**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MINNESOTA**

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| FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA,<br><br>Plaintiff,<br>v.<br><br>KURT THIEDE, Region 5 Administrator – Environmental Protection Agency; ANDREW WHEELER, Administrator of the Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,<br><br>and<br><br>SAMUEL L. CALKINS, District Engineer, St. Paul District, U.S. Army Corps of Engineers; RYAN D. MCCARTHY, Acting Secretary of the Army; U.S. ARMY CORPS OF ENGINEERS,<br><br>Defendants,<br><br>and<br><br>POLYMET MINING, INC.,<br><br>Defendant-Intervenor. | ) | Case No. 19-cv-2489 (PJS/LIB) |

**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, the Fond du Lac Band of Lake Superior Chippewa ("Band" or "Fond du Lac Band"), complains and alleges as follows:

## I. INTRODUCTION

1. This is an action to enforce the requirements of the Clean Water Act ("CWA"), National Environmental Policy Act ("NEPA") and Administrative Procedure Act ("APA") with

regard to the proposed development of an extensive open-pit copper-nickel-platinum mine ("NorthMet Mining Project" or "Mining Project"), which is the first of its kind in northern Minnesota to be developed by PolyMet Mining, Inc. ("PolyMet"). The mine, if developed, will destroy a large intact area of pristine wetlands, operate for 20 years, and require wastewater treatment both during the mine's operation as well as perpetually after the mine closes. The Fond du Lac Band brings this action because the proposed mine, as currently permitted, will be a source of pollution in northern Minnesota in perpetuity, creating an existential threat to the Band and its members who occupy a Reservation approximately 70 miles directly downstream from the proposed mine and who hold Treaty-reserved rights to hunt, fish, and gather natural resources both within and outside the Reservation, including within the area that will be affected by the mine. Despite their obligations to ensure compliance with federal law, both the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") violated their duties to ensure the permits for the Mining Project comply with the CWA, and failed to protect the Band's Treaty-reserved rights both within and outside the Fond du Lac Reservation from the NorthMet Mining Project.

2. The Band is a federally recognized Indian tribe and member band of the Minnesota Chippewa Tribe. The Band occupies a small reservation in northeastern Minnesota – part of a much larger extent of the Chippewa's (Ojibwe's) aboriginal territory which extended through much of present-day Minnesota, Wisconsin, and Michigan. The Fond du Lac Reservation ("Reservation") was established as the Band's permanent home by the 1854 Treaty of LaPointe, 10 Stat. 1109 ("1854 Treaty").

3. In the 1854 Treaty, the Band reserved hunting, fishing, and other usufructuary rights in lands ceded under the Treaty ("1854 Ceded Territory"). This Court has affirmed the

Band's Treaty rights in the 1854 Ceded Territory. Today, the Band's members exercise these rights throughout the 1854 Ceded Territory, and the exercise of these rights depends on uncontaminated natural resources. Both within the Reservation and the 1854 Ceded Territory, the Band has as an active role in natural resource management.

4. In 1996, the Band achieved Treatment as a State status for purposes of the CWA, 33 U.S.C. § 1377(e). In other words, the Band is a "State" for purposes of the CWA. The Band administers a water quality program to protect waters within the Reservation's boundaries. In 2001, EPA approved the Band's water quality standards, a first for an Indian tribe in the Great Lakes Basin. Since then the Band has implemented its water quality monitoring program for Reservation lakes and streams. These efforts have confirmed that Reservation lakes and streams are attaining the Band's water quality standards, with the exception of mercury, which is of particular concern to the Band because mercury accumulates in fish and the Band's members rely on fish for subsistence and cultural practices.

5. The St. Louis River watershed (called *Chi-gamii-ziibi* in Ojibwe) has been home to the Band for centuries. Over time, with the development of non-Indian economies in the watershed, the Band has seen its wild rice waters (called *manoomin* in Ojibwe) degraded; its lake sturgeon wiped out by overfishing, habitat degradation, and pollution; and the remaining fish are now so high in mercury that the Band cannot safely feed them to their children. Despite these impacts, the Band continues to work hard and exercises its authorities to restore and protect its waters and Treaty resources for future generations.

6. PolyMet, a corporation whose majority shareholder is Glencore, a Swiss-based mining company, proposes to construct and operate the NorthMet Mining Project. Many of PolyMet's mining and reclamation plans for an open pit mine are still unfinished or tentative,

despite the issuance of all necessary permits to begin construction. The mine will destroy a large intact area of pristine wetlands, have a permanent reactive waste rock stockpile, a tailings basin built on top of an old existing tailings basin that currently contaminates ground and surface water, and a pit lake requiring water treatment in perpetuity.

7. This action concerns two permits for the Mining Project that were issued to PolyMet pursuant to the CWA, 33 U.S.C. §§ 1251-1388.

8. The first permit is one to discharge pollutants under the National Pollutant Discharge Elimination System ("NPDES Permit"), 33 U.S.C. § 1342. On information and belief, the NPDES Permit was issued to PolyMet by the Minnesota Pollution Control Agency ("MPCA") after EPA political appointees, including but not limited to EPA's then-Region 5 Regional Administrator Cathy Stepp and her then-Chief of Staff Kurt Thiede, suppressed the comments and concerns of Region 5 personnel with the scientific, technical and legal expertise responsible for carrying out EPA's oversight of NPDES permitting. As a result, EPA's review of the NPDES Permit is arbitrary and capricious and an abuse of discretion in violation of the APA.

9. The second permit is one to discharge dredged and fill material into navigable waters under Section 404 of the CWA ("404 Permit"), 33 U.S.C. § 1344. The 404 Permit was issued to PolyMet by the Corps, without providing the Band with notice or a hearing on its objections to the 404 Permit under Section 401(a)(2) of the CWA, 33 U.S.C. § 1341(a)(2). Section 401(a)(2) of the CWA provides the Band, as a downstream State, the right to object to the 404 Permit and a hearing on those objections to ensure compliance with the Band's water quality standards. Although the Band requested notice and a hearing, no such notice or hearing was provided to the Band. On information and belief, political appointees within EPA, including but

not limited to Cathy Stepp and Kurt Thiede, engaged in an arbitrary, irregular, and unlawful process that prevented the Band from being heard on its well-founded objections to the 404 Permit.

10. Further, on information and belief, political appointees within EPA, including but not limited to Cathy Stepp and Kurt Thiede, did not allow career staff and managers at EPA Region 5 to inform the Corps of the deficiencies in the NPDES Permit and 401 Certification and prevented the Band from being heard on its objections to the 404 Permit pursuant to Section 401(a)(2). The Corps relied on and incorporated the terms of the deficient NPDES Permit and 401 Certification in its decision on the 404 Permit.

11. In issuing the 404 Permit, the Corps also violated NEPA by, *inter alia*, ignoring the Band's special expertise, as cooperating agency, including environmental analyses offered throughout the Mining Project's environmental review under NEPA. The Corps compounded this error by instead relying on erroneous data and analyses developed primarily by the applicant for the permit – PolyMet and its contractors. The NEPA review was concluded in November 2015 with the release of a 2015 Final Environmental Impact Statement ("FEIS"), which the Corps then relied on for its decision on the 404 Permit issued on March 21, 2019.

12. The Corps, in its decision to issue the 404 Permit, also failed to properly apply the statutory and regulatory criteria required to issue a dredge and fill permit under Section 404 of the CWA, 33 U.S.C. § 1344; 40 C.F.R. pt. 230, as well as the Corps' regulations for evaluating and determining the public interest, 33 C.F.R. pt. 320. The Mining Project is not the least environmentally damaging practicable alternative; will have an unacceptable adverse effect on municipal water supplies, fishery areas and wildlife habitat; will cause or contribute to significant degradation of waters of the United States and violations of water quality standards; is not in the

public interest; and fails to ensure that the Mining Project will comply with the downstream water quality standards established by the Band.

13. Both the FEIS and the Corps' decision on the 404 Permit are contrary to law, arbitrary and capricious, an abuse of discretion, and in derogation of the federal government's Treaty and trust obligations to the Band.

14. Accordingly, the Band brings this action for declaratory and injunctive relief.

## II. JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1362, 2201, and 2202. This action also states claims under the APA, 5 U.S.C. §§ 701-706.

16. Venue is proper in the District of Minnesota under 28 U.S.C. § 1391(b), because Defendants' actions relate to the NorthMet Mining Project, which is located within this district and it is where "a substantial part of the events or omissions giving rise to the claim[s] occurred."

## III. PARTIES

17. The Band is a federally recognized Indian tribe and a member band of the Minnesota Chippewa Tribe. 85 Fed. Reg. 5,462, 5,464 (Jan. 30, 2020). The Band's governing body is the Reservation Business Committee. The Band's Reservation lies in the St. Louis River basin, approximately 70 miles directly downstream from the Mining Project.

18. Defendant Kurt Thiede is Regional Administrator of Region 5 of the U.S. Environmental Protection Agency and is sued in his official capacity. Defendant Thiede previously served as chief of staff for Cathy Stepp, who was Regional Administrator of Region 5 from approximately December 2017 until January 2020.

19. Defendant Andrew Wheeler is the Administrator of the U.S. Environmental Protection Agency and is sued in his official capacity.

20. The U.S. Environmental Protection Agency is an agency of the United States government which is charged with oversight of permitting programs under §§ 401, 402, and 404 of the CWA, 33 U.S.C. §§ 1341, 1342, 1344.

21. Defendants Thiede, Wheeler, and EPA are sometimes hereafter referred to collectively as "EPA Defendants."

22. Defendant Samuel L. Calkins is the District Engineer for the St. Paul District of the U.S. Army Corps of Engineers and is sued in his official capacity.

23. Defendant Ryan D. McCarthy is the Acting Secretary of the Army and is sued in his official capacity.

24. The U.S. Army Corps of Engineers is an agency of the United States government which is charged with issuing dredge and fill permits under § 404 of the CWA, 33 U.S.C. § 1344.

25. Defendants Thiede, Wheeler, EPA, Calkins, McCarthy, and Corps are sometimes hereafter referred to collectively as "Federal Defendants."

26. Defendant-Intervenor PolyMet Mining Inc. is a corporation that was granted a 404 Permit and a NPDES Permit for its proposed NorthMet Mining Project. PolyMet sought and was granted intervention in this action on April 13, 2020.

## IV. LEGAL BACKGROUND

### A. The Band's 1854 Treaty Rights in the 1854 Ceded Territory.

27. "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). "In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party . . . it has charged

itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

28. A treaty between an Indian tribe and the United States recognizes and guarantees rights existing from time immemorial: the treaty is "a grant of right from" the relevant tribe and "a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905).

29. Under the Treaty of LaPointe of September 30, 1854, 10 Stat. 1109, ("1854 Treaty") the Band ceded a large portion of land in northeastern and east-central Minnesota ("1854 Ceded Territory"). *Id.* art. 1. In Article 11 of the 1854 Treaty, the Band reserved "the right to hunt and fish therein . . . ." *Id.* "As a result of this provision, the Chippewas residing in Minnesota obtained treaty-recognized usufructuary rights on non-reservation lands." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 363 (7th Cir. 1983). Article 2 of the 1854 Treaty also established a Reservation as the Band's permanent home, which remains the Band's Reservation to this day.

30. This Court has affirmed the Band's usufructuary rights in the 1854 Ceded Territory reserved under the 1854 Treaty. *Fond du Lac Band of Chippewa Indians v. Carlson*, No. 5-92-159, slip op. at 55 (D. Minn. Mar. 18, 1996) ("*Carlson*"). This Court affirmed that, "under Article 11 of the Treaty of September 30, 1854, 10 Stat. 1109, the Fond du Lac Band of Lake Superior Chippewa reserved and continues to hold usufructuary rights in the territory ceded under the 1854 Treaty . . . ." *See* Stipulation at 2, *Carlson*, No. 5-92-159 (D. Minn. May 17, 1996).

31. The Band's exercise of its 1854 Treaty rights requires natural resources that are not contaminated. *See Michigan v. U.S. EPA*, 581 F.3d 524, 525 (7th Cir. 2009) (recognizing that a tribe's "cultural and religious traditions . . . require the use of pure natural resources derived from a clean environment").

32. Federal agencies have the duty to consider and protect treaty rights in making decisions. *E.g.*, *Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1519-20 (W.D. Wash. 1996) (citing *Seminole Nation*, 316 U.S. at 296-97).

**B. The National Environmental Policy Act.**

33. NEPA, 42 U.S.C. §§ 4321-4370m-12, is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(2). NEPA requires federal agencies to take a "hard look" at environmental concerns of a federal action. To that end, NEPA is intended to ensure that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts . . . ." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

34. NEPA requires an agency to fully disclose all potential adverse environmental impacts of its action before deciding to proceed. 42 U.S.C. § 4332(2)(C). NEPA also requires an agency to use high quality, accurate scientific information. 40 C.F.R. § 1500.1(b).

35. A federal agency is required to prepare an environmental impact statement ("EIS") for a major federal action significantly affecting the quality of the human environment. *Id.* § 1502.3. An EIS must have an appropriate scope, which consists of the range of actions, alternatives, and impacts to be considered in the EIS. *Id.* §§ 1501.7, 1508.25. In particular, the EIS must consider direct and indirect effects. *Id.* §§ 1508.25(c), 1508.8. The direct effects of an action are those effects "which are caused by the action and occur at the same time and place." *Id.* § 1508.8(a). The indirect effects of an action are those effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 1508.8(b).

36. An EIS must also analyze the cumulative impacts/effects of a proposed project. *Id.* § 1508.25(c)(3). Cumulative impacts are the result of any past, present, or reasonably foreseeable future actions. *Id.* § 1508.7. Such effects "can result from individually minor but collectively significant actions taking place over a period of time." *Id.*

37. If more than one federal agency is involved in a group of actions directly related to each other, a lead agency or joint lead agencies are designated to "supervise the preparation of an environmental impact statement . . . ." *Id.* § 1501.5(a), (b).

38. A cooperating agency is an agency other than a lead agency which "has jurisdiction by law or special expertise with respect to any environmental impact involved in a . . . major Federal action significantly affecting the quality of the human environment." *Id.* § 1508.5. An Indian tribe and a lead agency may agree for the Indian tribe to become a cooperating agency in the NEPA process. *Id.*

39. A lead agency has the duty and responsibility to "[r]equest the participation of each cooperating agency in the NEPA process at the earliest possible time" and to "[u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency." *Id.* § 1501.6(a)(1), (2).

40. "If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate." Forty Most Asked Questions Concerning CEQ's National Policy Act Regulations, 46 Fed. Reg. 18,026, 18,030 (Mar. 21, 1981) (Answer 14b).

**C. The Clean Water Act.**

41. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the discharge of any pollutant, including dredged or fill material, into navigable waters unless authorized by a CWA permit. *Id.* §§ 1311(a), 1344.

**1. National Pollutant Discharge Elimination System Permits.**

42. The State of Minnesota exercises delegated federal authority under EPA's oversight to issue NPDES permits for discharges into Minnesota's waters. *See id.* § 1342(b). The Minnesota Pollution Control Agency ("MPCA") is the state agency charged with administering Minnesota's NPDES permit program and issuing NPDES permits. Minn. Stat. § 115.03.

43. Minnesota's NPDES permit program must comply with the CWA and EPA's regulations for NPDES permits. *See* 33 U.S.C. § 1342(b); 40 C.F.R. § 123.25(a).

44. EPA exercises oversight authority over NPDES permits issued by MPCA. 33 U.S.C. § 1342(d). Because EPA has ultimate responsibility and oversight of NPDES permitting, the EPA has the authority to object to MPCA's issuance of an NPDES permit "as being outside the guidelines and requirements" of the CWA. *Id.* § 1342(d)(2)(B). If EPA objects, "[n]o permit shall issue." *Id*. § 1342(d)(2). EPA may also assume permitting authority from MPCA and issue the permit "in accordance with the guidelines and requirements" of the CWA. *Id.* § 1342(d)(4), (a); *see also id.* § 1342(c).

45. EPA and MPCA have entered into a Memorandum of Agreement to govern the manner in which EPA will oversee and review MPCA's NPDES permitting. See Mem. of Agreement Between U.S. EPA & MPCA for Approval of State NPDES Permit Program (May 7, 1974), *available at* https://www.epa.gov/sites/production/files/2013-09/documents/mn-moa-npdes.pdf ("MOA"). This process is also governed by regulations promulgated by EPA for its

"review of and objections to State permits." 40 C.F.R. § 123.44. EPA may not waive its right to review a State-issued NPDES permit for "[d]ischarges which may affect the waters of a State other than the one in which the discharge originates . . . ." *Id.* § 123.24(d)(2). EPA also has established practices and procedures for reviewing a State-issued NPDES permit.

46. Under the CWA's requirements for NPDES permitting, "[n]o permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States . . . ." *Id.* § 122.4(d). The term "affected States" includes Indian tribes, like the Band, that have achieved Treatment as a State ("TAS") status under the CWA. 33 U.S.C. § 1377(e).

47. In addition, "[n]o permit may be issued . . . [t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i).

48. Under the CWA, effluent limitations on point source discharges are a means of ensuring compliance with water quality standards and achieving the objectives of the CWA. 33 U.S.C. § 1311(b). The CWA provides for two types of effluent limitations to control and ensure point source discharges' compliance with water quality standards: technology-based effluent limitations ("TBELs") and water quality-based effluent limitations ("WQBELs"). *Id.* § 1311(b)(1)(A), (b)(1)(C).

49. TBELs are industry-wide effluent limitations that represent the best practicable control technology currently available. *Id.* § 1311(b)(1)(A)(i). A NPDES permit includes TBELs without regard to any impact on the water quality of the waters receiving the discharge. *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1042 (D.C. Cir. 1978).

50. "When [TBELs] would fall short of achieving desired water quality levels," a NPDES permit includes "additional, more stringent [WQBELs] for those particular point sources." *Iowa League of Cities v. EPA*, 711 F.3d 844, 856 (8th Cir. 2013) (citing 33 U.S.C. § 1312(a)). EPA's regulations require NPDES permits to control by WQBELs all pollutants that are determined "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1)(i). If a "discharge causes, has the reasonable potential to cause, or contributes to" an exceedance of a "State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant." *Id.* § 122.44(d)(1)(iii).

51. Compliance with the CWA before a NPDES permit is issued is significant because the CWA also contains a "permit shield," which provides a defense to a permittee from liability and enforcement by EPA, government agencies, and citizens for violations of the CWA, so long as the permittee complies with the terms of its NPDES permit. *See* 33 U.S.C. § 1342(k).

**2. Section 404 Dredge and Fill Permits.**

52. EPA retains oversight authority over the Section 404 permitting program and may veto the Corps' approval of a permit if the dredged or fill material would have "an unacceptable adverse effect on . . . fishery areas . . . , wildlife, or recreational areas." *Id.* § 1344(c); *see Minnesota ex rel. Spannaus v. Hoffman*, 543 F.2d 1198, 1206 n.24 (8th Cir. 1976).

53. In evaluating an application for a Section 404 permit, the Corps must comply with criteria in 33 C.F.R. part 320, including evaluating the proposed activities for compliance with applicable water quality standards. 33 C.F.R. § 320.4(d).

54. The Corps' regulations prohibit the issuance of a Section 404 permit if "the district engineer determines that it would be contrary to the public interest." *Id.* § 320.4(a)(1). The Corps' public interest determination requires the district engineer to weigh the benefits that reasonably may be expected to accrue from the proposal against its reasonably foreseeable detriments, considering all relevant factors. *Id.*

55. The Corps must also comply with regulations promulgated in conjunction with EPA for its review of proposed discharges of dredged or fill material into navigable waters of the United States. 33 U.S.C. § 1344(b)(1); 40 C.F.R. §§ 230.1-230.98. These regulations are commonly referred to as the "404(b)(1) Guidelines."

56. A fundamental precept of the 404(b)(1) Guidelines is "that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 40 C.F.R. § 230.1(c).

> From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.

*Id.* § 230.1(d).

57. The 404(b) Guidelines provide, *inter alia*, that no discharge of dredged or fill material may be permitted if: (1) there is a "practicable alternative" that is less damaging to the aquatic ecosystem; (2) the discharge will "cause or contribute to significant degradation" of waters of the United States; or (3) the discharge "[c]auses or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard . . . ." *Id.*

§ 230.10(a), (b)(1), (c). Further, no discharge of dredged or fill material may be permitted "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." *Id.* § 230.10(d).

**3. Section 401 Certifications and Objections of a Downstream State.**

58. Section 401(a)(1) of the CWA requires any applicant for a federal permit to conduct any activity "which may result in any discharge into the navigable waters" to obtain a certification "from the State in which the discharge originates or will originate . . . ." 33 U.S.C. § 1341(a)(1) ("401 Certification"). This certification confirms "that any such discharge will comply" with certain provisions of the CWA, including the certifying State's water quality standards. *Id.* Section 401(a)(1) accordingly gives a certifying State the ability to deny certification or impose conditions on a federal permit to ensure any discharge will comply with the State's water quality standards. *See PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 711 (1994).

59. The rights of a State that is located downstream (an "affected State") from the certifying State are provided in Section 401(a)(2) of the CWA. 33 U.S.C. § 1341(a)(2). Section 401(a)(2) of the CWA "prohibit[s] the issuance of any federal license or permit over the objection of an affected [downstream] State unless compliance with the affected [downstream] State's water quality requirements can be ensured." *Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1992).

60. Section 518(e) of the CWA, 33 U.S.C. § 1377(e), expressly authorizes EPA to treat eligible federally recognized Indian tribes, like the Band, in a similar manner as a State for certain programs, including for purposes of Section 401(a)(2) regarding the water quality standards of a downstream State. The CWA provides the authority to require discharges to comply with the Band's more stringent downstream water quality standards. *See, e.g.*, *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996).

61. Accordingly, EPA must review an application for a federal permit and the accompanying 401 Certification for effects on a downstream State. 33 U.S.C. § 1341(a)(2); *see also* 40 C.F.R. § 121.13 (2019). "Whenever such a discharge 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 . . . ." 33 U.S.C. § 1341(a)(2).

62. Upon EPA's notification, the affected downstream State has sixty days to object to the permit and request a hearing on its objections. *Id.* If an affected State objects and requests a hearing, the permitting agency then "shall hold such hearing." *Id*. After considering the recommendations of the Administrator, the affected State, and "any additional evidence" at such hearing, the permitting agency "shall condition . . . [the] permit in such manner as may be necessary to insure compliance with applicable water quality requirements." *Id*. If conditions cannot ensure compliance with the affected State's water quality standards, the permitting agency "shall not issue such . . . permit." *Id*.

63. EPA's regulations to implement Section 401(a)(2) regarding a "Determination of Effect on Other States" appear at 40 C.F.R. §§ 121.11-16 (2019). In particular, 40 C.F.R. § 121.13 (2019) provides as follows:

> The Regional Administrator shall review the application, certification, and any supplemental information provided in accordance with §§ 121.11 and 121.12 and if the Regional Administrator determines there is reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates, the Regional Administrator shall, no later than 30 days of the date of receipt of the application and certification from the licensing or permitting agency as provided in § 121.11, so notify each affected State, the licensing or permitting agency, and the applicant.

*Id.*

64. EPA has adopted a Policy on Consultation and Coordination with Indian Tribes (May 4, 2011) ("Tribal Consultation Policy") to comply with Executive Order 13175 and the Presidential Memorandum regarding Guidance for Implementing E.O. 13175, "Consultation and Coordination with Indian Tribal Government" (Nov. 5, 2009).[1] The Tribal Consultation Policy provides:

> EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes.

*Id.* at 1. The Tribal Consultation Policy further states "that EPA takes an expansive view of the need for consultation in line with the 1984 Policy's directive to consider tribal interests whenever EPA takes an action that 'may affect' tribal interests." *Id.* at 2.

65. EPA Region 5 has adopted Implementation Procedures for EPA's Policy on Consultation and Coordination with Indian Tribes (July 26, 2011) ("Implementation Procedures").[2] Among other requirements, the Implementation Procedures provide:

> A written response to the concerns raised by the tribe(s) during consultation will be drafted by the Project Lead and signed by the Division or Office Director. The response letter will explain how EPA Region 5 considered the input from the tribe(s) in EPA Region 5's final decision. This response letter should be sent to the most senior tribal official involved in the consultation and, if appropriate, others may be copied.

*Id.* § 2.4.2.

## V. FACTS AND ALLEGATIONS

### A. The NorthMet Mining Project.

[1] *Available at* https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.
[2] *Available at* https://www.epa.gov/sites/production/files/2015-08/documents/r5-consultation-procedures-20110726.pdf.

66. The NorthMet Mining Project would be Minnesota's first copper-nickel-platinum mine. The Mining Project would be located within the Band's 1854 Ceded Territory, and would lie approximately 70 miles upstream of the Fond du Lac Reservation.

67. The NorthMet Mining Project will pollute the Embarrass and Partridge Rivers, which are both headwaters of, and tributaries to the St. Louis River. Waters within the St. Louis, Embarrass, and Partridge Rivers are listed as impaired for certain pollutants under Section 303(d) of the CWA, 33 U.S.C. § 1313(d), such as for mercury in the water column and in fish tissue. A listing as impaired under Section 303(d) of the CWA means, *inter alia*, that the listed water is not meeting water quality criteria for its designated use. The St. Louis River drains into Lake Superior and due, in part, to historical discharges of contaminants from industry, it is one of the 31 U.S.-based "areas of concern" across the Great Lakes.[3] EPA's identification of the St. Louis River as an "area of concern" means it is an area within the Great Lakes Basin that has experienced severe environmental degradation, largely due to the impacts of decades of uncontrolled pollution from industry.

68. Mining and ore processing for the NorthMet Mining Project will go on for at least 20 years and post-closure maintenance would continue for 200 or more years – essentially indefinitely.

69. The primary components of the Mining Project are a copper sulfide ore open pit mine ("Mine Site") and a processing plant ("Plant Site"), connected by a network of transportation and utility corridors and water pipelines. The Mine Site and Plant Site are located approximately eight miles apart.

[3] U.S. EPA, *St. Louis AOC*, https://www.epa.gov/great-lakes-aocs/st-louis-river-aoc.

70. The Mine Site is 3,016 acres and includes approximately 1,311 acres of pristine, high quality wetlands. High quality wetlands have low disturbance levels and high vegetative diversity and integrity. These wetlands cover approximately 43% of the Mine Site. The Mine Site includes a portion of the area called the One Hundred Mile Swamp at the Partridge River's headwaters, which is designated as a site of high biodiversity significance under Minnesota law.

71. There is no known existing contamination by hazardous materials at the Mine Site. The Mine Site was previously managed by the U.S. Forest Service as part of the Superior National Forest, until the Forest Service conveyed land within the Mine Site to PolyMet in a 2017 land exchange.

72. The Corps claims that the Mining Project would directly impact 901.24 acres of wetlands and indirectly impact 26.93 acres of wetlands, though other evaluations put the number of impacted acres much higher. These wetlands are part of a large, contiguous, mixed and connected wetland complex that provides important ecosystem functions to the St. Louis River Watershed, the Lake Superior Watershed, and the Great Lakes Basin, including downstream water quality, flood control, biodiversity and unique, connected habitat for a variety of wildlife, including moose and other species culturally important to the Band. EPA has also designated wetlands to be impacted at the Mine Site as an aquatic resource of national importance.

73. PolyMet's dredge and fill activities would result in the largest permitted destruction of wetlands in Minnesota's history. PolyMet will discharge dredged or fill material into wetlands, which would then either be removed and replaced by mine pits or excavated and replaced with fill material discharged to construct overburden and waste rock storage facilities, roads, storm and mine water management systems, tailings basin buttresses, the tailings basin seepage capture system, and utility corridors. PolyMet's discharges into wetlands will generate turbidity and

suspended particulates that will then be conveyed via overland flow to downstream waters. PolyMet's dredge and fill activities will remove and dewater wetlands that are dominated by peat bogs, which will release and discharge significant amounts of mercury into waters of the United States, affecting the Band's downstream waters.

74. During mining operations, PolyMet will extract 32,000 tons of ore per day. During 20 years of active mining, PolyMet will create over 300 million tons of waste rock, much of which will be reactive mine waste. Waste rock will remain at the mine permanently. The ore and waste rock that would be generated will contain sulfide minerals, which when exposed to oxygen and water can produce acid mine drainage and have devastating effects on natural resources and the environment. The Mining Project will adversely impact natural resources, including fish, plant and wildlife habitat, and water quality, through leaching of metals, sulfate, and other pollutants from waste rock and mine facilities into the environment.

75. At the Plant Site, PolyMet would process ore in a hydrometallurgical plant and produce approximately 313,000 tons of waste residue annually. These residues would be reactive and include mercury. PolyMet would deposit them into a hydrometallurgical residue facility located at the Plant Site.

76. Ore refining would also produce reactive mine wastes called tailings, which would be mixed with water to form a slurry and pumped into a flotation tailings basin ("FTB"). The FTB will be unlined and its design relies on water leaking into the ground and assumes a certain rate of seepage in order to operate. The FTB would be built on top of an over fifty-year-old existing tailings basin left behind by LTV Steel Mining Company ("LTVSMC"), which still contains taconite ore tailings that are currently contaminating waters and natural resources in the area. The Plant Site contains legacy contamination from LTVSMC's former iron ore processing facilities for

which PolyMet will only be partly responsible. Cliffs Erie, LLC ("Cliffs Erie") acquired LTVSMC's iron ore processing facilities and has since declared bankruptcy. Cliffs Erie is a party to a consent decree that requires remediation, reclamation, and closure activities that will address legacy contamination at the Plant Site regardless of whether the Mining Project proceeds.

77. During the 20 years of mining, PolyMet would deposit approximately 225 million tons of contaminated mine tailings into the FTB that will result in long-term seepage into groundwater and surface water.

78. At the Plant Site, PolyMet is to operate a Wastewater Treatment System ("WWTS") to treat polluted wastewater from mine processes and collected tailings basin seepage. As authorized by PolyMet's NPDES Permit, the WWTS will discharge polluted wastewater to surface water at Unnamed Creek and Trimble Creek, which flow into the Embarrass River, and to Second Creek, which flows into the Partridge River. After discharge, the polluted wastewater will flow down the Partridge and Embarrass Rivers into the St. Louis River, affecting the Band's waters downstream. PolyMet expects to start discharging polluted wastewater 24 months after the start of construction. During operations, PolyMet will continuously discharge on average approximately 2.4 million gallons of polluted wastewater per day (or a maximum of up to 2.9 million gallons per day) from the WWTS. This amount will increase to an average of 3.9 million gallons of polluted wastewater per day (or a maximum of up to 5.7 million gallons per day), during the tenth year of operations.

79. Under PolyMet's NPDES Permit, the WWTS is subject to state internal "operating limits," rather than WQBELs under the CWA for relevant pollutants. These "operating limits" derive from Minnesota's pollution control laws, not the CWA. PolyMet's NPDES Permit establishes "operating limits" for seven pollutants, including sulfate, copper, arsenic, cobalt, lead,

nickel, and mercury. These "operating limits" are set to the corresponding Minnesota water quality standard, which, for mercury, is 1.3 ng/L. PolyMet's NPDES Permit also includes TBELs that are up to a thousand times greater than applicable water quality criteria.

80. Methylmercury is an organic form of mercury that accumulates in fish. Methylmercury persists and accumulates progressively up the food chain, producing toxic effects to humans and wildlife that consume fish with mercury in fish tissue. Sulfate can convert inorganic mercury into methylmercury through a process called mercury methylation. In other words, sulfate plays a role in transforming mercury into methylmercury, which can then be readily accumulated in aquatic species.

81. Despite the distance between the Mining Project and the St. Louis River, there is no physical or chemical basis to deduct the Mining Project's contributions of mercury and methylmercury to the Partridge and Embarrass Rivers from the St. Louis River. In addition, there are no physical barriers to fish movement between the Partridge and Embarrass Rivers and the St. Louis River. As such, methylmercury will bioaccumulate in fish in the Partridge and Embarrass Rivers and the fish could then freely migrate downstream into the St. Louis River, as well as migrate into other waters within the 1854 Ceded Territory where Band members exercise Treaty fishing rights.

82. The St. Louis River is the most significant and utilized fishery on the Reservation. Since 2005, water quality data collected by the Band has demonstrated consistent exceedances of the Band's water quality numeric chronic criterion for mercury of 0.77 ng/L. Fish tissue collected by the Band has shown mercury concentrations that exceed human health risk levels and has required advisories that recommend Band members limit consumption of traditional fish species.

The Band's water quality standards also prohibit "further water quality degradation which would interfere with or become injurious to existing or designated uses."

83. The mining sector is the largest source of mercury within the Lake Superior Basin. Studies by the Band and other experts have shown that a primary source of mercury concentration in fish in the St. Louis River is mining waste from existing mines in the vicinity of the Mining Project. In addition, a 2011 report from the Minnesota Department of Health found that 1 in 10 newborns tested in the Lake Superior Basin had unsafe concentrations of mercury.

84. In addition, wild rice is a vital cultural and Treaty resource for the Band. Wild rice grows best in waters with low sulfate concentrations. Wild rice waters have been degraded in the Embarrass River and Partridge River watersheds due to inadequate protection of wild rice and failed enforcement of Minnesota's water quality standard for sulfate on the mining industry. Wild rice is susceptible to sulfate throughout the year, not just in certain seasons. Wild rice beds are also variable and can move from year-to-year to different locations within the same waterbody.

85. To address legacy pollution and environmental degradation, the Band's Environmental Program has implemented a broad-based water quality protection program, which includes federally approved water quality standards, a comprehensive monitoring program to assess Reservation lakes and streams, and protection plans for wetlands and groundwater resources. In 2008, the Reservation Business Committee approved the Band's Integrated Resource Management Plan, which identifies on- and off-reservation resource management priorities to include protecting and improving wild rice harvest; improving in-stream habitat for fishing; preserving traditional hunting, fishing, and gathering rights in the 1854 Ceded Territory; preserving the quality and quantity of wildlife and wildlife habitat in the 1854 Ceded Territory; and vigorous environmental protection.

**B. Environmental review of the NorthMet Mining Project.**

86. On July 16, 2004, PolyMet first submitted an application to the Corps for a 404 permit in order to develop the NorthMet Mining Project. Thereafter, the Corps determined that its action on the permit application required the preparation of an EIS pursuant to NEPA, due to the context and intensity of the proposed impacts to waters of the United States.

87. On October 25, 2005, the Corps, in cooperation with the Minnesota Department of Natural Resources ("Co-lead Agencies"), issued its final scoping decision for the Mining Project's EIS. The Corps did not involve or consult the Band during scoping or when the final scoping decision was issued.

88. The final scoping decision for the Mining Project required evaluation of project alternatives, including underground mining. The final scoping decision specified that underground mining could be eliminated only if it were infeasible. Otherwise, if underground mining merely provided a lower economic return, a detailed assessment must be prepared.

89. After scoping, the Co-lead Agencies set out to prepare a joint state-federal EIS. The Corps invited the Band to serve as a cooperating agency in the preparation of the EIS based on the Band's regulatory authority and subject matter expertise. The Band participated as a cooperating agency throughout the preparation of the EISs for the Mining Project.

90. In that role, the Band was assisted by the Great Lakes Indian Fish & Wildlife Commission ("GLIFWC"), an intertribal resource management agency that coordinates with the Band in natural resource monitoring and use within the 1854 Ceded Territory. The Band was also joined by the Bois Forte Band of Chippewa ("Bois Forte") and the Grand Portage Band of Lake Superior Chippewa ("Grand Portage") as cooperating agencies (collectively, "Tribal Cooperating Agencies"). The Tribal Cooperating Agencies, GLIFWC, and the 1854 Treaty Authority (a natural

resource management agency for the Bois Forte and Grand Portage Bands) provided comments, analyses, recommendations, and proposals at each stage of environmental review for the Mining Project, with the exception of the scoping process. Despite the Band's involvement throughout the NEPA process as a cooperating agency, the Corps ignored the Band's special expertise and analyses without adequate justification, and instead relied on erroneous data and analyses developed primarily by PolyMet and its contractors.

91. In October 2009, the Corps issued a Draft EIS ("DEIS") for the Mining Project. The Band commented on the DEIS and concluded that the DEIS was inadequate in numerous respects. In its comments, the Band noted that it had previously identified these deficiencies to the Corps, but the Corps disregarded the Band's recommendations and continued to rely on deficient analyses. The Band's comments identified several major areas in which the DEIS was deficient including, *inter alia*, (1) the scoping process; (2) the analysis of water quality impacts; (3) the analysis of the Mining Project's impacts on wildlife and other Treaty resources; (4) the assessment of indirect impacts to wetlands; (5) the cumulative impact analysis; and (6) the failure to adequately analyze impacts on the 1854 Ceded Territory and the Band's Treaty rights.

92. On February 18, 2010, EPA submitted written comments on the DEIS. EPA rated the DEIS as "Environmentally Unsatisfactory – Inadequate," which is EPA's lowest rating for an action's environmental impact, and meant that the Mining Project must not proceed as proposed due to the Project's adverse impacts on wetlands; adverse impacts to water quality, including the quality of water governed by the Band's water quality standards; issues related to financial assurance; and the DEIS's failure to analyze the 1854 Ceded Territory as a whole geographic area for its cumulative impacts analysis.

93. On March 6, 2012, the Band's water quality staff wrote to the Corps to explain the Band's water quality standards and their application to the Mining Project. In response to the Corps' apparent confusion, the Band's staff clarified the Band's status as a State for purposes of the CWA. The Band's staff noted EPA approved its water quality standards in 2001 through a process that was "subject to additional scrutiny at EPA Headquarters," as the first Indian tribe to seek approval in the Great Lakes Basin. The Band also noted it was authorized to exercise authority under Section 401 of the CWA. The Band explained all elements of its water quality standards, including designated or beneficial uses for waters of the Reservation, narrative and numeric criteria to support or sustain those uses, and antidegradation provisions. The Band's staff explained that the Band's water quality standards have been established to assume a higher fish consumption rate by Band members than the general public. This was based on an Ojibwe diet and traditional practice. The Band notified the Corps of current exceedances of the Band's water quality standard for mercury in the St. Louis River within the Reservation and asserted that, "if a new proposed project would *cause or contribute to an existing impairment*, it cannot be permitted."

94. The Corps, along with other Co-lead Agencies, which now included the U.S. Forest Service, proceeded to perform additional analysis for a Supplemental Draft Environmental Impact Statement ("SDEIS"). EPA was also added as a cooperating agency for the NEPA review. The Band was permitted to review a Preliminary Supplemental Draft Environmental Impact Statement ("PSDEIS"), which was made available to cooperating agencies prior to publication of the SDEIS.

95. Despite specific and repeated requests from the Tribal Cooperating Agencies, the Corps refused to use an EPA guidance document for evaluating cumulative effects on Treaty resources. Thus, in September 2013, the Tribal Cooperating Agencies proposed and submitted an alternative cumulative effects analysis for use in the SDEIS, in response to the Corps' refusal to

properly consider the Mining Project's cumulative effects on the Band's Treaty resources and cultural and historic sites. Based on their expertise, the Tribal Cooperating Agencies understood that historic, current, and reasonably foreseeable mining activities have profoundly and, in many cases, permanently degraded vast areas of wetlands, forests, air and water resources, wildlife habitat, cultural sites, and other critical Treaty-protected resources in the 1854 Ceded Territory. Based on their expertise, the Tribal Cooperating Agencies' alternative cumulative effects analysis sought to address the incompleteness and inadequacy of the Co-lead Agencies' cumulative effects analysis.

96. The Tribal Cooperating Agencies' alternative cumulative effects analysis evaluated cumulative effects in the St. Louis River watershed, the 1854 Ceded Territory, and the Tribal Historic District (a designated area within the 1854 Ceded Territory of particular cultural importance).

97. For example, the Tribal Cooperating Agencies proposed that the St. Louis River watershed be used for the Mining Project's cumulative effects analysis of water resources. In support, the Tribal Cooperating Agencies highlighted deficiencies in the Mining Project's water modeling. The Tribal Cooperating Agencies also showed that there were existing exceedances of water quality standards, which would require WQBELs based on a waste load allocation to be established for the Mining Project. The Tribal Cooperating Agencies showed the Corps that the Mining Project's additional loading of pollutants to waters that already exceed water quality standards justified an evaluation of cumulative effects for the entire St. Louis River watershed.

98. The Tribal Cooperating Agencies also justified the St. Louis River watershed as the appropriate scope for evaluating cumulative effects to aquatic species. In addition to the Partridge and Embarrass Rivers, the Tribal Cooperating Agencies pointed to the fact that there are impaired

rivers and streams in the St. Louis River watershed, including impairments related to exceedances of human health criteria for mercury in fish tissue. These existing impairments make the cumulative effects of the Mining Project greater.

99. The Tribal Cooperating Agencies' alternative cumulative effects analysis also analyzed sulfate concentrations throughout the St. Louis River watershed in relation to impacts on wild rice. This analysis showed, *inter alia*, that sulfate concentrations only gradually decrease downstream of mine discharge sites.

100. The Tribal Cooperating Agencies' alternative cumulative effects analysis also proposed that the No Action Alternative should include modeling with activities that will occur under the Cliffs Erie consent decree.

101. In November 2013, the Corps issued a Supplemental Draft EIS ("SDEIS") for the Mining Project, attempting to resolve environmental concerns and barriers to permitting raised in response to the DEIS.

102. After reviewing the SDEIS, the Band found that many of the very substantial problems that the Band had identified in the DEIS and its recommendations for proper study and analysis were disregarded. The Band submitted extensive detailed comments on the SDEIS identifying the Band's specific concerns, supported by expert analysis and recommendations for proper evaluation of the potential impacts of the Mining Project. The Band's comments, and those of the other Tribal Cooperating Agencies, emphasized the need to properly examine the impacts of the Mining Project on Treaty protected rights and resources, including, for example, the threat of increased mercury from the Mining Project given the existing levels of mercury in fish at levels that restrict human consumption, which threatens the ability of Band members to exercise their Treaty rights to sustain themselves in the 1854 Ceded Territory and within the Reservation.

103. EPA also submitted written comments on the SDEIS. In its comments on the SDEIS, EPA raised many substantive issues that required further analysis. For example, EPA raised issues regarding the SDEIS's water modeling. EPA commented on the SDEIS's GoldSim water modeling, which did not model mercury. EPA recommended that the FEIS should model mercury or otherwise provide a rationale for why modeling mercury is inappropriate. To model mercury, EPA suggested use of its "Water Quality Analysis Simulation Program," which "is commonly used by EPA to model elemental mercury."

104. EPA's comments on the SDEIS raised numerous other issues that it suggested be considered in the FEIS, such as: the correction of wetland delineation errors; the need to quantitively assess all indirect impacts to wetlands; environmental justice concerns related to mercury impacts on the Band's subsistence use of fish; an indication in the FEIS that any discharge not captured by the Mining Project's proposed groundwater capture systems and entering waters of the United States is subject to NPDES permitting; and impacts to moose as a culturally important species to the Band.

105. In November 2015, the Corps issued a Final EIS ("FEIS") for the Mining Project.

106. As it had with the DEIS and SDEIS, the Band reviewed and commented on the FEIS and found that it failed to address the deficiencies previously identified by the Band. The Band again submitted extensive detailed comments on the issues of concern, supported by expert analysis and recommendations on steps for a proper assessment of the Mining Project's impacts. The Band's comments also addressed PolyMet's application for a 404 permit.

107. The FEIS, like the SDEIS before it, eliminated alternatives that could provide mitigation for or prevent long-term environmental damage. For example, the FEIS stated that underground mining was eliminated as an alternative to the Proposed Action "because it was found

to be economically infeasible" in an analysis from 2013. The Band, as in its comments to the SDEIS, provided information explaining why various alternatives were inappropriately and unreasonably disregarded, such as underground mining and dry-stack tailings.

108. The FEIS reached conclusions about hydrology and water quality based on models that were not designed for those purposes, were improperly calibrated, or failed to model for significant pollutants. In particular, the FEIS used a modeling program called MODFLOW for groundwater hydrologic modeling. To model surface water hydrology, the FEIS used a program called XP-SWMM. The FEIS used a program called GoldSim to model water quality, with the exception of mercury. To model mercury, the FEIS used a "simple mass balance" estimation model.

109. The Band commented that the FEIS relied on a hydrology model in MODFLOW that was fundamentally flawed and was inappropriately used for numerous purposes in environmental review. MODFLOW cannot generate reliable environmental impact predictions because it was calibrated with data from different periods in time. The Tribal Cooperating Agencies discovered this error after independently reviewing the FEIS's hydrology model, and then corrected the calibration. When properly calibrated, the model showed that groundwater will flow north from the Mine Site after closure and eventually outflow to Birch Lake and the Boundary Waters Canoe Area Wilderness, which are located in the Rainy River basin.

110. The Corps acknowledged that the Tribal Cooperating Agencies' analysis was correct, but then discounted the probability of northward flow, based on PolyMet's rationale that it was unlikely due to a groundwater mound that would form and prevent northward flow of groundwater after closure. The Tribal Cooperating Agencies pointed out that PolyMet's theory was physically impossible, and requested a technical discussion on this issue, but the Corps flatly

refused to do so. In relying on MODFLOW, the Corps accepted PolyMet's approach, which was inconsistent with accepted modeling methodology and included an unacceptable calibration error.

111. The FEIS erroneously concluded that there would be an "overall reduction" in mercury loading downstream to the St. Louis River and that the Mining Project would not add to any exceedance of the Band's mercury water quality standard of 0.77 ng/L within the Reservation. As the regulatory authority for water quality within the Reservation, the Band disagreed with this conclusion and the FEIS's approach to evaluating mercury impacts. In support, the Band cited the analysis of Dr. Brian Branfireun, an internationally recognized expert in hydrology and environmental cycling of mercury, to show that the FEIS relied on flawed data and does not conform to standard practices for data collection and presentation. Rather than the FEIS's "simple mass balance" model, Dr. Branfireun had previously suggested other models be used that were more appropriate to model mercury dynamics.

112. The Band objected to the FEIS's reliance on a mercury mass balance model to predict future conditions. The Band emphasized that a mass balance model cannot model the input and removal processes for mercury, nor can such a model address aspects of mercury methylation. The Band showed that mine pit and wetland dewatering would increase total mercury, methylmercury, and sulfate in the Partridge River, Embarrass River, and the St. Louis River. The Band also showed it was highly likely that the lag time for monitoring increases in methylmercury would preclude effective adaptive management prior to irreversible impairment of downstream waters. In addition, the Mining Project's removal and dewatering of peat dominated wetlands will release and discharge mercury and sulfate into surface waters, affecting the Band's downstream water quality.

113. The FEIS assumed that the Mining Project's WWTS at the Plant Site would be subject to WQBELs that are protective of the Great Lakes Initiative water quality standard for mercury of 1.3 ng/L. This assumption was incorrect, as the final NPDES Permit does not impose a WQBEL for mercury.

114. The FEIS proposes monitoring that will be conducted after-the-fact to determine and mitigate indirect wetland impacts. Throughout the NEPA process, the Band repeatedly challenged the Corps' insistence on future monitoring as the best approach to determining and mitigating indirect wetland impacts. The Band commented that such an approach is inconsistent with the purpose of an environmental impact statement to be "forward looking" to predict potential impacts and provide adequate mitigation for those impacts.

115. The Band and GLIFWC advocated for the Corps to use the "Crandon method" to determine indirect wetland impacts. The Crandon method was previously used by the Corps in reviewing other proposed mines in the region. The Crandon method uses a detailed delineation of wetlands to obtain accurate wetland classifications, as well as a calibrated groundwater model to support an accurate characterization of groundwater hydrology. The FEIS's analysis is inadequate as to both of these critical data elements.

116. First, in September 2010, the Corps, the Co-lead Agencies, the Tribal Cooperating Agencies, EPA, and PolyMet's consultant conducted a site visit and determined that 25% of the wetlands visited were classified incorrectly. These wetlands also had more connectivity to groundwater than their original classification.

117. Second, the Corps refused to develop and calibrate a groundwater model so that the Crandon method could be properly implemented, despite a unanimous request from the Wetlands Impact Assessment Workgroup, which consisted of technical staff from the Tribal Cooperating

Agencies, the U.S. Fish & Wildlife Service, EPA, the Minnesota Department of Natural Resources ("MDNR"), and MPCA. The Corps acknowledged that additional field data collection and groundwater modeling was recommended and supported by Wetlands Impact Assessment Workgroup members from the Tribal Cooperating Agencies, U.S. Fish & Wildlife, EPA, and MPCA. However, the Co-lead Agencies and PolyMet's consultants did not support conducting this analysis. The Corps acknowledged that the Co-lead Agencies' position was "contrary to standard analysis that mining companies have to conduct as part of sulfide mine EIS processes across the country."

118. Rather than appropriately apply the Crandon method, the Corps used data from the Canisteo Mine Pit, a mine pit located in a different geologic formation and elevation than the Mining Project. The Corp also used selective data from the Canisteo Mine Pit that supported its predetermined conclusion that indirect impacts to wetlands would be minor.

119. Nevertheless, GLIFWC conducted an independent analysis of indirect wetland impacts using more relevant data and submitted it for the SDEIS. GLIFWC's independent analysis showed that a total of 5,719 acres of wetlands will suffer severe indirect impacts from mine pit drawdown. At a minimum, GLIFWC proposed that the Corps require up front mitigation for all severe indirect impacts.

120. GLIFWC also commented that the XP-SWMM modeling was fatally flawed because it is incapable of predicting current baseflow conditions. GLIFWC highlighted that, if the XP-SWMM model is incapable of predicting current water quantity, it will not accurately predict future water quantity conditions, a much more difficult task. Accordingly, GLIFWC contended that the XP-SWMM model is not suitable to predict future conditions for surface water.

121. In response to requests by the Tribal Cooperating Agencies, the Co-lead Agencies could not provide a single example of a similar facility that has been able to achieve a 90% or greater seepage capture efficiency. The Band commented that the Co-lead Agencies' assumptions regarding seepage capture efficiencies were unsupported and invalidated the FEIS's analysis related to groundwater contamination and water quality.

122. In Chapter 8 of the FEIS, the Corps attempts to describe the Tribal Cooperating Agencies' major differences of opinion regarding the SDEIS. The Band commented that Chapter 8 of the FEIS was not updated to reflect major differences of opinion that arose after publication of the SDEIS, including an error in the FEIS's groundwater modeling that the Band and Tribal Cooperating Agencies identified after being provided access to the final hydrologic model. The Band also commented that Chapter 8, which was written by the Co-lead Agencies without the Tribal Cooperating Agencies' input, mischaracterizes the Bands' positions. This was a recurring issue and flaw throughout the Mining Project's environmental review, as the Band previously objected to the Co-lead Agencies' attempts to edit or eliminate the Tribal Cooperating Agencies' alternative position statements in the DEIS.

123. The Band commented that the FEIS failed to take into consideration direct, indirect, and cumulative impacts to the Band's Treaty rights and resources, which include impacts to, *inter alia*, habitat and wildlife corridors as a result of the Mining Project. Instead, the Corps concluded, with respect to cumulative effects on cultural resources, that "Band members' use of the NorthMet Mining Project area, and the entire [Cumulative Effects Assessment Area], is not well-defined through research, and did not emerge through interviews."

124. In these and other ways, the Band identified and commented on deficiencies in the FEIS and PolyMet's application for a 404 permit and urged that further review be done, or at a

minimum, if no further NEPA review were to be done, then such deficiencies be addressed and corrected during permitting.

125. EPA submitted written comments on the FEIS and, among other matters, stated that there remained unresolved issues which EPA expected to be examined and addressed as permits were considered. In particular, EPA deferred resolving EPA's issues related to CWA compliance to the Mining Project's permitting phase. EPA requested the opportunity to review the Corps' final permit evaluation and 404 Permit, including for indirect and direct wetland impact monitoring, adaptive management, and mitigation plans, in order to assess compliance with the 404(b)(1) Guidelines prior to permit issuance. EPA's issues deferred to permitting included for example:

a. Discharges at the Mine Site and Plant Site that occur through hydrologically connected groundwater;

b. The FEIS's water modeling, including the modeled predictions of travel times for pollutants to reach the Partridge River and unmodeled discharges to waters of the United States closer to the Mine Site;

c. The need for the Mining Project's NPDES Permit to contain water quality-based effluent limitations necessary to protect water quality standards of the receiving waters, as well as limitations necessary to ensure that downstream water quality standards are protected; and

d. The transfer of current NPDES permits for the existing tailings basin facilities held by Cliffs Erie.

126. The FEIS stated that the Corps would address issues in its Record of Decision on the 404 Permit only if they had not been addressed in the FEIS.

127. On August 2, 2018, the Band petitioned the Corps to prepare a supplemental EIS given new information released by PolyMet in which PolyMet itself questioned the financial viability of the Mining Project and proposed plans to double or quadruple the scope and size of the Mining Project so that, as expanded, it might be financially viable. PolyMet's proposal for an expanded mining project had not been considered at all in the development of the FEIS. In the Band's petition for a supplemental EIS, the Band provided substantive comments describing the environmental impacts that needed to be evaluated given PolyMet's plans for an expanded Mining Project. The Band's petition highlighted that the FEIS's analyses of environmental impacts was premised on a mine operation limited to only 32,000 tons per day. As such, the likely expansion of the Mining Project will drastically change every environmental impact studied in the FEIS, including impacts to the Band's waters and Treaty resources.

128. Despite the Band's status a cooperating agency, its comments on the deficiencies of the FEIS, and its petition for a supplemental EIS, the Corps did not substantively engage the Band in any of the Corps' further analysis on the issues raised by Band.

### C. EPA's oversight role for the NPDES Permit and 404 Permit.

129. On January 21, 2016, shortly after issuance of the FEIS, EPA Region 5 wrote to the Band to recognize the Band's numerous concerns regarding the Mining Project's impacts on the Band's interests. In that letter, EPA recognized its oversight role with respect to MPCA's NPDES Permit. EPA also recognized its role in reviewing the Corps' 404 Permit.

#### 1. EPA political appointees prevent and/or suppress Region 5 career staff and managers from placing concerns in the record regarding the NPDES Permit.

130. The regular practice of Region 5 personnel with the scientific, technical and legal expertise responsible for carrying out EPA's oversight of NPDES permitting was to identify each

year the permits in each State that EPA was interested in reviewing. EPA Region 5 and MPCA selected the NPDES Permit for EPA's review.

131. When Region 5 provided technical and legal comments on a permit, its regular practice was to comment in writing.

132. Region 5's regular practice was to provide written comments to MPCA on draft NPDES permits selected for review during the public comment period. This regular practice was an exercise of EPA's oversight of Minnesota's NPDES program.

133. Region 5 began to communicate its expectations to MPCA for the NPDES Permit during the environmental review process that concluded in 2015 with the FEIS.

134. EPA documented additional requirements for the NPDES Permit on April 7, 2015. In particular, Kevin Pierard, Chief of Region 5's NPDES Program, emailed Ann Foss, then-Director of MPCA's Metallic Mining Sector, to document issues not yet put in writing related to NPDES permitting that would not be resolved during the environmental review process. Ms. Foss admonished Mr. Pierard for documenting EPA's concerns in writing rather than scheduling "conversations."

135. On July 11, 2016, PolyMet submitted its application to MPCA for an NPDES permit to authorize discharges of pollutants from the Mining Project.

136. On August 5, 2016, EPA confirmed with MPCA that it would review the NPDES Permit in accordance with EPA's oversight authority of Minnesota's NPDES permitting program.

137. Region 5 had a meeting with MPCA regarding EPA's review of PolyMet's application approximately one month later on August 11, 2016. EPA's notes from that meeting

that were obtained through the Freedom of Information Act reflect that Ms. Foss from MPCA "asks for nothing in writing."[4]

138. EPA's notes show that during the meeting Mr. Pierard stated that "we've got to put things in writing." EPA's notes further reflect a "post meeting discussion" among Region 5 staff and managers in which the following points were made: "write up notes to file for meetings"; "we can send emails"; "we are oversight agency and need to maintain independence"; and "need for good written record."

139. Region 5 had another meeting with MPCA on September 21, 2016. EPA's notes of that meeting reflect that MPCA continued to put pressure on Region 5 regarding its review of PolyMet's application. In particular, MPCA indicated that it wanted EPA to avoid using "the word deficiency" and "also don't like significant" in written communications.

140. Despite MPCA's improper attempts to influence EPA's oversight activities, EPA sent a letter to MPCA on November 3, 2016 regarding EPA's review of PolyMet's application for an NPDES permit. The letter described the "deficiencies" in PolyMet's application and highlighted its Memorandum of Agreement with MPCA that describes the process by which EPA reviews NPDES permit applications that have been submitted to MPCA.

141. The Memorandum of Agreement provides that, if EPA determines an application is incomplete and identifies deficiencies in a letter, MPCA shall not process the application "until the deficiencies are corrected and it has been advised in writing by the EPA that the NPDES application form is complete."

142. Region 5 continued to have meetings with MPCA as the permitting process moved towards the public notice period for the draft NPDES permit. On November 20, 2017, Christopher

[4] *See* ¶ 193 n.6 *infra*.

Korleski, then-Director of Region 5's Water Division, informed MPCA that Region 5 would review and provide comments on the draft NPDES permit during the public comment period.

143. The CWA's regulations provide that MPCA shall "[b]riefly describe and respond to all significant comments on the draft permit . . . *raised during the public comment period*, or during any hearing." 40 C.F.R. § 124.17(a)(2) (emphasis added); *see also id.* § 123.25(31) (applying § 124.17(a) to State NPDES programs).

144. Mr. Pierard testified in a separate but related court proceeding that Region 5 intended to provide written comments on the NPDES Permit by the close of the comment period in order to put EPA's comments in the record, and require that MPCA respond to them.[5]

145. In December 2017, President Donald J. Trump appointed Cathy Stepp to serve as Regional Administrator for Region 5. Defendant Thiede arrived shortly thereafter to serve as Ms. Stepp's chief of staff.

146. On January 17, 2018, MPCA provided EPA Region 5 with a public notice draft NPDES permit for EPA's review.

147. EPA identified numerous and significant issues during its review of the draft NPDES permit regarding its compliance with the CWA and the Mining Project's ability to meet water quality standards. EPA prepared a comment letter to send to MPCA detailing its concerns.

[5] The Band has a related case in the Minnesota Court of Appeals challenging MPCA's issuance of the NPDES Permit. *See* ¶¶ 181, 185 *infra*. As part of that litigation, the Band's appeal was transferred to the Minnesota District Court for Ramsey County pursuant to Minn. Stat. § 14.68 for a hearing and determination of alleged irregularities in procedure by MPCA that occurred during the NPDES permitting process. *See also* ¶¶ 185, 187 *infra*. Under subpoena, Mr. Pierard testified during the evidentiary hearing on January 21-22, 2020 regarding EPA's regular practice and interactions with MPCA during the permitting process. The United States Department of Justice made a limited appearance to assert any applicable EPA privileges during Mr. Pierard's testimony regarding EPA's decision making during its review of the NPDES Permit.

148. During a conference call on March 5, 2018, MPCA's Jeff Udd asked Region 5 if it would be submitting comments during the public notice period.

149. Mr. Pierard told MPCA during the conference call on March 5, 2018 that "we're going to send these comments in the comment period."

150. During the March 5 call, MPCA's Jeff Udd asked if there was "any wiggle room on that," but Mr. Pierard responded "no." Mr. Udd then communicated to Region 5 that the MPCA's "Commissioner's office is interested in what will happen here."

151. After learning that Region 5 intended to submit written comments during the public comment period, Shannon Lotthammer, then a political appointee at MPCA, called both Mr. Pierard and Mr. Korleski. According to Mr. Pierard, Ms. Lotthammer said "she thought it was inappropriate for EPA to comment with everyone else." Ms. Lotthammer also wrongly suggested that EPA would be violating the Memorandum of Agreement by submitting written comments during the public comment period.

152. On March 9, 2018, Mr. Pierard and Mr. Korleski briefed Ms. Stepp regarding Region 5's intent to submit written comments during the public comment period for the draft NPDES permit because MPCA "had expressed some discomfort." At the time, Ms. Stepp had been in office as Regional Administrator for roughly three months. At the briefing, Region 5 recommended to Ms. Stepp that EPA send a comment letter to MPCA during the public comment period to document Region 5's findings. Region 5 highlighted the significance of the comments identified during the review of the draft NPDES permit and the importance of sharing the comments with MPCA through a comment letter.

153. Region 5 and MPCA had another conference call on March 12, 2018. EPA's notes from that meeting reflect there was no agreement between Ms. Lotthammer and Mr. Korleski but that Ms. Stepp was going to talk to John Linc Stein, then-Commissioner of MPCA.

154. On March 12, 2018, Mr. Stine had a call with Ms. Stepp and Defendant Thiede. On that call, Mr. Stine complained about Region 5's intent to send written comments during the public comment period. Mr. Stine then emailed Ms. Stepp and Defendant Thiede after the call to thank them "for the phone conversation this morning." Mr. Stine copied Ms. Lotthammer on that email to "loop" her in so that she could "follow up directly with Kurt [Thiede] regarding the Region 5 – MPCA agreement I mentioned on our call."

155. Ms. Lotthammer followed up via email with Defendant Thiede the next day on March 13, 2018. In that email, Ms. Lotthammer stated: "We have asked that EPA Region 5 not send a written comment letter during the public comment period."

156. Sometime thereafter, Defendant Thiede summoned Mr. Korleski, Mr. Pierard, and Linda Holst to his office to discuss Ms. Lotthammer's request for EPA to not submit written comments during the public comment period. At the time, Defendant Thiede had been in his position as Ms. Stepp's chief of staff for roughly three months. During the meeting, Mr. Korleski and Mr. Pierard informed Defendant Thiede of Region 5's regular review and comment process for NPDES permits. They also explained that EPA's standard practice was to submit written comments on a draft NDPES permit during the public comment period, which was contrary to the representations made by Ms. Lotthammer to Defendant Thiede.

157. After that, Defendant Thiede had two phone calls only with Ms. Lotthammer to discuss the issue further on March 13 and 15, 2018. On information and belief, Defendant Thiede told Ms. Lotthammer during the call on March 15 that EPA was amenable to the idea of holding

off on formal written comments. During the call on March 15, Defendant Thiede suggested to Ms. Lotthammer a new concept of a "pre-proposed permit," which was not part of Region 5's standard review process for NPDES permits.

158. Region 5's comment letter was ready for signature by Mr. Pierard on or around March 15, 2018. Among other serious issues identified in the draft NPDES permit, Region 5 had multiple substantive comments on the need for WQBELs. *See* Letter from Kevin M. Pierard, Chief, Region 5 NPDES Program Branch, EPA, to Jeff Udd, Metallic Mining Director, Minnesota Pollution Control Agency (attached as Exhibit A).

159. The comment letter also raised concerns about ensuring that the permit will comply with the water quality standards of the "downstream tribe," which was a reference to the Band and its federally approved water quality standards. Ex. A at 7.

160. The comment letter also discussed an issue regarding discharges of stormwater from construction of the Mining Project that were expected to release significant amounts of mercury into downstream navigable waters. Ex. A at 9.

161. On information and belief, on or around March 15, 2018, Ms. Stepp and/or Defendant Thiede departed from established practice within Region 5 and overruled, without adequate justification, the recommendation of Region 5 and directed that Region 5's written comment letter not be sent to MPCA.

162. On information and belief, Ms. Stepp and/or Defendant Thiede's decision to prevent Region 5 from sending the written comment letter was improperly influenced by pressure from MPCA, including Mr. Stine's complaints and Ms. Lotthammer's misleading statements, and other considerations not relevant under the CWA.

163. On March 16, 2018, the Band sent its comments to MPCA on the draft NPDES permit. In its comments, the Band identified the draft NPDES permit's lack of water quality-based effluent limits, uncontrolled surface and groundwater seepage, inadequate monitoring, MPCA's deficient reasonable potential analysis, and the Mining Project's mercury impacts as deficiencies in the permit that rendered it inconsistent with the CWA.

164. The public comment period for the draft NPDES permit closed on March 16, 2018.

165. On March 16, 2018, Defendant Thiede emailed Ms. Lotthammer regarding an "agreement" reached between MPCA and EPA regarding a "pre-proposed permit." The "agreement" was for MPCA to develop a "pre-proposed permit" and provide it to EPA for its review prior to the beginning of the Memorandum of Agreement's review process for a proposed permit.

166. On information and belief, the "agreement" for a "pre-proposed permit" was a pretextual justification for Region 5 not sending written comments during the public comment period.

167. On September 25, 2018, Region 5 met with MPCA and PolyMet to discuss the NPES permit at a face-to-face meeting. The next day, September 26, 2018, Region 5 met only with MPCA at a face-to-face meeting. During the meeting on September 26, Region 5 described its comment regarding the Mining Project's discharges of construction stormwater, *see* ¶ 160, as a concern related to the Band's water quality standards and the process under Section 401(a)(2) of the CWA.

168. On information and belief, Defendant Thiede and/or Ms. Stepp made clear to Region 5 by the time of the September meetings that, regardless of any scientific, technical, or legal concerns, EPA was not going to object to the NPDES Permit.

169. On November 30, 2018, a Region 5 career manager informed the Band's water quality staff that EPA would not be submitting comments on or objecting to MPCA's proposed permit. The career manager provided no explanation for the decision.

170. On December 3, 2018, EPA's 45-day review period ended for the "pre-proposed permit." The deadline passed without EPA sending written comments to MPCA.

171. On December 4, 2018, MPCA sent EPA a proposed NPDES permit that MPCA intended to issue to PolyMet. Under EPA and MPCA's Memorandum of Agreement, this submission triggered EPA's 15-day review period for the proposed permit and the NPDES Program undertook that review.

172. The Region 5 career personnel who reviewed the NPDES Permit wrote a memorandum to file dated December 18, 2018 entitled, "Review Summary of Poly Met Mining, Inc., NorthMet Proposed NPDES Permit (MN0071013)" ("December 18 Memorandum"). The December 18 Memorandum reflects Region 5's review of MPCA's proposed NPDES permit for PolyMet. The December 18 Memorandum compares the proposed permit to EPA's comments on the draft NPDES permit. The December 18 Memorandum also includes some facts regarding the NPDES permitting process.

173. The December 18 Memorandum documents Region 5's unresolved issues in the NPDES Permit.

174. Defendant Wheeler later testified before the House Subcommittee on Interior, Environment, and Related Agencies on April 2, 2019 that Region 5 "resolved all the issues" related to the PolyMet NPDES permit. Defendant Wheeler's testimony is contradicted by the December 18 Memorandum, which documents numerous unresolved issues as of two days before the NPDES Permit issued.

175. The December 18 Memorandum documents in detail the continued substantive concerns about the lack of water quality-based effluent limits (WQBELs) in the NPDES Permit, permit enforceability, various pollutants and Mining Project facilities for which MPCA set no limits, tailings basin seepage, inadequate monitoring, and unregulated mercury discharges from construction stormwater.

176. The December 18 Memorandum states that "[t]he Region 5 review team was asked by Kurt Thiede to determine whether operating limits could be federally enforceable provisions of the permit." In response to Defendant Thiede's request,

> The Office of Regional Counsel, in conjunction with EPA's Office of General Counsel, evaluated these "operating" limits and determined that they are arguably federally enforceable as operation and maintenance requirements for the facility's reverse osmosis/nanofilitration treatment system. 40 C.F.R. 122.41(e). We note that federal enforceability of these operating limits is less certain and more complex than if these limits were established as WQBELs.

177. On information and belief, Defendant Thiede's request for the Region 5 review team to determine whether MPCA's operating limits could be federally enforceable was an attempt to justify a predetermined decision that EPA would not object to the NPDES Permit.

178. The December 18 Memorandum identifies 29 issues with the proposed NPDES permit. The December 18 Memorandum indicates that MPCA fully resolved only six of those 29 issues as of December 18, 2018. The December 18 Memorandum also indicates that MPCA completely failed to address nine issues raised by EPA, noting for these issues that EPA's "[c]omment was not addressed." (emphasis in original).

179. On information and belief, Region 5 did not provide MPCA a letter or email stating that EPA had no objection to MPCA's issuance of the NPDES Permit due to the nature of unresolved concerns in the NPDES Permit. Region 5's prior reviews of NPDES permits show its standard practice is to disclose and explain in writing its justification for deciding not to object to

an NPDES permit, including the manner in which MPCA addressed EPA's comments on a prior version of the permit. Region 5 acted contrary to prior practice for the NPDES Permit because it simply gave MPCA "verbal confirmation" over the phone to proceed on the NPDES Permit without any explanation.

180. Two days after the December 18 Memorandum, on December 20, 2018, MPCA issued the NPDES Permit to PolyMet.

181. On January 22, 2019, the Band filed a petition for certiorari with the Minnesota Court of Appeals for review of the NPDES Permit. The Band's petition asserted that MPCA failed to ensure the NPDES Permit complied with the CWA and Minnesota law, and that MPCA's decision to issue the NPDES Permit was otherwise arbitrary and capricious.

182. On January 31, 2019, Jeffry Fowley, a retired attorney for EPA Region 1, submitted a complaint to EPA's Office of Inspector General ("OIG") regarding Ms. Stepp's conduct during the NPDES permitting process for the NorthMet Mining Project. Letter from Jeffry Fowley, to Kathlene Butler, EPA Office of Inspector General (Jan. 31, 2019) (attached as Exhibit B). Mr. Fowley alleged, *inter alia*, that, "after she reportedly was called by the State Commissioner, John Linc Stine, who reportedly complained about the planned comments," Ms. Stepp "directed in March, 2018, that the EPA staff not send any written comments to the State." *Id.* at 2. Mr. Fowley further alleged that Ms. Stepp continued to direct Region 5 not to send written comments to MPCA up to the issuance of the NPDES Permit. *Id.* at 3.

183. Having been informed of Ms. Stepp's conduct by Mr. Fowley's OIG complaint, the Band submitted its own complaint to the EPA OIG on February 5, 2019.

184. On June 12, 2019, EPA OIG announced it had opened a full investigation of Region 5's review of the NPDES Permit.

185. On June 25, 2019, the Minnesota Court of Appeals ordered the pending state certiorari appeals challenging the NPDES Permit to be stayed and transferred to the District Court for the County of Ramsey, based on substantial evidence of procedural irregularities not shown in the administrative record regarding MPCA and EPA's interactions during NPDES permitting. Order, *In re Denial of Contested Case Hearing Requests & Issuance of NPDES/SDS Permit No. MN0071013 for the Proposed Northmet Project St. Louis Cnty. Hoyt Lakes & Babbit Minn.*, Case Nos. A19-0112, A19-0118, A19-0124 (Minn. Ct. App. June 25, 2019). The Minnesota Court of Appeals determined there was undisputed evidence that:

a. MPCA and EPA departed from typical procedures in addressing the NPDES Permit, engaging in multiple telephone conferences and in-person meetings, some of which are not reflected in the administrative record;

b. EPA prepared written comments on the draft NPDES permit, and those written comments were never submitted to MPCA and are not part of the administrative record;

c. EPA instead read the written comments to MPCA during an April 5, 2018 telephone call; and

d. MPCA's notes taken during that call were not included in the administrative record and are believed to have been discarded.

186. On July 16, 2019, the December 18 Memorandum became public after it was released by a confidential source to a journalist at the *Star Tribune* newspaper in Minnesota. The Band first learned of the substance of the December 18 Memorandum on that day.

187. The Ramsey County District Court held an evidentiary hearing on the alleged procedural irregularities by the MPCA regarding the NPDES Permit in January 2020. The Ramsey

County District Court is to issue findings and determinations on the alleged procedural irregularities by MPCA.

188. EPA and the Corps are not parties to the proceedings before the Minnesota Courts. The Minnesota Courts have no jurisdiction over EPA's and the Corps' conduct, nor the ability to remedy violations of federal law against EPA and the Corps.

189. EPA OIG's investigation of Region 5's review of the NPDES Permit is ongoing and it is expected to take some time to conclude.

190. Based on the actions and inactions of Defendant Thiede and/or Ms. Stepp, the Band was deprived of critical information from the federal agency staff that has the expertise in applying and enforcing the CWA, and which is required to ensure that any NPDES permit that may be issued for the Mining Project contains terms and conditions necessary to protect the waters that will be affected by the Mining Project and on which the Band relies.

191. Based on the actions and inactions of Defendant Thiede and/or Ms. Stepp, EPA did not engage in a fair and reasoned decision making process free from improper influences and other irrelevant considerations with respect to EPA's oversight review of the NPDES Permit to ensure compliance with the CWA and the Band's water quality standards.

**2. EPA fails to provide the Band with the notice and related procedures for affected downstream States and Tribes required by 33 U.S.C. § 1341(a)(2).**

192. Ms. Stepp and Defendant Thiede similarly engaged in unusual practices and procedures for the Section 401(a)(2) process for the 404 Permit as they did with the NPDES Permit. Consequently, EPA Defendants turned the normal Section 401(a)(2) process into a secretive, arbitrary, and unlawful process that prevented the Band from being heard on its objections to the 404 Permit.

193. As early as 2016, Region 5 committed to follow EPA's established Section 401(a)(2) process for the 404 Permit. Notes obtained from EPA pursuant to the Band's Freedom of Information Act ("FOIA") request[6] reflect a meeting on April 6, 2016, with MPCA, the Corps, and PolyMet, in which Region 5 staff explained that a "completed 401 cert would trigger the [Section 401(a)(2)] process." In response to a question asking "what's the bar for epa to decide to make notification" under Section 401(a)(2), Region 5 staff explained the "initial bar, may affect, is a low bar." According to Region 5 staff, the "second bar is that downstream state that [water quality] requirements would not be complied with."

194. Indeed, EPA's past practice for Section 401(a)(2) shows that the EPA's determination of whether a discharge "may affect" the water quality standards of a downstream State is a low threshold. EPA's past practice also demonstrates that the standard for whether a discharge "may affect" water quality standards differs from whether a discharge will comply with an affected downstream State's water quality standards.

195. For example, documents obtained by the Band show that EPA provided notice under Section 401(a)(2) on March 15, 2018 to Illinois, Kentucky, West Virginia, and Indiana for a proposed discharge from the Mountaineer Natural Gas Liquids Storage Powhatan Project that was to be located near the Ohio River in Monroe County, Ohio. In the letter to Illinois, EPA stated it was notifying Illinois "that the discharge associated with this proposed permit may affect the quality of Illinois state waters, specifically the Ohio River." EPA also stated that "EPA has made

[6] On May 31, 2019, the Band submitted a FOIA request to EPA for documents regarding (1) EPA's review of MPCA's 401 Certification for the Mining Project; (2) EPA's review of PolyMet's application for the 404 Permit; and (3) the Band's requests for notice under Section 401(a)(2) of the CWA. EPA eventually produced approximately 1,024 documents. EPA withheld in full approximately 2,682 documents that were responsive to the Band's request. In addition, environmental groups have submitted multiple FOIA requests regarding the Mining Project that have uncovered relevant documents.

no determination that this project will violate water quality requirements in the State of Illinois." EPA determined that the project's discharge "may affect" Illinois state waters in the Ohio River despite the fact that the proposed discharge was located hundreds of miles upstream of Illinois's waters.

196. EPA also provided notice to Illinois notice under Section 401(a)(2) for the Singleton Quarry Project located in Lake County, Indiana on October 13, 2015. At the time, EPA stated publicly that the letter was "notification to Illinois of its rights." And Region 5's Peter Swenson further explained in a news statement: "This is just a notification to give the downstream state the opportunity to participate in the permitting process."

197. Similarly, EPA Region 10 provided notice under Section 401(a)(2) to the Spokane Tribe on August 15, 2008 regarding the relicensing of the Spokane River Hydroelectric Project. In the letter, Region 10 stated that "EPA has determined there is reason to believe that the discharge addressed by the Washington 401 certification and the Idaho 401 certification may affect the quality of waters of the Spokane Reservation." Consistent with Section 401(a)(2), Region 10 stated that "Section 401(a)(2) of the CWA authorizes the Tribe to evaluate this matter to determine whether the discharge will affect the quality of the Spokane Reservation waters so as to violate any federal or Tribal water quality requirement applicable to those waters."

198. EPA's past practice shows the notification and determination under Section 401(a)(2) is signed by a career manager.

199. In or around March 2017, a Region 5 career manager told the Band's water quality staff that there was a probability that the proposed Mining Project would not comply with the Band's downstream water quality standards. During this conversation, the Region 5 career

manager committed to consultation with the Band for the Section 401(a)(2) process for PolyMet's 404 Permit.

200. Shortly after Ms. Stepp's appointment as Regional Administrator for Region 5 in December 2017, PolyMet's representative reached out to Ms. Stepp regarding the Mining Project. On January 4, 2018, PolyMet's representative emailed Ms. Stepp to offer "[c]ongratulations on [Stepp's] appointment." In that email, PolyMet's representative stated that "PolyMet is in the process of developing a copper-nickel project in Northern Minnesota" and "[w]e would like to request an opportunity to meet with you and provide an update on the status of the project."

201. On information and belief, after Ms. Stepp's appointment, Region 5 started to treat the Band dissimilarly with respect to the Section 401(a)(2) process. For example, Region 5 had another 404 permit before it for the United Taconite mine expansion project in 2018 ("UTAC Project"). Region 5's Water Division had a meeting with Ms. Stepp on February 15, 2018 that included discussion regarding "UTAC: Update and Path Forward" and "Polymet – timeline for 401(a)(2)." The Band requested notice under Section 401(a)(2) for the UTAC Project on March 1, 2018.

202. After Region 5 failed to provide a formal response, the Band sent a second request for notice under Section 401(a)(2) for the UTAC Project on April 8, 2018. The Band never received notice for the UTAC Project. Rather, Region 5 responded to the Band's requests with a letter dated April 28, 2018. The Band only learned about the letter on May 11, 2018 when the Corps mentioned its existence to the Band's water quality staff.

203. On May 16, 2018, Region 5 finally provided the letter to the Band's water quality staff. Region 5's letter acknowledged the Band's request but inexplicably stated:

> Your letter of April 4 requests a hearing be held in this matter "to inform the Band membership and general public of our concerns and to provide for the development of

> appropriate permit conditions to ensure compliance with our water quality requirements." As the U.S. Army Corps of Engineers is the Clean Water Act Section 404 permitting agency, we defer to the U.S. Army Corps of Engineers to respond to that request.

204. There is no basis in Section 401(a)(2) for EPA to "defer" to the Corps and take no action. In fact, if EPA takes no action under Section 401(a)(2), the Corps' regulations provides that the "district engineer will assume EPA has made a negative determination with respect to section 401(a)(2)." 33 C.F.R. § 325.2(b)(1)(i). Thus, EPA's inaction under Section 401(a)(2) has the effect of a negative determination for a 404 permit. Further, EPA's guidance on Section 401(a)(2) provides that EPA may not simply do nothing, but either "finds no potential effects on neighboring states and tribes" or "notifies the states/tribes that may be effected [sic]." Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes at 9 (2010) ("401 Guidance").

205. PolyMet sought another meeting with Region 5 in August 2018. EPA documents obtained through a FOIA request reflect that this meeting occurred on August 8, 2018. Mr. Pierard reported on the meeting in an email to Region 5 career staff, stating that "Polymet expressed their opinion that we should not offer 401a2 consultation to the tribes citing all the work done to confirm there will be no downstream effects." Mr. Pierard's email referenced a cross-media analysis prepared by PolyMet's contractor that the Band criticized as inadequate in numerous respects. In any event, PolyMet's cross-media analysis plainly states that the Mining Project "<u>will affect</u> downstream water quality," which is higher than the "may affect" standard for notice under Section 401(a)(2). (emphasis added).

206. On October 31, 2018, seeking to proactively assert its rights, the Band sent a letter to Ms. Stepp, Acting Director Linda Holst of Region 5's Water Division, Regulatory Branch Chief Chad Konickson of the Corps' St. Paul District, and officials at the MDNR and MPCA ("October

31 letter"). The October 31 letter stated that the Band's water quality staff had determined that the Mining Project will affect the Band's waters and result in violations of the Band's downstream water quality standards. The Band requested it be given notice pursuant to Section 401(a)(2) of the CWA so that the Band could comment on, raise objections to, and/or urge additional measures to ensure that the Mining Project will comply with the Band's downstream water quality standards.

207. On or around November 26, 2018, Ms. Stepp was "asking about a briefing on NorthMet 401(a)(2), and this could happen soon." The Band subsequently learned from an EPA privilege log produced in February 2020 in response to the Band's FOIA request that Ms. Holst emailed Ms. Stepp and Defendant Thiede a final version of a briefing memo prepared by Region 5 career staff and managers on December 14, 2018.

208. On information and belief, a career manager in Region 5 told the Band on November 30, 2018 that by that date the decision had already been made not to send the Band notice under Section 401(a)(2). The Region 5 career manager did not provide any additional detail regarding EPA's change in position.

209. On December 12, 2018, Andrew Baca, an official in EPA's Office of International and Tribal Affairs, asked John Haugland at Region 5 to "share the R5 response" to the Band's October 31 letter. Mr. Haugland forwarded the request to Ms. Holst, who responded that "I don't believe a response has been developed."

210. EPA's Privilege Log shows that days later, on December 18, 2018, Region 5 staff had an email discussion regarding "Draft 401(a)(2) Notification Letters."

211. On December 20, 2018, MPCA issued its 401 Certification for the NorthMet Mining Project pursuant to Section 401(a)(1) of the CWA, 33 U.S.C. § 1341(a)(1). In its fact sheet

supporting the 401 Certification, MPCA concluded there was "sufficient uncertainty" regarding the Mining Project's effects on downstream water quality in the St. Louis River.

212. On December 20, 2018, MPCA sent its 401 Certification to the Corps and PolyMet, with a copy to EPA. EPA's documents reflect that Region 5 was in receipt of the 401 Certification on that day, triggering the process under Section 401(a)(2) of the CWA and 40 C.F.R. § 121.13. As a result, EPA was required to review the 401 Certification to determine whether the Mining Project's discharges may affect the Band's water quality within 30 days or by January 19, 2019. *See* 33 U.S.C. § 1341(a)(2); 40 C.F.R. § 121.13.

213. The 401 Certification only addresses measures to ensure the Mining Project's compliance with Minnesota's water quality standards. It does nothing to address or ensure compliance with the Band's downstream water quality standards.

214. A purpose of Section 401(a)(2) is to provide the downstream State—here, the Band—the right to notice and a hearing to ensure compliance with the downstream State's water quality standards. *See* 33 U.S.C. § 1341(a)(2); 40 C.F.R. §§ 121.13, 121.15.

215. On January 10, 2019, the Band sent a second letter asserting its rights under Section 401(a)(2) to Ms. Stepp, Ms. Holst, Regulatory Branch Chief Chad Konickson of the Corps' St. Paul District, and officials at MDNR and MPCA ("January 10 letter"). The Band's January 10 letter asserted again that its water quality staff had determined that the Mining Project would result in a violation of the Band's water quality standards. The January 10 letter further asserted the right to comment, object, and urge additional measures to ensure the Mining Project will satisfy the Band's water quality standards consistent with the requirements of CWA Section 401(a)(2).

216. Ms. Holst and Defendant Thiede continued a prior email string on Region 5 career staff's briefing paper regarding "Northmet 401(a)(2)" on January 18, 2019.

217. On information and belief, two days later, on January 20, 2019, high level political appointees within EPA's headquarters and Region 5, including Defendant Thiede and Ms. Stepp, had discussions via email about various issues, including the Section 401(a)(2) process for the Mining Project.

218. On February 5, 2019, the Band sent a third letter asserting its rights under Section 401(a)(2) to Ms. Stepp, Ms. Holst, Regulatory Branch Chief Chad Konickson of the Corps' St. Paul District, and officials at MDNR and MPCA ("February 5 letter"). The Band's February 5 letter objected to the 401 Certification's monitoring requirements and presented expert analysis that contradicted MPCA's analysis of the Mining Project's mercury impacts. For at least the third time, the February 5 letter asserted the Band's right to comment, object, and urge additional measures to ensure the Mining Project will satisfy the Band's water quality standards. The February 5 letter described the Band's water quality staff's review of the 401 Certification and Band staff's conclusion that the 401 Certification's monitoring will not detect relevant mercury increases and changes.

219. EPA's privilege log shows that on February 7, 2019, Barbara Wester, Regional Counsel for Region 5, prepared a document named "draft letter response/polymet 401(a)(2)." Ms. Wester exchanged emails regarding the draft response to the Band with Leverett Nelson, also Regional Counsel at Region 5. Mr. Nelson then forwarded the draft response to Ms. Holst, who apparently took no further action.

220. EPA's privilege log also shows that on February 11, 2019, Ms. Wester and Mr. Nelson exchanged emails regarding "polymet – 19th floor ask #2." On information and belief, the reference to a "19th floor ask" in these emails refers to a request from Region 5's political

leadership in offices on the 19th floor of the Metcalfe Building, which is Region 5's headquarters in Chicago, IL.

221. Ms. Wester then corresponds via email regarding this "19th floor ask" with attorneys in EPA's Office of General Counsel. EPA's privilege log shows that these attorneys eventually developed a document named "PolyMet CWA 401 Q&A.docx." The subject of the email discussion reflects that "Matt would like to hear from us today," which, on information and belief, is a reference to Matthew Leopold, EPA's General Counsel.

222. EPA's privilege log shows that the discussion among various EPA attorneys continued throughout February 11, 12, and 13, 2019, as multiple attorneys, including Mr. Leopold, revised and exchanged a document named "PolyMet CWA Q&A." Mr. Leopold then forwards an email titled "PolyMet Q&A" to Ms. Stepp on February 14, 2019.

223. On information and belief, Defendant Thiede additionally sought information regarding EPA interactions with other agencies, including the Corps, for the purpose of justifying a decision already made to not issue the Band notice under Section 401(a)(2). In particular, Defendant Thiede began seeking information regarding "interactions" involving EPA, MPCA, the Corps, and the Band. In particular, Shannon Lotthammer from MPCA emailed Ms. Holst to provide information regarding "MPCA's interactions with the Fond du Lac Band, as requested." These "interactions" are not relevant to the statutory or regulatory criteria of whether the Mining Project's discharges "may affect" the Band's water quality. *See* 33 U.S.C. § 1341(a)(2); 40 C.F.R. § 121.13. Nevertheless, Ms. Holst reported the information to Defendant Thiede. Likewise, Ms. Holst emailed various Region 5 programs for information regarding EPA's interactions with MPCA for the Mining Project. Ms. Holst stated that "Kurt Thiede has asked for information from us regarding interactions EPA has had with MPCA on PolyMet between 2005 and 2011."

Defendant Thiede also sought information on EPA's "interactions with the Corps on the 404 permit."

224. Defendant Thiede's attempts to obtain information regarding irrelevant "interactions" are consistent with Mr. Fowley's allegation in his OIG Complaint that EPA sought to avoid the 401(a)(2) process on the basis that it was "duplicative of other permit processes." Ex. B at 6.

225. EPA's documents reflect that EPA's "401(a)(2) decision for Polymet still under consideration" as of February 20, 2019, long after the statutory and regulatory deadline passed. Indeed, EPA's privilege log shows that EPA attorneys continued to revise a document called "Draft Deliberative" at least as late as March 8, 2019.

226. It is contrary to EPA's established process for Section 401(a)(2) for EPA to still be engaged in purported pre-decisional "deliberative" activities more than 30 days after receiving the 401 Certification.

227. In the end, EPA Defendants never provided the Band notification as is required by 33 U.S.C. § 1341(a)(2). EPA Defendants never responded to any of the Band's requests.

228. EPA Defendants also failed to provide basic notice that EPA had denied the Band's requests as is required by the APA, 5 U.S.C. § 555(e).

229. EPA Defendants further violated EPA's Tribal Consultation Policy and Region 5's Implementation Procedures by failing to consult and respond to the Band's requests. *See* Implementation Procedures § 2.4.2; ¶¶ 64-65 *supra*. In fact, Region 5 ignored an explicit request from David Horak, Region 5 staff for Tribal Water Quality Issues, to follow-up with the Band on its October 31 letter. On February 28, 2019, Mr. Horak emailed Region 5 career staff and

managers regarding "follow up items" from an EPA site visit to the Reservation. Mr. Horak's email on February 28, 2019 stated the following:

> Tribe is concerned that on 12/20 MPCA issued a 401 permit for Polymet . . . .
>
> Tribe send [sic] a 401-certification letter in October about Polymet compliance with WQS requesting a public hearing and has not gotten a response from EPA . . . .
>
> **Follow-up**: Water Division staff please contact Nancy on this and Polymet in general

(emphasis in original). Region 5 never contacted Nancy Schuldt at the Band as requested by Mr. Horak.

230. On information and belief, EPA Defendants' decision not to provide notice to the Band was based on considerations that are neither appropriately considered nor relevant under Section 401(a)(2) of the CWA.

231. On information and belief, EPA Defendants purposefully withheld notice to the Band, or purposefully prevented notice from issuing to the Band, in order to prevent the Band from being heard on its objections to the 404 Permit and 401 Certification as was its right under Section 401(a)(2) of the CWA.

232. The Corps failed to respond to the Band's requests for a hearing or hold a hearing on the Band's objections to the 404 Permit and 401 Certification.

**D. The Corps issues the 404 Permit for the Mining Project.**

233. On March 21, 2019, the Corps completed its Record of Decision ("ROD") and issued the 404 Permit to PolyMet for the Mining Project.

234. The 404 Permit authorizes the dredge and fill activities for the purpose of constructing the Mining Project. PolyMet's dredge and fill activities will directly drain approximately 901 acres of wetlands that are dominated by peat bogs. These activities will release and discharge significant amounts of mercury into downstream waters, affecting the Band's water

quality. In addition, over 90% of the wetlands directly destroyed by dredge and fill activities at the Mine Site are high-quality, meaning they have high ecological function and support a high level of biological diversity.

235. The ROD acknowledges but does not substantively address the Band's repeated requests for notice under Section 401(a)(2) of the CWA, stating only that "[n]o such notice or request for supplemental information was received from EPA." The ROD fails to disclose that the Band also requested a hearing pursuant to Section 401(a)(2), and that the Corps failed to hold such hearing.

236. The ROD failed to address the Band's objections to the 404 Permit and 401 Certification that were set forth in the Band's letters dated October 31, 2018, January 10, 2019, and February 5, 2019.

237. With respect to the Band's Treaty rights and resources, the ROD states that the Mining Project would have "minor adverse impacts" on cultural resources.

238. Despite GLIFWC's analysis of indirect wetland impacts, including calculating 5,719 acres of severe indirect impacts to wetlands, the ROD notes that the Corps found evaluation of indirect wetland impacts too difficult. The Corps ignored its own findings in the FEIS that the Mining Project could result in indirect impacts through degradation or destruction of additional acres of high quality wetlands, and rather used this information "to inform where monitoring should take place." The Corps developed a "protocol" which requires PolyMet to monitor in locations "having a potential for indirect wetland effects." The Corps required PolyMet to provide "upfront compensation" to mitigate indirect wetland impacts in the amount of 162 credits from the Lake Superior Wetland Mitigation Bank ("Mitigation Bank"). PolyMet is also required to purchase options to 529 credits in the Mitigation Bank that "may be used" if additional wetlands

are lost as a result of indirect impacts. Once PolyMet exhausts these credits in the Mitigation Bank, PolyMet is not required to mitigate future indirect wetlands impacts by providing for in-kind watershed mitigation.

239. The ROD erroneously and arbitrarily states that the Mining Project complied with the 404(b)(1) Guidelines.

240. The ROD erroneously and arbitrarily states that the Mining Project will not be contrary to the public interest.

241. The ROD says that the Mining Project's discharges will not cause or contribute to violations of applicable water quality standards. In addition to other deficiencies, the ROD claims that the Mining Project will not cause any significant water quality impacts, based on the FEIS's water modeling, including the modeling that attempted to show a 90% probability that a pollutant parameter would not exceed water quality "evaluation criteria." In the context of the FEIS, the Corps determined that the FEIS's "evaluation criteria" was a "reasonable method" of probabilistic modeling for EIS impact assessment, but also recognized it was "not appropriate" to use for determining whether a constituent will exceed actual water quality standards.

242. The ROD incorporated MPCA's 401 Certification into the 404 Permit and included the 401 Certification as terms and conditions of the 404 Permit.

243. The ROD notes that the Corps' decision to issue the 404 Permit relied on PolyMet's NPDES Permit issued by MPCA. The ROD then asserts that the NPDES Permit "contains Operating Limits for sulfate and copper in the permit that are enforceable" and thus "compliance with the Operating Limits will ensure the discharge does not exceed water quality standards for other parameters." However, in the December 18 Memorandum, EPA career staff did not reach that conclusion, but instead found that the NPDES Permit's operating limits were only "arguably"

enforceable and concerns remained about the Mining Project's ability to comply with the CWA and ultimate enforcement of the NPDES Permit. In addition, the NPDES Permit does not ensure compliance with the Band's water quality standards.

244. The ROD and the 404 Permit failed to include any permit conditions to ensure the Mining Project will comply with the Band's water quality standards.

245. The ROD failed to address many substantive deficiencies in the FEIS and PolyMet's 404 permit application that the Band identified. The ROD relied on, in very substantial respects, the FEIS and therefore the errors contained in the FEIS are carried forwarded in the ROD.

246. The ROD represents final agency action. EPA's actions or inactions are now final, because the NPDES Permit and 404 Permit have issued.

## VI. CAUSES OF ACTION

### First Cause of Action:

### EPA Defendants' Review of the NPDES Permit is Arbitrary and Capricious or An Abuse of Discretion in Violation of the APA

247. Plaintiff realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

248. The APA provides that courts must "hold unlawful and set aside" agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

249. EPA Defendants' review of the NPDES Permit is arbitrary and capricious and an abuse of discretion for multiple reasons.

250. First, EPA Defendants did not follow EPA's standard practices regarding its review of the NPDES Permit for PolyMet. EPA and MPCA selected the NPDES Permit for EPA's review. In instances where Region 5 acts to review a NPDES permit, Region 5's standard practice is to submit written comments during the public notice period and provide a written notice, via

letter or e-mail, that it does not object to MPCA's final issuance of the permit. On information and belief, EPA Defendants' departure from EPA's standard practices was based on improper influences, pretextual justifications, and without reasoned explanation in contradiction to concerns raised by Region 5 staff and managers. EPA Defendants did not engage in a fair and reasoned decision making process free from improper influences and consideration of factors not relevant under the CWA.

251. Second, EPA Defendants improperly engaged in an outcome determinative process that ignored contrary and long-standing technical evaluations and concerns raised by Region 5 staff and managers in an effort to justify a predetermined decision to not object to MPCA's issuance of the NPDES Permit.

252. Third, EPA Defendants' review is arbitrary and capricious because EPA Defendants failed to consider important aspects of the problem, including multiple unresolved issues documented in the December 18 Memorandum and enforcement by the Band as a downstream State.

253. Therefore, EPA Defendants' review of the NPDES Permit is arbitrary and capricious and an abuse of discretion in violation of the APA. 5 U.S.C. § 706(2)(A).

**Second Cause of Action:**

**EPA's Failure to Issue Notice to the Band for the 404 Permit is Arbitrary and Capricious, An Abuse of Discretion, and Otherwise Not In Accordance with Law, In Excess of Statutory Authority, and Without Observance of Procedure Required By Law in Violation of the APA and CWA**

254. Plaintiff realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

255. Under Section 401(a)(2) of the CWA, if the EPA Administrator determines that "a discharge may affect . . . the quality of the waters of any other State," the Administrator "shall so

notify such other State." 33 U.S.C. § 1341(a)(2). Under EPA's regulations, the Regional Administrator "shall review" the application for a 404 permit, the 401 certification, and any supplemental information requested to determine within 30 days whether "there is reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates." 40 C.F.R. § 121.13 (2019).

256. Within sixty days, such other State (or "affected State") may notify the Administrator and the licensing agency in writing of its objection to the issuance of the permit and request a public hearing. 33 U.S.C. § 1341(a)(2). If the affected State requests a hearing, the licensing agency "shall hold such a hearing." *Id.*

257. Under the APA, courts must "hold unlawful and set aside agency action, findings, and conclusions" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "in excess of statutory jurisdiction, authority, or limitations"; or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D).

258. EPA Defendants' failure to provide the Band notice pursuant to Section 401(a)(2) is unlawful and must be set aside for multiple reasons.

259. First, EPA Defendants treated the Band differently than other States regarding the Section 401(a)(2) process without a reasoned explanation for doing so. *See, e.g.*, *Simmons v. Smith*, 888 F.3d 994, 1001-02 (8th Cir. 2018). Region 5 acknowledged in 2016 that EPA's "may affect" determination under Section 401(a)(2) is a "low bar." EPA Defendants treated the Band differently starting with the UTAC Project in or around April 2018. EPA responded to the Band's requests for notice under Section 401(a)(2) regarding the UTAC Project with a meritless and irregular letter which asserted that EPA "defer[red] to the U.S. Army Corps of Engineers to respond to that request." On information and belief, this differential treatment continued with the

Mining Project, as Defendant Thiede and Ms. Stepp sought the assistance of other political appointees in EPA's Headquarters and Office of General Counsel regarding the Band's requests for notice under Section 401(a)(2). EPA Defendants' differential treatment of the Band regarding the Section 401(a)(2) process is in violation of the CWA's requirement for EPA to treat the Band as a State, 33 U.S.C. §§ 1377(e), 1341(a)(2), and the APA, 5 U.S.C. § 706(2)(A), (D).

260. Second, EPA Defendants sought and effectuated a predetermined outcome for the Section 401(a)(2) process in which no notice would issue to the Band. Region 5 career staff prepared a briefing memo for Defendant Thiede's decision in or around December 2018. Yet by November 30, 2018, EPA Defendants had already decided that no notice would issue to the Band and an EPA career manager informed the Band that EPA would not be issuing notification to the Band under Section 401(a)(2). This decision was made despite the fact that the Regional Administrator's review process had not even started because MPCA had not yet issued its 401 Certification. *See* 33 U.S.C. § 1341(a)(2); 40 C.F.R. § 121.13. On information and belief, EPA Defendants took such actions and other actions in an attempt to rationalize the predetermined, arbitrary decision to not provide the Band notice. EPA Defendants' actions in this regard deprived the Band of a fair and reasoned determination, including the right to receive notice and a hearing under Section 401(a)(2), in violation of the CWA and regulations, 33 U.S.C. § 1341(a)(2); 40 C.F.R. § 121.13, and the APA, 5 U.S.C. § 706(2)(A), (D).

261. Third, on information and belief, EPA Defendants' failure to provide notice under Section 401(a)(2) was based on factors not made relevant by Congress, including improper influence and irrelevant considerations, to reach an outcome that was not based on whether the Mining Project's discharges "may affect" the Band' water quality standards. EPA Defendants'

failure to provide notice under 401(a)(2) is therefore a violation of the APA, 5 U.S.C. § 706(2)(A), (C).

262. Fourth, EPA Defendants failed to follow their own procedures on tribal consultation. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 713 (8th Cir. 1979) (agency must "conform to the agency's own internal procedures"). In particular, EPA Defendants failed to conform to EPA's Tribal Consultation Policy and Region 5's Implementation Procedures in multiple ways. Region 5 committed to consultation with the Band on the Section 401(a)(2) process as early as March 2017. Despite the Band's October 31 letter requesting notice under Section 401(a)(2) and providing the reasons therefore, EPA Defendants failed completely to consult with the Band during the Section 401(a)(2) process. Rather, EPA Defendants worked in secret to avoid providing the Band notice under Section 401(a)(2) in violation of EPA's Tribal Consultation Policy, § V(A)(3), and Region 5's Implementation Procedures, § 2.3.2. EPA Defendants failed to adequately consider the Band's input in their arbitrary and unlawful decision not to issue the Band notice under 401(a)(2). EPA Defendants further failed to provide the Band a written response of their decision and to explain how the Band's input was considered in EPA Defendants' decision not to issue the Band notice under Section 401(a)(2). Tribal Consultation Policy, § V(A)(4); Implementation Procedures, §§ 2.4.2, 2.4.3. EPA Defendants never responded to the Band, even though a Region 5 staff explicitly implored the Water Division to "please contact" the Band regarding this issue. EPA Defendants' failure to follow their own procedures on tribal consultation therefore violated the APA, 5 U.S.C. § 706(2)(A).

263. Fifth, the Mining Project's discharges "may affect the quality of the waters" of the Band, particularly with respect to the Band's federally approved water quality standard for mercury of 0.77 ng/L. As such, EPA was required to issue notice to the Band under Section

401(a)(2). To the extent EPA made a determination to the contrary, that determination was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 33 U.S.C. § 1341(a)(2); 40 C.F.R. § 121.13; 5 U.S.C. § 706(2)(A). In the alternative, if EPA took no action, EPA's failure to act was an abdication of its statutory responsibility and likewise arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 33 U.S.C. § 1341(a)(2); 40 C.F.R. § 121.13; 5 U.S.C. § 706(2)(A).

264. Sixth, EPA Defendants violated 5 U.S.C. § 555(e) of the APA by failing to provide notice and a brief statement to the Band that they had denied the Band's three requests for notice made in connection with EPA's 401(a)(2) process and the Corps' 404 permitting process. In particular, the APA requires "[p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding." 5 U.S.C. § 555(e). The APA further provides that "the notice shall be accompanied by a brief statement of the grounds for denial." *Id.* EPA Defendants failed to comply with the most basic requirement of the APA that they provide the Band notice and their reasons for denying the Band's well-founded requests. EPA Defendants' agency action under Section 401(a)(2) was therefore not in accordance with law and without observance of procedure required by law. 5 U.S.C. § 706(2)(A), (D).

**Third Cause of Action:**

**EPA Defendants' Review of PolyMet's Application for a 404 Permit and the 401 Certification is Arbitrary and Capricious, An Abuse of Discretion or Not in Accordance with Law in Violation of the APA**

265. Plaintiff realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

266. EPA Defendants had an obligation pursuant to 33 U.S.C. § 1341(a)(2) and 40 C.F.R. § 121.13 to perform a review of the 404 Permit application and 401 Certification within 30 days of receiving the 401 Certification.

267. The APA provides that courts must "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

268. The practices and procedures employed by EPA Defendants in the review process they undertook pursuant to 33 U.S.C. § 1341(a)(2) and 40 C.F.R. § 121.13 for PolyMet's application for a 404 Permit and the 401 Certification is arbitrary and capricious, an abuse of discretion and not in accordance with law.

269. EPA Defendants' treated the Band dissimilarly in their review process than other States, effectuated a predetermined outcome, and utilized improper influences and other irrelevant factors. Therefore, EPA Defendants' review of the 404 Permit application and 401 Certification is arbitrary and capricious, an abuse of discretion and not in accordance with law. 5 U.S.C. § 706(2)(A).

**Fourth Cause of Action:**

**Federal Defendants' Failure to Provide Notice Of and Grounds For their Denial of the Band's Requests Is in Violation of the APA**

270. Plaintiff realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

271. Under the APA, "[p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding." 5 U.S.C. § 555(e). "Except in affirming a prior denial or when the denial

is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." *Id.*

272. The Band requested notice and a hearing pursuant to Section 401(a)(2) of the CWA on October 31, 2018, January 10, 2019, and February 5, 2019. The Band made these requests to EPA and the Corps in connection with their proceedings respecting the grant, denial, modification, or conditioning of the 404 Permit.

273. Federal Defendants did not provide "[p]rompt notice" and an accompanying brief statement to the Band that they denied in whole or in part the Band's requests as required by 5 U.S.C. § 555(e).

274. Therefore, Federal Defendants' failure to provide "[p]rompt notice" and "a brief statement of the ground for denial" is agency action unlawfully withheld or unreasonably delayed, otherwise not in accordance with law, or without observance of procedure by law. 5 U.S.C. §§ 555(e); 706(1), (2)(A), (C).

**Fifth Cause of Action:**

**The Corps' Analysis of Environmental Effects is Inadequate in Violation of NEPA and the APA**

275. Plaintiff realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

276. Under NEPA, agencies are required to take a hard look at impacts that major federal actions will have on the human environment. *See, e.g.*, 42 U.S.C. § 4332(2)(C); *Robertson*, 490 U.S. at 352. NEPA requires, *inter alia*, that an environmental impact statement contain high-quality information and accurate scientific analysis. 40 C.F.R. § 1500.1(b).

277. The Corps relied on the FEIS in the ROD for the 404 Permit, which constitutes final agency action.

A. The Corps Failed to Meet Its Obligations to the Band as a Cooperating Agency

278. As part of the NEPA process, a cooperating agency is an agency other than a lead agency which has "jurisdiction by law or special expertise with respect to any environmental impact involved in a . . . major Federal action significantly affecting the quality of the human environment." *Id.* § 1508.5. An Indian tribe and a lead agency may agree for the Indian tribe to become a cooperating agency in the NEPA process. *Id.*

279. Under NEPA, a lead agency is required to "[u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency." *Id.* § 1501.6(a)(2).

280. The Corps was a Co-lead agency in preparation of the FEIS for the Mining Project.

281. The Corps and the Band agreed for the Band to serve as a cooperating agency in preparation of the FEIS for the Mining Project.

282. The Band has special expertise in water quality for waters within the Reservation located downstream from the Mining Project and with respect to its Treaty rights, including managing resources within the 1854 Ceded Territory.

283. In its role as a cooperating agency, the Band, assisted by GLIFWC, submitted numerous environmental analyses and proposals to the Corps for use in its environmental review and analysis for the Mining Project.

284. The Corps failed to use the Band's environmental analysis and proposals to the maximum extent possible. Instead, as a Co-lead agency, the Corps relied on erroneous and inaccurate data and analysis in reaching its conclusions to support its ROD and issuance of the 404 Permit. The Band provided and made available to the Corps better and more accurate information and analysis, but the Corps refused to incorporate this information into its analysis.

285. The Corps failed to incorporate the information and expertise of the Band as required by NEPA. As a result of the Corps' failure to consider and incorporate the input of the Band with expertise and regulatory authority in relevant areas, the Corps' analysis in both the FEIS and ROD is seriously flawed rendering it inadequate in numerous aspects relevant to the Band. Therefore, the Corps' failure to meet its obligations to the Band as a cooperating agency was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with NEPA, CEQ regulations, and the APA.

B. Arbitrary and Capricious Finding Regarding Environmental Effects

286. Under NEPA, federal agencies must take a hard look at direct and indirect effects of major federal actions. *See* 40 C.F.R. § 1508.8.

287. In November 2015, the Corps issued an FEIS for the Mining Project, which suffers from numerous factual and legal flaws, including issues that were deferred to the permitting stage which have never been addressed.

288. For example, the FEIS relies on a hydrology modeling program, MODFLOW, that the Corps acknowledged was scientifically flawed. The FEIS does not disclose the error nor does it have any analysis of environmental impacts to the Rainy River basin due to contaminated groundwater that will flow north after closure of the Mining Project and eventually reach the Boundary Waters Canoe Area Wilderness.

289. The FEIS erroneously assumed that Mining Project's wastewater treatment facilities would be subject to water quality based effluent limits that are protective of the GLI water quality standard for mercury of 1.3 ng/L.

290. The FEIS relies on a flawed mass balance estimation to model mercury and other flawed models for hydrology and water quality.

291. The FEIS does not evaluate the impacts of increased mercury and methylmercury due to the destruction and dewatering of wetlands in the Mining Project area. These contaminants will flow into the Partridge and Embarrass Rivers, which then flow into the St. Louis River and downstream to the Band's Reservation waters.

292. The FEIS's conclusion of no mercury impacts downstream in the St. Louis River watershed is not supported by the information presented and is not scientifically defensible. Proper expert analysis shows that the Mining Project is likely to result in significant and long-lasting downstream mercury impacts to aquatic life, wildlife, and human health.

293. The FEIS arbitrarily compares the Mining Project's predicted water quality against a continuation of existing conditions scenario which excludes future activities that will improve water quality, such as activities mandated by the Cliffs Erie consent decree.

294. The FEIS does not adequately evaluate or quantitively assess all indirect impacts to wetlands or provide for sufficient mitigation of these impacts to avoid adverse impacts before they occur.

295. In preparing the FEIS, the Corps and other Co-lead agencies declined to undertake a number of studies that could be done to better determine the potential impacts of the Mining Project, or to correct errors in the data used in the models that were applied. Instead, as set out in the FEIS, the Corps takes the position that the potential adverse impacts can be addressed by "adaptive management" – meaning that after the Mining Project is approved and in operation, monitoring would be done to determine potential adverse impacts, and if such were to occur, then future mitigation measures would be identified, developed, and implemented on an as-needed basis.

296. The FEIS's use of adaptive management plans is contrary to NEPA, as an adaptive management plan is not a substitute for proper testing and evaluation of effectiveness before a project is approved when testing and information needed for the analysis can reasonably be obtained prior to completion of the EIS.

297. The FEIS's use of adaptive management plans is also contrary to NEPA because those plans fail to contain the details necessary to determining when and how the plans will be applied. An adaptive management plan, to be effective, should include: clearly defined monitoring and reporting protocols; specific action criteria/triggers; detailed mitigation measures, the effectiveness of which have been evaluated; management requirements and decision tree; identity of technical advisors and decision-makers; and financial assurance for an entire plan, including contingencies. The "adaptive management plans" in the FEIS, such as those for hydrological characterization of the site, for indirect wetlands impacts, and other potential Mining Project impacts, contain none of these elements.

298. The ROD relied on, in very substantial respects, the FEIS and therefore the errors contained in the FEIS are carried forwarded in the ROD.

299. Based on the foregoing and other flaws in the FEIS and ROD, the Corps' evaluation of environmental effects is arbitrary and capricious, an abuse of discretion, not otherwise in accordance with law, and not supported by substantial evidence in violation of NEPA and the APA. 5 U.S.C. § 706(2)(A), (2)(E).

C. Arbitrary and Capricious Environmental Justice Analysis

300. Under Executive Order 12,898, "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs,

policies, and activities on minority populations and low-income populations in the United States . . . ." Exec. Order No. 12,898, § 1-101, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994).

301. CEQ guidance requires that, as environmentally preferable alternatives are considered in the NEPA process, the disproportionately high and adverse human health or environmental effect on low-income populations, minority populations, or Indian tribes "should be a factor in determining the environmentally preferable alternative." Council on Envtl. Quality, Exec. Office of President, *Environmental Justice: Guidance Under the National Environmental Policy Act* 15 (1997), *available at* https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf. "In weighing this factor, the agency should consider the views it has received from the affected communities, and the magnitude of environmental impacts associated with alternatives that have a less disproportionate and adverse effect on low-income, minority populations, or Indian tribes." *Id.* Mitigation measures "to avoid, mitigate, minimize, rectify, reduce, or eliminate the impact associated with a proposed agency action . . . should reflect the needs and preferences of affected low-income populations, minority populations, or Indians tribes to the extent practicable." *Id.* at 16.

302. Under CEQ guidance, disproportionate impacts to an Indian community or other population may occur as a result of that community's special historical, religious, economic, cultural, or other significant connection to the natural environment. *Id.* at 9.

303. Construction and operation of the Mining Project will have a combined impact on the natural and physical environment that has the potential to significantly and adversely affect the Band.

304. The adverse cultural, social, economic, and ecological impacts to the Band are interrelated to the adverse impacts to the natural and physical environment that will result from the Mining Project.

305. The additional environmental effects of the Mining Project will be significant and will have an adverse impact on the Band that appreciably exceed or will likely appreciably exceed the effects on the general population.

306. The Mining Project is not intended to serve broad public interests or needs. The Mining Project is an open-pit sulfide mine which is sought by a privately-owned company and intended, first and foremost, to generate profits for that company. Although the Mining Project may generate a "small number of jobs" and some tax revenues, those are the only potential benefits which may inure to the public and will likely be negated by the potential adverse environmental impacts of the project that are projected to occur during construction, operation, and indefinite reclamation of the Mining Project. The FEIS acknowledges that the Mining Project area will remain closed to the public after mine closure. Under the No Action Alternative, remediation under the existing Cliffs Erie consent decree will reduce mercury and sulfate without the Mining Project.

307. The FEIS contains no meaningful consideration of the disproportionate impacts that the Mining Project would have on the Band and Indian people as is required by Executive Order 12,898. Contrary to CEQ guidance, the FEIS focuses on a simple recitation of census numbers and proportions of Native Americans in the regional and statewide populations. The FEIS acknowledges that the Mining Project has the potential to disproportionally affect the Band's rights to hunt, fish, and gather in the area, but the FEIS otherwise ignores those impacts and fails to evaluate the extent of such impacts on the Band and its members.

308. The Corps also relies on its erroneous and arbitrary analysis of mercury and methylmercury to conclude there is no expected change in fish mercury concentrations, and no subsequent change in human health risks related to fish consumption.

309. The FEIS dismisses the Band's concerns regarding impacts to subsistence use of Treaty resources such as fish, wild rice and moose. Instead, the FEIS simply notes that "bioaccumulation of mercury in fish could affect Band members' willingness to rely on subsistence fishing as a contribution to household economies, as well as affect continuation of traditional fishing practices . . . ." Despite acknowledging this harm, the FEIS evaluates no alternative that might have a less adverse environmental impact, nor any measure to mitigate the harm. In these and other ways, the FEIS failed to accurately assess and disclose whether the Mining Project would have a disproportionately adverse effect on minority and low-income populations.

310. Therefore, the Corps' evaluation of environmental justice impacts and conclusion that the Mining Project would not have a disproportionally high and adverse health or environmental effect on minority populations and low-income populations is arbitrary and capricious, an abuse of discretion, and not otherwise in accordance with NEPA and its implementing regulations, Executive Order 12,898, the CEQ guidance, and the APA. 5 U.S.C. § 706(2)(A).

D. Failure to Prepare a Supplemental Environmental Impact Statement

311. An agency "[s]hall" prepare a supplemental EIS if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1); *see also* 33 C.F.R. § 230.13(b). New information justifies supplementation of an EIS when the information "provides a seriously different picture

of the environmental landscape" than that which existed at the time the EIS was drafted. *Nat'l Comm. for New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (quoting *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002)).

312. On August 2, 2018, the Band petitioned the Corps for a supplemental EIS for the Mining Project, based on new information publicly released by PolyMet in a report that PolyMet is required to file under Canadian law. In that report, PolyMet advises that to make the NorthMet Mining Project financially viable and provide an adequate rate of return to its investors, the Project would need to be expanded. PolyMet proposed to increase the Mining Project's processing rate so that, rather than processing 32,000 short tons of ore per day ("STPD"), it would increase processing rates to at least 59,000 STPD or 118,000 STPD. The economic analysis in PolyMet's report indicated that to be financially viable, PolyMet must more than triple the Mining Project's daily processing rate, expand the pit mine, and dramatically change the design of its waste processing and storage facilities to handle a huge increase in waste. The Band highlighted how such a major expansion of the Mining Project would likely substantially increase the environmental impacts of the Project, including the waters, wildlife, and other natural resources on which the Band relies to exercise its Treaty rights within both the Reservation and the 1854 Ceded Territory. The FEIS never considered the environmental impacts of a mining operation of the magnitude that PolyMet now proposes, and this new information and its substantially different environmental impacts requires careful evaluation in a supplemental EIS.

313. In its ROD, the Corps arbitrarily discounted the new information presented in the Band's petition for a supplemental EIS and refused to supplement the FEIS. For example, the Corps stated that "it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place," and therefore

viewed the possible expansion of the Mining Project to be "speculative." But the Corps' "assumption" is contradicted by PolyMet's own analysis that the Mining Project is not economically viable without a substantial expansion which PolyMet was actively examining for development. In short, PolyMet's report raised "significant new circumstances" and "information relevant to environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c)(1), including cumulative impacts, which required analysis in a supplemental EIS.

314. Therefore, the Corps' decision not to prepare a supplemental EIS was arbitrary and capricious, an abuse of discretion, and not otherwise in accordance with NEPA and its implementing regulations and the APA. 5 U.S.C. § 706 (2)(A).

**Sixth Cause of Action:**

**The Corps Failed to Properly Evaluate the Mining Project's Impacts on the Band's Treaty Rights Within and Outside the Reservation in Violation of Federal Common Law Governing Treaties with Indian Tribes, NEPA and the APA**

315. Plaintiff realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

316. The Corps correctly recognized that the proposed Mining Project "falls within the territory ceded as part of the 1854 Treaty between the U.S. government and the Chippewa of Lake Superior," including the Fond du Lac Band. The Corps also correctly found that, under the 1854 Treaty the Chippewa of Lake Superior, including the Fond du Lac Band, retained the rights to hunt and fish (gather or take) natural resources within the 1854 Ceded Territory. The Corps further correctly found the "Project would have effects on 1854 Treaty resources because the Project area is characterized by areas and species that are traditionally or culturally important to the Bands," and that "[n]atural resources and the lands on which they are gathered are important to the Bands for a number of reasons, including cultural, spiritual, and/or historical meanings."

317. The Supreme Court has emphasized that, "[i]n carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. . . . [I]t has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation*, 316 U.S. at 296-97. The courts have further found that this standard requires more than mere compliance with statutes, but that the federal government's trust responsibility also constrains agency discretion: "When faced with several policy choices, an administrator is generally allowed to select any reasonable option. Yet this is not the case when acting as a fiduciary for Indian beneficiaries as 'stricter standards apply to federal agencies when administering Indian programs.'" *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (quoting *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984)). Where the federal agency "is obligated to act as a fiduciary . . . his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Jicarilla Apache Tribe*, 728 F.2d at 1563; *see, e.g.*, *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256-57 (D.D.C. 1972).

318. The Corps, like other federal agencies, has an obligation to protect tribal treaty rights. These obligations are set out in the policies adopted by the Department of Defense and the Corps. U.S. Dep't of Defense, American Indian and Alaska Native Policy (Oct. 20, 1998) *available at* https://www.denix.osd.mil/na/policy/dod-policies/american-indian-and-alaska-native-policy/. The Department of Defense's polices provide, *inter alia*, that the Corps will ensure that it "address[es] tribal concerns regarding protected tribal resources, tribal rights, or Indian lands." *Id.* at 3. The policies further provide that, "[u]nder the federal trust doctrine, the United

States – and individual agencies of the federal government – owe a fiduciary duty to Indian tribes" and directs that, "[w]here agency actions may affect Indian lands or off-reservation treaty rights, the trust duty includes a substantive duty to protect these lands and treaty rights 'to the fullest extent possible.'" *Id.* at 3 n.(g). The Corps has applied these policies to deny permits for proposed activities that would have had more than a de minimus interference with such tribal treaty rights. *See, e.g.*, *Nw. Sea Farms,* 931 F. Supp. at 1519-22.

319. With regard to the Mining Project, however, the Corps gave no practical effect to the matters the Band and other Tribes identified as essential to protecting the Treaty rights and natural resources on which those rights depend.

320. For example, in the FEIS and the ROD, the Corps limited its review of impacts to the Band's Treaty rights in the 1854 Ceded Territory based on a wrongful and narrow view that it was only required to evaluate "specific information concerning the use of natural resources by the Bands in the [Mining] Project area," and then only if there is "specific information concerning recent-historic subsistence use and . . . information regarding contemporary subsistence activity at the Mine Site, Transportation and Utility Corridor, or Plant Site."

321. The Corps' narrow formulation applied an improper test as a matter of law and was further contrary to the record.

322. The Corps in the FEIS and the ROD failed to provide any justification for its flawed and narrow evaluation of the Band's Treaty rights, which runs counter to prevailing law. *See, e.g.*, *Nw. Sea Farms*, 931 F. Supp. at 1519-20 (federal agencies have the duty to consider and protect an Indian tribe's treaty rights in making decisions).

323. As a result of the Corps' improperly narrow construction, the FEIS and ROD did not fully evaluate the Mining Project's impacts on the Band's Treaty rights in the 1854 Ceded

Territory, including for example: the irreplaceable nature of the pristine wetlands at the Mine Site and the impact of the loss of those wetlands – which serve as a vital habitat for a wide variety of natural resources and an important wildlife corridor in a region that has otherwise been the subject of extensive iron ore mining – on the natural resources outside the Project area boundaries; the relationship of activities within the Mining Project area to Treaty resources within the 1854 Ceded Territory; the Mining Project's impact to resources outside the Mining Project area that support the exercise of the Band's Treaty rights throughout the 1854 Ceded Territory; and that the Mining Project's destruction of 900 acres of pristine wetlands would be permanent and represent lands lost forever to the Band's Treaty rights.

324. The Corps failed to give heightened consideration to the Band's analysis that showed the Mining Project would impact the Band's Treaty rights and resources.

325. Based on a flawed evaluation of the Band's Treaty rights, the ROD wrongly stated that a "decrease [of] portions of the 1854 Ceded Territory available for use by the Bands" would have a "negligible" impact on the Treaty rights. The Corps also failed to consider the cumulative impacts to Treaty resources within the 1854 Ceded Territory, such as impacts to wildlife and habitat corridors and wetland functions. The Corps gave little weight to the Band's access to fish that can be safely be consumed in the St. Louis River watershed, an essential component of the Band's Treaty rights. The Corps ignored the Band's management of resources throughout the 1854 Ceded Territory.

326. In addition to the adverse effect that the loss of habitat on the Mining Project site itself will have on the Band's Treaty rights, the many errors contained in the analysis of the Mining Project's impacts as well as the defects in the NPDES Permit and 401 Certification mean that the Project will have adverse effects on the Band's ability to exercise Treaty-protected rights in a far

larger portion of the 1854 Ceded Territory beyond the Mining Project area itself, and adversely affect the Band's on-reservation resources. The Corps' assumption that the Mining Project's "negative impacts on traditional uses by the Bands, . . . habitat for fish and wildlife and wetlands that provide watershed functions . . . will be minimized through measures to be implemented by the Permittee, through compliance with required state and federal regulations, and by specific permit conditions . . . ." is undercut by the errors made in the environmental review and the deficiencies in the NPDES Permit and 401 Certification.

327. In derogation of its obligations to the Band to protect the Band in its Treaty rights, the Corps also failed to take any action with respect to the Band's repeated objections to the 404 Permit and 401 Certification as insufficient to ensure compliance with the Band's water quality standards that are essential to the protection of the waters and natural resources within the Fond du Lac Reservation. The Corps unlawfully failed to hold a hearing as requested by the Band on its objections to the 404 Permit and 401 Certification.

328. Therefore, the Corps' evaluation of the Band's Treaty rights is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the federal government's Treaty and trust responsibilities, NEPA, and the APA. 5 U.S.C. § 706(2)(A).

**Seventh Cause of Action:**

**The Corps' Analysis of Cumulative Impacts/Effects is Inadequate in Violation of NEPA, CWA and the APA**

329. Plaintiff realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

330. Under NEPA, agencies must consider cumulative impacts, which are impacts on the environment that result "from the incremental impact of the action when added to other past,

present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

331. Under the CWA, the 404(b)(1) Guidelines require the Corps to "determine in writing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment" including the "cumulative effects on the aquatic ecosystem." *Id.* § 230.11(a), (g). Cumulative impacts "are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material." *Id.* § 230.11(g)(1).

332. The Band proposed a scope for cumulative impacts analysis that was appropriate for resources important to the Band and its Treaty rights. The rationale for the Band's proposal was set forth in the Tribal Cooperating Agencies' Cumulative Effects Analysis submitted to the Corps in September 2013. The Corps arbitrarily disregarded the Tribal Cooperating Agencies' Cumulative Effects Analysis in favor of an analysis with an inadequate scope.

333. For example, the Corps disregard the Band's proposal to consider the cumulative effects to land use in and cultural resources of the 1854 Ceded Territory. The FEIS's cumulative effects analysis considered cumulative effects to cultural resources and land use only in the Mesabi Iron Range.

334. In disregard of the Band's proposal to consider the cumulative effects to water resources, wetlands, and aquatic species within the St. Louis River watershed, the FEIS's cumulative effects analysis considered cumulative effects to these resources only in the Partridge and Embarrass Rivers.

335. The FEIS's cumulative effects analysis does not account specifically for impacts to moose, a species of concern that is particularly culturally important to the Band.

336. The FEIS's cumulative effects analysis is also inadequate because it does not consider cumulative effects to the Rainy River Basin resulting from northward flow of groundwater after mine closure. The FEIS does not disclose the error in its hydrology modeling which was identified by the Tribal Cooperating Agencies.

337. The ROD relies on the FEIS's inadequate analysis for determining cumulative effects under the 404(b)(1) Guidelines.

338. The ROD fails to include or analyze the cumulative effects of PolyMet's plans for an expanded mining project that had not been considered at all in the FEIS.

339. Therefore, the Corps' cumulative effects analysis in the FEIS and the ROD is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with NEPA, the CWA and implementing regulations, and the APA. 5 U.S.C. § 706(2)(A).

**Eighth Cause of Action:**

**The Corps' Decision to Issue the 404 Permit is Arbitrary and Capricious, Abuse of Discretion and Otherwise Not in Accordance with Law or Without Observance of Procedure Required by Law in Violation of the CWA and APA**

340. Plaintiff realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

341. The Corps is required, but failed, to comply with the 404(b)(1) Guidelines that govern decisions on whether to issue a permit to allow discharges of dredged and fill materials into the waters of the United States. 40 C.F.R. pt. 230.

342. Under the 404(b)(1) Guidelines, the Corps is prohibited from issuing a 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." *Id.* § 230.10(a). An alternative is practicable if it is "available and

capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2). For example, the Corps did not demonstrate that the Proposed Action is the least environmentally damaging practicable alternative for the Mining Project, including with respect to alternatives such as dry stack tailings and underground mining.

343. The 404(b)(1) Guidelines prohibit the discharge of dredged or fill material if the discharge "[c]auses or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard . . . ." *Id.* § 230.10(b)(1). For purposes of the 404(b)(1) Guidelines, the Band's water quality standards are an "applicable State water quality standard," because the Band has TAS status and approved water quality standards under the CWA. *See* 33 U.S.C. §§ 1311(b), 1377(e).

a. EPA deferred resolution of surface water quality concerns from the FEIS to permitting. As documented in the December 18 Memorandum, which is consistent with EPA concerns raised throughout permitting, there are numerous issues regarding water quality that were never resolved during permitting nor in the ROD.

b. The Mining Project's discharges will also cause or contribute to violations of the Band's downstream water quality standards. The NPDES Permit fails to ensure compliance with the Band's downstream water quality standards. In addition, the 401 Certification fails to ensure compliance with the Band's downstream water quality standards. In issuing the 404 Permit, the Corps failed to ensure compliance with the Band's water quality standards by imposing sufficient conditions in the 404 Permit and resolving the Band's objections to the 404 Permit and 401

Certification. The Corps unlawfully failed to hold a hearing as requested by the Band on its objections to the 404 Permit and 401 Certification.

c. Therefore, the Corps' finding that the proposed "discharge of dredged and fill material would not . . . [c]ause or contribute to violations of any applicable water quality standards" is arbitrary and capricious and in violation of the CWA and APA. 5 U.S.C. § 706(2)(A).

344. The 404(b)(1) Guidelines prohibit the discharge of dredged or fill material "which will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10(c). The 404(b)(1) Guidelines set forth adverse effects of the discharge that must be considered individually or collectively. *See id.* § 230.10(c)(1)-(4). Adverse effects contributing to significant degradation include, *inter alia*, adverse effects on human health or welfare; life stages of aquatic life and other dependent wildlife; and aquatic ecosystem diversity, productivity, and stability. *Id.* § 230.10(c)(1)-(3). In making a determination of whether discharges will "cause or contribute to significant degradation of the waters of the United States," the Corps must consider the direct, secondary, and cumulative effects resulting from issuance of the 404 Permit. *Id.* § 230.11. The Corps arbitrarily determined that the Mining Project will not have significant adverse effects on waters of the United States.

a. The Mining Project will foreseeably cause the loss of thousands of acres of wetlands, portions of which include the One Hundred Mile Swamp, an interconnected complex of wetlands and forested area designated as an aquatic resource of national significance. These wetlands rank high in terms of biodiversity and ecosystem function and form the headwaters of major sources of drinking water. The loss will irrevocably fragment the entire area of connected and

contiguous wetland ecosystems, destroying its status as a high-quality wetland and natural area.

b. The 404 Permit's direct, secondary, and cumulative effects will have significant adverse effects on human health or welfare, aquatic life and dependent wildlife, and the aquatic ecosystem through, for example, increased methylation of mercury in wetlands, rivers, and streams, increased mercury and sulfate in rivers and streams, and increased fish mercury concentrations.

c. The Corps relied on its erroneous and arbitrary analysis related to mercury and sulfate to incorrectly conclude there will be a "net decrease" in overall loadings of mercury and sulfate to the St. Louis River as a result of the Mining Project.

d. The Corps arbitrarily ignored the predictable extent of indirect impacts to wetlands without adequate justification. Instead, the Corps relied on an alternative analysis to determine indirect impacts and allowed for inadequate mitigation, both of which ignored known issues and omitted information that served only to allow for a reduction in overall mitigation that would be required up front. This approach is also contrary to the Corps' own guidance, which requires wetlands assessment prior to approval of a Section 404 Permit, and fails to minimize anticipated impacts, *inter alia*, by ensuring adequate compensatory habitat will be available.

345. In addition, the 404(b)(1) Guidelines prohibit the discharge or dredged and fill material "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." *Id.* § 230.10(d). The Corps "must determine the compensatory mitigation to be required in a [404] permit, based on what is practicable and capable of compensating for aquatic resource functions that will be lost as a result

of the permitted activity." *Id.* § 230.93(a)(1). In making this determination, the "district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project." *Id.*

a. The Corps did not adequately evaluate or quantitively assess all indirect impacts to wetlands or provide for sufficient mitigation of these impacts to avoid or minimize impacts before they occur.

b. The Corps did not adequately evaluate or provide measures to minimize impacts from the likely pulse of mercury to the Partridge River that will result from the placement of stripped peat and unsaturated overburden into the unlined Overburden Storage and Laydown Area.

c. The Corps did not evaluate or provide measures to minimize the impacts of increased mercury, methylmercury, and sulfate due to the destruction and dewatering of wetlands in the Mining Project area. These pollutants will flow into the Partridge and Embarrass Rivers, which will then flow into the St. Louis River and downstream to the Band's Reservation waters, contaminating aquatic ecosystems.

d. The Corps failed to provide measures to mitigate or minimize the adverse impacts described in the Band's comments and objections to the 404 Permit and did not ensure compliance with the Band's water quality standards.

e. The Corps failed to provide measures to minimize impacts to moose, a culturally important species to the Band.

346. The Corps, in many other respects, relied on the FEIS to reach its decision under the 404(b)(1) Guidelines, and the flaws in the FEIS likewise undermine the Corps' decision regarding the 404 Permit.

347. The Corps violated 5 U.S.C. § 555(e) of the APA by failing to provide the Band notice with a brief statement of the ground of its decision to deny the Band's requests for a hearing pursuant to 33 U.S.C. § 1341(a)(2).

348. For these and other reasons, the Corps did not comply with the 404(b)(1) Guidelines.

349. Therefore, the Corps' decision to issue the 404 Permit is arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, without observance of procedure required by law, and/or contrary to the evidence in violation of the CWA, implementing regulations, and the APA. 5 U.S.C. § 706(2)(A), (D), (2)(E).

**Ninth Cause of Action:**

**The Corps' Evaluation of the 404 Permit Application and Determination of the Public Interest is Arbitrary and Capricious in violation of the CWA and APA**

350. Plaintiff realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

351. The Corps promulgated "general regulatory policies" that govern its evaluation of all applications for a permit from the Department of Army. 33 C.F.R. § 320.4.

352. The Corps' regulatory policies require the Corps to decide whether to issue a permit "based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." *Id.* § 320.4(a)(1). For the Corps' determination of the public interest, the Corps is required to consider factors relevant to the proposal, including the cumulative effects thereof, which in this case include: conservation, general environmental

concerns, wetlands, historic properties, fish and wildlife values, land use, water quality, considerations of property ownership, and generally the needs and welfare of the people. *See id.*

353. The Corps' regulatory policies also define how the Corps is to assess the proposed permitted activity's impacts on water quality, wetlands, fish and wildlife, historic and cultural values associated with Indian religious or cultural sites, land use, and property ownership. *Id.* § 320.4(b), (c), (d), (e), (g).

354. With respect to the Corps' evaluation of applicable water quality standards required by 33 C.F.R. § 320.4(d), the Corps states that it evaluated the overall Mining Project, including "all activities in uplands, mining and processing of ore over a 20 year period, restoration and project closure procedures, and mechanical or non-mechanical treatment for as long as necessary . . . ."

a. In finding that there will not be a violation of water quality standards from the Mining Project's discharge of dredge and fill materials into waters of the United States (including wetlands), the Corps unlawfully and arbitrarily ignored the Band's objections to the 404 Permit and 401 Certification. The Corps erroneously relied on and referenced the 401 Certification.

b. The Corps erroneously relied on the NPDES Permit to conclude there would be no significant impacts on water quality from the Mining Project's discharge of pollutants from the waste water treatment facility at the Plant Site. The NPDES Permit does not ensure compliance with the Band's water quality standards.

c. The Corps never considered the potential impacts to water quality in the event that polluted groundwater flows northward after mine closure, an event which "cannot be ruled out."

d. For these and other reasons, the Corps determination that the Mining Project "would have minor adverse effects on water quality" is arbitrary and capricious, an abuse of discretion, and not supported by the evidence. 5 U.S.C. § 706(2)(A), (2)(E).

355. With respect to the Corps' evaluation of cultural values associated with Indian religious or cultural sites required by 33 C.F.R. § 320.4(e), the Corps repeated its erroneous analysis regarding the Band's Treaty rights and resources. The Corps' cumulative impacts analysis also failed to evaluate the full 1854 Ceded Territory. As a result, the Corps made an unsupported, arbitrary, and conclusory statement that the Mining Project "is not likely to significantly reduce overall availability of 1854 Treaty resources that are typically part of subsistence activities in the 1854 Ceded Territory."

356. With respect to evaluating impacts to wetlands as required by 33 C.F.R. § 320.4(b), the Corps failed to properly delineate and calculate the acreage of indirectly impacted wetlands and erroneously relied on PolyMet's inadequate mitigation for direct and indirect impacts to wetlands to conclude impacts to wetlands would be "minor."

357. The Corps' evaluation of effects on fish and wildlife required by 33 C.F.R. § 320.4(c) relies on the FEIS's flawed water quality analysis to discount effects on fish. The Corps also failed to provide measures to mitigate or minimize impacts to moose, a culturally important species to the Band.

358. With respect to effects on land use required by 33 C.F.R. § 320.4, the Corps said that the Mining Project "would decrease portions of the 1854 Ceded Territory available for use by the Bands," but then found that this was "negligible." The conclusion that this impact was "negligible" was arbitrary, unsupported, and contrary to the Corps' trust responsibility to the Band.

359. With respect to consideration of property ownership required by 33 C.F.R. § 320.4(g), the Corps' conclusion that the 404 Permit did not authorize any injury to or invasion of the Band's Treaty rights was arbitrary, unsupported, and contrary to the Corps' trust responsibility to the Band.

360. With respect to the Corps' evaluation of food supply required by 33 C.F.R. § 320.4, the Corps relied on the FEIS's flawed conclusion that there is no expected change in fish mercury concentrations. The Corps said bioaccumulation of mercury in fish "could affect" the Band's willingness to rely on fish, a very significant impact on subsistence food supply for the Band and traditional practices. The Corps placed significant weight on "information showing recent or historic fishing activity in the Project area," which is an arbitrary metric given that fish are not confined to the waters within the Project area but move freely from the Embarrass and Partridge Rivers to the St. Louis River.

361. The Corps, in many other respects, relied on the FEIS to reach its decision to approve the application for the 404 Permit, and the flaws in the FEIS likewise undermine the Corps' decision regarding the 404 Permit.

362. As to these and other factors, the Corps' evaluation of PolyMet's permit application for the 404 Permit is flawed, rendering the Corps' determination of the public interest arbitrary and capricious.

363. Therefore, the Corps' evaluation of PolyMet's application for a 404 permit and determination of the public interest is arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, and/or contrary to the evidence in violation of the CWA, implementing regulations, and the APA. 5 U.S.C. § 706(2)(A), (2)(E).

**PRAYER FOR RELIEF**

WHEREFORE, the plaintiff Fond du Lac Band of Lake Superior Chippewa prays that this Court grant it the following relief:

A. Declare EPA Defendants' review of the NPDES Permit to be unlawful in violation of the APA;

B. Order EPA to undertake a transparent and lawful review of the NPDES Permit based on the proper legal and factual considerations required by the CWA;

C. Declare EPA Defendants' failure to provide notice to the Band pursuant to 33 U.S.C. § 1341(a)(2) to be unlawful in violation of the CWA and the APA;

D. Declare EPA Defendants' review process pursuant to 33 U.S.C. § 1341(a)(2) and 40 C.F.R. § 121.13 to be unlawful in violation of the APA;

E. Order the Corps to hold a hearing on the Band's objections to the 404 Permit regarding compliance with the Band's water quality standards pursuant to 33 U.S.C. § 1341(a)(2);

F. Declare Federal Defendants' failure to provide notice of their denial of the Band's written requests for notice and a hearing under Section 401(a)(2) of the Clean Water Act, accompanied by a brief statement of the grounds for denial, to be in violation of 5 U.S.C. § 555(e);

G. Declare that Department of the Army Permit No. MVP-1999-05528-TJH (the 404 Permit), issued on March 21, 2019 by the St. Paul District of the U.S. Army Corps of Engineers was unlawfully issued in violation of the CWA, NEPA, and the APA;

H. Set aside the Corps' Record of Decision for the 404 Permit;

I. Vacate and remand the 404 Permit to the Corps for further action consistent with the Court's rulings;

J. Grant preliminary and permanent injunctive relief requiring Federal Defendants to order the permit holder to suspend all activities authorized under the 404 Permit;

K. Award plaintiff its reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation, pursuant to 28 U.S.C. § 2412; and

L. Grant plaintiff such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 29th day of June 2020.

*/s/Vanessa L. Ray-Hodge*
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