the entity's information system.	<b>X</b>	10. Management should design control activities to achieve objectives and respond to risks.
			11. Management should design the entity's information system and related control activities to achieve objectives and respond to risks.
			12. Management should implement control activities through policies.
<b>X</b>	<b>Information and Communication</b> The quality information management and personnel communicate and use to support the internal control system.		13. Management should use quality information to achieve the entity's objectives.
		<b>X</b>	14. Management should internally communicate the necessary quality information to achieve the entity's objectives.
		<b>X</b>	15. Management should externally communicate the necessary quality information to achieve the entity's objectives.
<b>X</b>	<b>Monitoring</b> Activities management establishes and operates to assess the quality of performance over time and promptly resolve the findings of audits and other reviews.	<b>X</b>	16. Management should establish and operate monitoring activities to monitor the internal control system and evaluate the results.
			17. Management should remediate identified internal control deficiencies on a timely basis.

Source: Based on internal control components and principles outlined in GAO-14-704G, *Standards for Internal Control in the Federal Government* (also known as the "Green Book"), issued September 10, 2014. (EPA OIG table)

## Region 3 Response to Draft Report



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
 REGION III  
 1650 Arch Street  
 Philadelphia, Pennsylvania 19103-2029

### MEMORANDUM

**SUBJECT:** Response to the Office of Inspector General (OIG) Draft Report *Improved Review Processes Could Advance EPA Regions 3 and 5 Oversight of State-Issued National Pollutant Discharge Elimination System Permits* for Region 3 and Region 5 dated February 17, 2021

**FROM:** Diana Esher, Acting Administrator  
 EPA Region III

DIANA  
 ESHER

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 ESHER  
 Date: 2021.03.24  
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**TO:** Kathlene Butler, Director  
 Water Directorate  
 Office of Audit and Evaluation  
 Office of Inspector General

Thank you for the opportunity to respond to the issues and recommendations in the subject draft audit report. The following is a summary of the U.S. Environmental Protection Agency (USEPA) Region III's overall position on the draft report along with our response to each of the recommendations. The draft report contains three recommendations for Region III which are identified below. We are also enclosing an attachment that provides additional comments addressing specific statements and information contained in the draft report. We have limited our response and comments to those portions of the report that are focused on or reference the Office of the Inspector General's (OIG) evaluation of Region III's oversight program.

### SUMMARY OF RESPONSE

EPA Region III does not concur with the OIG's recommendations. The Region believes that the report does not accurately reflect the entirety of the Region's oversight of the state's National Pollutant Discharge Elimination System (NPDES) programs, in particular West Virginia's mining permit program.

The Region's oversight of state programs assures that all Clean Water Act (CWA) statutory and regulatory requirements are met. There are aspects of the Region's oversight program that should be better identified in the draft report, including real time permit reviews (RTRs) and monthly meetings with the states' permitting programs to discuss process, issues, and comments on draft permits and fact sheets. With the significant volume of permits submitted to the Region for RTR, the permit reviewers are relied upon for their program knowledge and expertise to

prioritize draft permits for review and comment. EPA's comments are often addressed and/or resolved between the state and the permit reviewer prior to providing written comments.

To improve oversight, Regional management instituted a permit review process which enabled management to identify reoccurring issues, assure consistency across permit reviewers, and elevate appropriate issues for resolution with the state. As a result of this process, the Region can more quickly elevate concerns and issue objections when draft permits fail to meet federal CWA statute and regulations. The Region fully executes all state program oversight responsibilities.

### **REGION III RESPONSE TO OIG RECOMMENDATIONS**

**OIG RECOMMENDATION:** Review the modified National Pollutant Discharge Elimination System mining permits issued by West Virginia based on the 2019 revisions to its National Pollutant Discharge Elimination System program to ensure that no backsliding has occurred, including for discharges of ionic pollution, in accordance with EPA Region III's approval letter dated March 27, 2019. If a permit does not contain record documentation for the reasonable potential analysis or otherwise allows backsliding, alert West Virginia of the permit inadequacies.

**REGION III RESPONSE:** We will review draft permits and associated documentation provided to EPA to ensure that draft permits and fact sheets meet federal statute and regulations. West Virginia conducts a reasonable potential analysis on its permits. The Region will include a review of reasonable potential for mining permits in future permit quality reviews. The next review for West Virginia is tentatively scheduled in federal fiscal year 2024. The Region will continue to review permits and appropriate documentation in accordance with the RTR document. This will provide the process by which EPA and West Virginia coordinate on permits that are required to be submitted for EPA review. The RTR document will be final by the end of March 2021. Please note that this is a living document that will be updated on a periodic basis to reflect changes in process.

**OIG RECOMMENDATION:** Review the modified National Pollutant Discharge Elimination System mining permits issued by West Virginia based on the 2019 revisions to its National Pollutant Discharge Elimination System program to determine whether the permits contain effluent limits for ionic pollution and other pollutants that are or may be discharged at a level that causes, has the reasonable potential to cause, or contributes to an excursion above any applicable water quality standard, as required by Clean Water Act regulations. If a permit lacks required effluent limits, take appropriate action to address such deficiencies.

**REGION III RESPONSE:** We will review draft permits and associated documentation provided to EPA to ensure that draft permits and fact sheets meet federal statute and regulations. West Virginia conducts a reasonable potential analysis on its permits. The Region will include a review of reasonable potential for mining permits in future permit quality reviews. The next

review for West Virginia is tentatively scheduled in federal fiscal year 2024. The Region will continue to review permits and appropriate documentation in accordance with the RTR document. This will provide the process by which EPA and West Virginia coordinate on permits that are required to be submitted for EPA review. The RTR document will be final by the end of March 2021. Please note that this is a living document that will be updated on a periodic basis to reflect changes in process.

**OIG RECOMMENDATION:** Develop a formal internal operating procedure to facilitate timely permit reviews and transmission of EPA comments to states.

**REGION III RESPONSE:** As we shared with the OIG during the onsite Regional review, we addressed this recommendation through an internal operating procedure implemented in July 2019. The Region’s internal operating procedure for timely reviews is part of EPA’s Lean Management System (ELMS). The procedure requires permit reviewers to complete their detailed reviews and develop comments by day 21 of our 30-day review time. This procedure enables timely transmission of permit reviews to the states.

### **CONTACT INFORMATION**

If you have any questions regarding this response, please contact the EPA Region III Water Director, Catherine Libertz, at [Libertz.Catherine@epa.gov](mailto:Libertz.Catherine@epa.gov) or (215) 814-2737 or the Region III Audit Coordinator, Lorraine Fleury, at [Fleury.Lorraine@epa.gov](mailto:Fleury.Lorraine@epa.gov) or (215) 814-2341.

cc: Cheryl Newton, Acting Administrator, EPA Region V  
Allison Dutton, OIG

### ATTACHMENT 1

EPA Region III Response to specific statements in OIG Draft Report *Improved Review Processes Could Advance EPA Regions 3 and 5 Oversight of State-Issued National Pollutant Discharge Elimination System Permits* for Region 3 and Region 5 dated February 17, 2021

**OIG STATEMENT:** On Page 2, the OIG references the following in bullet 2: “Historical reviews, called *permit quality reviews*, of final permits.”

**REGION III RESPONSE:** The text highlighted suggests that EPA reviews all final permits as part of the permit quality review. We recommend that the OIG edit the document to state that “some” final permits are reviewed. We also recommend that the OIG include a reference to the EPA PQR guidance, which outlines the procedures to ensure that there is no ambiguity in the process and expectations: <https://www.epa.gov/npdes/npdes-program-and-permit-quality-review-standard-operating-procedures>.

**OIG STATEMENT:** On Page 2, the OIG states that “EPA regional staff conduct real-time reviews of selected draft or proposed NPDES permits that authorized states intend to issue.”

REGION III RESPONSE: EPA is not obligated to review all of the draft permits and documentation that are required to be submitted for review. For draft permits required to be submitted by federal regulation, executed memorandum of agreement (MOA) or the revocation of a waiver, EPA has the discretion to review the permit. On average, the Region reviews greater than 500 draft permits in the mining sector alone. Additionally, the Region receives draft permits in other sectors for formal and informal review. In the mining sector, the Region has a best practice of triaging permits for review. We meet with our state permitting agencies regularly (monthly) to discuss permits, comments, and program issues.

OIG STATEMENT: On Page 6, the OIG states that the “complaint alleged that regional management implemented a real-time permit review process that hampered Region 3 staff’s ability to review and comment on NPDES permits within the allowed comment period.”

REGION III RESPONSE: The comment response process was modified to improve permit reviews by creating a process to identify, evaluate, raise, and resolve reoccurring issues in draft permits. In the former process, individual staff sent EPA comments directly to the state, generally without a review by EPA Regional management. The Region determined that it was more effective and efficient to resolve common, potential program-wide issues by elevating the issue for attention by both state and EPA management rather than repeating comments in staff-to-staff letters. The revised, current process includes a review by the Clean Water Branch Chief who then sends EPA comments on draft permits to the states. The purpose for this process change was to enable the Branch Chief to identify programmatic issues occurring across multiple permit reviewers, evaluate for potential impact, and elevate as appropriate. This process change has (1) helped to identify common issues to be addressed; (2) ensured consistency of permit reviews across the NPDES Permits Section; and (3) created an effective, efficient elevation and resolution process for draft permits which don’t meet federal CWA statute and regulations.

OIG STATEMENT: One Page 7, the OIG states that “We analyzed key background and criteria documents, including documents relating to state-issued NPDES permits, from the initial permit application to the issuance of the final permit; official EPA records; emails; written communications between all interested parties and stakeholders; memorandums of agreement; administrative records; court records; and legal proceedings. AND Because of the disproportionate geographic distribution of responses received from EPA staff, we were unable to identify national, overarching NPDES oversight issues.”

REGION III RESPONSE: It would be helpful to understand the specific documents reviewed as part of this effort. The Region would like to gain a better understanding of the basis for the OIG recommendations, given that the OIG was unable to identify national, overarching NPDES oversight issues.

OIG STATEMENT: On Page 9, the OIG states that “From July 2019 through December 2020, the West Virginia Department of Environmental Protection, which is the state permitting authority for West Virginia, issued 286 modified NPDES mining permits without conducting a reasonable potential analysis to ensure that the CWA’s anti-backsliding provisions were met.”

REGION III RESPONSE: It would be helpful in formulating a response to understand the documentation and review process which the OIG used to reach the conclusion that West Virginia’s

final permits do not meet the statutory and regulatory requirements of the CWA and that the state is not conducting a reasonable potential analysis.

OIG STATEMENT: On Page 9, the OIG states that “NPDES permits that incorporated water quality criteria by reference—such as ionic pollution, which is commonly found in mine discharges—are no longer regulated by the modified NPDES permits.”

REGION III RESPONSE: This statement is misleading. Ionic pollution does not have an EPA recommended or state-imposed Water Quality Criteria.

OIG STATEMENT: On Page 10, the OIG states that “As such, facilities discharging pursuant to their permits may be shielded from enforcement action by the EPA or a state regarding discharges that, in fact, violate water quality” standards.

REGION III RESPONSE: Water Quality Standards are limits or methods bound in state legislation. As they are incorporated into the permits as a limit, violations occur when a facility exceeds the limits that are included in the permit.

OIG STATEMENT: On Page 10, the OIG states that “Previously, on two occasions in 2015, Region 3 did not approve West Virginia Department of Environmental Protection requests to modify or remove the narrative water quality criteria permit requirement.”

REGION III RESPONSE: In 2015, EPA did not take any formal disapproval action. The Region’s first formal action was in March 2019.

OIG STATEMENT: On Page 11, the OIG states that “These instructions meant that, for even those state-issued NPDES permits for which a reasonable potential analysis was previously performed and included in the record documentation, an additional reasonable potential analysis should be performed and included in the record documentation if these permits were reissued after the removal of the narrative criteria.”

REGION III RESPONSE: It is unclear how the OIG determined the intent with regards to an additional reasonable potential analysis.

OIG STATEMENT: On Page 12, the OIG states that “On July 5, 2019, Region 3 began reviewing the first two modified permits submitted by the West Virginia Department of Environmental Protection for reissuance. Region 3 permit reviewers found that the permit documentation did not include the required reasonable potential analysis”. This page also includes the following statement “West Virginia stated in the modified permits that no backsliding has occurred; however, Region 3 cannot verify this statement, since the State provided no documentation that the reasonable potential analysis was completed.” Finally, the report includes the following statement: “To date, Region 3’s management has not taken action to ensure that the modified permits reflect reasonable potential analysis and do not violate the CWA anti-backsliding provision. Without the reasonable potential analysis, these permits may be less stringent than prior permits and may violate the CWA anti-backsliding provision.”

REGION III RESPONSE: Region III would find it helpful in formulating a response to know the specific permits and documentation which the OIG reviewed to reach this conclusion.

OIG STATEMENT: Throughout Page 13, the OIG references Region III's processes, including the Region's decision to modify comment procedures and the timeliness of the Regional process and the state's response to EPA comments.

REGION III RESPONSE: Comments are offered to provide additional information to the state on clarity and interpretation of the draft documents reviewed. If the draft permit as written does not meet federal and state statute and regulation, the Region uses the tools at our disposal, including objection, to address those issues. We take into consideration the recommendations from our Mining Team and the permit reviewers for select permits to ensure that the state is issuing a permit that meets the requirements of the CWA. The state is not obligated to address all comments, only those that do not meet federal statute and regulations and/or state statute and regulation. When permits do not meet the Federal statute and regulations, the Region may object to permits.

Members of the Region III Mining Team triage permits for review. The state must submit all permits in accordance with federal regulations, but EPA is not required to review all state submissions. Region III program management relies on the Mining Team to use their best professional judgement to prioritize permits for review. The Mining Team meets to discuss and review the volume of permits received from all Region III states. In addition, the Mining Team meets with state mining contacts to discuss any issues, concerns and potential corrective actions.

Not all comments rise to the level of objection or need to be addressed by the state. The state must address only those comments that do not meet federal statute or regulations. In those instances, EPA may choose to issue an objection to a permit. Regional permit objection authority resides with the Water Director in Region III. The process change has resulted in an earlier elevation of concerns and better articulation of the issues to the Director.

EPA Region III management encourages permit reviewers to reach out to the state to ask questions, gather information and understand the draft permits. Management implemented a change to the process for the transmission of comments to the state. The change was instituted to ensure better elevation of commonly found issues and to address programmatic concerns with the state. This resulted in a more efficient process to expeditiously elevate and address concerns and issue an objection when draft permits do not meet federal CWA statute and regulations. Since 2019, the Region has issued 7 objection letters to states using this revised process and 6 of those objections have been satisfied. The final objection is still within the regulatory timeframe for the state to address EPA's concerns.

OIG STATEMENT: On Page 15, the OIG states that "all staff views regarding water quality limits were not provided to West Virginia before it issued the permit."

REGION III RESPONSE: There were instances where permit reviewers did not provide clear or concise comments timely for comments to be provided to the state. Where this occurred, the permit reviewers did not meet the internal deadlines that had been established in July 2019 as part of the formal internal permit review process. As we shared with the OIG during the onsite Regional review, the Region's internal operating procedure for timely reviews is part of EPA's Lean

Management System (ELMS). The procedure requires permit reviewers to complete their detailed reviews and develop comments by day 21 of our 30-day review time. This procedure enables timely transmission of permit reviews to the states.

OIG STATEMENT: On Page 16, the OIG provides its conclusions on the Region III process.

REGION III RESPONSE: We respectfully request that the OIG review and revise its conclusions based on the comments provided by the Region.



## Region 5 Response to Draft Report



### UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

**R-19J**

### MEMORANDUM

**SUBJECT:** Region 5 Response to the February 17, 2021, Office of Inspector General's Draft Report (Project No. OA&E-FY19-0340), "Hotline Report: Ensuring Clean and Safe Water Improved Review Processes Could Advance EPA Regions 3 and 5 Oversight of State-Issued National Pollutant Discharge Elimination System Permits"

**FROM:** Cheryl Newton, Acting Regional Administrator  
EPA Region 5

**CHERYL  
NEWTON**

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CHERYL NEWTON  
Date: 2021.03.25  
16:41:03 -05'00'

**TO:** Kathlene Butler, Director  
Water Directorate  
Office of Evaluation

EPA Regions 3 and 5 have been asked to review and comment on the Office of Inspector General's Findings in the February 17, 2021 Draft Report, "Improved Review Processes Could Advance EPA Regions 3 and 5 Oversight of State-Issued National Pollutant Discharge Elimination System Permits (Project No. OA&E-FY19-0340) ("Draft Report"). In accordance with the Office of Inspector General's (OIG) request, Region 5 submitted a timely response to the Draft Report on March 19, 2021. Region 5 now submits this updated response to reflect the clarifications discussed in the March 22, 2021 exit interview between Region 5 representatives and the Office of the Inspector General.

The draft report provides:

In accordance with EPA Manual 2750, you are required to provide a written response to the findings and recommendations in this draft report within 30 days of the draft report date. The response should address the factual accuracy of the draft report and indicate whether you concur or do not concur with each finding and recommendation. The response should also indicate planned completion dates for all recommendations. If you do not concur with a recommendation, please provide any alternative actions you wish to be considered for the final report. Your response should identify any corrective actions

already initiated or planned. The final report will include an assessment of your response, and we reserve the right to modify our report in light of your response.<sup>1</sup>

Accordingly, Region 5 reviewed the Draft Report and makes the following responses regarding factual accuracy, our concurrence/non-concurrence with your findings, and our response to your recommendation as set forth in the table below. We note that key aspects of EPA's oversight of the PolyMet permitting matter, including EPA's actions with respect to review under Clean Water Act (CWA) Section 401(a)(2), 33 U.S.C. § 1341(a)(2) remain in litigation.<sup>2</sup> Additionally, on March 8, 2021, the U.S. District Court for Minnesota granted the U.S. Environmental Protection Agency's request for a voluntary remand in *Fond du Lac Band of Lake Superior Chippewa v. Andrew Wheeler, et al*, Case No. 19-CV-2489 (PJS/LIP) (ECF No. 89) (hereafter *FDL v. EPA*). EPA sought this remand to reconsider its 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). Therefore, it would be inappropriate for EPA to comment on those matters that remain in litigation or are predecisional.

This limitation does not, however, preclude us from confirming that the Region is committed to (1) reviewing and providing a written response to any National Pollutant Discharge Elimination System (NPDES) permit prepared for reissuance by the Minnesota Pollution Control Agency for the PolyMet Mining Inc. NorthMet project (should such an opportunity arise) and (2) to making a determination whether discharges "may affect" the waters of the Band pursuant to CWA section 401(a)(2) in accordance with the Minnesota District Court's Order referenced above, in the PolyMet matter. We believe these commitments are consistent with the Draft Report Recommendations Nos. 4 and 5.

We note, however, that consistent with the CWA, NPDES regulations and the Region's NPDES Permit Review Standard Operating Procedure (SOP), EPA maintains its discretion to choose whether to review and comment on state NPDES permits. The Agency's discretion to make such choices was recently affirmed by the federal District Court for Minnesota in *FDL v. EPA*. The Court affirmed:

[T]he Clean Water Act explicitly grants EPA the authority to waive its right to object to a proposed NPDES permit. *See* 33 U.S.C. § 1342(d)(3). Consequently—and as a number of courts have recognized—EPA's waiver decision is not subject to judicial review under the Administrative Procedure Act ("APA") because it is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *see District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980); *see also Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065, 1073 (7th Cir. 2020); *Save the Bay, Inc. v. Adm'r of EPA*, 556 F.2d 1282, 1295 (5th Cir. 1977). (*FDL v. EPA*, Order, February 16, 2021, at 11-12).

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<sup>1</sup> Memorandum from Kathlene Butler, Director, Water Directorate, Office of Evaluation, to Diana Esher, Acting Regional Administrator Region 3, and Cheryl Newton, Acting Regional Administrator, Region 5, enclosing Draft Report: *Improved Review Processes Could Advance EPA Regions 3 and 5 Oversight of State-Issued National Pollutant Discharge Elimination System Permits*, Project No. OA&E-FY19-0340 (February 17, 2021), at 1.

<sup>2</sup> *Fond du Lac Band of Lake Superior Chippewa v. Andrew Wheeler, et al*, Case No. 19-CV-2489 (PJS/LIP) (Hereafter *FDL v. EPA*).

Region 5's other comments and ongoing and/or proposed actions are further explained below.

Thank you for the opportunity to review and comment on these draft findings and recommendations. Please do not hesitate to contact me should you wish to further discuss the information in this letter, or you may contact Stephen Jann and David Pfeifer of my staff regarding the NPDES permit review and oversight and 401(a)(2), respectively.

Draft Report Findings Relating to NPDES Permit Review and Oversight

	Allegation/Quoted language from report	Factual Accuracy/Does EPA Concur or Not Concur	Planned Completion Date for Recommendations	Alternative Action for things EPA does not concur on	Corrective Actions Already initiated or planned
1	Despite the concerns about the draft PolyMet NPDES permit, Region 5 management did not transparently exercise its oversight authority, choosing instead to not provide written comments summarizing those concerns.	<p>Not Concur with comments</p> <p>Both the CWA and the NPDES regulations require that any <i>objections</i> must be provided in writing. While Region 5 did not provide written comments on the proposed PolyMet Permit, the CWA and the NPDES regulations provide EPA discretion to comment or not and do not obligate EPA to provide written comments. <i>See</i> 40 C.F.R. 123.44(a)(1).</p> <p>Clean Water Act (CWA) section 402(d)(3), 33 U.S.C. § 1342(d)(3) provides discretion for EPA to waive its rights to object to a proposed permit.</p> <p>40 C.F.R. § 123.44 (a)(1) provides that “the Memorandum of Agreement shall provide up to 90 days in</p>	N/A		

	Allegation/Quoted language from report	Factual Accuracy/Does EPA Concur or Not Concur	Planned Completion Date for Recommendations	Alternative Action for things EPA does not concur on	Corrective Actions Already initiated or planned
		<p>which the Regional Administrator <i>may</i> make general comments upon, objections to or recommendations on proposed permits. EPA reserves the right to take 90 days to supply specific grounds for objection, notwithstanding any shorter period specified in the Memorandum of Agreement, when a general objection is filed within the review period specified in the Memorandum of Agreement. The Regional Administrator shall send a copy of any comment, objection or recommendation to the permit applicant.” [Emphasis added.]</p>			
2	<p>We found that Region 5 did not follow either its standard operating procedure for NPDES permit reviews or common EPA practice when it decided to not convey comments in writing regarding its review of the draft PolyMet NPDES permit.</p>	<p>Not Concur with comments</p> <p>While the Region typically transmits comments on permits it reviews, the SOP reflects the discretion in the CWA and the NPDES</p>	N/A		

	Allegation/Quoted language from report	Factual Accuracy/Does EPA Concur or Not Concur	Planned Completion Date for Recommendations	Alternative Action for things EPA does not concur on	Corrective Actions Already initiated or planned
		<p>regulations cited in (1) above.</p> <p>The SOP explicitly states that it is not binding on EPA or others: “[t]his SOP is intended as <i>guidance</i> for Region 5 NPDES Programs Branch staff only. It shall not be deemed to create any right or benefit, either substantive or procedural, enforceable by any person or entity against EPA. EPA retains <i>discretion</i> to take approaches consistent with EPA’s authority under the Clean Water Act and EPA’s regulations on a case by case basis that <i>differ</i> from those described in this SOP.” [Emphasis added.]</p> <p>The MOA between Region 5 and Minnesota provides, in relevant part, that “If no written comment is received by the Agency from the Regional Administrator within the 15 days, the Director may assume, after</p>			

	Allegation/Quoted language from report	Factual Accuracy/Does EPA Concur or Not Concur	Planned Completion Date for Recommendations	Alternative Action for things EPA does not concur on	Corrective Actions Already initiated or planned
		verification of receipt of the proposed permit, that the EPA has no objection to the issuance of the permit.”			
3	<p>The Region 5 NPDES permit review standard operating procedure, published in 2012, outlines the region’s administrative process for providing comments to states, as well as the process to follow when EPA comments are not fully addressed by states. Per the standard operating procedure:</p> <p>Though discussions may continue to resolve issues and answer questions about the permit, the Permit Reviewer must provide an appropriate comment review transmittal letter to the State within 30 days of the date that a Proposed Permit (or, in some cases, Draft Permit) was received.</p>	<p>Not Concur with comments</p> <p>See (2) above. We also note that when reviewing permits that may be complex or require decisions that are not delegated to the Branch Chief, the typical process laid out in the SOP may not apply.</p>	N/A		
4	<p>Once the permit review process is complete, according to the standard operating procedure, the region is to prepare and send a letter, even if only to indicate that the region has no objection to the permit.</p>	<p>Not Concur with comments</p> <p>See (2) above.</p>	N/A		
5	<p>For example, pursuant to 40 C.F.R. § 123.44(a)(1), the EPA “shall send a copy of any comment, objection or recommendation to the permit applicant.”</p>	<p>Concur with comment</p> <p>See (1) above.</p>	N/A		

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6	Sending a copy of comments, objections, or recommendations would require that such communications be written.	<p>Not Concur with comments</p> <p>See (1) above.</p> <p>The CWA and regulations do not prohibit providing comments orally. There are often permit specific conversations regarding comments that are preliminary or a preview of comments in advance of anticipated communication. The Region has found these detailed conversations helpful in understanding the basis for permit conditions and reaching agreement on necessary modifications in draft and proposed permits. The changes are then submitted to EPA for review in accordance with the CWA, the MOA and regulations.</p>	N/A		
7	Region 5 used two different terms to describe the draft NPDES permit versions discussed above: <i>pre-public notice</i> and <i>pre-proposed</i> . For the purpose of this chapter, we refer to both of these versions simply as the <i>draft</i>	<p>Not Concur with comments</p> <p>Under EPA’s regulations at 40 C.F.R. 122.2, a “draft permit” and a “proposed</p>	N/A		



	Allegation/Quoted language from report	Factual Accuracy/Does EPA Concur or Not Concur	Planned Completion Date for Recommendations	Alternative Action for things EPA does not concur on	Corrective Actions Already initiated or planned
	<p><i>permit</i>, as they were not yet finalized by the Minnesota Pollution Control Agency.</p>	<p>permit” are distinct and cannot be used interchangeably. A “draft permit” is, in part, a document prepared under 40 C.F.R. § 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a “permit.” In general, draft permits are subject to public participation requirements. A “proposed permit” is “a State NPDES ‘permit’ prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State.” In general, proposed permits have already undergone public participation procedures. In the case of the Polymet permit review, EPA also used the term “pre-proposed”</p>			

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		<p>permit at times. This term was used to describe the stage of the permit proceeding after the permit had undergone public participation procedures, but before it formally had been submitted to EPA for review. The email from K. Thiede to S. Lotthammer dated March 16, 2018 memorialized this specific agreement (see attached). Thus, characterizing proposed or pre-proposed permits as draft permits is inappropriate.</p>			
8	<p>The Minnesota Pollution Control Agency requested that the comments be provided orally instead of in writing, and the region's then chief of staff agreed with that approach, even though the approach did not follow the region's standard operating procedure.</p>	<p>Partially Concur, with comments</p> <p>Region 5 concurs with highlighted text. However, both the CWA and the NPDES regulations provide EPA with discretion whether to provide written comments; written comments are not required.</p>	N/A		

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		See also (1) and (2) above.			
9	<p>The branch chief memorialized this information in an internal memorandum to file dated December 18, 2018, one day before the expiration of the EPA’s 15-day comment period on the final permit, detailing:</p> <p>The 29 comments and multiple recommendations that had been read to the Minnesota Pollution Control Agency over the telephone;</p> <p>The permit revisions, if any, made in response, to these comments and recommendations; and</p> <p>Whether the EPA’s comment was addressed by the revisions made, if any.</p>	Neither concur nor non-concur – the memorandum speaks for itself.	N/A		
10	<p>This table identified 12 EPA comments as “Comment was not addressed” or “Comment was not addressed fully.” (Emphasis in original.)</p> <p><i>EPA did not include the table here.</i></p>	Neither concur nor non-concur – the memorandum speaks for itself.	N/A		
11	<p>Also in the memorandum, the NPDES branch chief expressed skepticism of the Minnesota Pollution Control Agency’s use of “operating limits” rather than “water quality-based effluent limitations,” referring repeatedly to</p>	Neither concur nor non-concur – the memorandum speaks for itself.	N/A		

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	operating limits as “arguably” enforceable. (Emphasis in original.)				
12	The branch chief noted that “federal enforceability of these operating limits is less certain and more complex than if these limits were established as water quality-based effluent limitations.”	Neither concur nor non-concur – the memorandum speaks for itself.	N/A		
13	Despite Region 5 senior management knowledge of the unaddressed NPDES permit concerns, Region 5 chose to not exercise its oversight authority to ensure that all deficiencies in the PolyMet NDPEs permit were addressed.	Not concur. As the Court found in <i>FDL v. EPA</i> , “[t]here is no dispute that EPA has discretion to choose not to object to a permit even if the permit fails to comply with federal regulatory requirements.” ( <i>FDL v. EPA</i> , Order, February 16, 2021, at 14.)	N/A		
14	Despite Region 5’s concerns with the draft PolyMet NPDES permit, the region chose to not exercise its oversight authority to ensure that the final permit met CWA and NPDES requirements.	Not Concur with comments  EPA engaged with MPCA both in writing and orally with respect to this permit review.  See discussion of EPA discretion at (1). Also, as the Court held in <i>FDL v. EPA</i> , “[t]here is no dispute that	N/A		

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		EPA has discretion to choose not to object to a permit even if the permit fails to comply with federal regulatory requirements.” ( <i>FDL v. EPA</i> , Order, February 16, 2021, at 14.)			
15	Regional management did not ensure that its comments were conveyed to Minnesota in a transparent and timely manner per the region’s standard operating procedure, and the permit issued by the State did not address all of the EPA’s concerns.	Not Concur with comments  See discussion at (14) and of discretion at (1).	N/A		
16	Recommendation 4  Review and provide written input on any National Pollutant Discharge Elimination System permit prepared for reissuance by the Minnesota Pollution Control Agency for the PolyMet Mining Inc. NorthMet project, if applicable, as appropriate pursuant to the requirements of the Clean Water Act, National Pollutant Discharge Elimination System regulations, the Region 5 National Pollutant Discharge Elimination System permit review standard operating procedure, and the memorandum of agreement between EPA Region 5 and the Minnesota Pollution Control Agency.	Concur	Consistent with the CWA, the regulations and the MOA with MPCA, Region 5 will review the permit if or when it is transmitted for review by MPCA. Comments or recommendations, if there are any, will be transmitted in writing.  Notwithstanding the possible remand of		

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			<p>the PolyMet permit to MPCA for further action in accordance with on-going state litigation, EPA anticipates it would next review a draft permit for this project when the State proposes to renew it, pending the facility's request for permit renewal, in conjunction with the current permit's expiration date of November 30, 2023.</p>		

Draft Report Findings Relating to CWA 401(a)(2)

	Allegation/Quoted language from report	Factual Accuracy/Does EPA Concur or Not Concur	Planned Completion Date for Recommendations	Alternative Action for things EPA does not concur on	Corrective Actions Already initiated or planned
1A	<p>The Minnesota Pollution Control Agency issued a CWA § 401(a)(1) certification for the NorthMet project on December 20, 2018. The Fond du Lac Band, based on its “Treatment as a State” status, formally requested on three occasions that the EPA provide notice to the tribe regarding the downstream water quality impacts of discharges associated with the CWA § 404 permit, pursuant to CWA § 401(a)(2) (Figure 2). The Fond du Lac Band’s requests included assertions that the permit would have downstream impacts to tribal water quality. Pursuant to CWA § 401(a)(2), the EPA has a responsibility to “determine[]” whether the downstream water quality will be impacted and to notify downstream states or tribes, if applicable. (p. 21)</p>	<p>Neither concur nor not concur with the highlighted portion. Concur with the remainder. The District Court in <i>FDL v. EPA</i> held that EPA has a duty under Section 401(a)(2) to make a determination whether discharges from federally-licensed projects “may affect” the waters of other states. This is the first court to make a conclusion regarding the scope of EPA’s discretion under this statutory provision. EPA is reviewing this decision and its potential impact on Agency decisionmaking.</p>	N/A		
2A	<p>The Region 5 Office of Regional Counsel asserted that the phrase “as determined by the Administrator” in CWA § 401(a)(2) indicates that it is within the EPA’s discretion whether to make such a determination at all, irrespective of requests from downstream states. The Army Corps of Engineers issued the CWA § 404</p>	<p>The District Court in <i>FDL v. EPA</i> held that EPA has a duty under Section 401(a)(2) to make a determination whether discharges from federally-licensed projects “may affect” the waters of other</p>	N/A		

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	permit for PolyMet’s NorthMet project on March 21, 2019. (p. 22)	states. This is the first court to make a conclusion regarding the scope of EPA’s discretion under this statutory provision. EPA is reviewing this decision and its potential impact on Agency decisionmaking.			
3A	While arguably consistent with the letter of CWA § 401(a)(2), Region 5’s interpretation of the provision allows the region to deny a potential administrative remedy to the tribe simply by neglecting to assess downstream affects, despite repeated requests. (p. 23)	See 2A.	N/A		
4A	We found that Region 5’s failure to make a determination about the potential downstream effects per CWA § 401(a)(2) barred the Fond du Lac Band’s access to the administrative process by which it could formally voice its concerns.  In addition, the EPA arguably did not meet the intent of its tribal and environmental justice policies, including its Policy on Consultation and Coordination with Indian Tribes and Environmental Justice Policy, which aim to ensure consultation, fair treatment, and meaningful involvement of tribes in EPA decisions affecting their health or environment. (p. 23)	On March 4, EPA sought a voluntary remand of its lack of notice to the Band. See Motion of March 4, 2021 (Attachment 1 to this memorandum). EPA sought this remand to reconsider its 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).	N/A		



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5A	In addition, by not making a determination regarding the potential downstream impacts of proposed discharges related to the NorthMet project, Region 5 limited the Fond du Lac Band's ability to formally voice the tribe's concerns in accordance with the process outlined in CWA § 401. (from conclusion, p. 23)	See 4A.	N/A		
6A	Furthermore, the EPA did not meet the intent of its tribal and environmental justice policies, which aim to ensure that tribes receive consultation, fair treatment, and meaningful involvement in decisions affecting tribal health or the environment. (from conclusion, p. 23)	See 4A.	N/A		
7A	<p>Recommendation 5:</p> <p>Pursuant to Clean Water Act § 401(a)(2), commit to making a determination regarding the downstream water quality impacts of pertinent discharges whenever available information, including information provided by downstream states or tribes, indicates reasonable grounds to conclude that the discharges may impact downstream water quality.</p>	Concur with comment. Our concurrence is limited to the PolyMet matter. See 4A.	See 4A.		EPA Region 5 aims to complete its review under 401(a)(2) for the PolyMet matter within 90 days of the Court's grant of our voluntary remand motion; EPA will report the status of its action to the

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					<p>Court on June 7, 2021.</p> <p>Should EPA require additional time to complete its review, it will so notify the OIG.</p>

## ***Distribution***

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