Minn. Mine Denial Stresses Importance Of Tribal Partnerships

By **Ben Mayer, Endre Szalay and David Wang** (July 14, 2023)

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On June 6, the Army Corps of Engineers **revoked** a suspended Clean Water Act permit for a proposed mine in northeast Minnesota because the permit could not ensure compliance with a downstream tribe's water quality requirements.[1]

The Corps' decision highlights the significant influence a tribe can have in a project's permitting process under the act, as well as under other federal environmental statutes and treaties. Project developers should be mindful of this development, and should consider partnerships or early and frequent consultation with tribes to avoid the risks of protracted litigation, delays or even shutdown.

The NorthMet Project Saga

In March 2019, the Corps completed a record of decision authorizing the discharge of dredged and fill material into hundreds of acres of wetlands associated with the construction and development of the NorthMet open-pit copper-nickel mine by PolyMet Mining Inc. in St. Louis County, Minnesota. The Corps had determined at that time that the NorthMet project complied with all applicable federal laws and regulations.[2]

In September 2019, following the issuance of the project's permit, the Fond du Lac Band of Lake Superior Chippewa filed a lawsuit against the U.S. Environmental Protection Agency and the Corps in the U.S. District Court for the District of Minnesota alleging the agencies violated the CWA and failed to protect the band's treaty-reserved rights within and outside the band's reservation located approximately 70 miles downstream of the project.[3]

The lawsuit focused on Section 401(a)(2) of the act, which requires the EPA to evaluate whether project discharges may affect the quality of waters of another state and provide notice to such state.

This provision applies equally to certain tribes, including the Fond du Lac Band, which has its own EPA-approved water quality standards.[4] The district court held that the EPA had a legal duty to determine if the project may affect the water quality in downstream neighboring jurisdictions, including the quality of waters in the state of Wisconsin and in the band's reservation, and remanded to the agency.[5]

Following the decision, the EPA asked the Corps to suspend the NorthMet Project's Section 404 permit to give the EPA time to consider the project's effect on the quality of waters in Wisconsin and the Fond du Lac Band's reservation.

The Corps suspended the Section 404 permit in March 2021. In June 2021, the EPA issued its "may affect" determination to both Wisconsin and the Fond du Lac Band, providing both parties an opportunity to determine if the permitted discharge would affect their respective water quality requirements.

After determining that the project would affect its jurisdictional waters, the Fond du Lac Band objected to the Section 404 permit and requested that the Corps hold a public hearing on its objection. Wisconsin did not object to the permit.

At the Corps' hearing in May 2022, the Fond du Lac Band contended that the discharges from the project would violate its water quality requirements for mercury and specific conductance.

The EPA agreed with the Fond du Lac Band's determination and recommended the Corps not reinstate the suspended permit, as the EPA was not aware of any conditions that would ensure compliance with band's water quality requirements for waters within its reservation.[6]

Subsequently, on June 6, 2023, the Corps announced that it had no choice but to revoke the Section 404 permit, as Section 401(a)(2) states that if imposition of permit conditions cannot ensure compliance with applicable downstream water quality requirements, the permitting agency shall not issue the permit.[7]

It noted, however, that PolyMet was not precluded from submitting a new permit application for the project that would meet all applicable water quality requirements, including the Fond du Lac Band's.

Tribal Rights Under the CWA

The Fond du Lac Band's successful legal strategy to at least temporarily halt the project based on noncompliance with downstream tribal water quality requirements has important implications for project developers nationwide. The crux of the strategy is grounded in the Fond du Lac Band's treatment as a state under the CWA.

Under the CWA, as it was originally enacted, only states — under EPA supervision — had the authority to establish water quality standards for waters within their boundaries, to certify compliance with those standards and to issue and enforce discharge permits.

In 1987, Congress amended the CWA to authorize the EPA to treat eligible tribes as states under CWA Section 518(e). To be granted treatment-as-state status, a tribe must:

- Be federally recognized;
- Have a governing body that carries out substantial governmental duties and powers;
- Exercise functions that pertain to the management and protection of water resources that are held by the tribe, held by the U.S. in trust for the tribe or otherwise within the borders of the tribe's reservation; and
- Be capable of carrying out the CWA.[8]

At the time, the EPA required applicant tribes to demonstrate inherent authority to regulate their water resources under the U.S. Supreme Court's 1981 decision in Montana v. U.S.[9]

That is, a tribe had to show that it was regulating, via its water quality standards, a nontribal party with which it had a consensual relationship, e.g., through contracts or other dealings, or whose activities had a direct effect on the political integrity, health or welfare of the tribe.

The EPA eliminated this requirement with a revised rule in September 2016, thereby easing the treatment-as-state application process for tribes.[10] As of April 2023, however, only 84 of the 574 federally recognized tribes in the U.S. have received EPA approval to administer water quality standards under CWA Section 401.[11]

Pending EPA Regulations Seek to Strengthen Tribal Rights Under the CWA

In addition to the authority tribes with treatment-as-state status have, the EPA is currently engaged in two rulemakings that would further bolster tribal rights under the CWA.

First, in December 2022, the EPA proposed revisions to the CWA regulations to clarify and prescribe how water quality standards must protect aquatic and aquatic-dependent resources reserved to tribes through treaties and federal law.[12]

This rule would ensure that water quality standards do not impair tribal reserved rights by giving clear direction on how to develop water quality standards where tribes hold such reserved rights. The comment period for this proposed rule ended on March 6, and the EPA will promulgate a final rule before December.

Second, on April 27, the EPA issued a notice of proposed rulemaking to establish water quality standards for waters on tribal reservations that do not have water quality standards under the CWA.[13]

Under the proposed rule, the EPA would establish baseline water-quality standards for eligible tribal reservation waters in a manner that would address location-specific water quality conditions and tribal circumstances, as appropriate.[14]

Such baseline water-quality standards would be established with tribal consultation, and the EPA explicitly invites and offers assistance to tribes to develop their own water quality standards under the CWA.

This notice of proposed rulemaking, if enacted, would further expand the geographical scope where tribes could affect project development under the CWA. The comment period for this NOPR ends on Aug. 3.

Project developers should thoroughly understand this continuously evolving regulatory framework and remain apprised of developments in this area of federal agency rulemaking.

Consultation and Partnership With Tribes Is Critical

The Corps' decision to revoke NorthMet's permit has implications for developers whose projects rely on federal permits.

In the context of tribal treaty rights, for example, projects have been blocked because of

adverse effects on those rights.

In Muckleshoot Indian Tribe v. Hall,[15] for instance, in the U.S. District Court for the Western District of Washington in 1988, the Muckleshoot Indian Tribe and Suquamish Indian Tribe sued to enjoin the construction of a 1,200-slip marina in Seattle's Elliott Bay because it would eliminate a portion of one of the tribes' usual and accustomed fishing areas and would therefore interfere with their fishing rights protected under the 1855 Treaty of Point Elliott.

Observing that the tribes' rights could not be abrogated without specific and express congressional authority, the federal district court granted the injunction and prohibited the project altogether.[16] Under this precedent, where there is a treaty violation, a tribe cannot be forced to accept mitigation measures to cure the breach.[17]

A developer's only option is to settle or change the project to eliminate the treaty violation. In the Hall case, the developer reached a settlement with the tribes in 1989 and opened the Elliott Bay Marina in 1991.

In May 2016, the Corps similarly denied a permit to the Gateway Pacific Terminal, which was a proposed coal terminal at Cherry Point, Washington.[18] The Lummi Nation opposed the project, citing adverse effects to its treaty-protected usual and accustomed fishing rights.

The Corps determined that the terminal would have greater than de minimis effects on the Lummi Nation's usual and accustomed rights and denied the permit. Unlike the Elliott Bay Marina, the project developers and Lummi Nation never came to an agreement.

Of course, project conflicts with tribal treaty rights are not the same as project conflicts with tribal water quality standards. One arises as a result of negotiated treaties between the federal government and sovereign tribes, and the other is derived from federal statute and hinges on the EPA's unique obligation to ensure compliance with a tribe's downstream water quality requirements.

As a result, while a developer can theoretically alter a project so it can meet a water quality standard, where treaty rights are involved, a developer's best option is to reach agreement with the affected tribe or tribes. Both, however, should be taken seriously, and both reflect a pattern of federal regulatory deference to tribes and tribal concerns.

The NorthMet saga demonstrates that tribes with treatment-as-state status and EPA-approved water quality standards can have significant influence over projects that may affect their downstream water quality — even for potential water quality impacts downstream of a project.

Developers need to be cognizant that tribal water quality standards — and possibly other federal standards that tribes with treatment-as-state status have the authority to enforce — could affect projects, even if those projects are not located on tribal land.

Tribes, for example, have authority to effect permitting for projects with impacts on tribal lands and on resources, including water quality, by seeking enforcement of standards that may result in the denial of key project permits if they are not complied with.

It is therefore important that developers are sufficiently apprised of tribal rights and standards in order to structure projects for successful permitting, development, and

operation. The importance and value of adequate consultation and/or partnership with tribes prior to project permitting cannot be overstated.

There are viable paths forward when project developers and federal agencies work with tribes to come to equitable solutions. Tribes can also be invaluable partners to protect against other potential challenges to project permitting.[19] Absent such cooperation, however, project developers need to, at a minimum, take tribal authority and rights seriously, because courts and agencies certainly are.

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[1] See Decision Memo, File No. 1999-05528-TJH, U.S. Army Corps of Engs. (Jun. 6, 2023), available at: https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/PolyMet/NorthMet%20Decision%20Memo_Signed.pdf?ver=B9KGCuLR0I6w1JfB35pR5Q%3d%3d; see also Tom Lotshaw, "Army Corps Revokes Permit For NorthMet Mine In Minnesota," Law360 (Jun. 7, 2023), https://www.law360.com/nativeamerican/articles/1686142.

[2] PolyMet has since changed its name to NewRange Copper Nickel, LLC.

[3] See Complaint for Declaratory and Injunctive Relief, Fond du Lac Band of Lake Superior Chippewa v. Stepp, No. 19-cv-2489 (D. Minn. Sept. 10, 2019).

[4] The Band is treated as a state under Section 401(a)(2). See 33 U.S.C. §1377(e).

[5] Fond du Lac Band of Lake Superior Chippewa v. Wheeler, 519 F. Supp. 3d 549, 561–65 (D. Minn. 2021).

[6] See 33 U.S.C. § 1341(a)(2) ("Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.").

[7] Press Release, U.S. Army Corps of Eng'rs, St. Paul Dist. Corps of Engineers announces NorthMet Mine permit decision (Jun. 6, 2023), https://www.mvp.usace.army.mil/Media/News-Releases/Article/3419225/corps-of-engineers-announces-northmet-mine-permit-decision/.

[8] See 33 U.S.C. §1377(e); 40 C.F.R. § 131.8(a); see also Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001).

[9] 450 U.S. 544 (1981).

[10] See Final Rule, Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act, 81 Fed. Reg. 65,901 (Sept. 26, 2016).

[11] Tribes Approved for Treatment as a State (TAS), U.S. Env't Protection Agency, https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.

[12] See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 87 Fed. Reg. 74,361 (Dec. 5, 2022), https://www.federalregister.gov/documents/2022/12/05/2022-26240/water-quality-standards-regulatory-revisions-to-protect-tribal-reserved-rights.

[13] See Federal Baseline Water Quality Standards for Indian Reservations, 88 Fed. Reg. 26,496 (May 5, 2023), https://www.federalregister.gov/documents/2023/05/05/2023-09311/federal-baseline-water-quality-standards-for-indian-reservations.

[14] The baseline water quality standards would not apply to tribal reservation waters for which EPA has promulgated other federal water quality standards (currently only the Confederated Tribes of the Colville Reservation) and tribal reservation waters where EPA has explicitly found that a state has jurisdiction to adopt water quality standards or authorized a tribe to adopt water quality standards pursuant to the TAS regulation and where EPA has approved the applicable state or tribal water quality standards. Id. at 29,500.

[15] 698 F. Supp. 1504 (W.D. Wash. 1988).

[16] Id. at 1523.

[17] See id. at 1516 ("The treaty fishing right is a property right protected under the fifth amendment, and the harm to this right cannot be measured solely in terms of the amount of lost income the Tribes might suffer." (citing United States v. Washington, 384 F. Supp. 312, 404 (W.D. Wash. 1974) (Boldt decision))).

[18] See Bart J. Freedman and Benjamin A. Mayer, "Considering The Difference: Treaty Rights And NEPA Review," Law360 (Aug. 29, 2016), https://www.law360.com/articles/833840/considering-the-difference-treaty-rights-and-nepa-review.

[19] See, e.g., Benjamin Mayer, Bart Freedman, and David Wang, "Recent Rulings Affirm Tribal Sovereign Immunity and Joinder," Law360, https://www.law360.com/articles/1591070/recent-rulings-affirm-tribal-sovereign-immunity-and-joinder.