

**Poly Met Mining, Inc.**

**Section 401(a)(2) Hearing Brief**

Submitted to  
U.S. Army Corps of Engineers  
St. Paul District  
Permit No. MVP-1999-05528-TJH

May 3, 2022

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## INTRODUCTION

The Fond du Lac Band of Lake Superior Chippewa requested this hearing because, the Band says, PolyMet's NorthMet project will violate its water quality requirements. The evidence says otherwise.

The Band's reservation is 116 river miles downstream from PolyMet's mine. PolyMet's water discharges will represent less than 0.5% of the water flowing in the St. Louis River as it passes through the reservation. Just as important, the water that PolyMet discharges will be cleaner—with less mercury, less sulfate, and lower specific conductance—than the water flowing from the site today. Cleaner water cannot violate water quality requirements.

This cleaner water conclusion is not just PolyMet's conclusion. The federal and state agencies that jointly prepared the environmental impact statement for PolyMet's mine found that the project will reduce pollutant loading in the St. Louis River. The agencies that permitted PolyMet's mine agreed. And since the mine will remove mercury and sulfate from the river, and reduce specific conductance, the Band has nothing to complain about.

Still, the Band claims that PolyMet's mine will violate its water quality requirements. But it can only make that claim by ignoring the effects of PolyMet's water management and treatment plans. Because the Band's arguments both lack evidentiary support and fail on a theoretical level, PolyMet's permit should be reinstated.

## BACKGROUND

When PolyMet proposed its NorthMet copper-nickel mine in 2005, Tesla was still years away from launching its first all-electric vehicle.<sup>1</sup> Apple had yet to sell its first iPhone.<sup>2</sup> And the United States' wind power capacity was a tenth of what it is today.<sup>3</sup> Now, the ever-growing green economy—including electric cars, mobile phones, and wind turbines—demands more

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<sup>1</sup> See Tesla, About Tesla, available at <https://www.tesla.com/about> (Model S launched in 2008).

<sup>2</sup> See Pierce, David & Goode, Lauren, *The WIRED Guide to the iPhone*, (Dec. 7, 2018) available at <https://www.wired.com/story/guide-iphone/> (iPhone was announced in 2007).

<sup>3</sup> See Office of Energy Efficiency and Renewable Energy, U.S. Installed and Potential Wind Power Capacity and Generation, available at <https://windexchange.energy.gov/maps-data/321>.

of the copper, nickel, and other precious metals that PolyMet will produce.<sup>4</sup> Recognizing these demands, the President of the United States recently issued an order under the Defense Production Act declaring that domestic production of minerals for large-capacity batteries is “essential to the national defense.”<sup>5</sup>

To access these essential minerals, PolyMet’s project underwent the most extensive environmental review in Minnesota history. That review ended with a 2015 Final Environmental Impact Statement jointly published by the Minnesota Department of Natural Resources, the U.S. Army Corps of Engineers, and the U.S. Forest Service.<sup>6</sup> Throughout, the Band served as a cooperating agency.<sup>7</sup>

The Department of Natural Resources found that the EIS was adequate for permitting under Minnesota law.<sup>8</sup> Its adequacy decision went unchallenged. Even so, federal and state agencies spent two more years reviewing permits for PolyMet’s project. Those reviews included ample opportunity for public input, and the Band commented often.

The Corps of Engineers issued PolyMet’s Clean Water Act section 404 permit in March 2019. Soon after, the Band sued the Corps and EPA in federal court.<sup>9</sup> One of the Band’s arguments was that EPA should have notified it of

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<sup>4</sup> See Valckx, Nico, et al., *Metals Demand from Energy Transition May Top Current Supply*, Int’l Monetary Fund Blogs (Dec. 8, 2021), available at <https://blogs.imf.org/2021/12/08/metals-demand-from-energy-transition-may-top-current-global-supply/>.

<sup>5</sup> White House, Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended (March 31, 2022), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/31/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended/>.

If all of the copper PolyMet plans to mine were used for electric vehicles that replaced gas-powered ones, the change would reduce greenhouse gas emissions by more than 30 million metric tons. See [www.epa.gov/greenvehicles/greenhouse-gas-emissions-typical-passenger-vehicle](http://www.epa.gov/greenvehicles/greenhouse-gas-emissions-typical-passenger-vehicle).

<sup>6</sup> Final EIS ES-3. The Final EIS is available online at: [www.dnr.state.mn.us/input/environmentalreview/polymet/feis-toc.html](http://www.dnr.state.mn.us/input/environmentalreview/polymet/feis-toc.html).

<sup>7</sup> Final EIS I-10.

<sup>8</sup> Minn. Dep’t of Nat. Res., Record of Decision (Mar. 3, 2016), available at <https://files.dnr.state.mn.us/input/environmentalreview/polymet/polymet-eis-rod-030316-final.pdf>. See Minn. Stat. § 116D.04, subd. 2b(3).

<sup>9</sup> See Case No. 19-cv-2489 (D. Minn.).

a potential downstream water quality effect under section 401(a)(2) of the Clean Water Act. Though it did not rule on the merits of that argument, the district court held that EPA should at least have considered whether such a downstream effect was possible. *Fond du Lac Band of Lake Superior Chippewa v. Wheeler*, 519 F. Supp. 3d 549, 565-67 (D. Minn. 2021).

Without conceding that the court was right, EPA sought a voluntary remand to decide whether PolyMet's mine "may affect" the Band's water quality. When the court granted EPA's request, the Corps suspended PolyMet's permit. On remand, EPA found that a downstream effect was possible, and so notified the Band. The Band then timely filed a letter objecting to the Corps' permitting decision.<sup>10</sup> This hearing followed.

## LEGAL AND FACTUAL DISCUSSION

To prevail on its section 401(a)(2) objection, the Band must show that PolyMet's permit "will affect the quality of its waters so as to violate any water quality requirement." 33 U.S.C. § 1341(a)(2). That requires evidence, not just assertion. But the Band does not have any evidence that PolyMet's mine will violate its water quality requirements. And it is hard to imagine how it could, given that the Band's reservation is 116 river miles downstream and that PolyMet's project will actually reduce mercury, sulfate, and specific conductance in the St. Louis River. Indeed, when the agencies reviewed the evidence, they concluded that PolyMet's mine will not violate the Band's water quality requirements. Nothing the Band has said since calls for a different conclusion.

### **I. For its objection to succeed, the Band must prove that PolyMet's permit will violate its water quality requirements.**

The first step in evaluating the Band's section 401(a)(2) objection is to understand the statutory framework. Section 401(a)(2) allows a downstream state to object when it determines that a permit will violate its water quality requirements. But if that determination is not supported by the evidence presented to the permitting agency, no change to the permit is necessary.

#### **A. The sole legal issue is whether PolyMet's permit will violate the Band's water quality requirements.**

The section 401(a)(2) process begins when EPA finds that a permitted discharge "may affect the quality of the waters" of a downstream state. 33

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<sup>10</sup> EPA also notified Wisconsin, but Wisconsin did not object to PolyMet's permit.

U.S.C. § 1341(a)(2). From there, the downstream state can object to the permit if it “determines that such discharge will affect the quality of its waters so as to violate any water quality requirements.” *Id.* That objection leads to a hearing, where the permitting agency must “condition” the permit “as may be necessary to insure compliance with water quality requirements.” *Id.*

At each of these steps, section 401(a)(2) addresses “water quality requirements.” That explains why the Corps’ rules for section 401(a)(2) hearings say that “[t]he issues to be considered at the public hearing will be limited to water quality impacts.” 33 C.F.R. § 325.2(b)(1)(i). It also explains why, not long after section 401(a)(2) became law, EPA’s Office of General Counsel said that a downstream state cannot object to a permit absent “violations of water quality requirements.” *Envtl. Protection Agency, Office of General Counsel, Objections of a Downstream State Under § 401(a)*, 1973 WL 21941 (March 29, 1973). Under section 401(a)(2), compliance with water quality requirements is the only issue.

Despite the plain terms of the statute and the Corps’ rules, the Band has argued that the Corps should consider treaty rights and environmental justice issues.<sup>11</sup> It should not. The Band can raise those other issues in other forums. Here, the Band’s objection to PolyMet’s permit can be sustained only if permitted discharges violate the Band’s water quality requirements. Otherwise, PolyMet’s permit should be reinstated.

**B. As the objecting party, the Band bears the burden of proof.**

Because this hearing will test the Band’s claim that PolyMet’s permitted discharges will violate its water quality requirements, the Band must bear the burden of proof. In section 401(a)(2) terms, the Band is the party making an “objection” to the permit and “request[ing]” a hearing. 33 U.S.C. § 1341(a)(2). As the permitting agency, the Corps’ role is to weigh EPA’s and the Band’s “recommendations,” as well as “any additional evidence,” and to “condition” the permit “as may be necessary.” *Id.* If the Band’s recommendations and evidence fail to show that such conditions are necessary, the Corps may issue (or reinstate) the permit.

No other way of proceeding makes sense. The party seeking relief before a court or agency naturally bears the burden of proof. *See* 5 U.S.C. § 556(d) (providing that, in hearings under the Administrative Procedure Act, “the

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<sup>11</sup> The Fond du Lac Band of Lake Superior Chippewa’s Clean Water Act Section 401(A)(2) “Will Affect” Analysis for PolyMet Mining, Inc.’s NorthMet Mine Project at 33-34 (Aug. 3, 2021). For short, PolyMet refers to this as the Band’s “Will Affect Analysis.”

proponent of a rule or order has the burden of proof”). It is “the ordinary default rule,” according to the U.S. Supreme Court, “that plaintiffs bear the risk of failing to prove their claims.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

The “plaintiff” in a section 401(a)(2) hearing is the objecting state or tribe. The objecting party is the one claiming that the permit will violate its water quality requirements. Without its objection, the permit would have issued. Thus, the “ordinary default rule” applies, and the Band bears the burden of proof.

**C. To prove a violation, the Band must prove a measurable increase in pollutant concentrations.**

What does it mean for the Band to prove that PolyMet’s permitted discharge will violate its water quality requirements? Start with what it does not mean. The U.S. Supreme Court held in *Arkansas v. Oklahoma* that nothing in the Clean Water Act “mandates a complete ban on discharges into a waterway that is in violation of [water quality] standards.” 503 U.S. 91, 108 (1992). So even if mercury concentrations in the Band’s waters are already in excess of the Band’s water quality standards, it does not preclude every upstream mercury discharge. Nor does section 401(a)(2) mean, as the Band seems to suggest, that PolyMet must submit to the Band’s permitting requirements.<sup>12</sup> Nothing in section 401(a)(2) gives the Band permitting power over discharges outside its reservation.

Section 401(a)(2) instead ties the Band’s objection to its conclusion that the permitted discharge “will affect the quality of its waters so as to violate any water quality requirements.” 33 U.S.C. § 1341(a)(2). On its face, that means the Band must show *both* (1) a violation of one of its “water quality requirements” *and* (2) that the violation “will” happen. *Id.* Two important points follow.

First, an alleged effect on water quality must be measurable to qualify as a violation. Any downstream jurisdiction can claim that pollutant molecules discharged upstream will reach its waters. But if the amounts are too small to measure, or if the net effect of the discharge is to improve water quality,

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<sup>12</sup> See, e.g., Will Affect Analysis at 29 (alleging that “PolyMet has not submitted an antidegradation analysis to the Band for its consideration and approval”). In any case, the Band’s argument that PolyMet cannot comply with its permitting requirements turn on its faulty claims that PolyMet’s project will increase sulfate, mercury, and specific conductance in the St. Louis River. See *infra* at 9-13, 26-27.



the Corps need not “condition” the permit to “insure compliance with applicable water quality requirements.” 33 U.S.C. § 1341(a)(2). If the Band cannot prove a measurable, negative effect on its water quality, it cannot prove a violation.

Second, the Band must prove that the permitted discharge “will affect” its water quality, not just that an effect is possible. Indeed, section 401(a)(2) includes a lower, “may affect” threshold, but it applies only to EPA’s decision to notify. Contrasting EPA’s “may affect” finding with the Band’s “will affect” finding underscores that the Band must prove an actual effect on its water quality. Speculation is not enough.

**D. Section 401(a)(2) applies only to Corps-permitted discharges.**

Clean Water Act section 401 applies only to an “applicant for a Federal license or permit” that “may result in any discharge into the navigable waters.” 33 U.S.C. § 401(a)(1). The only such permit for PolyMet’s project is its section 404 permit. That means the only “discharges” relevant to the Band’s water quality claims under section 401(a)(2) are those permitted by the Corps. PolyMet’s state permits, including its National Pollutant Discharge Elimination System permit, are not at issue here. But for the sake of completeness, and to respond to all of the Band’s arguments, PolyMet will address them anyway.

**II. The agencies reviewing PolyMet’s project rightly concluded that it would not worsen water quality.**

If the Band is to prove that PolyMet’s permitted discharges will violate its water quality requirements, it must do so in the face of an environmental review and permitting process that found the opposite. More, that finding came after the Band had every chance to make its case. So the Band is not starting this hearing with a blank slate; it is trying to reverse 15 years of work that reject its claims.

**A. The Band’s reservation is so far from PolyMet’s project that it is inherently hard to prove an effect on water quality.**

The first step in considering the Band’s claims is to look at a map. It will show that PolyMet’s project is near the headwaters of the Embarrass and Partridge Rivers, 116 river miles upstream from the nearest border of the Fond du Lac Reservation. See Figure 1.

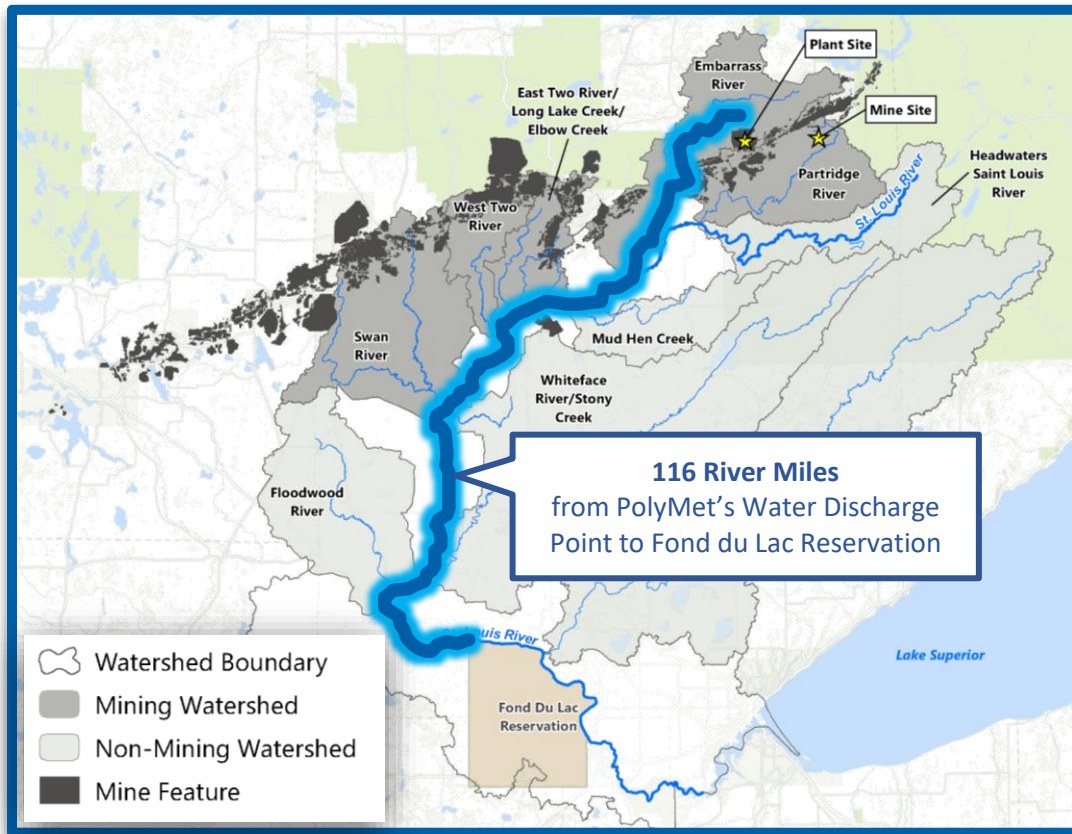


Figure 1, PolyMet's Project and the Fond du Lac Reservation

In those 116 miles, many other rivers empty into the St. Louis River, including Whiteface River, Swan River, and Floodwood River.<sup>13</sup> The Cloquet River empties into the St. Louis within the Band's reservation. As a result, the flow from PolyMet's site is a tiny fraction of the St. Louis River flow when it reaches the Fond du Lac Reservation. See Figure 2.

<sup>13</sup> Barr Engineering, NorthMet Project Supplemental Evaluation of Baseline Wetland Water Levels, Water Chemistry (Sulfate, Total Mercury, and Methylmercury), and Export to Downstream Waters at 7-10 (April 2022) (Barr Supplemental Evaluation).

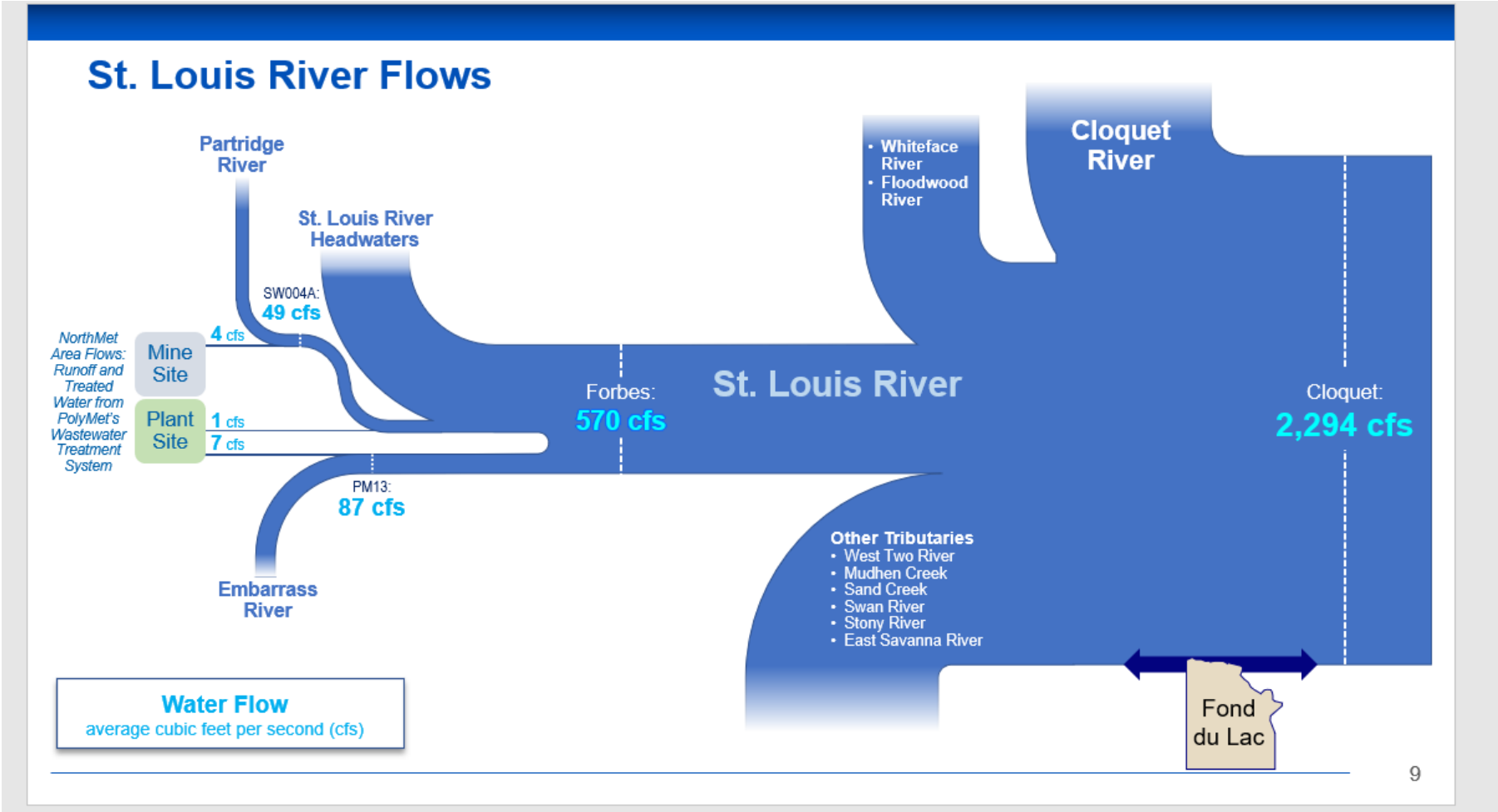


Figure 2, St. Louis River flows

These two figures highlight two basic obstacles the Band faces in its effort to prove that discharges from PolyMet’s project will measurably affect water quality on its reservation. First, 116 miles is a long way for pollutants to travel. Second, any pollutants that managed to make the trip would be diluted to the point of disappearing by the vast amounts of water (containing the same pollutants) that enters the reservation from other places.<sup>14</sup>

**B. Because PolyMet’s project will reduce mercury and sulfate in the St. Louis River, it will not affect the Band’s water quality.**

The obstacles created by the river miles between PolyMet’s project and the Band’s reservation are not the Band’s only problems. They also must face the agencies’ finding that PolyMet’s project will *reduce* the amount of mercury and sulfate in the St. Louis River. That finding makes it impossible for the Band to prove that PolyMet’s project will adversely affect reservation water quality with respect to mercury, methylmercury, and sulfate.

**I. The agencies found that PolyMet’s project will protect water quality by reducing mercury and sulfate loading.**

To predict how PolyMet’s project would affect water quality, the agencies preparing the EIS began with background data.<sup>15</sup> That data included tests for mercury and sulfate concentrations in both the Partridge and Embarrass Rivers.<sup>16</sup> (Pollutant concentration is different from pollutant load. Load means the absolute amount of a pollutant, while concentration refers to how much of it is in a given volume of water.) As relevant here, the data showed that seepage from the existing taconite tailings basin with a high sulfate load is increasing sulfate concentrations in the Embarrass River headwaters.<sup>17</sup>

Using this baseline data, the agencies studied the water quality effects of PolyMet’s project. In so doing, they recognized that the Band “has promulgated water quality standards” that protect “specific, designated, or beneficial uses for waterbodies on the Fond du Lac Reservation.”<sup>18</sup> And contrary to the

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<sup>14</sup> Barr Supplemental Evaluation at 8-12.

<sup>15</sup> See Final EIS at 4-19-4-157.

<sup>16</sup> See Final EIS at 4-41, Table 4.2.2-4 (summary of total mercury concentrations in the Partridge River and Embarrass River watersheds near the mine site and plant site).

<sup>17</sup> See Final EIS at 4-141 (noting that tailings basin outflow “provides a significant source of sulfate loading to the Embarrass River”).

<sup>18</sup> Final EIS at 5-20.

Band's allegations,<sup>19</sup> the agencies also “analyze[d] compliance with [the Band's] mercury standard” of 0.77 ng/L.<sup>20</sup>

The key to the agencies' water quality analysis is that PolyMet's project will improve current conditions at the tailings basin. Today, untreated, higher-sulfate water seeping from the tailings basin enters the Embarrass River headwaters.<sup>21</sup> PolyMet will change that by installing a cutoff wall and a collection trench between those headwaters and the tailings basin.<sup>22</sup> This system will capture water from the tailings basin and either pump it back into the tailings basin or send it to the water treatment system, as illustrated below.<sup>23</sup> See Figure 3.

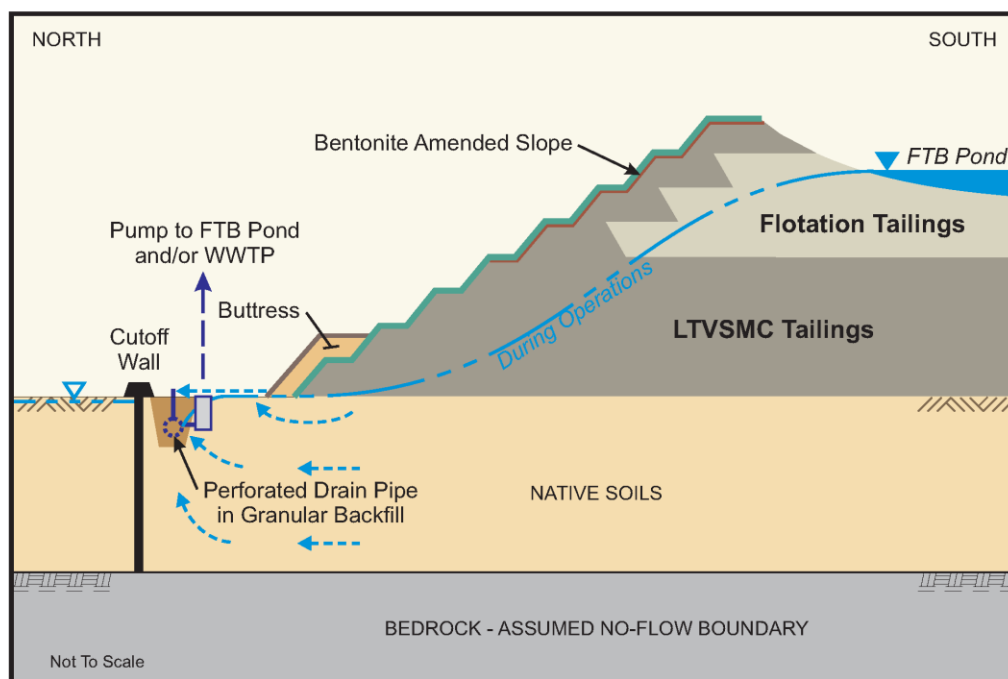


Figure 3, Seepage capture system

Because PolyMet's project will replace untreated seepage from the tailings basin with treated effluent that has “a low sulfate load,” the agencies found that “the sulfate load to the Embarrass River is reduced.”<sup>24</sup> Indeed, the

<sup>19</sup> Will Affect Analysis at 10.

<sup>20</sup> Final EIS at 5-20; *see id.* at 5-21.

<sup>21</sup> Final EIS at 4-141.

<sup>22</sup> Final EIS at 5-185.

<sup>23</sup> Final EIS at 3-120, 3-123.

<sup>24</sup> Final EIS at 5-211; *see id.* at 5-218 (“[A] substantial reduction in sulfate load would occur under the NorthMet Project Proposed Action . . .”).

change is dramatic: PolyMet’s project will annually remove about *1400 metric tons* of sulfate from the Embarrass River watershed.<sup>25</sup> That translates to a sharp decrease in St. Louis River sulfate.<sup>26</sup>

The agencies also concluded that PolyMet’s project will reduce the amount of mercury in the St. Louis River.<sup>27</sup> The agencies reached this conclusion because water that today flows into the Partridge River with a concentration of 3.6 ng/L would instead be captured and treated to a concentration of 1.3 ng/L.<sup>28</sup> And having found that PolyMet’s project will reduce the overall amount of mercury in the St. Louis River, the agencies also concluded the project “would not add to any potential exceedance of the Fond du Lac mercury water quality standard of 0.77 ng/L within the Reservation.”<sup>29</sup>

When the Band complained that this conclusion about downstream water quality omitted potential airborne pollutants, the agencies responded by commissioning a groundbreaking study known as the Cross-Media Analysis.<sup>30</sup> That analysis found that PolyMet’s project would:

- decrease sulfate loading in the St. Louis River watershed;
- measurably decrease sulfate concentration in the Embarrass River;
- cause no measurable change to sulfate concentration in the St. Louis River;
- decrease mercury loading in the St. Louis River watershed;
- cause no measurable change to mercury or methylmercury concentrations in the Partridge, Embarrass, or St. Louis Rivers; and

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<sup>25</sup> Minn. Pollution Control Agency, PolyMet Mining, Inc. NPDES Antidegradation Review – Final MPCA Determination at 30 (NPDES Antidegradation Determination).

<sup>26</sup> NPDES Antidegradation Determination at 30.

<sup>27</sup> Final EIS at 5-234; Barr Engineering, Surface Water Antidegradation Analysis – NorthMet Waste Water Treatment System (WWTS) Discharge at 89-90 (Oct. 2017).

<sup>28</sup> Final EIS at 5-227.

<sup>29</sup> Final EIS at 5-10.

<sup>30</sup> Barr Engineering, Cross-Media Analysis to Assess Potential Effects on Water Quality from Project-Related Deposition of Sulfur and Metal Air Emissions (Oct. 2017) (Cross-Media Analysis). The Cross-Media Analysis is available online at <https://www.pca.state.mn.us/sites/default/files/wq-wwprml-5li.pdf>.

- cause no measurable change in fish tissue mercury concentrations in the Partridge, Embarrass, or St. Louis Rivers.<sup>31</sup>

These loading and concentration findings reiterate that PolyMet’s project will not violate the Band’s water quality standards.

The agencies’ conclusions about the Band’s water quality have already been challenged in state court. There, the Band argued that PolyMet’s Clean Water Act section 402 permit should not have issued because it lacked “a required finding that the permit would ensure compliance with the Band’s water-quality standards.” *In re the Denial of Contested Case Hearing Requests*, No. A19-0112, 2022 WL 200338, at \*13 (Minn. Ct. App. Jan. 24, 2022). The Minnesota Court of Appeals found instead that PolyMet’s “permit will comply with the Band’s water-quality standards because discharges from the project will not alter the quality of the waters within the Band’s reservation boundaries.” *Id.* at \*14; *see id.* at \*17 (“The permit ensures compliance with the Band’s water-quality standards.”). The court also rejected the Band’s argument that “if a downstream water already is impaired,” no more pollutants can be added, reasoning that “downstream water-quality standards are not violated if there will be no adverse change to the quality of downstream waters with respect to the particular pollutant.” *Id.* at \*14 (relying on *Arkansas v. Oklahoma*, 503 U.S. at 95, 98, 107, 110-11). Each of these holdings lines up with the agencies’ findings.

## **2. Using the agencies’ analyses, the Corps found that PolyMet’s project would not affect the Band’s water quality.**

The Corps had access to all of the agencies’ work—including the EIS and the Cross-Media Analysis—when it granted PolyMet’s Clean Water Act section 404 permit. The Corps’ Record of Decision noted that the EIS was “based on an open, collaborative and robust process” involving the Corps, the U.S. Forest Service, MDNR, “and other cooperating entities including federally recognized Tribes and the participating public.”<sup>32</sup> The Corps accordingly relied on the EIS as providing “a sufficiently detailed analysis of the environmental impacts” of PolyMet’s project.<sup>33</sup> Still, when it saw a need for additional analysis, the Corps provided it.<sup>34</sup>

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<sup>31</sup> Cross-Media Analysis at 124-27.

<sup>32</sup> U.S. Army Corps of Engr’s, NorthMet Record of Decision at 1 (March 2019) (Corps ROD); *see id.* at 3 (noting the permitting requirements).

<sup>33</sup> Corps ROD at 1.

<sup>34</sup> *See, e.g.*, Corps ROD at 27 (considering project modifications made after the Final EIS).

As part of its permitting review, the Corps explicitly considered water quality issues in the Embarrass, Partridge, and St. Louis Rivers. In particular, the Corps found that the reduced flow to Embarrass River tributaries caused by PolyMet's seepage capture system "will be offset" by the discharge of treated effluent.<sup>35</sup> And the Corps directly addressed the Band's water quality claims, finding that the project would cause "an overall reduction in mercury loadings to the downstream St. Louis River" and that the project "is not expected to add to any potential exceedance of the Fond du Lac mercury water quality standard of 0.77 ng/L within the Reservation."<sup>36</sup> Simply put, less mercury in the St. Louis River means no violations of the Band's water quality requirements.

The Corps also knew that the Band wanted a hearing under section 401(a)(2). But because EPA had not then sent the Band a "may affect" notice, it did not order one.<sup>37</sup> That EPA reconsidered its position after a court ruling should not change the Corps' already-definitive water quality findings.

**C. PolyMet's monitoring program will ensure that downstream water quality is unaffected.**

The Band disbelieves all the evidence that PolyMet's project will not lead to violations of its water quality requirements. It seems to point instead to the uncertainty inherent in all scientific predictions as a reason not to permit the project.<sup>38</sup> Since the Band bears the burden of proof, that is not enough. The Band must disprove the agencies' findings, and it cannot.

The proper solution to scientific uncertainty is careful monitoring. That is exactly what the agencies are requiring here. PolyMet must implement a monitoring program that accounts for scientific uncertainty by detecting any potential pollutant discharges and ensuring that they do not migrate downstream.<sup>39</sup> That program includes 280 monitoring locations—more than all the other mines on the Iron Range combined.<sup>40</sup> See Figure 4.

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<sup>35</sup> Corps ROD at 42.

<sup>36</sup> Corps ROD at 42. The Band's Will Affect Analysis inaccurately claims that "[t]he Section 404 permit does not discuss the Band's downstream water quality standards." Will Affect Analysis at 10.

<sup>37</sup> ROD at 24.

<sup>38</sup> Will Affect Analysis at 11-12.

<sup>39</sup> See, e.g., Dep't of the Army Permit No. MVP-1999-05528-TJH, issued to PolyMet Mining, Inc., Conditions 16-23 (requiring monitoring and mitigation for wetland impacts).

<sup>40</sup> This conclusion is based on PolyMet's review of Iron Range mining permits.



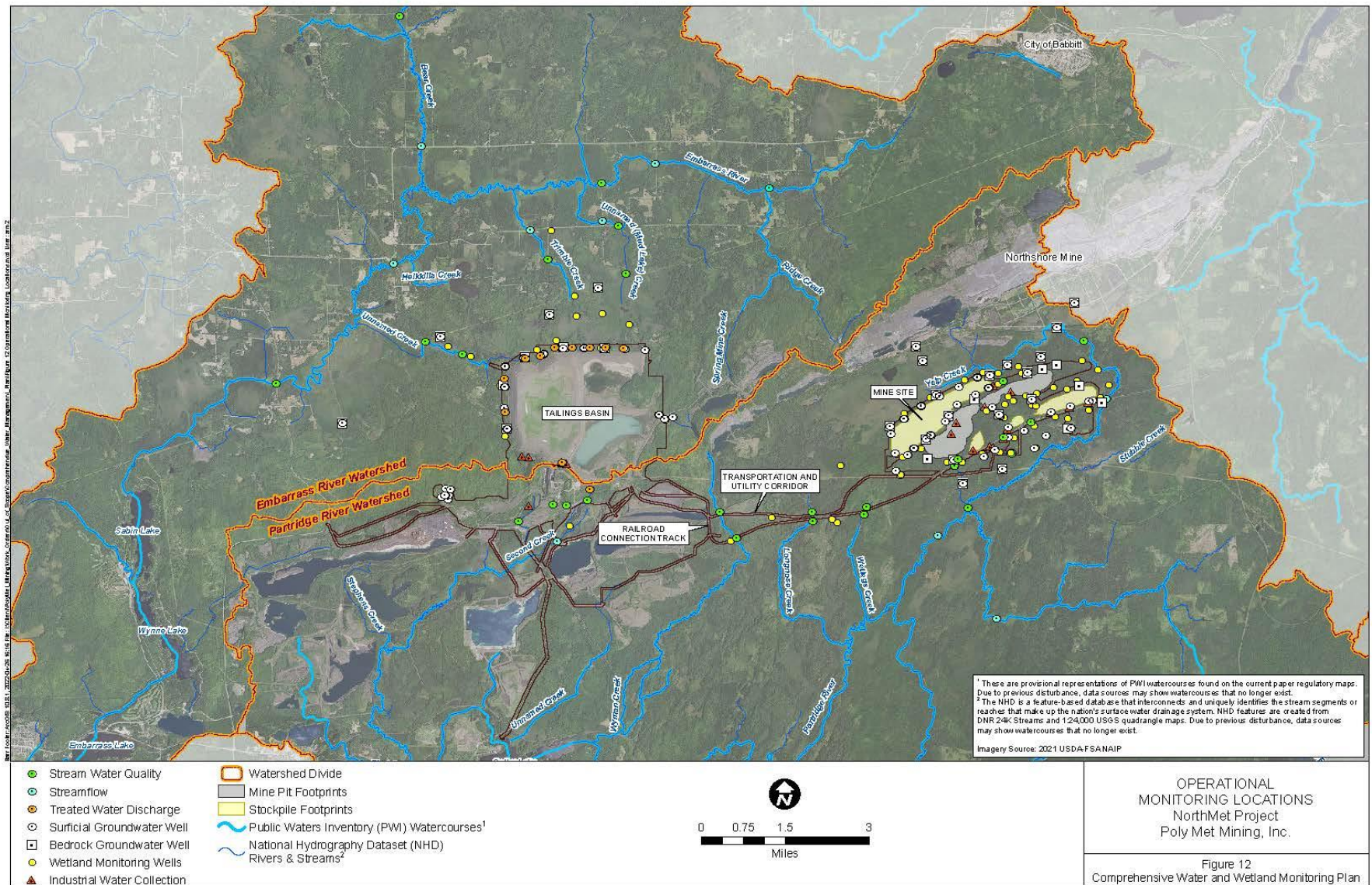


Figure 4, Monitoring locations

Together, these 280 monitoring locations will detect any potential threats to surface water, groundwater, or wetlands long before they could cause harm downstream. And if such threats are detected, PolyMet’s permits provide for adaptive management solutions.<sup>41</sup> This monitoring and mitigation work is detailed in PolyMet’s Comprehensive Water and Wetland Monitoring Plan, which includes maps and descriptions for each monitoring location.<sup>42</sup>

### **III. The Band has offered no reason for the Corps to change its mind about the Band’s water quality.**

The Band portrays its Will Affect Analysis as including new reasons why the project will violate its water quality requirements. In general, however, the agencies have already addressed the points it makes. And when the Band is making different points, those points are invalid. No wetland drawdown scenario could lead to violations. Neither could PolyMet’s construction stormwater permit. The Band’s claims that PolyMet’s permitted direct discharges will cause violations ignore the project’s net effects. And the Band’s specific conductance claims are not supported by the evidence.

#### **A. The agencies have already considered the potential effects of PolyMet’s discharges.**

Some of the Band’s water quality arguments assert that the agencies failed to account for—or to account properly for—PolyMet’s discharges. The Band makes this point both as to PolyMet’s permitted discharges and as to discharges it says are unpermitted. Neither set of arguments is right.

#### **I. The Band’s claims about direct discharges ignore the net effect of PolyMet’s project.**

PolyMet’s main water discharges are those permitted by the state—not the Corps—under section 402 of the Clean Water Act. The Band claims that those “direct wastewater outfalls” will “increase[e] water loading by several million gallons per day” and “supply[] hundreds of pounds of sulfate per year.”<sup>43</sup> Building on this premise, the Band argues that PolyMet’s permitted

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<sup>41</sup> Minn. Pollution Control Agency, NPDES Permit Program Fact Sheet, NorthMet Project at 82-83 (Dec. 2018) (NPDES Fact Sheet).

<sup>42</sup> See PolyMet Mining, Inc., NorthMet Project Comprehensive Water and Wetland Monitoring Plan (April 2022).

<sup>43</sup> Will Affect Analysis at 19.

discharges “will add to the cumulative load of inorganic mercury and methylmercury in the St. Louis River and its tributaries.”<sup>44</sup>

Despite founding this argument on its characterization of PolyMet’s permitted discharges, the Band says nothing about how those discharges represent a net *reduction* in the mercury and sulfate entering the St. Louis River watershed. To repeat, the agencies that reviewed PolyMet’s project found that by capturing and treating seepage from the existing tailings basin and by managing water flows at the mine site, PolyMet would decrease mercury and sulfate loadings to the St. Louis River.<sup>45</sup> The Band’s contrary assertion—that PolyMet’s project “will add to the cumulative load of inorganic mercury and methylmercury”—is false.

If the Band is arguing that the reductions in mercury and sulfate loading that PolyMet will achieve are legally irrelevant, it offers no authority for that position. The question under section 401(a)(2) is whether a project’s permitted discharges “will affect” downstream water quality. The only conceivable way to answer that question is to consider the project’s net water quality effect. Here, that means considering how PolyMet’s project will cause overall mercury and sulfate loading to decrease.

## **2. The EIS appropriately considers all potential discharges.**

The Band also argues that the agencies failed to consider certain discharges from PolyMet’s project, including: (1) discharges into wetlands; (2) pollutants that escape the seepage capture system at the tailings basin; and (3) discharges that would occur in the event of a tailings basin dam failure.<sup>46</sup> In fact, the agencies appropriately addressed each of these potential discharges.

To start, the Band asserts that “PolyMet’s discharges into wetlands will generate turbidity and suspended particulates that will then be conveyed via overland flow to downstream waters.”<sup>47</sup> But the Band ignores the facts that (1) PolyMet will use “sedimentation ponds” at the mine site “to manage suspended solids prior to discharge to surface waterbodies”; and (2) PolyMet is required to maintain water flows at the tailings basin within 20% of where

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<sup>44</sup> Will Affect Analysis at 21.

<sup>45</sup> NPDES Antidegradation Determination at 30.

<sup>46</sup> Will Affect Analysis at 10-11. The Band also mentions “drawdown effects” and PolyMet’s “general NPDES construction stormwater permit” in this section but discusses them separately. PolyMet will follow suit with separate discussions. *See infra* at 20-25.

<sup>47</sup> Will Affect Analysis at 10.

they are today.<sup>48</sup> The agencies concluded that PolyMet’s ponds “should be adequate to manage suspended solids.”<sup>49</sup> And since maintaining existing water flows will not increase turbidity either, there is no turbidity threat to downstream waters.

Next, the Band’s claim that “at least 10% of untreated polluted water will seep through [PolyMet’s] proposed seepage capture system.”<sup>50</sup> It is true that the EIS assumed less-than-perfect seepage capture. But that was a “conservative” assumption meant to overestimate potential impacts for the environmental review.<sup>51</sup> Actual modeling results showed that “all seepage from the [t]ailings [b]asin would be captured.”<sup>52</sup> Those results make sense because the seepage capture system will use pumping to lower the groundwater level inside the cutoff wall, forcing groundwater to flow toward the mine and “preventing the flow of potential pollutants to the surficial aquifer.”<sup>53</sup> Again, the Band is wrong to say that this system will lead to violations of its water quality requirements.

Finally, the Band’s suggestion that pollutant discharges will happen because “PolyMet’s proposed tailings basin has a significant probability of failure” has been roundly rejected.<sup>54</sup> The safety of the tailings basin dam fell within the jurisdiction of the Minnesota Department of Natural Resources. Not only did MDNR’s dam safety engineers review it “for over 10 years,” MDNR hired “top experts to assess and comment on the proposed design, operation, and maintenance of the proposed dams.”<sup>55</sup> Those independent experts concluded that PolyMet’s upstream dam “has demonstrated the capacity to safely store a large flood, withstand up to a 2500-year earthquake, resist static liquefaction, and withstand other rare events and occurrences.”<sup>56</sup> The

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<sup>48</sup> Final EIS at 5-143; *see id.* at 3-23, 3-25, 3-27 (maps showing stormwater collection ditches) & 5-201 (requiring water flow maintenance).

<sup>49</sup> Final EIS at 5-143.

<sup>50</sup> Will Affect Analysis at 11.

<sup>51</sup> Final EIS at 5-51.

<sup>52</sup> Final EIS at 5-51.

<sup>53</sup> NPDES Fact Sheet at 56.

<sup>54</sup> Will Affect Analysis at 11.

<sup>55</sup> PTM Findings ¶ 468; Dam Safety Findings ¶¶ 63-66.

<sup>56</sup> Minn. Dep’t of Nat. Res., NorthMet Project Permit to Mine, Findings of Fact, Conclusions of Law, and Order of Commissioner ¶ 493 (Nov. 1, 2018); Minn. Dep’t of Nat. Res., NorthMet Project Dam Safety Permits, Findings of Fact, Conclusions of Law, and Order of Commissioner ¶ 187 (Nov. 1, 2018); *see id.* ¶ 185 (“It is very unlikely that the FTB Dam would breach.”); Final EIS

Minnesota Supreme Court, having reviewed this evidence, upheld MDNR’s decision to decline contested case hearings for PolyMet’s dam safety permits. *See In re NorthMet Project Permit to Mine*, 959 N.W.2d 731, 750-51 (Minn. 2021) (discussing “engineering and technical data showing that the tailings basin dam will be structurally sound”). No dam failure will lead to violations of the Band’s water quality requirements.

**B. The Band’s claims about wetland drawdown cannot show violations of its water quality requirements.**

The Band’s next argument for downstream water quality violations turns on its claim that PolyMet’s project “will lower groundwater and surface water levels around the mine, directly affecting an area that contains over 6000 acres of wetlands.”<sup>57</sup> The agencies have already addressed that claim.<sup>58</sup> They correctly concluded that drawdown impacts were most likely within 1,000 feet of the mine pits, and decreasingly likely at greater distances.<sup>59</sup> But even if the Band’s wetland drawdown theories were right, that drawdown would not cause violations of the Band’s water quality requirements.

**I. Nearly all mercury in the St. Louis River watershed comes from precipitation.**

Because the agencies’ studies were focused on PolyMet’s project, they did not talk much about the bigger picture concerning mercury in the St. Louis River. But that bigger picture is relevant to the Band’s water quality. So before addressing the Band’s specific mercury claims, PolyMet asked its experts to prepare a report addressing mercury sources in the St. Louis River.<sup>60</sup>

The facts about mercury loading from precipitation are not in dispute. The data show that precipitation in the St. Louis River watershed contains

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at 5-657-5-661 (“[T]he proposed design of the Tailings Basin would meet all respective Factors of Safety as required.”).

<sup>57</sup> Will Affect Analysis at 11 (comma added).

<sup>58</sup> *See* Final EIS at 5-111-5-113 (explaining the use of the analog method for groundwater drawdown); 5-258-5-263 (explaining the use of the analog method to estimate indirect wetland effects); 5-279-5-309 (explaining the use of the analog method to estimate changes in wetland hydrology).

<sup>59</sup> Corps ROD at 36; *see* Final EIS at 5-283-5-285 (using “crossing analog zones” approach); 5-295-5-297 (using “within analog zones” approach).

<sup>60</sup> *See* Foth, Mercury and Sulfate Loading via Precipitation to the St. Louis River Watershed Upstream of the Fond du Lac Reservation in Comparison to the NorthMet Project (May 2, 2022) (Foth Precipitation Report).



about 11.7 ng/L of mercury.<sup>61</sup> Since precipitation averages 29.8 inches annually, simple math says that the watershed receives about 56,000 grams of mercury from rain and snow each year.<sup>62</sup> By contrast, runoff from the existing (pre-project) tailings basin contributes 22.3 grams of mercury to the Embarrass River each year, and runoff from the existing wetlands at the future mine site contributes 24.2 grams of mercury to the Partridge River.<sup>63</sup> That total—46.5 grams—is less than 0.1% of the mercury that enters the St. Louis River watershed via precipitation. And by collecting and treating this runoff, PolyMet’s project will reduce the amount of mercury from the tailings basin and the mine site.<sup>64</sup>

These facts matter because even if the agencies were wrong about the amount of mercury that PolyMet’s project will generate, any imaginable contribution from the project would be swamped by the amount of mercury that enters the watershed through rain and snow.<sup>65</sup> As even the Band has elsewhere admitted, mercury on its reservation “originates *almost exclusively* from off-site sources (air emissions).”<sup>66</sup> Under these conditions, the Band cannot prove that PolyMet’s project will cause a violation of its water quality requirements.

## **2. Other analog sites reinforce the agencies’ wetland draw-down conclusions.**

As for the specifics of the Band’s argument that wetland dewatering will lead to downstream water quality effects, the first question is whether the Band is right that the agencies dramatically underestimated the scope of dewatering. The Band says that the agencies’ analog method of calculating wetland drawdown is “neither supported by best available science, nor PolyMet’s own data (or lack thereof) and expert opinions.”<sup>67</sup> That claim is untrue, and PolyMet’s experts have identified other analog sites that reinforce the agencies’ findings.

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<sup>61</sup> Foth Precipitation Report at 2.

<sup>62</sup> Foth Precipitation Report at 2.

<sup>63</sup> Final EIS at 5-227, 5-230.

<sup>64</sup> NPDES Antidegradation Determination at 30; Foth Precipitation Report at 2.

<sup>65</sup> Foth Precipitation Report at 2-5.

<sup>66</sup> Foth Precipitation Report at 2 (quoting Jacobson Hendin, Fond du Lac Reservation Nonpoint Source Assessment Report (Feb. 2021)).

<sup>67</sup> Will Affect Analysis at 12.

To understand why the agencies' analog method works, it is important first to consider the hydrology of the mine site. The agencies and PolyMet's experts agree that water in the wetlands at the mine site does not readily mix with the groundwater.<sup>68</sup> They know this because site-specific monitoring data show that most mine site wetlands are mainly supported by precipitation.<sup>69</sup> In addition, bedrock characteristics and low-permeability peat layers at deeper levels help prevent mixing.<sup>70</sup> Knowing that water in wetlands does not readily mix with groundwater, it makes sense that mining would minimally affect wetland water levels.<sup>71</sup>

Many wetlands in northeastern Minnesota share these characteristics.<sup>72</sup> That is why the agencies reasoned that the drawdown experienced from other mines in similar wetlands would be analogous to the drawdown from PolyMet's mine. The analog sites used by the agencies predicted relatively minor drawdown. PolyMet's experts have now compared two more analog sites: one in a large, Canadian peatland complex, and another just north of PolyMet's mine site.<sup>73</sup> At each of these sites, wetland drawdown has been in line with what the agencies predict for PolyMet's project—and far less than what the Band predicts.<sup>74</sup>

Both the agencies and PolyMet's experts use analog data showing that wetland drawdown from PolyMet's project will be low. That data fits with the wetlands' hydrogeology. The Band fails to explain why its wetland drawdown story is better.

### **3. High-flow, high-concentration events will not lead to water quality violations on the Band's reservation.**

Even if the Band were right about increased wetland drawdown leading to more mercury and methylmercury, its theory of water quality violations still requires a mechanism to move that mercury and methylmercury 116 miles downstream to its reservation. No such mechanism exists. As PolyMet's experts explain, there are two reasons why any wetland pollutants will not move downstream: (1) the mine site wetlands lack sufficient direct-channel

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<sup>68</sup> Final EIS at 5-111-5-113; Barr Supplemental Evaluation at 17-19.

<sup>69</sup> See Barr Supplemental Evaluation at 18; Final EIS at 4-175.

<sup>70</sup> Barr Supplemental Evaluation at 18.

<sup>71</sup> Barr Supplemental Evaluation at 18-19.

<sup>72</sup> Barr Supplemental Evaluation at 18.

<sup>73</sup> Barr Supplemental Evaluation at 19-23.

<sup>74</sup> Barr Supplemental Evaluation at 20-21.

connections to the Partridge River, and (2) PolyMet’s project will prevent additional pollutants from reaching the river.

First, PolyMet’s experts point to research showing that riverbank (“riparian”) wetlands have the most influence on mercury and methylmercury concentrations in the St. Louis River.<sup>75</sup> Wetlands farther from the river have less influence, especially if they lack a direct channel connection to the river.<sup>76</sup> The wetlands on the mine site are not riparian wetlands. And there is just one stream on the mine site with a direct connection to the Partridge River, much less the St. Louis River.<sup>77</sup> These facts limit the ability of mine site wetlands to transport mercury and methylmercury to the St. Louis River—the first step in the 116-mile journey they must make if they are to violate the Band’s water quality requirements.

Second, PolyMet’s project is designed to prevent pollutants in wetland runoff from reaching the Partridge River. In particular, the project uses retention ponds to store runoff unaffected by mine features so suspended solids can settle.<sup>78</sup> Water that contacts mine features is collected and transported to the tailings basin pond.<sup>79</sup> These protections work even in the Band’s worst-case scenario: a high-flow, high-pollutant event that flushes mercury and methylmercury out of the wetlands. PolyMet’s experts calculate that the project will collect higher-mercury water, treat it, and discharge lower-mercury water.<sup>80</sup> This process will lead to lower mercury loading, even in the Band’s worst-case.<sup>81</sup>

#### **4. Even if wetland drawdown worked the way the Band thinks, it would not lead to violations.**

Setting aside the accuracy of the agencies’ analog analysis and the lack of a mechanism for transporting pollutants downstream, the Band’s wetland drawdown theory still fails. They claim, as they have for nearly 10 years, that PolyMet’s mine pits will affect over 6000 wetland acres, causing 5-10 feet of drawdown in the wetlands closest to the pits; 3-5 feet in the next closest

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<sup>75</sup> Barr Supplemental Evaluation at 27.

<sup>76</sup> Barr Supplemental Evaluation at 27.

<sup>77</sup> Barr Supplemental Evaluation at 29.

<sup>78</sup> Barr Supplemental Evaluation at 29-31. Colby Lake, which is downstream of the mine site, would serve a similar function. Barr Supplemental Evaluation at 31.

<sup>79</sup> Barr Supplemental Evaluation at 36-37.

<sup>80</sup> Barr Supplemental Evaluation at 37-38.

<sup>81</sup> Barr Supplemental Evaluation at 41-50.



wetlands; 1-3.5 feet in the third closest; and up to 1 foot in the most distant.<sup>82</sup> The agencies considered and rejected this theory during the EIS process.<sup>83</sup> But there are at least four reasons why the Band's theory fails.

First, no one disputes that the wetlands at the mine site already undergo a seasonal process that releases mercury and sulfate.<sup>84</sup> The Band argues that this process will greatly accelerate if the mine is built.<sup>85</sup> But the Band's argument does not acknowledge that building the mine will remove 750 wetland acres.<sup>86</sup> Those removed wetlands will no longer discharge any mercury and sulfate to the Partridge River.<sup>87</sup> To match that reduction, the remaining wetlands would have to increase their mercury and sulfate releases by an amount unsupported by science.<sup>88</sup> This alone defeats the Band's argument for a downstream water quality violation based on wetland dewatering.

Second, PolyMet's experts have performed a new analysis proving again that the Band's drawdown claims would not lead to water quality violations. This analysis starts with an undisputed fact: The modeling in the EIS shows that groundwater inflows to PolyMet's mine pits will average about 500 gallons per minute.<sup>89</sup> If that inflow were spread out over 6000 acres, as the Band's theory requires, the average impact to those wetlands' water budgets would be just 0.083 gpm/acre—the equivalent of 1.6 inches per year over 6000 acres.<sup>90</sup> That is just over 5% of the average annual precipitation at the mine site.<sup>91</sup>

Third, the Band bases its analysis on estimates of the amount of mercury and methylmercury in the top 30 cm of wetland soils.<sup>92</sup> It theorizes that the mine will cause "prolonged" drawdown in these soils, which will increase

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<sup>82</sup> Will Affect Analysis at 12-17.

<sup>83</sup> Final EIS at A-496-A-499 (responding to "GLIFWC's method of analogue assessment"); *id.* at 8-13.

<sup>84</sup> Tetra Tech, Response to Fond du Lac Band's Concern Regarding Mine-Based Drawdown Affecting Downstream Water Quality at 2 (May 2, 2022) (Tetra Tech Response); Will Affect Analysis at 9.

<sup>85</sup> Will Affect Analysis at 14-17.

<sup>86</sup> Tetra Tech Response at 2.

<sup>87</sup> Tetra Tech Response at 2.

<sup>88</sup> Tetra Tech Response at 3.

<sup>89</sup> Tetra Tech Response at 3.

<sup>90</sup> Tetra Tech Response at 4.

<sup>91</sup> Tetra Tech Response at 4.

<sup>92</sup> Will Affect Analysis at 14.

oxidation, releasing sulfate, mercury, and methylmercury.<sup>93</sup> But over 15 years of baseline monitoring data show that the mine site wetlands *already* experience natural seasonal water level fluctuations of 30-46 cm.<sup>94</sup> That means the fluctuations that the Band says will cause new water quality violations are happening now.<sup>95</sup> Those fluctuations thus cannot be the reason for a new water quality violation.

Finally, the Band does not explain how any mercury or sulfate produced by the wetlands at the mine site could travel 116 miles downstream to the Fond du Lac Reservation. Instead, the Band seems to think it is enough to say that “wetlands are generally not closed systems” and that the wetlands at the mine site ultimately drain to the St. Louis River.<sup>96</sup> As PolyMet’s experts explain, however, movement of pollutants from wetlands to streams requires a hydraulic gradient.<sup>97</sup> If groundwater levels are as low as the Band predicts—a necessary condition for its entire theory—it is unlikely that such a gradient would exist.<sup>98</sup> Drawn-down wetlands near the mine pits would be a mercury sink, not a source.<sup>99</sup> And because lower water levels would create more storage space, more rainfall would be retained within the drawn-down wetlands, rather than washing pollutants downstream.<sup>100</sup> A lower water table would also lead pollutants to migrate deeper in wetland soils, rather than migrating downstream.<sup>101</sup>

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In sum, PolyMet’s experts have debunked the Band’s speculative theories about how wetland drawdown would cause water quality violations on the

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<sup>93</sup> Will Affect Analysis at 15.

<sup>94</sup> Foth, Methylmercury Formation and Release and the Role of Seasonal Wetland Water Level Fluctuation in Peat Environments at the NorthMet Project at 5 (May 2, 2022) (Foth Methylmercury Report); Barr Supplemental Evaluation at 24. This fluctuation happens because the mine site wetlands are hydraulically isolated from the groundwater aquifer. Water levels in the wetlands thus vary based on seasonal inputs like spring snow melt and summer rain. This fact also undermines the Band’s claim that groundwater inflow to the mine pits will dewater the wetlands. Barr Supplemental Evaluation at 24.

<sup>95</sup> Foth Methylmercury Report at 5-6.

<sup>96</sup> Will Affect Analysis at 16.

<sup>97</sup> Tetra Tech Response at 4.

<sup>98</sup> Tetra Tech Response at 4-5.

<sup>99</sup> Tetra Tech Response at 5.

<sup>100</sup> Tetra Tech Response at 5.

<sup>101</sup> Tetra Tech Response at 5.

Band's reservation. Even assuming, contrary to the evidence, that drawdown will be widespread, there are multiple reasons why it still would not release additional mercury and sulfate. As a result, the Band cannot carry its burden of proof.

**C. PolyMet's construction stormwater permit will not lead to any violation of the Band's water quality requirements.**

Besides its main wetland drawdown argument, the Band claims that PolyMet's construction stormwater general permit "authorizes discharges from the draining of over 900 acres of wetlands," which it says "will release significant amounts of mercury and sulfates."<sup>102</sup> That claim is wrong on both fronts.

To begin with, PolyMet's construction stormwater general permit does not allow "discharges from the draining" of 900 wetland acres. Rather, "[d]ewatered construction water will be treated"; it "will not be discharged off-site."<sup>103</sup> PolyMet's permits require that when stormwater washes over a mine feature—including the overburden storage and laydown area—it must be drained to a "process water pond."<sup>104</sup> The water in those ponds will be sent to the tailings basin.<sup>105</sup> Other stormwater will be routed around the mine features via ditches.<sup>106</sup> The upshot is that less runoff from the mine site wetlands will reach the Partridge River during construction and operations than reaches it today. *See* Figure 5, where yellow arrows indicate the ditches that direct runoff at the mine site to storage ponds, pink shows separate storage of mine-impacted water, and the green line shows how the mine-impacted water is sent to the water treatment system at the plant site.

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<sup>102</sup> Will Affect Analysis at 18.

<sup>103</sup> Mine Site SWPPP Permit at 40; *see* NPDES Permit at 8 ("The Construction Mine Water Pipeline will transport construction mine water and runoff from the OSLA Pond to the FTB.").

<sup>104</sup> Final EIS at 5-101.

<sup>105</sup> Final EIS at 5-101. Note that the Category 1 stockpile uses a seepage containment system similar to the one used at the tailings basin to capture both runoff and groundwater. That captured water is sent to the tailings basin for treatment.

<sup>106</sup> Final EIS at 5-143; *see id.* at 3-23, 3-25, 3-27 (maps showing stormwater collection ditches).

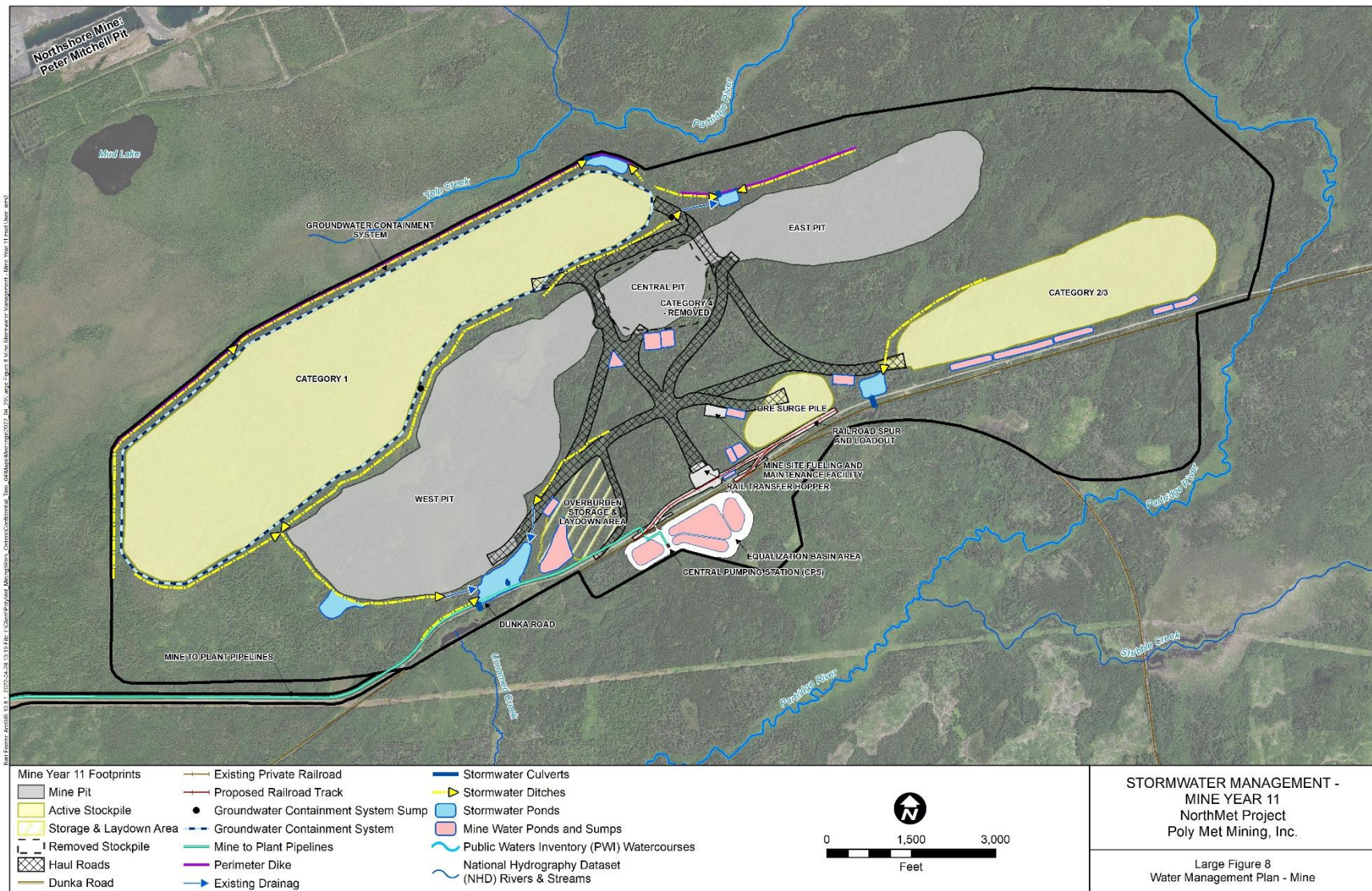


Figure 5, Mine Site Runoff Capture



In any event, PolyMet’s mine construction will not “release significant amounts of mercury and sulfates.”<sup>107</sup> The “peat overburden” that is removed from the mine pits will be stored for later use in a temporary overburden storage and laydown area that will be “graded and compacted to enhance drainage.”<sup>108</sup> And even though runoff from that area should “be of sufficient quality so as not to require treatment beyond settling to remove suspended solids,”<sup>109</sup> it is still “considered process water and would be captured” and treated before being released.<sup>110</sup> The Band ignores all those facts, claiming that PolyMet’s “general permit leaves mercury completely unaccounted for and unregulated.”<sup>111</sup> Once the facts are known, the Band’s claim is proved false.

**D. PolyMet’s project will not lead to violations of the Bands specific conductance requirements.**

The Band makes one water quality argument not related to mercury or sulfate: that discharges from PolyMet’s project will violate its specific conductance criterion.<sup>112</sup> To prove this claim, the Band offers a map to show how specific conductance “tended to only gradually decrease” downstream from other mine sites.<sup>113</sup> It suggests that specific conductance levels in PolyMet’s discharges will not decrease quickly enough to avoid violating the Band’s recently adopted standard of 300  $\mu\text{S}/\text{cm}$ .<sup>114</sup>

PolyMet’s experts have disproved this argument too. As with mercury and sulfate, the ions that affect specific conductance will be captured and treated by PolyMet’s seepage capture system. That would reduce specific conductance in tailings basin discharges.<sup>115</sup> That loading decrease precludes any water quality violations downstream. Taking their analysis a step further, PolyMet’s experts used two methods to estimate specific conductance in

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<sup>107</sup> Will Affect Analysis at 18.

<sup>108</sup> NPDES Fact Sheet at 65.

<sup>109</sup> NPDES Fact Sheet at 65.

<sup>110</sup> Final EIS at 5-121 (internal quotation marks omitted).

<sup>111</sup> Will Affect Analysis at 18.

<sup>112</sup> Will Affect Analysis at 24.

<sup>113</sup> Will Affect Analysis at 26-27.

<sup>114</sup> Will Affect Analysis at 24-27.

<sup>115</sup> Foth, Project-Related Effects on Specific Conductance and Salinity in the St. Louis River at the Fond du Lac Reservation at 1 (May 2, 2022) (Foth Specific Conductance Report.)

PolyMet's discharges.<sup>116</sup> The results showed immeasurable changes that would not violate the Band's water quality standard.<sup>117</sup>

#### **IV. The Band's non-water quality concerns are unavailing.**

The final argument in the Band's Will Affect Analysis tries to tie its water quality complaints to its hunting and fishing rights under the 1854 Treaty of LaPointe.<sup>118</sup> And, the Band suggests, those same issues raise environmental justice questions that the agencies never answered.<sup>119</sup> But both those points fall outside the scope of this hearing. The only issue here is whether PolyMet's permitted discharges will violate the Band's water quality requirements.

##### **A. The Band is already seeking relief on other claims in other forums.**

This hearing is not the only place where the Band can argue about treaty rights and environmental justice, and the Band knows it. Counting the lawsuit that led to this hearing, the Band has sued to stop PolyMet's project six times.<sup>120</sup> It was free to raise treaty rights arguments in any of those cases, and it has.<sup>121</sup> It has done the same with its environmental justice arguments.<sup>122</sup>

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<sup>116</sup> Foth Specific Conductance Report at 2-3

<sup>117</sup> Foth Specific Conductance Report at 3-4. Because these estimates did not account for any attenuation based on speciation, sorption, or mineral precipitation, they were extremely conservative. Foth Specific Conductance Report at 4.

<sup>118</sup> Will Affect Analysis at 33-34.

<sup>119</sup> Will Affect Analysis at 34.

<sup>120</sup> See Minn. Case No. A18-1959 (challenging PolyMet's permit to mine); Minn. Case No. A18-1960 (challenging PolyMet's dam safety permits); Minn. Case No. A19-124 (challenging PolyMet's water quality permit); Minn. Case No. A19-134 (challenging PolyMet's air permit); D. Minn. Case No. 19-cv-2489 (challenging PolyMet's Clean Water Act section 404 permit); D. Minn. Case No. 22-cv-170 (challenging PolyMet's land exchange).

<sup>121</sup> See *Fond du Lac Band v. Cummins*, Case No. 22-cv-170 (D. Minn.), ECF 1, Compl. at 51-53 (claiming that the Forest Service failed to consider the Band's treaty rights); *Fond du Lac Band v. Stepp*, Case No. 19-cv-2489 (D. Minn.), ECF 1, Compl. at 72-76 (claiming that the Corps failed to consider the Band's treaty rights).

<sup>122</sup> *Fond du Lac Band v. Cummins*, ECF 1 at 49-51 (environmental justice claims); *Fond du Lac Band v. Stepp*, ECF 1 at 67-70 (environmental justice claims).

This is not to say that the Band lacks power to make the same argument in multiple forums. But the arguments available in this forum are limited by statute and rule to “water quality impacts.” 33 C.F.R. § 325.2(b)(1)(i).<sup>123</sup> Even if it were true, as the Band claims, that water quality impacts are an inherent violation of its treaty rights, or a sign of environmental injustice, those issues are not before the Corps. That the Band is suing elsewhere to make those claims underscores their immateriality here.

**B. PolyMet’s project will not violate the Band’s treaty rights.**

If the Corps decides to consider the Band’s treaty rights argument, it should not tilt this hearing in the Band’s favor. The Band’s treaty rights argument seems to be that, because of historical mining, the fish in the ceded territory are already “so high in mercury that the Band members cannot safely feed the fish to their children.”<sup>124</sup> But PolyMet is not responsible for historical mining impacts. Indeed, PolyMet’s project will remedy some of those impacts by reducing mercury and sulfate loading in the St. Louis River.<sup>125</sup> So even if it were true that historical mining impacts violated the Band’s treaty rights by polluting the St. Louis River, PolyMet’s project will improve those conditions. The Band offers no legal reason why such improvements would violate their treaty.

**C. PolyMet’s project does not raise any environmental justice concerns.**

The Band’s environmental justice argument is similarly premised on its claim that PolyMet’s project will have “significant” environmental effects for the Band.<sup>126</sup> Those effects, the Band says, will “appreciably exceed the [project’s] effects on the general population.”<sup>127</sup> But the Band offers no evidence on that point other than to reiterate its claim that the project will affect its treaty rights.<sup>128</sup> Again, that claim lacks proof.<sup>129</sup> The agencies also addressed environmental justice issues as part of the EIS, including in response to the Band’s comments.<sup>130</sup> Nothing is left for this hearing, even if environmental justice were within its proper scope.

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<sup>123</sup> See *supra* at 3-4.

<sup>124</sup> Will Affect Analysis at 34.

<sup>125</sup> NPDES Antidegradation Evaluation at 30; see *supra* at 9-12.

<sup>126</sup> Will Affect Analysis at 34.

<sup>127</sup> Will Affect Analysis at 34.

<sup>128</sup> Will Affect Analysis at 34.

<sup>129</sup> NPDES Antidegradation Evaluation at 30; see *supra* at 9-12.

<sup>130</sup> See Final EIS at 5-575; A-18; A-96; A-135; A-422-23.

**D. The Band's speculation about future expansion is misguided.**

Finally, the Band makes the admittedly “speculative” argument that “there is a clear potential for PolyMet to have a need to expand” its project to “ensure” it is “economically feasible.”<sup>131</sup> Such speculation cannot be the basis of changes to PolyMet’s permit. Indeed, similar speculation has already been rejected as a basis for a supplemental EIS and as an argument against issuing a section 404 permit.<sup>132</sup> PolyMet will build the permitted project, the only thing its permits allow. The idea that PolyMet would violate its permits and build something different is no reason to change them.

**CONCLUSION**

Because the Band cannot prove that PolyMet’s permitted discharges would violate its water quality requirements, PolyMet’s Clean Water Act section 404 permit should be reinstated with no changes.

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<sup>131</sup> Will Affect Analysis at 5.

<sup>132</sup> See *In re Applications for a Supplemental Env'tl. Impact Stmt.*, No. A18-1312, 2019 WL 2262780 (May 28, 2019); see Corps ROD at 18-20.