



November 20, 2012

Tim Smith
U.S. Army Corps of Engineers
Regulatory Branch
180 Fifth Street East, Suite 700
Saint Paul, MN 55101-1678

Re: Comments on Modification of Permit 81-172-13

Dear Mr. Smith,

Please accept these comments regarding the Modification of Department of the Army Permit 81-172-13, submitted on behalf of the Center for Biological Diversity, Save Lake Superior Association, Save Our Sky Blue Waters, the Sierra Club North Star Chapter, and the National Wildlife Federation. The Center for Biological Diversity (“Center”) works through science, law and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center has offices in a number of states, including Duluth, Minnesota, and has more than 474,000 members and online activists. The Center has hundreds of members who reside and recreate in northeastern Minnesota. Save Lake Superior Association (“SLSA”), begun in 1969, is the oldest citizen group working exclusively to preserve and protect Lake Superior. SLSA’s mission is to prevent further degradation of Lake Superior and to promote its rehabilitation. Save Our Sky Blue Waters is an all volunteer grassroots nonprofit organization dedicated to protecting Minnesota’s waters, forests, and wildlife. The Sierra Club is a non-profit environmental organization with several thousand members in Minnesota. The National Wildlife Federation (“NWF”) is the nation’s largest conservation education and advocacy organization with more than 4 million members and supporters. NWF’s mission is to protect wildlife for future generations.

The October 23, 2012 public notice regarding the modification of Permit 81-172-13 raises more questions than it answers. As set forth in the accompanying Freedom of Information Act request, we seek the following information related to this Permit: (1) any National Environmental Policy Act (“NEPA”) analysis (42 U.S.C. § 4332), prepared by the U.S. Army Corps of Engineers (“Corps”) prior to issuing Permit 81-172-13 to the Eveleth Taconite Company; (2) any assessment prepared by the Corps, prior to issuing Permit 81-172-13 to the Eveleth Taconite Company, regarding compliance with the Section 404 Guidelines, 40 C.F.R. § 230.10; and (3) any correspondence between the Corps and Eveleth Taconite Company, United Taconite LLC, the Environmental Protection Agency and/or the Minnesota Pollution Control Agency regarding the discharge of dredge and fill material, and/or pollution, into Hammer Lake.

We appreciate that the Corps has chosen to now require mitigation for the major wetlands impacts associated with Permit 81-172-13. Prior to allowing any further discharge of dredge and fill material at this site, however, the Corps must first prepare an Environmental Impact Statement (“EIS”), pursuant to NEPA, 42 U.S.C. § 4332, and assess and insure compliance with the Section 404 Guidelines, pursuant to 40 C.F.R. § 230.10. If the Corps failed to comply with these NEPA and Clean Water Act requirements prior to issuing this permit in 1982, it is even more important to comply with these requirements now, prior to modifying this permit.

The 1982 permit in fact authorizes the Corps to modify, suspend, or revoke the permit if such action would be in the public interest. *See also* 33 C.F.R. § 325.7. The history of this site demonstrates that revocation of the permit would be in the public interest, with the permittee required to apply for a new permit if it seeks to destroy more wetlands at this site. From our review based on the limited information that has been provided, it appears that one lake has already been completely filled and permanently destroyed by the construction of tailings basin 1, another lake (Hammer Lake) is being filled and polluted by ongoing discharges and runoff at the site, and 800 acres of high quality wetlands have already been destroyed through the construction of tailings basin 2, all apparently without any NEPA analysis, compliance with the Section 404 Guidelines, or the required mitigation.¹

The original permit also required the permittee to establish study sites regarding basin 1, in order to determine the feasibility of developing and sustaining a wetland area or open water area on deactivated tailings basins 2 and 3. This study and the results, which were not included with the public notice for review, need to be disclosed and considered prior to any further wetlands destruction at this site. Similarly, the Corps must also disclose and consider, within the public NEPA process, any additional data or information that has been provided by the permittee over the years to comply with additional permit conditions and requirements. Moreover, the permittee should be required to demonstrate that tailings basins 1 and 2 have not resulted in any violations of water quality standards or environmental harm to groundwater or other resources, by providing objective data and information, prior to the Corps considering whether or not to modify the permit or otherwise allow construction of basin 3.

At the very least, the permit should be suspended, and any work on tailings basin 3 delayed, until the Corps is able to prepare and complete a detailed NEPA analysis, complete consultation with the U.S. Fish and Wildlife Service pursuant to the Endangered Species Act, and demonstrate compliance with the Section 404 Guidelines. As noted in the public notice, the construction and utilization of tailings basin 3, which has not yet occurred, would impact an additional 1,300 acres of wetlands and adjacent waterways. The destruction of an additional 1,300 acres of wetlands at this site would

¹ We note that when the Draft EIS was issued for the PolyMet mine proposal, the Corps stated that if approved PolyMet would be the largest wetlands impact that the St. Paul office of the Corps has permitted. It appears, however that United Taconite’s wetlands impacts are even greater – and apparently without any NEPA review or compliance with the Section 404 Guidelines.

clearly constitute a significant impact on the environment, requiring an EIS under NEPA prior to the issuance of a modified permit. 42 U.S.C. § 4332(2)(C).

The purpose of the Clean Water Act Section 404 Guidelines is to restore and maintain the integrity of the nation's waters by controlling and regulating discharges of dredged or fill material. 40 C.F.R. § 230.1(a). A fundamental precept is that fill should not be discharged into aquatic ecosystems unless it can be demonstrated that the discharge will not have unacceptable adverse impacts. 40 C.F.R. § 230.1(c). "From a national perspective, the degradation or destruction of special aquatic sites such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by [the] Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." 40 C.F.R. § 230.1(d).

The Section 404 Guidelines prohibit the discharge of dredge or fill material if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). We are unaware of an assessment or consideration of any practicable alternatives to the major destruction of wetlands at this site. Moreover, at issue is a non-water dependant activity. Pursuant to the Guidelines, where the activity associated with a discharge proposed for a special aquatic site, such as wetlands, does not require access or proximity to or siting within the special aquatic site to fulfill its basic purpose, practicable alternatives that do not involve special aquatic sites are presumed to be available unless clearly demonstrated otherwise. 40 C.F.R. § 230.10(a)(3). United Taconite thus has the burden to clearly demonstrate that other alternatives are not available, which it has not met.

The Section 404 Guidelines also prohibit the discharge of dredge or fill material if the discharge would cause or contribute to violations of water quality standards. 40 C.F.R. § 230.10(b). Similarly, no discharge may be allowed if the discharge would cause or contribute to significant degradation of the waters of the United States. 40 C.F.R. § 230.10(c). Prior to authorizing further wetlands destruction at this site, the Corps must therefore assess whether current activities and pollution at the site is already causing violations of state water quality standards and/or the significant degradation of waters of the United States.

The Section 404 Guidelines further prohibit the discharge of dredge and fill material unless "appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d). The Corps must insure compliance with this minimization requirement before any further destruction of wetlands is allowed.

The Corps is further required to consider the full public interest by balancing the favorable impacts against the detrimental impacts, which is known as the "public interest review." 33 C.F.R. § 320.1. All factors which may be relevant to the proposal must be considered including the cumulative impacts, conservation, economics, aesthetics, environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion, recreation,

water supply and conservation, and water quality. 33 C.F.R. § 320.4(a). For activities involving 404 discharges, the permit must be denied if the discharge would not comply with the Section 404 Guidelines. *Id.*

Significantly, in balancing the public interests, wetlands “constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.” 33 C.F.R. § 320.4(b).

As part of the public interest review process, the Corps must also consider mitigation, which includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. 33 C.F.R. § 320.1(r). Here, if the permit is modified and the construction of basin 3 is allowed to proceed, part of the minimization should require an impermeable liner and a drainage system to catch any seepage.

Additional requirements for compensatory mitigation are set forth at 33 C.F.R. Part 332. “The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States.” 33 C.F.R. § 332.3(a). Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with the particular permit. *Id.* For the proposed modification of Permit 81-172-13, the public is unfortunately unable to provide meaningful comments without knowing what compensatory mitigation is being considered.

In considering the appropriate compensatory mitigation, the Corps must also consider and disclose whether compensatory mitigation was required for tailings basins 1 and 2. If not, considerable additional compensatory mitigation must now be required prior to any further destruction of wetlands on this site.

The Corps is also required to consider cumulative impacts. 40 C.F.R. § 230.11(g). For the proposed modification of Permit 81-172-13, the Corps must therefore assess the impacts from the first two tailings basins, along with all other cumulative impacts in the region, in order to properly assess the overall potential impacts of basin 3, and in order to properly determine the significance of the degradation.

The required NEPA analysis must also consider the impacts of the wetlands destruction at this site on sensitive wildlife populations, including Canada lynx, moose, wolves, and bird and aquatic species. Wetlands need to be protected for the important habitat they provide to wildlife species, and for the important function they serve in the surrounding ecosystem. The Corps simply cannot allow another 1300 acres in wetland destruction in this region without fully considering such impacts on area wildlife, as plainly required by NEPA.

Thus, prior to allowing additional wetlands destruction at this site to occur, the Corps must first determine what types of mitigation should be required for the major wetlands destruction that has already occurred on site. The Corps must then complete a NEPA analysis and insure compliance with the Section 404 Guidelines before determining whether any further wetlands should be allowed to be destroyed at this site.

Only after the NEPA analysis is completed and compliance with the 404 Guidelines is demonstrated will the Corps be in position to determine what types of mitigation should be required in the event additional wetlands destruction is authorized.

Moreover, if the Corps determines that additional wetlands destruction at this site may proceed, the required assessment of what mitigation will be required must consider, at a minimum, the importance and quality of the wetlands that would be destroyed, and the ratio, types, and location of other wetlands within the same watershed that must be restored.

Thank you for your consideration, and thank you for the opportunity to submit these comments regarding Permit 81-172-13. Please add me to the mailing list for this permit and proposal, and please call me if you have any questions.

Sincerely,



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