

## SPECIAL ENVIRONMENTAL COUNSEL MEMORANDUM NO. 2023-2

DATE: July 13, 2023

TO: Tribal Environmental Professionals

FROM: Tribal Government Practice Group  
Ogden Murphy Wallace, PPLC

SUBJECT: Army Corps of Engineers Revokes Mining Company CWA § 404 Permit That Does Not Comply with the Downstream Water Quality Standards of the Fond du Lac Band of the Lake Superior Chippewa

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On June 6, 2023, the Army Corps of Engineers District Commander for St. Paul (Corps) took the extraordinary step of revoking a previously issued Clean Water Act (CWA) Section 404 permit from PolyMet Mining, Inc. (PolyMet) because the permitted discharges would not comply with the water quality requirements of the Fond du Lac Band of Lake Superior Chippewa (Band).<sup>1</sup> This significant new decision serves as an example as to how Tribes may partner with EPA and the Corps to help protect tribal water quality standards (TWQS) from upstream discharges.

### 1. Procedural History

On March 21, 2019, the Corps completed a Record of Decision and authorized a CWA § 404 permit for PolyMet, permitting the discharge of dredged and fill material into 901 acres of wetlands and indirect impacts to twenty-seven acres of wetlands associated with the construction and development of the NorthMet mine that is located in St. Louis County, Minnesota, 116 miles upstream from the Fond du Lac Band's Reservation Homeland. Initially, the Corps determined that PolyMet's project was compliant with all applicable water quality standards, relying on the Water Quality Certification issued by the Minnesota Pollution Control Agency (MPCA) on December 20, 2018. It does not appear that the Corps requested certification from the Band.<sup>2</sup>

Soon thereafter, on September 10, 2019, the Band filed suit in the United States District Court for the District of Minnesota alleging that the EPA and the Corps violated CWA § 401(a)(2) due to EPA's failure to issue notice to the Band and the Corps' failure to either hold a hearing on

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<sup>1</sup> [Memorandum from U.S. Army Corps of Eng'rs on New Range Copper Nickel, LLC – Section 404 Permit Decision \(June 6, 2023\)](#). For associated materials, see [NewRange Copper Nickel, LLC – Section 404 Permit Status, U.S. ARMY CORPS OF ENG'RS: ST. PAUL DISTRICT](#).

<sup>2</sup> See [PolyMet Mining, Inc., Permit No. MVP-1999-05528-TJH, U.S. ARMY CORPS OF ENG'RS: ST. PAUL DISTRICT \(Mar. 21, 2019\)](#).

the downstream impacts of the project or take measures necessary to ensure the project would meet the Band's water quality standards. On February 16, 2021, the court held that "EPA had a legal duty to make a 'may affect' decision" within thirty days of MPCA's 401 Certification. EPA then filed a motion on March 4, 2021, requesting a voluntary remand so that EPA could make the "may affect" determination required under § 401(a)(2). The motion was granted on March 8, 2021.

On March 17, 2021, the Corps suspended PolyMet's 404 permit in response to EPA's request that it be allowed to consider the effects from the project under CWA § 401(a)(2) in response to the prior court ruling.<sup>3</sup> EPA then analyzed the effects of the NorthMet mine's operation on downstream jurisdictions' water quality standards (WQS), including the federally approved WQS of the Fond du Lac Band. As a result, EPA issued a "may affect" determination to the Band on June 4, 2021, and provided the Band with sixty days to determine if discharges associated with PolyMet's 404 permit would violate the Band's WQS.<sup>4</sup>

The Band determined that discharges from the project would violate Tribal WQS. On August 3, 2021, the Band informed the Corps that it objected to the permit and requested that the Corps hold a public hearing on its objection. The Band's objection stated that:

[T]he St. Louis River Watershed has unique importance to the Band because the Band retains the right to hunt, fish, and gather within the territory[; that the project would] adversely impact the Band culturally, socially, economically, and ecologically, including threatening the Band's treaty rights to use and harvest resources[; and] that the protection of its downstream waters is integral to protection of the Chippewa-Ojibwe tribes' treaty rights to water-dependent resources.<sup>5</sup>

The Band also raised the issue of disproportionate environmental justice-based injuries to the Band, its population, its water quality, and its aquatic-dependent resources that would result if the project's discharges were permitted.

EPA held multiple meetings with the Band in early 2022 to ensure meaningful communication with the Band regarding its concerns about the proposed mining project. In its evaluation of the Band's objection, EPA determined that there was significant uncertainty about the downstream impacts of the project and that EPA was unaware of any CWA § 404 permit conditions that, if imposed, would ensure compliance with the Band's WQS for mercury and specific conductance for Reservation waters.

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<sup>3</sup> [Letter from Karl D. Jansen, Colonel, Corps of Engineers, District Engineer, to Christie Kearney, PolyMet Mining, Inc., Regulatory File No. MVP-19999-05528-TJH \(Mar. 17, 2021\).](#)

<sup>4</sup> As a federally recognized tribe, the Band is recognized as a "state" for purposes of § 401(a)(2) and the Band's WQS were approved by EPA. The Band's WQS are intended to protect the Band's designated uses, in particular its aquatic dependent resources and culturally important designated uses.

<sup>5</sup> [Clean Water Act Section 401\(a\)\(2\) Evaluation and Recommendations with Respect to the Fond du Lac Band's Objection to the Proposed Clean Water Act Section 404 Permit for the NorthMet Mine Project, EPA \(Apr. 29, 2022\).](#)

The Corps public hearing took place from May 3-5, 2022, during which the Corps collected information to help inform its decision on PolyMet's 404 permit. The Corps evaluated the Band's objection and whether there were any new conditions that could be added to a modified 404 permit to ensure compliance with applicable Tribal WQS.

At the hearing, all the parties provided significant, albeit contrasting, scientific and technical data to support their positions. The Band informed the Corps that its water quality requirements were not intended to simply provide a base level of protection, rather, they are in place to protect the qualities and conditions that allow for diverse, healthy, and highly functioning ecosystems in the Band's lands and waters.

Ultimately, the Corps found the information provided by EPA and the Band to be compelling. It decided that because there were no 404 permit conditions that could be imposed to ensure compliance with the Fond du Lac Band's WQS, the Corps was obligated to revoke the permit and that revocation of the permit was in the public interest. However, the Corps did not revoke the 404 permit with prejudice, so PolyMet has the opportunity to submit a new CWA § 404 permit application if it can show in its new application that the project would meet the Band's WQS.

## 2. Where Do We Go from Here?

This action by the Corps is significant because it not only recognizes Tribal sovereignty but also effectively expands the scope of Tribal regulatory authority to include upstream permitted activities. This decision demonstrates a significant step towards increased recognition by the Corps and EPA of the importance of Tribal authority, in particular because the economic interests here are substantial and the forum state ignored impacts on downstream Tribes.<sup>6</sup>

The importance of this decision may also hinge on PolyMet's next steps. In response to this decision, PolyMet may either (1) reapply with a modified project plan that would meet the Band's WQS; (2) apply for reconsideration from the Corps as the permit was not revoked with prejudice; or (3) appeal the decision to the 8<sup>th</sup> Circuit Court of Appeals. The Corps' final agency action could possibly serve as the basis for judicial review. However, because PolyMet was given the opportunity to reapply, it would need to exhaust all administrative remedies before it could appeal unless it can show that reapplying or applying for reconsideration would be futile and that the Corps' decision was arbitrary and capricious. In the end, because PolyMet has the ability to

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<sup>6</sup> The current administration and federal courts appear to be further acknowledging both the sovereignty of Tribes and the history of the federal government's treatment of Tribes. *See, e.g., Haaland v. Brackeen*, 143 S. Ct. 1609, 1641 (2023) (7-2 decision) (Gorsuch, J., concurring); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (5-4 opinion) (Gorsuch, J., writing for Court); *Yellowbear v. Lampert*, 741 F.3d 48 (10<sup>th</sup> Cir. 2014). *But see also Arizona v. Navajo Nation*, No. 21-1484, No. 22-51 (2023) (5-4 opinion) (Gorsuch, J., dissenting); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1704 (2023) (8-1 decision) (Gorsuch, J., dissenting); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2505 (2022) (5-4 opinion) (Gorsuch, J., dissenting).

reapply, it is likely that any argument regarding futility would be unpersuasive so it is most likely that PolyMet will do further analysis and resubmit with modifications for a new 404 permit.<sup>7</sup>

### 3. Conclusion

If the Corps' 404 decision is ultimately subject to judicial review, the applicability of downstream WQS will likely be one of the grounds upon which this decision will be decided. Additionally, any judicial review would create an opportunity here for Tribes to join in amici curiae to write in support of the Corps including downstream Tribal WQS in its 404 decision making process under the CWA. At this juncture, even if this decision is not appealed, Tribes may consider showing their support for the position of the Band by providing letters of support to advise the Corps of the significance of this decision and its impacts on Indian Country. We are optimistic that this decision indicates a continuation in increased recognition of Tribal sovereignty and a future expansion of Tribal authority under the CWA. The OMW Tribal Government-Environmental Practice Group will continue to follow the developments in this matter as it proceeds through the administrative and/or judicial process. Please let us know if you have any questions or if we may be of assistance.

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<sup>7</sup> *Sackett v. EPA*, decided by the Supreme Court on May 25, 2023, effectively changed the scope of the Corps and EPA's geographic jurisdiction under the CWA. For a discussion of *Sackett*, please see the separate SEC memo #23-1 attached. The Corps' decision may be limited by *Sackett* as it considered the impacts of the new application on "wetlands." However, the Corps' decision with regard to impacts on downstream WQS is likely not dependent on the Corps' wetland jurisdiction, as it concerns the permit controls that protect downstream surface waters and Tribal WQS.