UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, Plaintiff, v. KURT THIEDE, Region 5 Administrator – Environmental Protection Agency; ANDREW WHEELER, Administrator of the Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and 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, Defendants.	)	Case No. 19-cv-02489-PJS-LIB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL DISMISSAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

State Statute

Rules

Code of Federal Regulations

INTRODUCTION

The Fond du Lac Band of Lake Superior Chippewa (the "Band") asks this Court to convert wholly discretionary actions by the United States Environmental Protection Agency ("EPA") into actions subject to judicial review under the Administrative Procedure Act. The Band's claims lack any basis in law and should be dismissed.

The Band alleges harms stemming from EPA's oversight of two permits issued to PolyMet Mining, Inc. ("PolyMet") by other permitting entities. One permit, a Clean Water Act ("CWA") Section 402 National Pollutant Discharge Elimination System ("NPDES") permit, was issued by the Minnesota Pollution Control Agency ("MPCA") under its authorized NPDES program.[1] The other permit, a CWA Section 404 permit, was issued by the U.S. Army Corps of Engineers ("Corps"). The Band's claims against EPA regarding both permits must fail because, under the CWA, EPA's oversight of these permits is wholly discretionary – and the scope of that discretion is not altered by EPA's trust responsibility to the Band.

The Band's claims that EPA's oversight of the permits, and its decisions not to act, are arbitrary and capricious final agency actions must be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Congress has not waived the United States' sovereign immunity under the Administrative Procedure Act for agency actions like these that are statutorily committed to agency discretion by law. The Band's claims therefore fail.

---

[1] The Band is also pursuing litigation against MPCA regarding the issuance of the same NPDES permit in Minnesota state court. EPA is not a party to that case.

The Band also argues, without evidence, that EPA failed to consider all relevant statutory factors, and that EPA considered factors not relevant under the CWA. However, the Band's complaint does not allege specific facts that, even if accepted as true, support a finding either that EPA failed to consider relevant factors or considered irrelevant factors. Further, the Band's factual allegations do not establish that interactions between MPCA and EPA were improper or that MPCA exerted pressure that caused EPA decision makers to act contrary to the CWA. Accordingly, these claims fail as well.[2]

Finally, the Band claims that EPA and the Corps violated 5 U.S.C. § 555(e) by failing to provide the Band with notice and a brief statement explaining their denial of the Band's request for notice and hearing under CWA Section 401(a)(2). However, the Band is not an "interested person" under Section 555(e), nor was their request made "in connection with any agency proceeding", as required under the statute. Further, because EPA's "may affect" determinations under Section 401(a)(2) are discretionary, and the statute provides no petition for rulemaking or adjudication, nor notification provision for

[2] This is a motion for partial dismissal because claims 5-9, against the Corps of Engineers, are not addressed in this motion. Upon resolution of the Motion to Dismiss, the Defendants intend to file an answer in response to the remaining claims. *See Gortat v. Capala Bros., Inc.*, 257 F.R.D. 353, 366 (E.D.N.Y. 2009) (finding that "filing a partial motion to dismiss will suspend the time to answer" claims not subject to the motion); *Cf. Northland Ins. Cos. v. Blaylock*, 115 F. Supp. 2d 1108, 1115 (D. Minn. 2000) (no answer required until court disposes of motion to dismiss).

failures to take action,[3] judicial review under Section 555(e) is not available. As such, this claim also fails.

STATUTORY AND REGULATORY BACKGROUND

I. National Pollution Discharge Elimination System Permits Under CWA Section 402

Pursuant to the CWA, "any person" who wishes to discharge "any pollutant"[4] from a "point source" into the waters of the United States must obtain an NPDES permit. 33 U.S.C. §§ 1311(a), 1342. NPDES permits bring both state ambient water quality standards and technology-based effluent limitations to bear on individual discharges of pollutants, *id.* § 1342(a)(3), (b)(1)(A), and tailor these to the discharger through procedures set forth in the CWA and in EPA regulations. *Id.* § 1342. NPDES permits may be issued by EPA or by an authorized state or Indian tribe. *Id.* §§ 1342(b), 1377(e); 40 C.F.R. § 123.31. In 1974, EPA authorized Minnesota to administer its own NPDES permit program. Am. Compl. ¶¶ 42-51; Minn. Stat. § 115.03.

Under the CWA and its implementing regulations, a state wishing to receive authorization to implement the NPDES program is required to submit a program application containing a comprehensive list of requirements, including rules to control discharges, evaluate compliance, conduct enforcement, and allow for judicial review of permit grants or denials. 40 C.F.R. §§ 123.25-123.30. A state seeking authorization of

[3] EPA is required to give notice only if it makes a positive "may affect" determination under CWA Section 401(a)(2). Section 401(a)(2) does not require the Corps to give any notice.

[4] Permits for the discharge of dredge or fill material are governed by Section 404 of the CWA.

its program is required to ensure that these provisions are addressed in permit issuance and enforcement and that citizens may seek judicial review in state court of the approval and denial or permits under an approved program. 40 C.F.R. § 123.30. To date, forty-seven states, including Minnesota, have authorized NPDES permitting programs.[5]

Under the statute, while the state is required to transmit a copy of each permit application to EPA, EPA may waive this requirement. 33 U.S.C. § 1342(e). Even if a permit application is provided for review, EPA "may, as to any permit application, waive" its authority to object to that permit. 33 U.S.C. § 1342(d)(3) (emphasis added). EPA's ability to waive its authority to object to any permit extends to permits that may be "outside the guidelines and requirements" of the CWA. 33 U.S.C. § 1342(d)(2), (3).

Under EPA's implementing regulations, once a state program receives authorization, the state is responsible for issuing permits for the discharge of pollutants to waters within the state and "the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program." 40 C.F.R. §§ 123.1 (d)(1), (g)(1). For proposed state permits, the regulations provide that EPA "may make general comments upon, objections to, or recommendations," but the regulations do not require EPA to do any of these things. 40 C.F.R. § 123.44(a)(1). The regulations also allow EPA, in its Memorandum of Agreement with an authorized state, to waive entire classes or categories of certain permit applications for review and comment. 40 C.F.R. § 123.24(d).

[5] *See* EPA, *About NPDES*, https://www.epa.gov/npdes/about-npdes (last visited June 8, 2020).

II. Notification Requirements Under the CWA Section 401(a)(2)

Section 401(a) of the CWA requires any applicant for a federal license or permit, such as a permit under Section 404 of the CWA, that authorizes an activity that may result in a discharge into navigable waters to obtain a certification "from the State in which the discharge originates." 33 U.S.C. § 1341(a)(1). Upon receipt of an application for a federal license or permit and a CWA Section 401 certification, the federal licensing or permitting agency is required to notify the Administrator of EPA of the application and certification. 33 U.S.C. § 1341(a)(2).

If the discharge at issue in the certification "may affect, as determined by the Administrator, the quality of the waters of any other State," then EPA must provide notice to that other State, as required under Section 401(a)(2) of the CWA.[6] *Id.* (emphasis added).

III. Notification Requirement under 5 U.S.C. § 555(e)

Under the Administrative Procedure Act (APA), agencies are to provide "[p]rompt notice" 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). Notably, the APA defines "agency proceeding[s]" as processes involving rulemaking, adjudication (that is, formulation of an order), or licensing. 5 U.S.C. § 551(12).

[6] Section 518(e) of the CWA authorizes EPA to treat an Indian tribe as a State for the purposes of Section 401, including Section 401(a)(2), if the Tribe meets certain statutory and regulatory criteria. 33 U.S.C. § 1377(e); 40 C.F.R. §§ 131.4(c) and 131.8.

FACTUAL BACKGROUND

The Band's Complaint for Declaratory and Injunctive Relief concerns permits issued by MPCA and the Corps for PolyMet's proposed NorthMet mining project.[7] The proposed NorthMet mining project is a copper-nickel-platinum mine to be constructed and operated approximately 70 miles upstream of the Band's Fond du Lac Reservation. Am. Compl. ¶ 66.

I. The PolyMet NPDES Permit

In May 1974, EPA approved MPCA's submission to administer the NPDES permit program in Minnesota and issue NPDES permits for discharges into waters of the United States in Minnesota, excluding those discharges occurring in Indian country. Am. Compl. ¶¶ 42-45; Minn. Stat. § 115.03. At that time, MPCA and EPA signed a Memorandum of Agreement providing the terms and conditions of EPA's program approval. Am. Compl. ¶ 45.

In July 2016, PolyMet submitted its application to MPCA for an NPDES permit to authorize discharges from the NorthMet mining project. Am. Compl. ¶ 135. In August and September 2016, EPA Region 5 met with MPCA to review the permit application. Am. Compl. ¶¶ 137, 139. In November 2016, EPA Region 5 sent a letter to MPCA containing a list of deficiencies in PolyMet's application. Am. Compl. ¶ 140. As the

[7] As required under Fed. R. Civ. P. 12(b)(6) and a facial Fed. R. Civ. P. 12(b)(1) motion, this narrative accepts the factual allegations in the complaint as true solely for purposes of this motion.

permitting process moved towards the public notice period, EPA Region 5 and MPCA continued to have meetings regarding the application. Am. Compl. ¶ 142.

In January 2018, MPCA provided a public notice draft NPDES permit for the NorthMet mining project to EPA Region 5 for review. Am. Compl. ¶ 146. During the public comment period, between January 2018 and March 2018, EPA Region 5 staff and MPCA held telephone discussions regarding the state's draft NPDES permit. Am. Compl. ¶¶ 146-48. In these discussions, EPA Region 5 staff provided substantive comments to MPCA regarding the draft permit. Am. Compl. ¶ 147.

The public comment period for the draft NorthMet permit closed in mid-March 2018. Am. Compl. ¶ 164. EPA did not submit written comments to MPCA during the public comment period. Am. Compl. ¶¶ 165-66. EPA Region 5 and MPCA agreed that once MPCA had completed its responses to the public comments, MPCA would develop a pre-proposed permit for EPA's review. Am. Compl. ¶ 165.

EPA met with MPCA and PolyMet on September 25, 2018, to discuss the NPDES permit. Am. Compl. ¶ 167. The following day, EPA Region 5 staff met with MPCA alone to further discuss the permit. *Id*. In these meetings, EPA Region 5 staff identified issues with the draft permit and discussed those issues with MPCA staff. *Id.*; Grillot Decl., Exhibit 1 – December 18, 2018, Memo at 2.[8] After considering these issues, MPCA agreed to make changes to the draft permit – including the addition of operating

[8] This memorandum may be considered here as it has been incorporated into the Amended Complaint by reference. *See Dittmer Props. LP v. F.D.I.C.*, 708 F.3d 1011, 1021 (8th Cir. 2013).

limits for certain pollutants and a condition stating that the discharge of treated wastewater "must not violate state water quality standards." Grillot Decl., Exhibit 1, Dec. 18 Memo at 2-3, n.6.

On October 25, 2018, MPCA provided EPA with a copy of the pre-proposed state NPDES permit that addressed many of the concerns raised by EPA. *Id.* at 4. On December 3, 2018, EPA's 45-day review period for the pre-proposed permit concluded and EPA did not submit written comments. Am. Compl. ¶ 170. On December 4, 2018, MPCA formally sent EPA the proposed Permit that it intended to issue to PolyMet, triggering a 15-day review period for EPA. Am. Compl. ¶ 171. EPA Region 5 did not object to the proposed permit within the 15-day period, and on December 20, 2018, MPCA issued the NPDES Permit to PolyMet. Am. Compl. ¶¶ 179, 180.

II. State Court Litigation Regarding the PolyMet NPDES Permit

In January 2019, the Band filed a petition for certiorari with the Minnesota Court of Appeals for judicial review of the state's NPDES permit. Am. Compl. ¶ 181. In June 2019, the Minnesota Court of Appeals transferred the Band's NPDES permit challenges to the Ramsey County District Court for a hearing and determination of whether there were irregularities in procedure by MPCA in issuing the state's NPDES permit. Am. Compl. ¶ 185. In August 2019, the Minnesota Court of Appeals stayed the state's NPDES permit during the pendency of the transferred proceedings in Ramsey County. In January 2020, the Ramsey County District Court held an evidentiary hearing on the

alleged irregularities by MPCA in issuing the state's NPDES permit. Am. Compl. ¶ 187. To date, the court has not made that determination.

III. CWA Section 401(a)(2) Notice

In April 2016, EPA Region 5 staff discussed with MPCA, the Corps, and PolyMet that a water quality certification under CWA Section 401(a)(1) for PolyMet's CWA Section 404 Permit would "trigger the [Section 401(a)(2)] process." Am. Compl. ¶ 193. Over the years, there have been occasions when EPA regional offices have made Section 401(a)(2) discretionary determinations and have notified downstream states that their water quality may be impacted. Am. Compl. ¶¶ 195, 197. If the EPA Regional Administrator takes no action regarding a Section 404 permit, the Corps' District Engineer assumes that EPA has "made a negative determination with respect to Section 401(a)(2)." Am. Compl. ¶ 204.

In October 2018, the Band sent a letter to EPA Region 5 requesting that EPA provide notice to the Band under CWA Section 401(a)(2) so that it could comment on, raise objections to, and/or urge additional measures to ensure the NorthMet mine project would comply with the Band's downstream water quality standards. Am. Compl. ¶ 206. MPCA issued its certification pursuant to CWA Section 401 for the NorthMet Mining Project on December 20, 2018. Am. Compl. ¶ 211.

On January 10, 2019, and February 5, 2019, the Band sent additional letters to EPA providing the Band's own assessment of impacts from the NorthMet mining project and requesting that EPA issue notice under Section 401(a)(2). Am. Compl. ¶¶ 215, 218.

EPA did not issue a Section 401(a)(2) notice regarding the PolyMet CWA Section 404 Permit. Am. Compl. ¶¶ 227-28.

STANDARD OF REVIEW

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). A claim that asserts a legal theory that is not cognizable as a matter of law or fails to allege sufficient facts to support a cognizable legal claim should be dismissed. *Neitzke v. Williams*, 490 U.S. 319, 325, 327-28 (1989); *Brown v. Mortgage Electronic Registration Sys., Inc.*, 738 F.3d 926, 933 n.7 (8th Cir. 2013).

Further, a plaintiff has the burden to demonstrate that subject matter jurisdiction exists for each of its claims. *VS Ltd. P'ship v. HUD*, 235 F.3d 1109, 1112 (8th Cir. 2000). Dismissal under Federal Rule of Civil Procedure 12(b)(1) is appropriate when a facial attack on a complaint's alleged basis for subject matter jurisdiction shows there is no basis for jurisdiction. *Namarra v. Mayorkas*, 924 F. Supp. 2d 1058, 1061 (D. Minn. 2013) (quoting *Wheeler v. St. Louis Sw. Ry. Co.*, 90 F.3d 327, 329 (8th Cir. 1996)).

ARGUMENT

In the First and Third Causes of Action, the Band argues that EPA's review of certain permits related to PolyMet's proposed NorthMet mine project violated the APA. Similarly, in the Second and Fourth Causes of Action, the Band argues that EPA's failure

to provide the Band with notice of the same permits violated the APA. As set forth below, these claims fail.

Under the APA, Congress has not waived the United States' sovereign immunity for challenges to agency actions, like those at issue here, that are wholly committed to agency discretion by law. The Band's allegations that EPA did not follow so-called "standard practices" and the Band's critiques of EPA's process for decision making do not change the fact that the Band's complaint fails to allege facts supporting its claim that EPA failed to consider relevant factors, or considered improper statutory factors, in its oversight of the permits at issue here. Accordingly, the Band's claims must be dismissed.

I. The Band's First Four Claims Should be Dismissed Because This Court Does Not Have Subject Matter Jurisdiction to Review Actions that Are Committed to Agency Discretion by Law

The Band's allegations in its first four causes of action are not reviewable under the APA. While the APA waives sovereign immunity for judicial review of certain agency actions, the APA expressly excludes from review any agency action or inaction that is "committed to agency discretion by law[,]" 5 U.S.C. § 701(a)(2). This excludes from judicial review actions, like those alleged by the Band, that are made pursuant to a statute that is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (internal quotation marks and citation omitted); *see also Namarra*, 924 F. Supp. 2d at 1065 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

We do not take issue with the general proposition that there is a presumption in favor of judicial review under the APA. Nonetheless, courts have consistently found that

EPA's decision not to object to a state NPDES permit to be largely immune to judicial review, because the CWA is drawn in such broad terms that there is no law to apply. *See, e.g.*, *Dist. of Columbia v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980) (finding EPA's decision not to object to NPDES permit to be unreviewable agency action); *Friends of Crystal River v. EPA*, 35 F.3d 1073, 1079 (6th Cir. 1994) (finding decision not to object to be "within the sole discretion of the agency"); *Mianus River Pres. Comm. v. EPA*, 541 F.2d 899, 907 (2d Cir. 1976); *Pa. Mun. Auths. Ass'n. v. Horinko*, 292 F. Supp. 2d 95, 109 (D.D.C. 2003); *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1294 (5th Cir. 1977).

As discussed below, because EPA's oversight and review of the two permits at issue here, as well as EPA's determination under CWA Section 401(a)(2), were discretionary, and the CWA provides no manageable framework against which to evaluate EPA's review, this Court lacks subject matter jurisdiction. Accordingly, the Band's claims should be dismissed.

A. EPA's Review of Minnesota's NPDES Permit Is Committed to Agency Discretion by Law

In the First Cause of Action, the Band argues that EPA's review of the State of Minnesota's NPDES permit was "arbitrary and capricious, an abuse of discretion and not in accordance with the law." Am. Compl. ¶ 269. This claim should be dismissed, because Congress committed the decision making in this area was committed to EPA's discretion, making these actions unreviewable under the APA.

In the CWA, Congress "spread across the record clear and convincing evidence of legislative intent to preclude federal review of state-issued permits." *Am. Paper Inst.,*

Inc. v. EPA, 890 F.2d 869, 875 (7th Cir. 1989). The CWA reflects "the desire of Congress to put the regulatory burden on the states and to give the [EPA] broad discretion in administering the program." *Id.* (quoting *Schramm*, 631 F.2d at 860). Therefore, courts "should leave EPA with its discretion to review state-issued permits" to accomplish the CWA's goal of allowing states to take a primary role in determining water quality standards. *Am. Paper Inst.*, 890 F.2d at 875. As the Fifth Circuit found in *Save the Bay*:

> Given discretion to weigh the substantiality of any violations of the guidelines and requirements of the Amendments as well as a mandate to determine the presence of such violations, EPA's decision not to veto a particular permit takes on a breadth that in our judgment renders the bottom line of that decision unreviewable in the federal courts.

Save the Bay, Inc., 556 F.2d at 1295.[9] To "conclude otherwise would contravene the spirit of the federal-state partnership created by the [CWA]." *Id.* Therefore the Band's First Cause of Action should be dismissed for lack of subject matter jurisdiction because EPA's decision making in this area is committed to agency discretion by law.

[9] Courts routinely have upheld EPA's similarly broad discretion regarding review of state permits issued pursuant to CWA Section 404. *See e.g.*, *Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065, 1072 (7th Cir. 2020) ("The initial choice—the decision whether to object [to a State-issued CWA Section 404 permit]—remains discretionary. That discretion remains no matter how much a particular permitting proposal may, as an objective matter, deviate from the prescribed regulatory standards."), *reh'g denied* (May 8, 2020); *Bristol Bay Econ. Dev. Corp. v. Hladick*, No. 3:19-cv-265, 2020 WL 1905290, at *15 (D. Alaska Apr. 17, 2020) (holding that EPA's decision to withdraw proposed CWA Section 404(c) veto is committed to agency discretion by law).

B. EPA's Actions Under CWA Section 401(a)(2) Are Committed to Agency Discretion by Law

In the Third Cause of Action, the Band argues that EPA's actions in relation to CWA Section 401(a)(2) violated the APA. Further, in the Second Cause of Action the Band claims that EPA was *required* to provide notice to the Band under CWA Section 401(a)(2). These claims must fail because EPA's choice to determine whether discharges "may affect" a downstream state is wholly committed to agency discretion by law, and EPA did not make such a notice-triggering determination here.

As discussed above, CWA Section 401(a)(2) provides that the Administrator is required to notify an affected state, such as the Band here, whenever – as determined by the Administrator – a discharge "may affect" the quality of waters of that state. 33 U.S.C. § 1341(a)(2). EPA is not required to make such a determination or to notify downstream states under Section 401(a)(2) unless it does, in fact, determine that a discharge "may affect" downstream waters. Am. Compl. ¶ 194.

Because the language of the statute expressly grants the Administrator discretion whether to determine a discharge "may affect" downstream waters the Administrator's decision is not reviewable under the APA. Importantly, the Band does not allege that the Administrator made a "may affect" determination and yet failed to notify the Band. Instead, the Band maintains that the Administrator should have made this determination – a decision that the CWA places in the sole discretion of the Administrator.

EPA's action is unreviewable because, as with EPA's discretion regarding its review of state permits under CWA Section 402, there are "no judicially manageable

standards" to determine how the agency should make a determination whether discharges "may affect" a downstream state pursuant to CWA Section 401(a)(2). *Namarra*, 924 F. Supp. 2d at 1065; *see also Coal. to Save the Menominee River, Inc. v. EPA*, 423 F. Supp. 3d 560, 570 (E.D. Wis. 2019) (finding EPA's decision to be unreviewable as the CWA is "drafted in such broad terms" that "there is no clear law to apply and no meaningful standard against which to judge the agency's exercise of discretion.").

To find otherwise would inject the Court into the nuances of the agency's process for determining whether a discharge "may affect" the waters of a downstream state. The statute itself does not provide judicially manageable standards that would allow a court to substitute its understanding of what discharges "may affect" the downstream state for that of the agency. Accordingly, this is a matter that Congress has left to the agency and the Second and Third Causes of Action should be dismissed as they are not reviewable under the APA.

II. The Band Fails to Allege Facts Showing that EPA Based Its Actions on Improper Factors

The Band's Amended Complaint also claims, in its First, Second, and Third Causes of Action, that EPA violated the APA by allegedly basing its actions on the consideration of factors not relevant under the CWA due to "improper influences." See, e.g., Am. Compl. ¶¶ 250, 261. Specifically, the Band argues that EPA failed to follow the Band's preferred procedure; and that EPA allegedly treated the Band differently than other similarly situated parties. See, e.g., Am. Compl. ¶ 250 (EPA did not follow "standard practices" when reviewing state-issued NPDES permit and acted in

"contradiction to concerns raised by Region 5 staff and managers."); Am. Compl. ¶¶ 251-52 (EPA engaged in an "outcome determinative process" and failed to consider "unresolved issues" when deciding not to object to the state-issued NPDES permit). Even accepting the factual allegations as true, the Band has not alleged sufficient facts to show that EPA actions were outside of the broad discretion Congress granted here.

Unless there is clear evidence to the contrary, courts presume that public officers have discharged their duties properly and without bias. *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). Further, as the United States Supreme Court recently recognized, agency decisions are not made in a vacuum, stating that:

> [A] court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. Agency policymaking is not a "rarified technocratic process, unaffected by political considerations or the presence of Presidential power." *Sierra Club v. Costle*, 657 F.2d 298, 408 (CADC 1981). Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).

Dep't. of Commerce v. New York, 139 S. Ct. 2551, 2573 (2019). Thus, in and of themselves, such diverse considerations are not improper. Judicial review of agency decision making is limited to whether an agency took actions based on factors made relevant by Congress. *See, e.g., D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1248 (D.C. Cir. 1971) ("so long as the [Administrator] applies his expertise to considerations Congress intended to make relevant, he acts within his discretion and our role as a reviewing court is constrained."); *Fallini v. Hodel*, 725 F. Supp. 1113, 1117 (D.

Nev. 1989) (an agency acts arbitrarily if it "failed to consider an important aspect of the problem before it.").

Courts have set out two "very narrow" lines of judicial review of agency decision-making: (1) if the agency fails to consider all relevant factors; or (2) if "unlawful factors" have "tainted the agency's exercise of its discretion." *Save the Bay, Inc.*, 556 F.2d at 1295-96; *see also Orangetown v. Ruckelshaus*, 579 F. Supp. 15, 20 (S.D.N.Y. 1984) (requiring a "reasoned process of considering relevant factors"); *Fallini*, 725 F. Supp. at 1117 (requiring consideration of "important aspects of the problem").

With respect to the first test, the Band must show that the proposed permit contained a "violation of applicable federal guidelines that the agency has failed to consider." *Save the Bay, Inc.*, 556 F.2d at 1296 (emphasis added). However, once all "relevant factors are before the agency," courts should decline to second-guess the agency's decision making as "there is such insufficient likelihood of improving the decision that the presumption for judicial review falls." *Id.*

Alternatively, the Band must show that "unlawful factors" such as "consideration of the political popularity of a decision to veto a permit" have "tainted the agency's exercise of its discretion." *Id.* This typically occurs in situations where there is "improper influence" – that is the potential for coercive pressure (from Congress for example) that may influence an agency to take an action or to make a decision based on factors outside those identified in the statute. *See, e.g., Volpe*, 459 F.2d at 1245-46. Such a claim requires a factual basis that (1) the "content of the pressure" on the agency was "designed to force" it to decide upon factors not made relevant by Congress in the

applicable statute; and (2) the "agency's determination must have been affected by those extraneous considerations." *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981) (emphasis added); *see also Ruckelshaus*, 579 F. Supp. at 20 .

Because the Band fails to make the relevant factual showing that EPA either failed to consider relevant factors, or improperly considered factors beyond those laid out in the CWA due to improper influence, its claims fail.

A. The Band Fails to Allege Sufficient Facts Establishing that EPA's Review of MPCA's NPDES Permit Was Improper

EPA's actions regarding MPCA's NPDES Permit were based on reasoned consideration of the relevant factors. Although the Band may disagree with the outcome of these actions, the Band does not allege facts establishing that the agency either failed to consider relevant factors, or that EPA's action here was "tainted" by the consideration of improper factors.

First, the Clean Water Act does not require that EPA follow any particular procedure once it receives a NPDES permit from an approved state. Once the "relevant factors" are in front of an agency, EPA's action not to veto a state-issued NPDES permit "takes on a breadth" that "renders the bottom line of that decision unreviewable in federal court." *Save the Bay*, 556 F.2d at 1295. This is because "a judge's judgment on the significance in terms of water quality of the provisions of a permit is not likely to be sounder or fairer to the challenger, whether environmentalist or industrialist, than that of the EPA." *Id.*

Accordingly, the Band's allegations that EPA did not submit written comments on MPCA's NPDES permit, nor provide written notice that EPA did not object to the permit, lack merit. Am. Compl. ¶ 250. Similarly, allegations that EPA officials ignored concerns of staff go to EPA's internal decision making process and are not reviewable here. As described above, the CWA gives EPA broad discretion to object, or not, to a state-issued NPDES permit and is silent on commenting on such permits. Further, the CWA does not prescribe a process for internal review and as such, internal deliberations are not reviewable.

As for the Band's allegations that there were "unresolved issues" with the NPDES permit that were documented by EPA staff, this fact does not make EPA's decision making arbitrary or reviewable. Am. Compl. ¶ 252. The CWA does not require EPA to resolve all issues, but only to consider all relevant factors. Congress expressly gave EPA broad discretion to decline to object to a permit at all, even if the agency otherwise believes that the proposed permit violates some applicable guideline or requirement. See 33 U.S.C. § 1342(d)(3); *see also Schramm*, 631 F.2d at 860-61; *Chesapeake Bay Found., Inc. v. United States*, 445 F. Supp. 1349, 1353 n.6 (E.D. Va. 1978); *Save the Bay, Inc.*, 556 F.2d at 1294 (legislative history "makes very clear that Congress intended EPA to retain discretion to decline to veto a permit even after the agency found some violation of applicable guidelines") (emphasis added). Accordingly, the fact that some of EPA's concerns were not addressed to the Band's liking is legally insufficient to state a claim upon which relief can be granted.

Instead, what is pertinent here is that, as shown by the December 18 Memorandum cited by the Band, the "relevant factors [were] before the agency" and were carefully considered by EPA. The facts pled in the Amended Complaint demonstrate that MPCA and EPA engaged in significant dialogue regarding the draft permit – including multiple meetings and phone calls – following which MPCA made changes to the permit based on EPA's identified concerns. Am. Compl. ¶¶ 134, 137, 142, 167, 172-78.

As set forth in the December 18, 2018, Memorandum, EPA's decision not to object to the state NPDES permit was "[b]ased upon the changes made to provide additional protection at Outfall SD001 and the inclusion of additional operating limits which [EPA] believe[s] are arguably federally enforceable." Grillot Decl., Exhibit 1, Dec. 18 Memo at 4.[10] As a result of EPA's dialogue with MPCA, 20 of 29 issues identified were resolved, including two of the "more objectionable issues [identified] by EPA Region 5… in the draft permit" (operating limits and outfall protection). *Id. at* 2; Am. Compl. ¶ 178. Accordingly, the Band fails to allege facts that demonstrate EPA "failed to consider important aspects" of permit.

Further, beyond conclusory statements based on "information and belief," the Band makes no specific factual allegations that establish that EPA's actions here were tainted by reliance on "improper influences" or "improper factors." Such conclusory allegations are legally insufficient to state a claim upon which relief may be granted. *See*

[10] The memorandum at issue states that the relevant decision makers were provided with "[t]he review team's conclusion that there are legal arguments that can be made to support enforcement of the proposed permit." Grillot Decl., Exhibit 1, Dec. 18 Memo at 4.

Hughes v. City of Cedar Rapids, Iowa, 840 F.3d 987, 994, (8th Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

Instead, the facts alleged by the Band show that EPA properly considered the technical details of the state-issued NPDES permit and did not object to the permit based on changes MPCA made to the draft permit after receiving input from EPA. To the extent the Band alleges that EPA was improperly influenced, the Band fails to allege facts showing that either MPCA or PolyMet was in a position where it could force EPA to alter its actions or decision making, nor alleged facts showing that EPA actions were based on factors extraneous to the CWA. Absent facts demonstrating such pressure, and a nexus between that supposed pressure and EPA's actions, the Band's allegations of improper influence fail as a matter of law.

Accordingly, because the Band has failed to allege specific facts showing that EPA's action not to object for reasons other than the permit's consistency with relevant guidelines, its claim in its First Cause of Action, that EPA's review of the NPDES permit was arbitrary and capricious due to alleged improper influences should be dismissed.

B. The Band Fails to Allege Facts Permitting Judicial Review of EPA's Exercise of Discretion Under CWA Section 401(a)(2)

In the Second and Third Causes of Action, the Band argues that EPA failed to consider relevant factors or relied on improper factors in acting under CWA Section 401(a)(2), treated the Band dissimilarly from likewise affected states, and erred in not considering the Band's conclusions on water quality effects. Am. Compl. ¶¶ 259-63. However, judicial review of EPA's exercise of discretion requires more than conclusory

allegations. The Band fails to make sufficient factual allegations to establish that EPA either failed to consider relevant factors, or improperly considered unlawful factors when it did not provide notification to the Band under CWA Section 401(a)(2).

i. **The Band Fails to Allege Specific Facts Sufficient to Show that EPA's Actions Were Improper or Predetermined**

Instead of specific factual allegations, the Band instead makes a conclusory allegation that "on information and belief" EPA failed to make a "may affect" determination based on "improper influence and irrelevant considerations." Am. Compl. ¶ 261. The Band offers no specific factual support for this claim and such conclusory allegations are not sufficient to state a claim. *See Hughes*, 840 F.3d at 994.

Similarly, the Band claims without factual support that EPA "sought and effectuated a predetermined outcome for the Section 401(a)(2) process" that excluded the Band from participation. Am. Compl. ¶ 260. While the Band asserts that an EPA "career manager" told the Band it would not be receiving notification pursuant to CWA Section 401(a)(2) in November 2018, the Band's Amended Complaint also alleges that as of December 2018, internal EPA communications show that a CWA Section 401(a)(2) determination had not been developed, and that discussions on the issue continued within EPA through January 2019. Am. Compl. ¶¶ 209-17. The Band's claim of a pre-determined outcome not to issue a CWA Section 401(a)(2) notification is not supported by the Band's own factual allegations that demonstrate that EPA was engaged in extensive internal deliberations far past November 2018. Far from being

"predetermined" or based on improper factors or a failure to consider relevant factors, the Amended Complaint shows that EPA was engaged in reasoned decision-making.

ii. The Band Fails to Allege Specific Facts Sufficient to Show EPA Treated the Band Differently

The Band further alleges EPA treated it differently than similarly situated states undergoing the CWA Section 401(a)(2) process. Am. Compl. ¶ 259. To establish such a claim, the Band must show that EPA's decision had no rational basis or "involved a clear and prejudicial violation of applicable statutes or regulations." *Latecoere Int'l, Inc. v. U.S. Dept. of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994) (internal quotation marks and citation omitted); *Simmons v. Smith*, 888 F.3d 994, 998 (8th Cir. 2018). The Band fails to do so.

Instead, the Band alleges that in the past, with respect to other permits, EPA has given notice to downstream states and that not doing so in this instance indicates dissimilar treatment. Am. Compl. ¶¶ 194-97. The Band does not allege that EPA gave notice to downstream states in every instance in which EPA may have considered the downstream water quality impacts of a project and might have made a "may affect" determination, nor could it. On average, between 2017 and 2019, states authorized to issue NPDES permits issued an average of over 11,000 individual permits per year, [11] but EPA does not make a "may affect" determination in all, much less many of these cases.

[11] Data from the Integrated Compliance Information System NPDES database. These data can be accessed through EPA's Enforcement and Compliance History Online (ECHO) Water Facility Search Portal, *available at*: https://echo.epa.gov.

In the Amended Complaint, the Band alleges two instances where EPA made a "may affect" determination but the Band makes no allegation that these examples are either routine or analogous to the situation at issue here. Am. Compl. ¶ 195. Further, the only examples cited in the Band's Amended Complaint are those where a "may affect" determination was made but the Band offers no facts showing that these instances were factually similar to the permit here for the NorthMet mine project. *Id.* Accordingly, the Band has not shown that EPA was treating the Band dissimilarly or acting in bad faith. Rather, the Amended Complaint demonstrates, at best, only that EPA did not find the PolyMet situation analogous to the Band's cited instances when EPA had issued a "may effect" notice in accordance with its discretion under CWA Section 401(a)(2).

The Band further argues that dissimilar treatment began only after the appointment of Ms. Stepp as EPA's Regional Administrator and took the form of a letter on an entirely different permitting matter in which EPA stated it would "defer" to the Corps to respond to the Band's request for notification under CWA Section 401(a)(2). Am. Compl. ¶¶ 201-04. These facts, especially in light of the number or proposed permits for which EPA conducts oversight, do not plausibly demonstrate that EPA treated the Band dissimilarly from other states or acted in bad faith, and thus cannot overcome the highly deferential presumption of a lack of administrative bias. As such, the claim is legally insufficient and should be dismissed.

iii. EPA's Tribal Consultation Policy Is Not Enforceable Against EPA Under the APA

The Band further argues in its Second Cause of Action that EPA failed to follow its "own procedures on tribal consultation" and that EPA "worked in secret" to avoid both providing notification to the Band under CWA Section 401(a)(2) and in contravention of EPA's national and Region 5 tribal consultation policies. Am. Compl. ¶ 262. EPA's tribal consultation policies were issued pursuant to Executive Order No. 13,175, which "does not create a private right of action and specifically states that it was 'not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Corps of Eng'rs*, No. 3:11-CV-03026-RAL, 2016 WL 5478428, at *10 (D.S.D. Sept. 29, 2016), *aff'd*, 888 F.3d 906 (8th Cir. 2018).

EPA's tribal consultation policies establish procedures which are intended only to improve the internal management of EPA and explicitly state that they "are not intended to create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the EPA or any person." Grillot Decl., Exhibit 2 – EPA Region 5 Implementation Procedures ("Implementation Procedures") at i.[12]

In addition, neither the EPA-wide Policy on Consultation and Coordination with Indian Tribes ("Consultation Policy") nor the Region 5 Implementation Procedures

[12] Grillot Decl., Exhibits 2 and 3, containing EPA's Tribal Consultation policies, may be considered on this Motion for Partial Dismissal as they have been incorporated into the Amended Complaint by reference. *See Dittmer Props. LP*, 708 F.3d at 1021.

mandate that any particular action will be the subject of consultation. Grillot Decl., Exhibit 3 – Consultation Policy; Grillot Decl., Exhibit 2, Implementation Procedures. Rather, the Consultation Policy is meant to provide a "general framework from which to begin the determination of whether any particular action or decision is appropriate for consultation." Consultation Policy at 5. Further, the Consultation Policy provides that a final decision on consultation is normally made in conjunction with a consideration of the specific facts of an agency activity, including timing, complexity of the activity, and resource constraints, among other factors. *Id*.

Accordingly, because EPA's tribal Consultation Policy does not create a right enforceable by law, and EPA's policy does not mandate that any particular action will be the subject of consultation, the Band's argument that EPA violated the APA must fail.

iv. The Band's Own "May Affect" Determination Does Not Affect EPA Discretion

Finally, the Band asserts that it has made its own "may affect" determination, claiming that because it has determined its water quality may be affected, EPA was required to issue notice to the Band, and any contrary finding by EPA is arbitrary and capricious as a matter of law. Am. Compl. ¶ 263 (emphasis added). This argument has no basis in law. Under the statute, EPA's "may affect" determination is entirely under EPA's authority and is entirely discretionary. That the Band made its own "determination" does not alter the fact that any EPA "determination" is entirely at the agency's discretion, and the Band's determination does not compel EPA to act, much less compel any particular outcome to EPA's CWA Section 401(a)(2) process. 33 U.S.C. §

1341(a)(2); 40 C.F.R. § 233.50. Under the CWA, the Band's own opinion on the potential water quality impacts of the NorthMet mine project may be considered by EPA, but does not change the discretionary nature of EPA's Section 401(a)(2) decision making process.

Accordingly, the Band's Amended Complaint provides no factual basis on which to conclude that EPA considered irrelevant or inappropriate factors, or treated the Band differently from similarly situated states, nor is it clear that such matters are actionable in any event. The Band also lacks the statutory basis to assert that its independent conclusion that the PolyMet mine will impact its water quality is information EPA is required to endorse or consider pursuant to CWA Section 401(a)(2). Accordingly, the Band's Second and Third Causes of Action also fail, and the Court should dismiss them.

III. Neither EPA Nor the Corps Were Required to Provide Prompt Notice to the Band under the APA

Finally, in the Fourth Cause of Action, the Band claims that both EPA and Corps violated 5 U.S.C. § 555(e) by not responding to the Band's requests for "notice and hearing pursuant to Section 401(a)(2) of the CWA." Am. Compl. ¶¶ 270-74. This inaction, the Band claims, is an agency action "unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(a)(1), and thus an action reviewable under § 706(a)(2). *Id*. at 274.

The provision at issue, Section 555(e), states:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request <u>of an interested person</u> made in connection with any agency proceeding. 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.

5 U.S.C. § 555(e) (emphasis added). Section 555(e) applies only to "agency proceedings," limited by statute to the agency processes of rulemaking, adjudication, and licensing. 5 U.S.C. § 551(12). The Band's insistence, accordingly, that it was entitled to prompt notice of denial under Section 555(e) is misplaced because the Band is not an "interested person" in any "agency proceeding" as defined by the APA here.

The text of Section 401(a)(2) does not provide a state or tribe with either (1) the opportunity to provide public input to EPA or the Corps with respect to discretionary determination of potential downstream effects or (2) a requirement that EPA or the Corps consider or respond to a state's or tribe's input if received. Further, 401(a)(2) requires no action whatsoever from the Corps. The Band may not engraft such requirements onto the CWA's discretionary Section 401(a)(2) determination process by claiming a violation of 5 U.S.C. § 555(e). *Bollow v. Fed. Reserve Bank of S.F.*, 650 F.2d 1093, 1101-02 (9th Cir. 1981) (holding that where an agency process falls outside the scope of "proceedings" and is a discretionary action, Section 555(e) is not applicable).

Even if EPA's internal determination regarding adverse effects on downstream waters were an "agency proceeding" under the APA, the Band's claim fails because Section 555(e) is inapplicable where the underlying action here—a determination of possible adverse effects on the tribe's waters—is discretionary. It is settled law that discretionary agency actions are unreviewable under § 701(a)(1)-(2). *See, e.g.*, *Volpe*, 401 U.S. 402; *Heckler*, 470 U.S. 821; *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64

(2004). EPA's internal determination is an action committed to agency discretion by law, and thus notice of any EPA determination is not required.

Similarly, while the Band notes that the "Corps failed to respond to the Band's request for a hearing or [to] hold a hearing on the Band's objections to the 404 Permit and 401 Certification," (Am. Compl. ¶ 232) the Band fails to identify any provision requiring the Corps to hold such hearings. Accordingly there is no "agency proceeding" at issue here and 5 U.S.C. § 555(e) does not apply. And even if there were such a proceeding, the Corps' determination to hold a hearing (or not) is wholly discretionary. Accordingly, notice of any determination by the Corps is not required here.

As the Band offers no support for its assertion that otherwise discretionary, unreviewable actions by EPA and the Corps should be subject to 5 U.S.C. § 555(e), the Band's Fourth Cause of Action also fails.

CONCLUSION

For the foregoing reasons, the Court should dismiss the first, second, third, and fourth Causes of Action in the Complaint for failure to state a claim upon which relief can be granted and/or for lack of subject matter jurisdiction.

DATED: July 27, 2020

Respectfully submitted,

/s/ Benjamin J. Grillot
BENJAMIN J. GRILLOT
(D.C. Bar 982114)
United States Department of Justice
Environment & Natural Resources
Environmental Defense Section
P.O. Box 7611

Ben Franklin Station
Washington, DC 20044-7611
Phone: 202-305-0303
Email: benjamin.grillot@usdoj.gov

/s/ Shaun M. Pettigrew
SHAUN M. PETTIGREW
Attorney ID Number: 390530
United States Department of Justice
Environment & Natural Resources
Natural Resources Section
7600 Sand Point Way, NE
Seattle, WA 98115
Phone: 206-526-6881
Email: shaun.pettigrew@usdoj.gov

ERICA H. MacDONALD
United States Attorney
DAVID W. FULLER
Assistant U.S. Attorney
Attorney ID Number: 390922
600 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
Phone: 612-664-5600
Email: david.fuller@usdoj.gov

Attorneys for Federal Defendants