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, and POLYMET MINING, INC., Defendant-Intervenor.	)	Case No. 19-cv-2489 (PJS/LIB)

PLAINTIFF FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA'S CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiff, the Fond du Lac Band of Lake Superior Chippewa (the "Band"), hereby responds in opposition to the Federal Defendants' and PolyMet's (collectively "Defendants") motions to dismiss (ECF Nos. 56, 61) the Band's First, Second, Third, and Fourth Causes of Action of the Band's First Amended Complaint, ECF No. 51 ("FAC"). This Court should deny the motions for the reasons set forth below.

INTRODUCTION

Judicial review under the Administrative Procedure Act ("APA") protects against arbitrary and unlawful agency action, including arbitrary agency decisions to not take action. Courts accordingly apply a strong presumption in favor of judicial review that may only be overcome in those "rare" instances that a statute is drawn in such broad terms that there is "no law to apply." Defendants incorrectly assert that this is one such "rare" instance and seek to dismiss the Band's claims against EPA on that basis. Federal Defendants further seek to avoid judicial review by wrongly asserting that the Band must prove its allegations at the pleading stage. Defendants have failed to meet their burden and their motions must fail.

BACKGROUND

The Band is a federally recognized Indian tribe that occupies the Fond du Lac Reservation in northeastern Minnesota downstream of the NorthMet Mining Project, a proposed open-pit copper-nickel-platinum mine that is the first of its kind in northern Minnesota ("Mining Project"). FAC ¶ 1. To protect and restore the Reservation's waters, the Band obtained Treatment as a State status in 1996 under the Clean Water Act ("CWA"). FAC ¶¶ 4, 17. The Band accordingly is a "State" for purposes of certain rights in the CWA,

including adopting water quality standards ("WQS") and exercising authority under CWA Section 401. 33 U.S.C. § 1377(e) (citing 33 U.S.C. §§ 1313, 1341).

The Band has federally-approved WQS, including a numeric standard for mercury of 0.77 ng/L that applies to the St. Louis River within the Reservation. FAC ¶¶ 82, 85. The Band's water quality program has confirmed that Reservation lakes and streams are attaining the Band's WQS, with the exception of mercury. That is particularly concerning because mercury accumulates in fish and the Band's members rely on fish for subsistence and cultural practices. FAC ¶ 4. The St. Louis River is the most significant and utilized fishery on the Reservation. FAC ¶ 82. Since 2005, the St. Louis River has consistently exceeded the Band's WQS for mercury. *Id.* The Band has thus raised serious concerns regarding the Mining Project because it proposes to discharge significant amounts of mercury into tributaries of the St. Louis River during construction and operations that will affect the Band's water quality.

PolyMet obtained all permits necessary to begin construction of the Mining Project, despite many of PolyMet's mining and reclamation plans being unfinished or tentative. FAC ¶ 6. The Minnesota Court of Appeals has since vacated or stayed four of those permits, including a stay of a permit issued by the Minnesota Pollution Control Agency ("MPCA") under the CWA's National Pollutant Discharge Elimination System ("NPDES Permit").[1] This case concerns EPA's actions regarding the NPDES Permit and a permit

[1] *See* FAC ¶ 185; *In re Air Emissions Permit No. 13700345-101 for PolyMet Mining, Inc.*, 943 N.W.2d 399 (Minn. Ct. App. 2020); *In re NorthMet Project Permit to Mine Application Dated Dec. 2017*, 940 N.W.2d 216 (Minn. Ct. App. 2020).

issued by the U.S. Army Corps of Engineers ("Corps") to PolyMet to discharge dredged and fill material into navigable waters under Section 404 of the CWA, 33 U.S.C. § 1344 ("404 Permit").

MPCA issued the NPDES Permit under EPA's oversight. *See* FAC ¶ 44. EPA and MPCA have a Memorandum of Agreement ("MOA") to govern EPA's review of MPCA's NPDES permits. FAC ¶ 45. EPA's standard practice is also to select NPDES permits for review before the permit is issued, and among other things, provide written comments on the draft permit that MPCA puts out for public comment. FAC ¶¶ 130, 132, 179. EPA has the authority to object to issuance of the proposed permit "as being outside the guidelines and requirements" of the CWA. 33 U.S.C. § 1342(d)(2)(B). Even if EPA does not formally object to a proposed permit, EPA's written comments provide important analysis and expertise that aid affected parties and the courts in any judicial review of the permit. *See* FAC ¶¶ 179, 182, 190, 191. 250-253. EPA's written comments also trigger MPCA's obligation to respond to them. 40 C.F.R. § 124.17(a)(2); *see also id.* § 123.25(a)(31) (applying § 124.17(a) to State NPDES programs).

The 404 Permit is subject to the requirements of Section 401 of the CWA, 33 U.S.C. § 1341. Section 401 requires PolyMet to obtain a certification from Minnesota that the Mining Project's discharges will comply with Minnesota's WQS ("401 Certification"). *Id.* § 1341(a)(1). MPCA issued Minnesota's 401 Certification to PolyMet on December 20, 2018. FAC ¶ 211. This triggers Section 401(a)(2) in which EPA's Administrator determines whether the Mining Project's discharges "may affect" another State's WQS, such as the Band's (an "affected State"). 33 U.S.C. § 1341(a)(2). The Administrator

"shall" notify an affected State if he determines that the Mining Project's discharges "may affect" that State's WQS. *Id.* Upon notification, the affected State has the right to object to the permit and request a hearing on its objection. *Id.* The purpose of the notice requirement is to provide the affected State an opportunity to ensure discharges from the Mining Project comply with its WQS.

STANDARDS OF REVIEW

The APA creates a "strong presumption" for judicial review of agency action. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (citation omitted). There is a "very narrow exception" to judicial review under 5 U.S.C. § 701(a)(2) when an action is committed to agency discretion, which exists only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (citation omitted), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). A party seeking to invoke this exception "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review . . . ." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975), *overruled in part on other grounds by Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley*, 467 U.S. 526 (1984). Even if an action is committed to agency discretion by law, collateral or separable issues *are* reviewable. *See, e.g.*, *Story v. Marsh*, 732 F.2d 1375, 1381 (8th Cir. 1984).

In deciding a motion to dismiss raising a facial attack on subject matter jurisdiction "the court restricts itself to the face of the pleadings, and the non-moving party receives

the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Davis v. Anthony, Inc.*, 886 F.3d 674, 679 (8th Cir. 2018).

To properly state a claim, a plaintiff must make only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original) (citation omitted). In deciding a Rule 12(b)(6) motion to dismiss, the court must "take all of the factual allegations in the complaint as true," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and view them in the light most favorable to the plaintiff, *Barton v. Taber,* 820 F.3d 958, 963 (8th Cir. 2016). Courts do not require "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Varga v. U.S. Bank Nat'l Ass'n*, 764 F.3d 833, 838-39 (8th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678). This only requires a complaint to "contain factual allegations sufficient 'to raise a right to relief above the speculative level.'" *Parkhurst v. Tabor*, 569 F.3d 861, 865 (8th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). Lastly, "the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009).

ARGUMENT

I. This Court Has Jurisdiction to Review EPA's Unlawful and Arbitrary Review of the NPDES Permit.

In its First Cause of Action, the Band challenges EPA's review of the NPDES Permit because EPA departed from standard procedures, prepared but then withheld from public review its written comments describing deficiencies in the NPDES Permit, and took actions and made decisions based on improper influence and irrelevant factors. FAC ¶¶ 250-52. Defendants ignore these allegations and seek dismissal here claiming that EPA's review is unreviewable as committed to agency discretion by law under 5 U.S.C. § 701(a)(2). U.S. Mem. at 11-12, ECF No. 63; PolyMet Mem. at 4-5, ECF No. 58. Several federal courts have held that EPA's failure to object or veto a state-issued NPDES permit is largely—but not wholly—unreviewable. *See* U.S. Mem. at 11-12 (citing cases and noting that EPA's failure to object is only "largely immune" from judicial review); PolyMet Mem. at 5-6 (discussing cases). But here the Band seeks limited review of EPA's unlawful and arbitrary departure from its regular review procedures for the NPDES Permit.

Courts have found that a limited review of issues is available in appropriate circumstances even if the agency's ultimate decision is otherwise committed to agency discretion. Indeed, that distinction was made by the court in a case relied upon by Federal Defendants. *See* U.S. Mem at 12-13 (citing *Save the Bay, Inc. v. Administrator of EPA,* 556 F.2d 1282 (5th Cir. 1977)). In *Save the Bay,* although the Fifth Circuit found that, "the Administrator's conclusion not to veto an individual permit is itself immune to judicial review . . . [it also recognized] *separable issues appropriate for judicial determination are to be reviewed*, though other aspects of the agency action may be committed to the agency's expertise and discretion." *Id*. at 1295 (emphasis added). *Save the Bay* concluded limited review is available when "EPA undertakes consideration of the merits of a proposed permit

and decides on the basis of that consideration not to veto it." *Id.* at 1293. That limited review is available, for example, when EPA allegedly failed to consider a violation of the guidelines and requirements of the CWA or where EPA based its decision on factors "other than a specific permit's consistency with the guidelines or the insignificance of any departures." *Id.* at 1296.

Save the Bay does not reflect anything unique to EPA or the CWA. The Eighth Circuit has likewise held that judicial review is available under the APA for "the procedures followed by the [agency], or other collateral matters," including claims that "the agency's decision was occasioned by impermissible influences." *Story*, 732 F.2d at 1381.

This approach—reading "committed to agency discretion" very narrowly—is compelled by the Supreme Court's decisions on that issue. As the Supreme Court recently explained:

> In order to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review, we have read the § 701(a)(2) exception for action committed to agency discretion "quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'"

Dep't of Commerce v. New York, 139 S.Ct. 2551, 2568 (2019) (citations omitted). And in *Weyerhaeuser*, the Supreme Court highlighted "the 'tension' between the prohibition of judicial review for actions 'committed to agency discretion' and the command in § 706(2)(A) that courts set aside any agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 139 S.Ct. at 370. The Court

explained that "[a] court could never determine that an agency abused its discretion if all matters committed to agency discretion were unreviewable." *Id*.

The Band's First Cause of Action falls into this category of limited judicial review because the Band claims that impermissible influences tainted EPA's review of the NPDES Permit. FAC ¶ 250. In particular, MPCA improperly influenced EPA into not following its standard practices for reviewing state-issued NPDES permits, *see infra* Section V.A, and EPA political appointees, including then-Regional Administrator Cathy Stepp and Defendant Thiede, improperly influenced the review process and considered improper factors to depart from standard practices. *Id*.

This unlawful process led EPA to withhold from public and judicial review, prepared written comments which identified substantive deficiencies in the NPDES permit, *see* FAC Ex. A, as well as EPA's final written explanation for why it did not object to MPCA's issuance of the NPDES Permit, FAC ¶ 179. If EPA had adhered to its regular practices, EPA's written comments and final justification to MPCA would have appeared in the administrative record before the Minnesota courts and MPCA would have been required by federal law to respond to the comments in writing, 40 C.F.R. § 124.17(a)(2).

Instead, MPCA now justifies its failure to follow 40 C.F.R. § 124.17(a)(2) by relying on the fruits of this unlawful and arbitrary process—arguing before Minnesota courts that it was not required to respond to EPA's comments because EPA did not submit

them during the public comment period.[2] This has negative legal consequences for the Band because MPCA seeks to use EPA's silence as justification for an NPDES Permit the Band alleges contains violations of the CWA. *See* FAC ¶¶ 163, 181, 190-91. EPA's unlawful and arbitrary review is beyond the reach of the Minnesota courts but can be reviewed and remedied here. *See* FAC ¶ 188. The Band has provided a basis for limited judicial review and as shown in Section V.A *infra*, has sufficiently pled facts to support these claims. While EPA has some discretion on whether to veto an NDPES permit, it does not have discretion to reach such a conclusion by a process that violates the law including its own procedures.[3] For these reasons, this Court should deny Defendants' motions to dismiss the Band's First Cause of Action.

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[2] *See* Post-Hearing Br. for MPCA, *In re Denial of Contested Case Hearing Requests & Issuance of NPDES Permit No. MN0071013*, No. 62-CV-19-4626, at 38 (Ramsey Cnty. Apr. 22, 2020) (stating that MPCA was not required to respond under 40 C.F.R. § 124.17 because "EPA chose not to submit written comments during the public comment period"), http://www.mncourts.gov/getattachment/Media/62-CV-19-4626/Briefs2.pdf.aspx?lang=en-US. For purposes of the motions, this Court may consider MPCA's position in its brief before the Ramsey County District Court as a matter of public record. *See, e.g.*, *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999).

[3] In an argument not made by Federal Defendants, PolyMet cites *Dalton v. Specter*, 511 U.S. 462 (1994) to argue that EPA's NPDES review process is not final agency action. PolyMet Mem. at 6. *Dalton* recognizes the question for determining finality is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." 511 U.S. at 470. PolyMet fails to identify how EPA has not completed its decision-making process. The NPDES Permit has issued. EPA's decision-making process culminated when it provided "verbal communication" to MPCA at the end of its permit review that it would not object. FAC ¶ 179. Because the Band's claim is that EPA unlawfully departed from its regular process in making its decision on the NPDES Permit, the record of the process is reviewable as it is directly relevant to whether EPA's final decision resulted from an unlawful process.

II. EPA's Actions Under Section 401(a)(2) Are Subject to Judicial Review.

Defendants contend that this Court lacks jurisdiction to review the Band's Second Cause of Action because EPA's actions under Section 401(a)(2) are committed to agency discretion and unreviewable under the APA. U.S. Mem. at 12, 14; PolyMet Mem. at 7.[4] But Defendants fail to overcome the strong presumption in favor of judicial review. The APA creates a "strong," *Weyerhauser.*, 139 S. Ct. at 370, and "basic presumption of judicial review." *Dep't of Commerce,* 139 S. Ct. at 2567. Defendants bear a "heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review" of EPA's actions. *Dunlop*, 421 U.S. at 567. Defendants fail to carry their "heavy burden" here.

Actions committed to agency discretion under 5 U.S.C. § 701(a)(2) "is a very narrow exception" that only applies "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Overton Park*, 401 U.S. at 410 (internal quotation marks and citation omitted). There is no law to apply "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

In making that determination, a court is to consider "both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." *Tamenut v. Mukasey*, 521 F.3d 1000,

[4] Defendants do not claim the CWA expressly precludes review for purposes of 5 U.S.C. § 701(a)(1) and no such statutory provision exists.

1003-04 (8th Cir. 2008) (citation omitted). The court may also consider the agency's regulations implementing the statute and agency guidance. *See, e.g.*, *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027-28 (8th Cir. 2003) (law to apply in the form of an Army Corps manual); *see also Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016) (courts consider "the statutory text, the agency's regulations, and informal agency guidance that govern the agency's challenged action"). An agency action is committed to agency discretion by law only if there is an "absence of *any* statutory factors to guide the agency's decision-making process, in combination with the open-ended nature of the inquiry." *Tamenut*, 521 F.3d at 1004 (emphasis added).

Reviewable standards may be "broad ones." *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 975 (8th Cir. 2011). Because the exception is "quite narrow," a court should not apply it where "statutes provide even minimal guidance to limit agency discretion." *Ubbelohde*, 330 F.3d at 1027.

A. The Administrator does not have a "choice" to determine "whether discharges 'may affect' a downstream state."

Federal Defendants appear to assert that the Administrator has a "choice" to determine "whether discharges 'may affect' a downstream state." U.S. Mem. at 14. In other words, Federal Defendants appear to claim that the Administrator has a "choice" to do absolutely nothing when he receives the application and 401 Certification from the permitting agency. This dubious contention is inconsistent with the text of the statute, its purposes, and EPA's past litigation position on Section 401(a)(2) that EPA "*must* determine whether the discharge 'may affect . . . the quality of the waters of any other State

. . . ." Br. for Resp't EPA, *Hopkins v. Browner*, No. 97-1678, 1997 WL 33575133, at *4 (4th Cir. Sept. 18, 1997) (alterations in original) (emphasis added). Likewise, EPA's 401 Guidance provides that EPA *either* "finds no potential effects on neighboring states and tribes" or finds potential effects and "notifies the states/tribes that may be effected [sic]." FAC ¶ 204. Federal Defendants do not acknowledge this prior interpretation, let alone point to a reasoned explanation for EPA's departure from past practice in this case. *See, e.g.*, *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 927 (D.C. Cir. 2017) (agency's "failure even to acknowledge its past practice and formal policies . . . let alone to explain its reversal . . . was arbitrary and capricious").

Section 401(a)(2)'s structure and purpose confirm that the Administrator does not have a "choice" whether to make a determination. In relevant part, Section 401(a)(2) provides:

> Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. 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, the licensing or permitting agency, and the applicant.

33 U.S.C. § 1341(a)(2). Section 401(a)(2) uses compulsory language in providing that the Administrator "*shall* so notify such other State" if he determines that a discharge may affect that other State's WQS. *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (Congress's use of "shall" "impose[s] discretionless obligations"). The statute does not just authorize the Administrator to issue notice "[w]henever" he makes a positive "may affect" determination; it requires such action. 33 U.S.C. § 1341(a)(2). If the affected State then

makes a determination that a discharge "will affect" its WQS "so as to violate any water quality requirements in such State" and "requests a public hearing," then the permitting agency "shall hold such a hearing." *Id.*

The use of "shall" throughout Section 401(a)(2) shows that the Administrator must determine whether a discharge "may affect" another State's WQS. If the Administrator had a "choice" whether to perform his role in this otherwise mandatory process, "the 'shall' that appears to require step two becomes largely nugatory." *Ctr. for Biological Diversity v. EPA*, 794 F. Supp. 2d 151, 160 (D.D.C. 2011); *see also Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 899 (2d Cir. 1989) (statute's use of discretionary and mandatory language implies that the Administrator is "to make *some* formal decision"); *Key Medical Supply, Inc. v. Burwell*, 764 F.3d 955, 958 (8th Cir. 2014) (statute's use of "shall" identifies "mandatory tasks").

Federal Defendants' contention is wholly inconsistent with the mandatory language throughout Section 401(a)(2) and its purpose. It is also inconsistent with Congress's overall policy in the CWA "to recognize, preserve, and protect the primary responsibilities and rights of States . . . to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b). It would leave to the Administrator's whim Congress's carefully created mechanism for formal consultation with an affected State during a federal permitting process. Congress did not leave it to the Administrator's whim to decide if and when to engage in the statutory procedure.

Defendants provide no persuasive reason for such an absurd result. They simply emphasize the statutory phrase "as determined by the Administrator"—as if every

discretionary action is immune from judicial review. U.S. Mem. at 14; PolyMet Mem. at 7-8. But courts have rejected such arguments, and this Court should too. *See, e.g.*, *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) ("[t]he mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely nonreviewable"); *Perez Perez v. Wolf*, 943 F.3d 853, 863 (9th Cir. 2019) ("[A]n agency's sole discretionary authority is not inconsistent with judicial review of the agency's exercise of that discretion."); *see also Save the Bay*, 556 F.2d at 1293-94 (discretionary authority "does not alone commit that action to the agency's unreviewable discretion," and "the use of permissive language is of little persuasive effect itself").

Federal Defendants further warn the Court not to become involved in undescribed "nuances" of EPA's process. U.S. Mem. at 15. These "nuances" are irrelevant to the extent they do not involve an evaluation of a discharge's potential effect on a State's WQS. And to the extent these "nuances" involve agency expertise, that bears on the level of deference accorded by the Court in its review, not to whether review is to be had at all.

It is true that EPA's mandatory obligation to send notice to an affected State depends on the Administrator's "determination" that a discharge "may affect" such other State's WQS. But that discretion does not give EPA "a roving license to ignore the statutory text." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). After EPA receives the application and 401 Certification from the permitting agency, the Administrator's "reasons for action or inaction must conform to the authorizing statute." *Id.* The Administrator cannot rely on non-statutory reasons for his failure to provide notice precisely because the statute provides factors to guide his discretion. Accordingly, the Administrator must base his failure to

provide notice on a determination that there is no potential for a discharge to affect another State's WQS. No such determination appears to have been made by EPA here.

Accordingly, the Court's review of EPA's actions under Section 401(a)(2) simply calls for a routine determination of whether or not the agency's decision was based on the relevant factors and procedures, which as discussed below provide manageable standards for judicial review.

B. Section 401(a)(2) provides reviewable standards.

Federal Defendants misunderstand judicial review of agency action under the APA when they contend there must be "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." U.S. Mem. at 15. That is not the standard for APA review. The court reviewing agency action under the APA does not "substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416. The court reviews whether the agency has considered the relevant factors and followed the required procedures. *See id.* at 412-15. Certainly, Section 401(a)(2) provides sufficient judicially cognizable standards for the Court to perform this review.

Section 401(a)(2) provides for the Administrator to determine whether a "discharge" resulting from a federally licensed or permitted activity "may affect . . . the quality of the waters of any other State." 33 U.S.C. § 1341(a)(2). The statutory language "refers simply to those federally approved water quality requirements of affected states that would be violated if the permit were not appropriately conditioned." *Oklahoma v. E.P.A.*, 908 F.2d 595, 610 (10th Cir. 1990), *rev'd on other grounds sub nom. Arkansas v.*

Oklahoma, 503 U.S. 91 (1992). States adopt WQS for their waters according to the CWA and implementing regulations. 33 U.S.C. §§ 1313, 1370; 40 C.F.R. § 131.10. A State's WQS establish protected uses, specific water quality criteria, and anti-degradation policies. *See* 40 C.F.R. §§ 131.10, 131.11, 131.12. State WQS are subject to EPA's approval and have the status of federal law upon approval. *See* 33 U.S.C. § 1313(a), (c); *Arkansas*, 503 U.S. at 110 (water quality standards "are part of the federal law of water pollution control").

Accordingly, a State's WQS are reviewable factors to judge the Administrator's decision not to provide notice to an affected State. Here, the Band's approved WQS provide reviewable standards, including the numeric criterion for mercury in the St. Louis River. *See* FAC ¶¶ 4, 82. Moreover, under Section 401(a)(2) the Administrator is to determine whether a discharge "may affect" another State's WQS. 33 U.S.C. § 1341(a)(2). This language plainly means that the Administrator must determine whether a discharge has possible effects on another State's WQS. American Heritage Dictionary (5th ed. 2020) ("may" means "to express possibility or probability"). The CWA defines a "discharge" as a "discharge of a pollutant," 33 U.S.C. § 1362(16), providing another reviewable standard for what "may affect" a State's WQS for purposes of Section 401(a)(2).

EPA's inquiry under Section 401(a)(2) is also not open-ended. Section 401(a)(2) limits the Administrator's determination to effects on another State's WQS from discharges related to a specific permit application and a 401 Certification. *See* 33 U.S.C. § 1341(a)(2). The statute directs the Administrator as to when he should initiate and complete the process for determining whether a project's discharges may affect another State's WQS. The process starts when the permitting agency receives a permittee's application and the State's

401 Certification. *Id.* At that point, the permitting agency "shall immediately notify the Administrator of such application and certification." *Id.* The Administrator then makes a determination "within thirty days of the date of notice of application for such Federal license or permit . . . ." *Id.* EPA's regulations also mandate that the Regional Administrator "shall review" the application and 401 Certification upon receipt from the permitting agency. 40 C.F.R. §§ 121.13, 121.11(a). The Administrator does not have the discretion to choose which applications the EPA reviews. EPA's regulations direct the Regional Administrator to review each one.[5]

For these reasons, this Court can review the Band's Second Cause of Action.

C. The nature of the Administrator's notice supports judicial review.

The notice requirements of Section 401(a)(2) serve important purposes such that the failure to issue notice is subject to judicial review. Section 401(a)(2) requires the Administrator to determine whether EPA must send notice to an affected State over possible effects to its water quality during the federal permit review process. EPA managers describe EPA's notice under Section 401(a)(2) as "consultation." FAC ¶ 199. Notice gives the affected State the right to participate in the permitting process through a procedure that exists only for States under the CWA. This provides critical procedural

[5] This framework distinguishes EPA's inquiry under Section 401(a)(2) from *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003), on which PolyMet relies. PolyMet Mem. at 9. The Clean Air Act ("CAA") provision at issue in *Whitman* did not have any "statutory timelines or procedures for the triggering of such a determination," which indicated that "this determination rests within the EPA's discretion." *Id.* at 331 n.8. Unlike that CAA provision, Section 401(a)(2) has explicit statutory timelines and procedures that limit EPA's discretion, as well as implementing regulations that do the same.

protections for States downstream of, or neighboring, a federally-permitted activity whose WQS may be affected by discharges from that activity and ensures compliance with the WQS of all affected States.

The Administrator does not determine the adequacy of the permit application or 401 Certification when notice is issued. Section 401(a)(2) assigns responsibility to the affected State, not to the Administrator, to determine if a discharge will violate the State's WQS. *See* 33 U.S.C. § 1341(a)(2) (upon notice, the affected State can determine "that such discharge *will* affect the quality of its waters *so as to violate* any water quality requirements in such State" (emphasis added)). The Administrator simply evaluates whether the discharges may affect another State's WQS such that the State must be formally consulted during the permitting process with respect to those effects. Courts review this type of agency action—which in this case is an agency's failure to initiate formal consultation with another government entity.

For example, under the Endangered Species Act ("ESA"), courts review a federal agency's "may affect" determination for listed species or designated critical habitat. *See, e.g.*, *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) ("We have previously explained that 'may affect' is a 'relatively low' threshold for triggering consultation."). The ESA regulations provide for a formal consultation process between a federal agency and the appropriate fish and wildlife agency if the federal agency determines that its action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). The Ninth Circuit has explained that the "threshold for formal consultation must be set sufficiently low" because the purpose is "to allow Federal agencies to satisfy their duty to

'insure' that their actions do not jeopardize listed species or adversely modify critical habitat." *Karuk*, 681 F.3d at 1027 (citation and internal quotation marks omitted). Similar principles animate the Administrator's notice to an affected State under Section 401(a)(2).

In short, Defendants have failed to carry their "heavy burden" to overcome the strong presumption in favor of judicial review of EPA's actions under Section 401(a)(2). Section 401(a)(2) provides a "meaningful standard" to guide EPA's discretion by directing the Administrator to determine whether discharges may affect another State's WQS. As such, this Court should find that it has jurisdiction over the Band's Second Cause of Action.

III. The Administrator's Failure to Provide Notice is Agency Action.

PolyMet incorrectly asserts that the Band's Second and Third Causes of Action should also be dismissed under Rule 12(b)(6) because the Band does not allege "a 'discrete agency action' that EPA was 'required to take.'" PolyMet Mem. at 10 (citing *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004)). This argument fails.

The Band's Second and Third Causes of Action do not seek to "compel agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1). The Band seeks to have the Court "hold unlawful and set aside agency action" under 5 U.S.C. § 706(2) for several reasons. *See* FAC ¶¶ 257-64. *Norton* is therefore inapplicable. In *Norton*, the Supreme Court held a claim under Section 706(1) to compel agency action "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is *required to take*." 542 U.S. at 64. *Norton* found the "unlawfully withheld" language in Section 706(1) incorporated a mandamus remedy which courts had applied prior to enactment of the APA. *Id.* at 63-64. Consistent with that prior remedy, the *Norton*

Court found that Section 706(1) permitted a court to compel an agency "to perform a ministerial or non-discretionary act." *Id.* at 64 (citation omitted).

Norton did not hold that a claim to set aside agency action under Section 706(2) needs to make the same showing as a claim under Section 706(1), as courts have recognized. *See, e.g.*, *All. To Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 10 (D.D.C. 2007) (claims under Section 706(2) are "unaffected" by *Norton*); *Norton Const. Co. v. U.S. Army Corps of Eng'rs*, No. 1:03-CV-02257, 2006 WL 3526789, at *6 (N.D. Ohio Dec. 6, 2006) (*Norton* "did not hold that APA actions cannot proceed under both 'unlawfully withheld' and 'final agency action' theories" (citation omitted)).

The Band seeks to set aside EPA's action, not compel EPA to undertake a mandatory duty. "Agency action" is defined to "include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." 5 U.S.C. § 551(13). The APA's definition of "agency action" also includes the "failure to act." *Id.* *Norton* held that an agency's "failure to act" means a "failure to take an *agency action*—that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13)." 545 U.S. at 62. Under Section 401(a)(2), the Administrator must issue notice to an affected State when he determines that discharges "may affect" another State's WQS. 33 U.S.C. § 1341(a)(2). As discussed above, that notice gives the affected

State the right to participate in the permitting process, including the right to request a hearing.[6]

This is particularly true where, as here, the Band requested notice and supported the request with expert analysis showing that its WQS will be affected. The Administrator's failure to provide notice has direct legal consequences on a State. First, the Administrator's failure to provide notice cuts off the State's ability to object and request a hearing, which denies the State its statutory right to participate in the federal permitting process.

Second, the Corps treats the Administrator's failure to issue notice within 30 days as action because the Corps will "assume EPA has made a negative determination with respect to section 401(a)(2)." 33 C.F.R. § 325.2(b)(1)(i). This has significant negative implications for an affected State under Section 404 permitting. In defending against the Band's claims on the 404 Permit in this case, the Corps will likely rely on the Administrator's failure to provide notice as justification for its deficient analysis with respect to the Band's WQS.[7] *See* FAC ¶ 235. Thus, the fact that the Corps attributes significance to EPA's failure to issue notice also supports judicial review.

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[6] Thus, the Administrator's notice, at a minimum, falls under the definition of "relief" or "order" or their equivalent. Relief is defined as either the "grant of . . . authority, . . . privilege, or remedy" or the "recognition of a . . . right, . . . [or] privilege." *Id.* § 551(11)(A), (B). Order is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule-making but including licensing." *Id*. § 551(6). The Administrator's notice is also part of the Corps' issuance of the 404 Permit, which is an agency action. *Id*. § 551(9) ("license" includes "the whole or part of an agency permit").

[7] To be sure, the Corps' regulations recite that if EPA does not issue notice, the Corps assumes that EPA concluded that the project would not affect the downstream waters. 33 C.F.R. § 325.2(b)(1)(i). This illustrates the harm done to the Band because the regulation

For these reasons, this Court should find that the Band's Second and Third Causes of Action include final agency action subject to judicial review.

IV. Even if EPA's Ultimate "May Affect" Determination Under Section 401(a)(2) is Committed to Agency Discretion, this Court May Review Collateral Issues.

In its Third Cause of Action, the Band asserts a claim for limited review of EPA's action in connection with its Section 401(a)(2) review process. FAC ¶ 268. Even if EPA's ultimate "may affect" decision under Section 401(a)(2) is committed to agency discretion, which it is not, this Court may still conduct a limited review. As with limited review of the NPDES Permit, this Court may review collateral issues regarding EPA's failure to make any "may affect" determination and its failure to issue notice under Section 401(a)(2). *See Story*, 732 F.2d at 1381. This includes review of the Band's Third Cause of Action, which alleges that EPA's review process under Section 401(a)(2) and 40 C.F.R. § 121.13 was based on improper influence and irrelevant factors. FAC ¶¶ 268-69. And as discussed in Section V.B, *infra*, the Band has properly alleged facts in support of its claim that EPA arbitrary and capricious effectuated a predetermined outcome by relying on improper influences and other irrelevant facts during its review process. As such, this Court has jurisdiction over the Band's Third Cause of Action.

V. The Band Has Stated Claims Against EPA.

A. The Band alleges sufficient factual allegations to state a claim that EPA's review of the NPDES Permit was arbitrary and capricious and an abuse of discretion.

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presumes EPA carried out its Section 401(a)(2) responsibility. The Corps' position does not address EPA's statutory duties.

In challenging the Band's First Cause of Action, Federal Defendants seek to hold the Band to an incorrect standard at the pleading stage—to show "clear evidence" that the EPA took actions based on improper or unlawful factors or influences. U.S. Mem. at 16-18. At the pleading stage, the Band is not required to *prove* improper behavior, but only to allege sufficient facts to state a claim for relief that is plausible on its face. *Twombly,* 550 U.S. at 570. This requires only that the Band's factual allegations be sufficient to raise its right to relief above the speculative level. *Parkhurst,* 569 F.3d at 865. And here, the Band alleges sufficient facts that EPA's review of the NPDES Permit was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because EPA did not engage in a fair and reasoned decision-making process free from improper influences and consideration of irrelevant factors. FAC ¶ 250.

To support its claim, the Band pled factual allegations detailing the standard practices followed when EPA selects a state NPDES permit for review, but which were departed from here for the PolyMet NPDES Permit. FAC ¶¶ 44-46, 130-79. It is well established that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Sierra Club N. Star Chapter v. LaHood*, 693 F. Supp. 2d 958, 973-74 (D. Minn. 2010). "This requirement is not limited to formal rules or official policies and applies equally to practices implied from agency conduct." *Saget v. Trump*, 375 F. Supp. 3d 280, 355 (E.D.N.Y. 2019). And there is no presumption of regularity when an agency "deviates from its established procedures." *Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854, 859 (10th Cir. 1994).

The Band also alleges both external and internal political actors improperly influenced EPA's actions with respect to review of the NPDES Permit. In particular, Defendant Thiede and Ms. Stepp prevented Region 5 from sending its written comment letter due to improper influence from political appointees at MPCA and other irrelevant considerations. FAC ¶¶ 151, 154-57, 162. For example, Shannon Lotthammer, then a political appointee at MPCA, plainly stated to Defendant Thiede on March 13, 2018 that "[w]e have asked that EPA Region 5 not send a written comment letter during the public comment period." FAC ¶ 155. The Band alleges this was contrary to Region 5's established practice and that career managers explained this to Defendant Thiede. FAC ¶ 156. MPCA continued to pressure EPA not to send comments and went to EPA's political appointees who reversed course and eventually acceded to MPCA's requests. FAC ¶¶ 152-57, 161-62. These facts are sufficient to state a claim for improper influence. *See Connecticut v. U.S. Dep't of Interior*, 363 F. Supp. 3d 45, 64-65 (D.D.C. 2019) (concluding plaintiffs' claim was sufficient to survive motion to dismiss where plaintiff made allegations that federal agency was receiving outside political pressure that resulted in the agency "suddenly reversing course").[8]

[8] Federal Defendants' position that EPA's internal decision-making process is not reviewable based on the facts of this case is premature. U.S. Mem. at 19. Courts allow extra-record discovery, including deliberative process materials, if the plaintiff shows the administrative record—which has not yet been produced here—does not reflect the complete information before the agency at the time of its decision. *See Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487-88 (D.C. Cir. 2011) (citing *Overton Park,* 401 U.S. at 420).

The Band also alleges that Ms. Lotthammer's justification for her improper request was that "it was inappropriate for EPA to comment with everyone else" and to do so would violate the Memorandum of Agreement between EPA and MPCA. FAC ¶ 151. The Band alleges this was not only incorrect but Ms. Stepp and Defendant Thiede improperly relied on this representation to depart from EPA's regular practice. FAC ¶¶ 151, 161-62 Indeed, EPA regularly submits written comments during public comment periods "to put EPA's comments in the record, and require that MPCA respond to them," in accordance with 40 C.F.R. § 124.17(a)(2). FAC ¶¶ 131-32, 143-44. Thus, the Band's allegations, when taken together, reasonably infer that EPA relied on MPCA's improper request in departing from its regular practices.

The Band further alleges improper influence within EPA by Defendant Thiede and Ms. Stepp. FAC ¶¶ 168, 177, 182. Political appointees may improperly influence their agency's action by exerting their own bias and transmitting pressure down the chain of command. *See, e.g.*, *Latecoere Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342, 1365 (11th Cir. 1994) (agency decisionmaker's "actions sent a message that was heard—and responded to" during the agency process); *Tummino v. Torti*, 603 F. Supp. 2d 519, 546 (E.D.N.Y. 2009) (finding relevant evidence that FDA's "Commissioner transmitted this pressure down the chain of command at the FDA"). The Band alleges that Defendant Thiede and Ms. Stepp made it clear to Region 5 at least two months before the NPDES Permit issued that EPA was not going to object to the NPDES Permit "regardless of any scientific, technical, or legal concerns." FAC ¶ 168. Ms. Stepp also allegedly "continued to direct Region 5 not to send written comments to MPCA up to issuance of the NPDES

Permit." FAC ¶ 182. These alleged actions permitted MPCA to hide EPA's comments and concerns from the public and Minnesota courts that will review the NPDES Permit. *See* FAC ¶ 185.

Contrary to Federal Defendants' contention, the Band does not need to show that MPCA or PolyMet "force[d] EPA to alter its actions or decision making." U.S. Mem. at 21. "An agency's consideration of some relevant factors does not 'immunize' the decision; it would still 'be invalid if based in whole or in part on the pressures emanating from [political actors].'" *Tummino*, 603 F. Supp. 2d at 544 (alteration in original) (quoting *D.C. Fed'n of Civic Assocs. v. Volpe*, 459 F.2d 1231, 1246, 1248 (D.C. Cir. 1971)). The Band has sufficiently pled that federal and state political appointees improperly influenced EPA's review of the NPDES Permit.

The Band's allegations are not speculative given the manner in which EPA departed from prior practice in its review of the NPDES Permit. These alleged departures show that EPA did not act in good faith. *Id.* at 547 (plaintiff may show agency's bad faith "by the manner in which the [agency] departed from its normal procedures . . . ."). The court in *Tummino* found the Food and Drug Administration's ("FDA") "most glaring procedural departure" was its decision to act against an advisory committee's recommendation. *Id.* *Tummino* found another significant departure in that the FDA made its decision prior to the completion of scientific reviews. *Id.* That premature decision supported plaintiffs' theory that FDA's upper management was under external pressure from political actors. *Id.*

Here, too, the Band alleges that Defendant Thiede acted against the recommendation of Region 5's technical and legal staff and managers to send written comments to MPCA

during the public comment period. *See* FAC ¶¶ 152, 161. As pled, Defendant Thiede instead acted on MPCA's misrepresentations and complaints. FAC ¶¶ 161-62. As noted above, the Band also alleges that EPA reached its decision not to object *before* the Region 5 staff and managers met with MPCA on September 25-26, 2018 and started their review of both the "pre-proposed" *and* proposed permits. FAC ¶ 168.

The Band has alleged additional facts that support a lack of good faith. The Band alleges that Defendant Wheeler *testified before Congress* on April 2, 2019 that Region 5 "resolved all the issues" related to the NPDES Permit. FAC ¶ 174. Defendant Wheeler's representation to Congress is belied by the December 18 Memorandum, which identified numerous unresolved issues and was not public at the time of his testimony. FAC ¶¶ 172-73. In fact, the December 18 Memorandum was never intended to be public; it is a memorandum to file that was leaked by a confidential source roughly three months after Defendant Wheeler's testimony. FAC ¶ 186. Defendant Wheeler's alleged misleading statement to Congress is reasonably indicative of an attempt to cover-up an ulterior purpose. *See, e.g.*, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 661-62 (S.D.N.Y. 2019) (inferring pretext from agency officials' misleading statements).

The Band alleges that the December 18 Memorandum documents Defendant Thiede's attempt to justify a predetermined decision that EPA would not object to the NPDES Permit. FAC ¶ 177. The December 18 Memorandum states that Defendant Thiede asked the Region 5 review team "to determine whether operating limits could be federally enforceable provisions of the permit." FAC ¶ 176. Region 5's position during the permitting process was that MPCA should include water quality-based effluent limits for

relevant pollutants to ensure federal enforceability of the NPDES Permit. FAC Ex. A, at 5-7. Yet the December 18 Memorandum halfheartedly concludes that the NPDES Permit's "operating limits" are only "arguably" enforceable. U.S. Mem. Ex. 1, at 5. This weak justification could also be interpreted to mean that the NPDES Permit's "operating limits" are "arguably" *not* federally enforceable. This is but another factor for the Court to infer that Defendant Thiede and Ms. Stepp improperly influenced EPA's review of the NPDES Permit and relied on irrelevant factors. *See ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1529 (D.C. Cir. 1994) ("If the decision maker were suddenly to reverse course or reach a weakly-supported determination . . . we might infer that pressure did influence the final decision.").

Federal Defendants attempt to avoid judicial review by criticizing the Band for making some allegations "on information and belief." U.S. Mem. at 20. A plaintiff may plead facts "alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (citations and internal quotation marks omitted). The Band is not in possession of all the relevant information. This is not for lack of effort but rather is largely attributable to EPA's strategy of asserting deliberative process privilege over broad categories of information and documents within its possession. *See* FAC ¶¶ 144 n.5, 193 n.6. The Band has relied in good faith on the documents it has been able to obtain as well as second-hand information to make some allegations "on information and belief." *See*

FAC ¶¶ 161-62, 166, 168, 177, 179. The Band has also pled sufficient facts for the Court to draw the reasonable inference that EPA engaged in the conduct complained of.

Indeed, Federal Defendants completely ignore that some of the Band's allegations are informed by retired EPA regional counsel Jeffry Fowley's complaint, which launched a full investigation by EPA's Inspector General into Region 5's review of the NPDES Permit. FAC ¶¶ 182-84; FAC Ex. B; *see also Moore v. U.S. Dep't of State*, 351 F. Supp. 3d 76, 91 (D.D.C. 2019) (considering allegations in office of inspector general complaint for plaintiff's claim on the merits). Federal Defendants omit any reference to this ongoing investigation of Region 5's conduct.

The Band's factual allegations in its complaint, when taken as a whole, are more than sufficient to entitle the Band to relief on its First Cause of Action. *See, e.g.*, *Benton v. Merrill Lynch & Co., Inc.*, 524 F.3d 866, 870 (8th Cir. 2008) (dismissal is only appropriate "[w]here the allegations show on the face of the complaint there is some insuperable bar to relief"). Therefore, this Court should deny Federal Defendants' motion to dismiss the Band's First Cause of Action.

B. The Band's complaint contains sufficient factual allegations supporting its claims that EPA's failure to provide notice under CWA Section 401(a)(2) violates the APA and CWA.

Federal Defendants also seek to dismiss the Band's Second and Third Causes of Action for failure to state a claim. The Band seeks full APA review of EPA's actions under the Second Cause of Action because EPA's actions are not committed to agency discretion for the reasons discussed in Section II *supra*. In the alternative, the Band seeks a limited review under its Third Cause of Action. *See* Section IV *supra*.

1. The Band alleges sufficient facts to support a plausible basis that EPA's actions were improper or predetermined in violation of the APA.

As noted above, the Band is not required to *prove* its claims at the pleading stage, but merely allege sufficient facts to show that it is plausible that it is entitled to relief. *See Twombly*, 550 U.S. at 570; *Parkhurst*, 569 F.3d at 865.[9] The "complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden,* 588 F.3d at 594. The Band alleges significant departures from the normal Section 401(a)(2) process that suggest EPA's failure to issue notice was predetermined and based on irrelevant factors.

The Band provides factual allegations from which the Court can reasonably infer a highly unusual process for what EPA has previously described as "just a notification to give the downstream state the opportunity to participate in the permitting process," FAC ¶ 196. This suggests a predetermined outcome. *See, e.g.*, *Saget*, 375 F. Supp. 3d at 352 ("[T]he 'highly unusual' process undertaken by the Department of State, which typically provides a TPS recommendation to DHS, also suggests a predetermined outcome."). The Band's allegations with respect to the Section 401(a)(2) process are also informed by its similar allegations regarding EPA's review of the NPDES Permit.

[9] Even at the summary judgment stage, *Tummino* recognized that the plaintiffs did not need "conclusive evidence as to the merits of its claim." 603 F. Supp. 2d at 548. This was because the federal agency had "pursued a litigation strategy dependent on the assertion of the deliberative process privilege." *Id*.

The Band alleges that on April 6, 2016 Region 5 explained to other agencies that the "initial bar, may affect, is a low bar." FAC ¶ 193. The Band alleges that a Region 5 manager told the Band's water quality staff around March 2017 that the proposed Mining Project may not comply with the Band's WQS. FAC ¶ 199. In other words, Region 5 recognized in March 2017 that the Mining Project's discharges "may affect" the Band's WQS. The Region 5 manager therefore committed to consultation with the Band under Section 401(a)(2) for PolyMet's 404 Permit. FAC ¶ 199. But things changed after Ms. Stepp was appointed as Regional Administrator. *See, e.g.*, FAC ¶ 201.

In particular, EPA allegedly made the decision not to send the Band notice by November 30, 2018, which was before MPCA had issued the 401 Certification to trigger the Section 401(a)(2) process. FAC ¶¶ 208, 260. As with EPA's review of the NPDES Permit, the Band alleges that EPA made their decision prior to the completion of the technical review. *Cf. Tummino*, 603 F. Supp. 2d at 547. An EPA career manager informed the Band of this change in EPA's position but provided no explanation. FAC ¶ 208. And although Region 5 career staff and managers prepared a briefing paper for Ms. Stepp regarding Section 401(a)(2), FAC ¶ 207, and career managers usually handled these notices, FAC ¶ 198, the Band alleges that Defendant Thiede and Ms. Stepp then discussed the Mining Project's Section 401(a)(2) process with high level political appointees in EPA's headquarters. FAC ¶ 217.

The Band further alleges that a Regional Counsel for Region 5 prepared a draft response letter to the Band's requests for notice. FAC ¶ 219. But shortly thereafter the Regional Counsel had an email discussion regarding a "19th floor ask" for PolyMet, which

the Band alleges is a reference to a request from Region 5's political leadership. FAC ¶ 220. The Regional Counsel then allegedly corresponded via email with attorneys in EPA's Office of General Counsel. FAC ¶ 221. These discussions eventually involved EPA's General Counsel, as he and other EPA attorneys allegedly developed a document regarding "PolyMet CWA Q&A" that was sent to Ms. Stepp. FAC ¶ 222. Taken together, these allegations suggest that Defendant Thiede and Ms. Stepp solicited help from political appointees in EPA headquarters to provide cover for their predetermined decision not to provide the Band notice. *See, e.g.*, *Saget*, 375 F. Supp. 3d at 374 (soliciting new information to be congruous with a predetermined decision "certainly raises eyebrows on the motivation behind the decision in question"); *see also Dep't of Commerce,* 139 S.Ct. at 2575 (rejecting as "contrived" a rationale belatedly developed and offered for a decision that had been pre-determined).

Similarly, the Band alleges that Defendant Thiede also sought information regarding irrelevant permitting "interactions" to justify, post hoc, the decision not to provide notice to the Band. FAC ¶ 223. Defendant Thiede's attempts to obtain this irrelevant information are consistent with Mr. Fowley's allegation that EPA sought to avoid the Section 401(a)(2) process on the incorrect basis that it was "duplicative of other permit processes." FAC ¶ 224. As discussed above, the Administrator's determination under Section 401(a)(2) must be based on a discharge's potential effects on a State's WQS. The fact that the Band and other agencies "interacted" throughout various permitting processes is irrelevant to that determination.

Throughout this unusual process EPA's employees for tribal affairs continually pressed for a response to the Band's requests. An official in EPA's Office of International and Tribal Affairs asked Region 5 to "share the R5 response" to the Band's first request for notice. FAC ¶ 209. Later, Region 5 staff for Tribal Water Quality Issues allegedly pleaded with Region 5's Water Division to "please contact" the Band's water quality staff because the Band "has not gotten a response from EPA." FAC ¶ 229. However, the Band never received a response, which was contrary to the EPA's Tribal Consultation Policy, FAC ¶ 65, and the APA's requirement for EPA to provide a response on the grounds for denying the Band's requests, 5 U.S.C. § 555(e). *Tummino*, 603 F. Supp. 2d at 547 (plaintiff may show an agency's bad faith "by the manner in which the [agency] departed from its normal procedures . . . .").

In short, the Band alleges that EPA engaged in a highly unusual process simply to justify a decision to not provide the Band notice. Based on this, the Band alleges that EPA purposefully withheld notice to prevent the Band from being heard on its objections pursuant to Section 401(a)(2). FAC ¶ 231. The Band has sufficiently stated a claim that EPA's actions were improper and based on a predetermined outcome. *See, e.g.*, *Saget*, 375 F. Supp. 3d at 361; *ATX*, 41 F.3d at 1529.

2. The Band has sufficiently alleged facts to show that EPA treated the Band differently.

The Band has alleged facts to raise a plausible inference that EPA treated it differently than other States for Section 401(a)(2). *See* U.S. Mem. at 23. "Agencies may

act arbitrarily and capriciously if they treat similarly-situated parties differently or if they act with bad faith." *Simmons v. Smith*, 888 F.3d 994, 1001 (8th Cir. 2018).

The CWA directs EPA to treat the Band as a State for Section 401(a)(2). 33 U.S.C. § 1377(e). The Band's allegations compare the normal Section 401(a)(2) process with the Band's dissimilar treatment by EPA. The Band alleges that the EPA previously applied Section 401(a)(2)'s "may affect" determination as a low threshold, FAC ¶ 194, which is consistent with the statute's plain language and purpose. EPA's past practice shows that the notification and determination is signed by a career manager and the notice is just to notify the affected State of its rights and opportunity to participate in the process. *Id.* ¶¶ 196-98. As one example of EPA's low threshold determination, the Band alleges that EPA notified four States that surrounded a discharge in Ohio, including Illinois, which was located "hundreds of miles" downstream. FAC ¶ 195.

Consistent with that past practice, EPA conveyed as early as 2016 that it would follow its established Section 401(a)(2) process for the 404 Permit and that the initial "may affect" threshold is a "low bar." FAC ¶ 193. The Band also alleges it was informed in 2017 by an EPA career manager that there was a probability that the proposed Mining Project would not comply with Band WQS and that EPA would consult with the Band on the Section 401(a)(2) process. FAC ¶ 199. "An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996).

Despite EPA's commitment to the Band to apply the same low threshold and provide notice, the Band alleges that, after Ms. Stepp was appointed, EPA began to treat

the Band differently without any reasoned explanation. FAC ¶¶ 201, 259. As with the NPDES Permit, the Band makes some allegations "on information and belief" because EPA asserted deliberative process privilege over 2,682 documents related to Section 401(a)(2) in full. FAC ¶ 193 n.6. This includes documents that show EPA attorneys were purportedly engaged in "deliberative" activities in March 2019, which was long after the 30-day statutory deadline for the Administrator's determination. FAC ¶ 226.

The Band's allegations challenge why the process for the 404 Permit differed in so many respects from the normal process for States under Section 401(a)(2), which resulted in the Band never receiving notice or any explanation for EPA's change in position. Rather than accept the disparate treatment allegations in the Band's complaint as true—as required on a motion to dismiss—Federal Defendants point to an EPA database to contend that EPA makes decisions on thousands of state-issued NPDES permits without making "may affect" determinations for all of them. U.S. Mem. at 23. But Section 401(a)(2) only applies to permits issued by federal agencies and not to state-issued NPDES permits. Whatever may be shown by EPA's database are matters that should be addressed through discovery and then briefing on the merits. EPA cannot, in a motion to dismiss, dispute allegations in the complaint by an unexplained citation to data that may well be irrelevant or inapposite via a link to a database contained on an EPA website.

Thus, the Band alleged disparate treatment, provided a basis for its position, and accordingly has stated a claim not subject to a motion to dismiss.

3. EPA's failure to consult with the Band was arbitrary and capricious and otherwise not in accordance with the law under 5 U.S.C. § 706(2)(A).

Some courts have held that tribal consultation under Executive Order No. 13,175 (Nov. 6, 2000), by its express language does not create a private right of action on its own, U.S. Mem. at 25. But courts have also held that agency-specific tribal consultation policies can be enough to establish a duty when the agency fails to adhere to the process or procedures outlined therein. *See*, *e.g.*, *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") (citing *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)); *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 785 (D.S.D. 2006) ("The BIA's alleged failure to comply with its own consultation policy violates general principles that govern administrative decisionmaking.").

EPA's Tribal Consultation Policy takes "an expansive view of the need for consultation . . . to consider tribal interests whenever EPA takes an action that 'may affect' tribal interests." FAC ¶ 64. EPA Region 5 also adopted specific Implementation Procedures for consultation. FAC ¶ 65. These policies are premised on the United States' trust responsibility to Indian tribes "which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law." U.S. Mem. Ex. 3 at 3.

Federal Defendants admit that EPA's Tribal Consultation Policy includes a process for consultation but assert that decisions on whether to consult depend on the particular activity. U.S. Mem. at 26. Federal Defendants ignore that the Consultation Policy and Implementation Procedures expressly set out the process for consultation once issues are identified as possibly appropriate for consultation. U.S. Mem. Ex. 3 at 5; U.S. Mem. Ex.

2, § 2. Here, the Band has alleged that EPA committed to consulting with the Band for the Section 401(a)(2) process, FAC ¶ 199, and that it also submitted three requests to EPA requesting that it be heard on its Section 401(a)(2) request. FAC ¶¶ 206, 215, 218. EPA never responded or provided any explanation for reneging on its commitment to consult. *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency must generally "examine the relevant data and articulate a satisfactory explanation for its action."). Thus, the facts alleged are sufficient to support a claim that EPA, without reasoned explanation, violated the APA by failing to adhere to EPA's Tribal Consultation Policy and Region 5's Implementation Procedures, including in stark contradiction to express promises made to the Band. *Cf. Yankton Sioux Tribe*, 442 F. Supp. 2d at 785.

4. EPA's failure to provide notice was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

The Band's fifth reason to set aside EPA's failure to provide notice alleges that the Mining Project's discharges "may affect" the Band's WQS, especially the standard for mercury of 0.77 ng/L. FAC ¶ 263. Federal Defendants misunderstand this claim, U.S. Mem. at 26, which is that EPA's failure to provide notice is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law regardless of whether Federal Defendants characterize that failure as a negative determination or inaction. FAC ¶ 263.

In the event Federal Defendants determined that the Mining Project's discharges may not affect the Band's WQS, that determination is arbitrary and capricious because it runs counter to the evidence before the agency. *State Farm*, 463 U.S. at 43. The Band

alleges that the Mining Project's removal and dewatering of peat dominated wetlands will discharge mercury into surface waters, affecting the Band's WQS. FAC ¶¶ 73, 112, 234. Indeed, Region 5's comment letter on the NPDES Permit found the Mining Project's discharges of stormwater from construction are expected to release significant amounts of mercury into downstream navigable waters. FAC ¶ 160. Region 5 staff described this issue to MPCA as a concern related to the Band's WQS and the Section 401(a)(2) process. FAC ¶ 167. Region 5 staff concluded in the December 18 Memorandum that the mercury from these discharges was left "wholly unregulated" and "may release significant amounts of mercury into downstream navigable waters." U.S. Mem. Ex. 1, at 2-3. Even MPCA's 401 Certification concluded there was "sufficient uncertainty" regarding effects on downstream water quality in the St. Louis River. FAC ¶ 211.

If, as appears from the record available to the Band to date, EPA took no action, EPA's failure to act is an abdication of statutory responsibility and is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. There is no basis in Section 401(a)(2) for EPA to take no action. FAC ¶ 204. As discussed above, EPA's decision to take no action "must conform to the authorizing statute" or else it is arbitrary and capricious. *Massachusetts*, 549 U.S. at 533. Further, EPA's guidance on Section 401(a)(2) provides that EPA may not simply do nothing, but must either "find[] no potential effects on neighboring states and tribes" or "notif[y] the states/tribes that may be effected [sic]." FAC ¶ 204. EPA's departure from this practice is also arbitrary and capricious. *LaHood*, 693 F. Supp. 2d at 973 (agency changing course "must supply a reasoned analysis indicating that prior policies and standards are being deliberately

changed, not casually ignored" (citation omitted)). EPA's duty to act is even more compelling here where the Band made three formal requests for notice and provided detailed analysis of the reasons such notice was required. FAC ¶¶ 206, 215, 218.

Accordingly, EPA's failure to issue notice to the Band is arbitrary and capricious because EPA should have determined that the Mining Project's discharges "may affect" the Band's WQS for mercury. FAC ¶ 263.

VI. Federal Defendants Were Required to Provide Prompt Notice to the Band Under the APA.

Federal Defendants attempt to avoid their obligation under 5 U.S.C. § 555(e) to provide the Band even a "brief statement" for why they denied the Band's requests for notice and a hearing. They incorrectly assert that Section 555(e) is inapplicable because the Band is not an "interested person" and that the permitting process for the 404 Permit did not concern an "agency proceeding." U.S. Mem. at 28. Section 555(e) provides that "[p]rompt notice shall be given of the denial in whole or in part of a written . . . request of an interested person made in connection with *any* agency proceeding." 5 U.S.C. § 555(e) (emphasis added). The notice must include "a brief statement of the grounds for denial" if the denial is not "self-explanatory." *Id.*

First, the Band is an interested person under Section 555(e). Indian tribes fall within the APA's definition of "person." *See* 5 U.S.C. § 551(2); s*ee, e.g.*, *Flathead Joint Bd. Of Control v. U.S. Dep't of Interior,* 309 F.3d F. Supp. 2d 1217, 1221 (D. Mont. 2004); *Indian Law Res. Ctr. v. Dep't of Interior*, 477 F. Supp. 144, 146 (D.D.C. 1979). Additionally, the Band is clearly an "interested" person because the proceeding concerned the Band's rights

as a downstream State and discharges resulting from a federal permit that will affect its WQS. FAC ¶¶ 206, 215, 218.

Second, the Band's request concerned the permitting process for the 404 Permit, which is an "agency proceeding." The APA defines an "agency proceeding" to include "licensing." 5 U.S.C. § 551(12). "Licensing" is the "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." *Id.* § 551(9). Federal Defendants completely ignore that a "license" is defined to include "*the whole or a part of an agency permit* . . . ." *Id*. § 551(8) (emphasis added).

Here, the Band's request for notice and hearing under Section 401(a)(2) was made in connection with and as part of the permitting process for granting, denying, modifying, or conditioning the 404 Permit. FAC ¶¶ 206, 215, 218, 232, 272. Under Section 555(e)'s plain terms, the Band was entitled to notice denying its request by EPA and the Corps. Yet EPA and the Corps ignored the Band and never provided a response.

Federal Defendants are also wrong that Section 555(e) is inapplicable because EPA's actions under Section 401(a)(2) are within EPA's discretion. In *Roelofs v. Secretary of Air Force*, 628 F.2d 594, 600 (D.C. Cir. 1980), the D.C. Circuit explained that Section 555(e) "applies 'according to the provisions thereof'" and the "requirements of 'a brief statement of the grounds for denial' obtains even though the request pertains to a matter of discretion or grace, not one of entitlement." EPA's duties also do not excuse the Corps' failure to provide notice under Section 555(e). This Court should reject Federal

Defendants' attempt to avoid a basic obligation to be transparent about their actions under Section 401(a)(2).

CONCLUSION

This Court should deny Defendants' motions to dismiss for the reasons set forth above.

Respectfully submitted this 31st day of August 2020.

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