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MINNESOTA SUPREME COURT RULES THAT MPCA’S POLYMET WATER POLLUTION PERMIT DECISION WAS ARBITRARY AND CAPRICIOUS!

Procedural Irregularities are “Danger Signals” Requiring Remand

ST. PAUL, MINN., August 2, 2023 – The Minnesota Supreme Court determined that the Minnesota Pollution Control Agency’s (MPCA) issuance of the PolyMet copper-nickel mine water pollution (NPDES/SDS) permit was arbitrary and capricious.

The Court detailed the efforts made by Minnesota-based non-profit WaterLegacy to secure records and the findings of the Ramsey County district court on WaterLegacy’s motion for transfer due to irregularities of procedure that demonstrated MPCA’s unprecedented efforts to prevent the U.S. Environmental Protection Agency (EPA) from submitting comments on the PolyMet draft permit. The Court found that “several danger signals” suggested that the MPCA did not adequately consider whether the PolyMet project would result in an exceedance of water quality standards for mercury and other chemicals in the Lake Superior watershed. The Court remanded the permit to the MPCA “to remedy the procedural irregularities in the administrative record.”

Paula Maccabee, Advocacy Director and Counsel for WaterLegacy, stated, “The Supreme Court decision on the PolyMet water pollution permit is a complete vindication. The Court not only threw out another critical piece of PolyMet permitting, but also held the MPCA accountable for its irregular and arbitrary procedures.”

“This is a good day for clean water in Minnesota and a good day for the restoration of regulatory integrity in Minnesota,” continued Maccabee. “Whistleblowers, Freedom of Information Act lawsuits, and the district court hearing helped us learn that the MPCA used a corrupt process to keep EPA’s criticisms of the PolyMet permit secret. With this Minnesota Supreme Court decision, it becomes more likely that Minnesota agencies will use a fair process that protects people, rather than polluters.”

The Court specifically held that the following MPCA actions were irregularities of procedure constituting a danger signal of arbitrary and capricious decision making:

- MPCA’s request that the EPA refrain from providing written comments on the draft permit during the public comment period;
- MPCA’s failure to document its request that the EPA delay commenting on the draft permit in the administrative record;

(more)

- MPCA’s failure to document the substantive concerns of the EPA; and
- MPCA’s failure to document its response to the concerns of the EPA.

The Court ruled that in light of the conflicts between the MPCA and the EPA on key issues, the administrative record was inadequate for the court to rule on substantive claims regarding the MPCA permit decision, including the reasonable potential analysis under the Clean Water Act and the need for water quality-based effluent limits, compliance with downstream water quality standards, and the requirements of the Great Lakes Initiative.

The Court also ruled that Minnesota’s groundwater rules prevent discharge of pollutants to groundwater beneath an unlined “containment” system without application for and the grant of a variance.

Permit Background

The PolyMet NPDES/SDS water pollution permit was issued by the Minnesota Pollution Control Agency (MPCA) on December 20, 2018. WaterLegacy, other environmental groups and the Fond du Lac Band appealed. In June 2019, on WaterLegacy’s motion, the Court of Appeals sent the water pollution permit to district court for a hearing on whether the MPCA had used “irregular procedures” to issue the PolyMet permit, including an unprecedented effort to prevent the EPA from sending its comments.

WaterLegacy filed seven Minnesota Data Practices Act requests, nine federal Freedom of Information Act (FOIA) requests, and two FOIA lawsuits to expose EPA’s comments and a corrupted process. The EPA’s secret comments concluded that the PolyMet permit would violate pollution standards and the federal Clean Water Act. The district court confirmed that MPCA had requested that the EPA withhold these and that MPCA had destroyed its “smoking gun” emails making this request of the EPA.

Other PolyMet Permit Decisions

- The PolyMet permit to mine was reversed by the Minnesota Supreme Court due to an inadequate plan to control acid mine drainage and the lack of a permit term. The Court required a contested case hearing before any permit could be reissued.
- The PolyMet water pollution permit was previously reversed in part by the Minnesota Court of Appeals in order to determine if PolyMet pollution through groundwater to surface water must be regulated under the Clean Water Act.
- PolyMet’s wetlands destruction permit has been revoked as a result of federal litigation by the Fond du Lac Band. The U.S. Army Corps concluded that issuance of the permit would result in exceedances of the water quality standards of the downstream Fond du Lac Band of Lake Superior Chippewa.

PolyMet Copper-Nickel Sulfide Ore Mine

The PolyMet copper-nickel sulfide mine is proposed in the headwaters of the St. Louis River, the largest United States tributary to Lake Superior, upstream of the Fond du Lac Reservation, the City of Duluth, and the St. Louis River estuary. Sulfide ore mining conducted in water-rich environments—like the location of the proposed PolyMet mine—have a 100% track record of failure to protect waters from pollution.

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