IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Fond du Lac Band of Lake Superior Chippewa,

Plaintiff,

v.

Kurt Thiede, et al.,

Defendants,

and

Poly Met Mining, Inc.,

Defendant-Intervenor.

Case No. 19-cv-2489 (PJS/LIB)

MEMORANDUM OF LAW IN SUPPORT OF POLY MET MINING, INC.'S MOTION TO DISMISS PLAINTIFF'S FIRST, SECOND, THIRD, AND FOURTH CLAIMS IN THE AMENDED COMPLAINT

INTRODUCTION

EPA's role under the Clean Water Act often involves more oversight than action. The job of issuing water quality permits for a point source discharge is usually delegated to state agencies, with EPA retaining the discretion to review and object as it sees fit. *See* 33 U.S.C. § 1342(d). States also must certify that wetland discharges permitted by the U.S. Army Corps of Engineers will not violate their water quality standards. *See id*. § 1341(a)(1). EPA decides whether the discharge may affect a downstream state's water quality and, if so, notifies that state. *See id*. § 1341(a)(2).

In this case, EPA took no action. The Minnesota Pollution Control Agency granted Poly Met Mining, Inc. a permit to discharge treated water as part of PolyMet's proposed mining project. EPA did not object. The U.S. Army Corps of Engineers permitted PolyMet to discharge fill material into wetlands. EPA did not notify any downstream states that their water quality was threatened.

The Fond du Lac Band of Lake Superior Chippewa, whose reservation lies about 70 miles downstream from PolyMet's proposed mine, alleges that EPA's failure to act against these permits violated the Clean Water Act and the Administrative Procedure Act. But EPA's review of MPCA's water quality permit was committed to EPA's discretion, meaning that because EPA can freely choose whether to object, its choice is not reviewable in court. EPA is similarly the sole judge of whether a permitted wetland discharge may affect a downstream state's water quality, and its judgment is not actionable under the APA. Since the Band cannot show that this Court has jurisdiction over its claims against EPA, those claims should be dismissed from this lawsuit.

BACKGROUND

The permits at issue in this case grew out of a decade-long environmental review process under the National Environmental Policy Act and its Minnesota equivalent.[1] Throughout that time, the Band served as a cooperating agency.[2] When the state found that the joint Final Environmental Impact Statement was adequate for permitting, the Band and other opponents of PolyMet's project could have sue in state court. *See* Minn. Stat. § 116D.04, subd. 10. No one did, and the opportunity for such a suit has long since expired. *See id*. (requiring "an aggrieved person" to seek judicial review within 30 days of the state's finding an EIS to be adequate).

It took three more years of review before the relevant state and federal agencies issued permits authorizing PolyMet's proposed mine, known as the NorthMet Project. That includes the permits at issue here, a National Pollutant Discharge Elimination System (NPDES) water quality permit issued by the Minnesota Pollution Control Agency in December 2018[3] and a Clean Water Act section 404 dredge-and-fill permit that the U.S. Army Corps of Engineers issued in March 2019.[4] It also includes, as required by section 401 of the Clean Water Act, MPCA's certification that the discharges authorized by the Corps "will not result in any measurable changes to water quality downstream of the Project in the St. Louis River."[5] MPCA reached the same

[1] Dkt. 51, Am. Compl. ¶¶ 87-89, 105.
[2] Am. Compl. ¶ 89.
[3] Am. Compl. ¶ 180.
[4] Am. Compl ¶ 11.
[5] Clean Water Act Section 401 Water Quality Certification Fact Sheet at 14, available at https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-51jj.pdf.

conclusion about downstream water quality during its NPDES permitting process.[6]

When Minnesota issued permits for the NorthMet Project, the Band and other project opponents filed three clusters of cases that are still pending in state court: (1) challenges to PolyMet's permit to mine and dam safety permits that are currently before the Minnesota Supreme Court;[7] (2) challenges to PolyMet's air emissions permit that are also before the Minnesota Supreme Court;[8] and (3) challenges to PolyMet's NPDES permit that are before the Minnesota Court of Appeals and the Ramsey County District Court.[9] None of these cases challenged MPCA's section 401 water quality certification, and it is now too late to do so. *See* Minn. Stat. § 14.63.

The litigation over PolyMet's NPDES permit in Ramsey County District Court involved a 10-day evidentiary hearing at which the Band and others tried to prove MPCA's NPDES permitting process was tainted by procedural irregularities.[10] The claims made during that hearing about interactions between MPCA and EPA largely overlap with assertions that the Band makes here.[11] The district court has yet to issue findings and conclusions on those claims.[12] When it does, the parties are entitled to appeal them. *See* Minn. Stat. § 14.68.

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[6] National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Permit Program Fact Sheet at 87, available at https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-51gg.pdf.
[7] *See* Case Nos. A18-1952, A18-1953, A18-1958, A18-1959, A18-1960, A18-1961 (Minn. Sup. Ct.).
[8] *See* Case Nos. A19-0115 and A19-0134 (Minn. Sup. Ct.).
[9] *See* Case Nos. A19-0112, A19-0118, A19-0124 (Minn. Ct. App.); Case No. 62-cv-19-4626 (Ramsey Cty. Dist. Ct.).
[10] Am. Compl. ¶ 187.
[11] *See* Am. Compl. ¶¶ 129–91.
[12] Am. Compl. ¶ 187.

This case and another suit filed the same day against the Corps of Engineers (but not EPA) are the only PolyMet cases still pending in federal court.[13] Four cases filed against the U.S. Forest Service, which authorized a land exchange with PolyMet, were dismissed for lack of standing.[14]

ARGUMENT

PolyMet moves to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Under Rule 12(b)(1), the Band bears "the burden of proving subject matter jurisdiction" for each of its claims. *VS Ltd. Partnership v. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000). Dismissal is appropriate "when a facial attack on a complaint's alleged basis for subject matter jurisdiction shows there is no basis for jurisdiction." *Wheeler v. St. Louis Sw. Ry. Co.*, 90 F.3d 327, 329 (8th Cir. 1996). Under Rule 12(b)(6), by contrast, "a claim must be facially plausible, meaning that the 'factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Cole v. Homier Distributing Co., Inc.*, 599 F.3d 856, 861 (8th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (ellipses omitted).

I. EPA's decision not to object to an NPDES permit is committed to agency discretion, and the Court lacks jurisdiction to review it.

The Administrative Procedure Act generally authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see Hawkes Co., Inc. v. U.S. Army Corps of Engr's*, 782 F.3d 994, 999 (8th Cir. 2015). But this limited waiver of sovereign immunity

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[13] *See* Case No. 19-cv-02493, *Friends of the Boundary Waters Wilderness v. U.S. Army Corps of Engr's*.

[14] *See WaterLegacy v. USDA Forest Serv.*, Case Nos. 17-cv-276, 17-cv-905, 17-cv-909, 17-cv-914, 2019 WL 4757663 (D. Minn. Sept. 30, 2019).

does not extend to "agency action" that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That exception to APA jurisdiction applies here.

The Clean Water Act prohibits states from issuing NPDES permits if EPA "objects in writing." 33 U.S.C. § 1342(d)(2). The statute does little to explain why EPA might object to a permit, other than to reference permits that are "outside the guidelines and requirements of this chapter." *Id*. Any EPA objection must be made within 90 days of receiving notice from the issuing state or another affected state and must include a "statement of reasons." *Id*. But nothing in the statute *requires* EPA to object in any circumstance.

The D.C. Circuit Court of Appeals held 40 years ago that, under this statutory scheme, EPA's "decision not to review or to veto a state's action on an NPDES permit application is 'committed to agency discretion by law.'" *District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980) (quoting 5 U.S.C. § 701(a)(2)). The Seventh Circuit later agreed, explaining that the Clean Water Act "demonstrates an intent for the EPA and the states to work through differences in permitting decisions, and the EPA needs a range of discretion to accomplish this goal." *Am. Paper Inst., Inc. v. U.S. EPA*, 890 F.2d 869, 875 (7th Cir. 1989). The Sixth Circuit reached a similar conclusion in a different statutory context, holding that EPA's "decision not to object is within the sole discretion of the agency," and thus not subject to judicial review under the APA. *Friends of Crystal River v. U.S. EPA*, 35 F.3d 1073, 1079 (6th Cir. 1994). And while the Eighth Circuit does not appear to have weighed

in, this Court has cited *Schramm* with approval. *See Miss. River Revival, Inc. v. U.S. EPA*, 107 F.Supp.2d 1008, 1013 (D. Minn. 2000).[15]

The upshot is that EPA's decision not to object to the NorthMet Project NPDES permit is committed to agency discretion, which makes it unreviewable under the APA. The Band appears to have realized this, because its Amended Complaint does not explicitly challenge EPA's decision not to object. Instead, the Band says that EPA's "review" of the NPDES permit violated the APA.[16] That expedient will not solve the Band's problem.

EPA's review process, divorced from its decision not to object, is not final agency action. Final agency action is the "consummation of the agency's decisionmaking process." *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Corps of Eng'rs*, 888 F.3d 906, 914-915 (8th Cir. 2018) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). And as the U.S. Supreme Court explained in *Dalton v. Spencer*, when a final action is unreviewable under the APA, so are the intermediate steps in the agency decision-making process, which "carry no direct consequences" for the plaintiff. 511 U.S. 462, 469 (1994) (quoting *Franklin v. Mass.*, 505 U.S. 788, 798 (1992)) (brackets omitted).

Here, the consummation of EPA's decision-making process was an unreviewable decision not to object to the NorthMet Project NPDES permit. Because the Court lacks jurisdiction over that decision, it also lacks jurisdiction over the review leading to it. Any aspect of the Band's Amended

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[15] *Cf. City of Ames, Iowa v. Reilly*, 986 F.2d 253 (8th Cir. 1993) (holding that the court lacked jurisdiction under the Clean Water Act to hear a challenge to EPA's actions regarding a state-issued NPDES permit).

[16] *See, e.g.*, Am. Compl. ¶¶ 8, 249, 253.

Complaint tied to PolyMet's NPDES permit should thus be dismissed under Rule 12(b)(1).[17]

II. EPA's decision not to notify the Band under section 401(a)(2) is also unreviewable.

The rest of the Band's claims against EPA focus on EPA's decision not to notify the Band about its downstream water quality determination under Clean Water Act section 401(a)(2).[18] In contrast with its NPDES permit claims, the Band directly asserts that EPA's decision not to notify the Band under section 401(a)(2) violated the APA.[19] Its other arguments about EPA's section 401(a)(2) review process derive from that assertion.

A. EPA's section 401(a)(2) "may affect" determination is committed to agency discretion.

Section 401(a)(1) of the Clean Water Act requires states to certify that discharges permitted under federal law—including discharges into wetlands like the ones authorized by the Corps in this case—will not violate the state's water quality standards. *See* 33 U.S.C. § 1341(a). If the state certifies the discharge, section 401(a)(2) gives EPA an oversight role:

> Whenever such a discharge may affect, as determined by the [EPA] Administrator, the quality of the waters of any other State, the Administrator . . . shall so notify such other State . . . .

Id. § 1341(a)(2). EPA's regulations similarly provide that "if the Regional Administrator determines there is reason to believe that a discharge may

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[17] The Band's First Cause of Action is explicitly directed against PolyMet's NPDES permit. *See* Am. Compl. ¶¶ 247-53.

[18] This includes the Band's Second, Third, and Fourth Claims. *See* Am. Compl. ¶¶ 254-74.

[19] *See, e.g.*, Am. Compl. ¶ 264.

affect the quality of the waters of any" downstream state, EPA "shall" notify that state. 40 C.F.R. § 121.13.

Relying on these provisions, the Band argues that "EPA was required to issue notice to the Band."[20] That argument ignores the conditional language in both section 401(a)(2) and the relevant rule, which commits notice under section 401(a)(2) to EPA's discretion.

A statute commits a decision to agency discretion when it "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Ngure v. Ashcroft*, 367 F.3d 975, 982 (8th Cir. 2004) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Such situations often arise when "the agency decision involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id*. (internal quotation marks and citation omitted). EPA's role under section 401(a)(2) fits those criteria.

The discretion conferred on EPA by section 401(a)(2) is not as well-litigated as EPA's discretion not to object to an NPDES permit, but the principles are the same. As a pure statutory construction matter, section 401(a)(2)'s notice provision is triggered only when "a discharge may affect, *as determined by the Administrator*," a downstream state's water quality. 33 U.S.C. § 1341(a)(2) (emphasis added). EPA's rules likewise require notice only "if the Regional Administrator determines" the downstream state's water quality may be affected. 40 C.F.R. § 121.13. When an agency is the sole source of a determination, the agency's discretion leaves "no meaningful standard" for APA review. *See Ngure*, 367 F.3d at 982.

[20] Am. Compl. ¶¶ 255–56, 263. The Band asserts that it qualifies as a state for these purposes. Am. Compl. ¶ 4.

The Second Circuit addressed similar language in a case dealing with a notice of deficiency that the Clean Air Act authorized EPA to send to states. *See N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316 (2nd Cir. 2003). The statute in that case required notice "[w]henever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program." *Id*. at 330 (quoting 42 U.S.C. § 7661a(i)(1)). The court concluded that because this language "affords the EPA discretion," its decision not to issue notice was unreviewable under the APA. *Id*. at 331 (citing 5 U.S.C. § 701(a)(2)).

The similar language is section 401(a)(2) also affords EPA discretion. In both cases, EPA must make a discretionary "determination" before it is required to notify a state. Because such determinations are committed to EPA's discretion, they are not subject to review under the APA, and this case should be dismissed under Rule 12(b)(1).

B. Notice under section 401(a)(2) is not a discrete agency action that EPA was required to take.

Even if the "may affect" determination under section 401(a)(2) were not committed to EPA's discretion, the Band has not shown that it can state a claim for EPA's failure to issue such notice. The APA authorizes suit by a "person suffering legal wrong because of agency action." 5 U.S.C. § 702. "Where no other statute provides a private right of action, the 'agency action' complained of must be '*final* agency action,'" which can encompass a "failure to act." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61–62 (2004) (emphasis in original) (quoting 5 U.S.C. §§ 551(13), 706(1)). But "an agency's mere failure to act is usually not a final agency action triggering judicial review." *Org. for Competitive Markets v. U.S. Dep't of Agric.*, 912 F.3d 455, 462 (8th Cir. 2018). If a plaintiff challenges an agency's failure to act, as the Band

is doing here, it must identify "a *discrete* agency action that [the agency] is *required to take*." *Norton*, 542 U.S. at 64 (emphasis in original).

Nothing in the Band's Amended Complaint specifically alleges a "discrete agency action" that EPA was "required to take." On that ground alone, its claim could be dismissed under Rule 12(b)(6). The Band does say that "[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."[21] The Band also says that EPA "never provided the Band notification as is required by" section 401(a)(2).[22] So it appears the Band thinks EPA was required to take discrete action by notifying it that permitted discharges from the NorthMet Project "may affect" water quality on the Fond du Lac reservation—including if EPA found that the discharges would not affect reservation water quality.

Section 401(a)(2) did not require any such notice here. Instead, as discussed above, that section puts the "may affect" determination entirely in the hands of the EPA Administrator and requires notice only if the Administrator makes such a determination. When EPA—in its discretion—finds no downstream effect, section 401(a)(2) requires nothing. In that situation, notice is not a "discrete agency action" that EPA was "required to take."

It is true that both section 401(a)(2) and EPA's rules require notice when EPA determines that a discharge "may affect" a downstream state's water quality. But the Second Circuit has criticized an attempt to interpret a similar statute by "fixat[ing]" on notice requirements while "gloss[ing] over" conditional language that confers discretion. *N.Y. Pub. Interest Research Grp.*,

[21] Am. Compl. ¶ 214.
[22] Am. Compl. ¶ 227.

321 F.3d at 330. When a "nondiscretionary obligation only arises after a discretionary determination by the EPA," the obligation is not enforceable under the APA. *Id*. at 331 (finding EPA's decision unreviewable under 5 U.S.C. § 701(a)(2)). That is why, in *Dubois v. Thomas*, the Eighth Circuit concluded that a statute requiring enforcement action "[w]henever . . . the Administrator finds that any person is in violation of section 1311" imposed only "discretionary" duties. 820 F.2d 943, 946-47 (8th Cir. 1987).

Section 401(a)(2)'s language parallels the discretionary language in *New York Public Interest Research Group* and *Dubois*. EPA has to notify a downstream state of a threat to its water quality, but only if the Administrator first determines that such a threat exists. Because EPA has discretion to decide when a discharge "may affect" a downstream state's water quality, notifying that state is not a "discrete agency action" that EPA is "required to take." As a result, the Band's claims should be dismissed under Rule 12(b)(6).

C. Because EPA's decision not to notify the Band is unreviewable, so is its decision-making process.

As with its challenge to EPA's decision not to object to the NorthMet Project NPDES permit, the Band argues that EPA's "review" of the section 401(a)(2) issues violated the APA.[23] Its allegations on this score are many and varied, but they distill to the claim that the "practices and procedures" EPA employed in its section 401(a)(2) review violated the APA.[24] That claim, like the Band's NPDES claim, is not viable apart from a judicially reviewable final agency action. *See Dalton*, 511 U.S. at 469. Since EPA's decision not to notify the Band under section 401(a)(2) is unreviewable, so is the process by which it reached that decision.

[23] *See* Am. Compl. ¶¶ 192-232.
[24] Am. Compl. ¶ 268.

The Band also claims that EPA violated a different part of the APA—5 U.S.C. § 555(e)—by "failing to provide notice and a brief statement to the Band that [EPA] had denied the Band's three requests for notice made in connection with EPA's 401(a)(2) process and the Corps' permitting process."[25] Section 555(e) provides that "[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." It further requires that the denial "be accompanied by a brief statement of the grounds for denial," unless the agency is "affirming a prior denial or when the denial is self-explanatory." 5 U.S.C. § 555(e).

The Tenth Circuit has explained that the "purpose" of section 555(e) "is to allow a reviewing court to assess the agency's decision." *High Country Citizens All. v. Clarke*, 454 F.3d 1177, 1192 (10th Cir. 2006). Section 555(e) does not provide an independent "right of review" where an agency decision is otherwise unreviewable. *See id*. In *High County*, the Court lacked APA jurisdiction under section 701(a)(1). *See id*. Here, for the reasons explained above, EPA's decision is unreviewable because neither the Clean Water Act nor EPA's regulations impose a duty on EPA to notify the Band under section 401(a)(2). Section 555(e) is subordinate to that limitation on judicial review.

CONCLUSION

Agency inaction is reviewable only in rare cases. Because EPA's decision not to act against PolyMet's permits was part of its discretionary oversight role under the Clean Water Act, this is not one of those cases. And when an agency decision is unreviewable, so is the agency's decision-making process.

[25] Am. Compl. ¶ 264; *see also id.* ¶¶ 270–74.

For these reasons, PolyMet respectfully requests dismissal of the First, Second, Third, and Fourth Claims in the Band's Amended Complaint.

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