

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FOND DU LAC BAND OF LAKE)
SUPERIOR CHIPPEWA,)

Plaintiff,)

Case No. 19-cv-2489-PJS-LIB

v.)

CHERYL L. NEWTON, Acting Region 5)
Administrator – Environmental Protection)
Agency; JANE NISHIDA, Acting)
Administrator of the Environmental Protection)
Agency; and UNITED STATES)
ENVIRONMENTAL PROTECTION)
AGENCY,)

and)

COL. KARL JANSEN, District)
Engineer, St. Paul District, U.S. Army)
Corps of Engineers; JOHN E. WHITLEY,)
Acting Secretary of the Army; U.S. ARMY)
CORPS OF ENGINEERS,)

Federal Defendants,)

POLYMET MINING INC.,)

Defendant-Intervenor.)

_____)

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS
UNOPPOSED MOTION FOR VOLUNTARY
REMAND OF ONE ISSUE AND STAY

INTRODUCTION

The Federal Defendants¹ submit this memorandum in support of their Unopposed Motion for Voluntary Remand of One Issue (“Motion”). In the Motion, the Environmental Protection Agency (“EPA”) seeks a voluntary remand of its lack of notice to the Fond du Lac Band of Lake Superior Chippewa (the “Band”) under Section 401(a)(2) of the Clean Water Act. 33 U.S.C. § 1341(a)(2). This lack of notice is challenged in the Band’s second and third causes of action in their First Amended Complaint for Declaratory and Injunctive Relief. ECF No. 51.

In its Order of February 16, 2021, this Court held that EPA has a duty to make a determination under Section 401(a)(2) of the Clean Water Act as to whether discharges from a mining project proposed by PolyMet Mining, Inc. (“PolyMet”), located in Minnesota, “may affect” the waters of another state. ECF No. 77 at 26. This narrow remand would allow EPA to reconsider, re-review, or modify the challenged lack of notice and make a “may affect” determination in light of the Court’s order. Further, this remand would be time-limited, as EPA currently intends to make its determination within ninety days after issuance of a remand order by the Court.

If EPA determines that the discharges “may affect” the Band’s waters, EPA would so notify the Band as required by Section 401(a)(2). The Band would then have the ability to notify the EPA and the Army Corps of Engineers (“Corps”) of its objections, if any, to PolyMet’s Section 404 Permit and request a hearing. EPA has sent a letter to the Corps,

¹ Pursuant to Fed. R. Civ. P. 25(d) the successors to the public officers named by the Plaintiffs are automatically substituted in this action. The caption of this filing has been updated to reflect the current public officers.

requesting that the Corps consider suspending the CWA Section 404 Permit if this motion for voluntary remand is granted by the Court. As these subsequent administrative proceedings on the Section 404 Permit could affect the Band's additional claims in this litigation, the United States requests that the Court stay the Band's fourth through ninth causes of action in its Amended Complaint during the pendency of the remand.² This includes staying the deadline to submit a Joint Rule 26(f) Report currently set for March 5, 2021. ECF No. 78.

BACKGROUND

I. Statutory Background

A. Clean Water Act: Section 401(a)(2)

Under the Clean Water Act, a Section 404 permit issued by the Corps of Engineers is required for activities that will discharge dredged or fill material into waters of the United States. 33 U.S.C. §§ 1311(a), 1344. Applicants for Section 404 permits are required to provide the Corps of Engineers with a certification from the State where the discharge originates, stating that the discharges will comply with certain provisions of the Clean Water Act and “any other appropriate requirement of State law.” 33 U.S.C. §§1341(a)(1); (d).

Once the Corps of Engineers receives this certification, it is required to notify EPA of the permit application and State certification. *Id.* at § 1341(a)(2). If “such a discharge may affect, as determined by [EPA,]” the “quality of the waters of any other State,” then EPA “shall so notify such other State, the licensing or permitting agency, and the applicant” within thirty days after receiving notification from the Corps. *Id.* Under the Clean Water

² The Court dismissed the Band's first cause of action. ECF No. 77 at 18.

Act, the Band has been approved to be treated as a State for the purposes of Section 401(a)(2). *Id.* at § 1377(e).

Once a State or approved Tribe receives a “may affect” notification from EPA, it has sixty days to object to the permit and request a hearing on its objections. *Id.* at § 1341(a)(2). If that State or approved Tribe objects and requests a hearing, the Clean Water Act requires the Corps of Engineers to hold such a hearing. *Id.*

B. CWA Section 404 Permit Modification

Pursuant to its regulations, once the Corps has issued a Section 404 Permit, it may suspend that Permit – and then make a determination as to whether to reinstate, modify, or revoke that permit. 33 C.F.R. § 325.7. To suspend a permit, the District Engineer must prepare a “written determination” finding that “immediate suspension would be in the public interest.” *Id.* § 325.7(c). Within “a reasonable period of time,” the District Engineer may then take action to reinstate, modify, or revoke the permit. *Id.*

II. Factual Background

The Band’s Amended Complaint for Declaratory and Injunctive Relief concerns permits issued in connection with PolyMet’s proposed NorthMet mining project. The project is a copper-nickel-platinum mine to be constructed and operated approximately 70 miles upstream of the Band’s Fond du Lac Reservation. Am. Compl. ¶ 66.

On October 31, 2018, the Band sent a letter to EPA Region 5 requesting that EPA provide notice to the Band under CWA Section 401(a)(2) in connection with the NorthMet project. Am. Compl. ¶ 206. On December 20, 2018, the Minnesota Pollution Control Agency issued a Certification pursuant to CWA Section 401(a)(1) for PolyMet’s CWA

Section 404 Permit. *Id.* ¶ 211. The same day, MPCA sent this CWA Section 401 Certification to the Corps and PolyMet, with a copy to EPA. *Id.*

On January 10, 2019, the Band sent a second letter to EPA, the Corps, and others, asserting its rights under CWA Section 401(a)(2). *Id.* ¶ 215. On January 19, 2019, the 30-day period to provide notice to affected states expired. EPA did not issue notice to the Band.

III. Procedural History

The Band filed its First Amended Complaint on June 29, 2020. ECF No. 51. The Federal Defendants moved for partial dismissal of the First Amended Complaint on July 27, 2020, seeking to dismiss the Band's first four causes of action. ECF No. 61. On October 2, 2020, this Court held oral argument on the Federal Defendants' Motion. On February 16, 2021, this Court issued an Order granting the Federal Defendants' motion in part and denying the motion in part. ECF No. 77. Specifically, the Court denied the United States' motion to dismiss the second and third claims (involving CWA Section 401(a)(2)), concluding that "EPA did not have discretion to decline to make a 'may affect' determination under § 1341(a)(2)." ECF No. 77 at 26.

LEGAL STANDARD

When an agency action is challenged, "the agency may request a remand (without confessing error) in order to reconsider its previous position," without judicial consideration of the merits of the claim. *United Food and Commercial Workers Union, Local No. 663 v. U.S. Dep't of Agric.*, No. 19-cv-2660, 2020 WL 4218211, at *1 (D. Minn. July 22, 2020) ("UFCW"),

(quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)).³ District courts have “broad discretion to decide whether and when to grant an agency’s request for a voluntary remand.” *Limnia, Inc. v. United States Department of Energy*, 857 F.3d 379, 381 (D.C. Cir. 2017). Courts “generally grant” such requests “so long as ‘the agency intends to take further action with respect to the original agency decision on review.’” *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (citation omitted); see *Edward W. Sparrow Hosp. Ass’n v. Sebelius*, 796 F. Supp. 2d 104, 107 (D.D.C. 2011) (motions for voluntary remand are “usually granted”); *Am. Forest Research Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (voluntary remand motions “commonly granted even when they are opposed”). Voluntary remands reflect courts’ deference to the principle that “[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.” *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980).

A court may refuse a voluntary remand, however, “if the agency’s request appears to be frivolous or made in bad faith.” *Utility Solid Waste*, 901 F.3d at 436. Further, a court may refuse voluntary remand upon a showing that “remand would unduly prejudice the non-moving party.” *Id.*

³ In *SKF*, the Federal Circuit engaged in a comprehensive review of the law on voluntary remands of agency action, including cases in the D.C. Circuit which hears a large number of challenges to agency action. See 254 F.3d at 1027-30.

ARGUMENT

I. Remand is appropriate in this case because EPA intends to reconsider its lack of notice to the Band under CWA Section 401(a)(2).

The Court should grant this motion for voluntary remand to allow EPA to reconsider its lack of notice to the Band under CWA Section 401(a)(2). To secure a remand, an agency must “profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge.” *UFCW*, 2020 WL 4218211 at *1, (quoting *Limnia, Inc.*, 857 F.3d at 387). Such voluntary remand requests should be granted so long as the agency has “substantial and legitimate” concern regarding the action under review, and the agency demonstrates a commitment to conclude the remand process “within a reasonable time.” *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417-18 (6th Cir. 2004).

This principle remains true even when the remand concern is first identified during litigation by the plaintiff or the court. See e.g., *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73-74 (D.D.C. 2015) (voluntary remand granted to address concerns identified in court’s preliminary injunction order); *ASSE Int’l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1063 (C.D. Cal. 2016) (granting voluntary remand when appellate decision in same litigation raised concerns about agency’s action); see also *Pellissippi Parkway*, 375 F.3d at 416 (noting “it is an abuse of discretion to prevent an agency from acting to cure the very legal defects asserted by plaintiffs challenging federal action”).

Voluntary remand is appropriate if it allows an agency to “consider further the governing statute, or the procedures that were followed” in reaching its decision. *SKF*, 254 F.3d at 1029. On remand, an agency may either “offer a fuller explanation of the agency’s

reasoning at the time of the agency action” or “deal with the problem afresh by taking new agency action.” *Dep’t of Homeland Security v. Regents of the University of California*, 140 S.Ct. 1891, 1907-08 (2020) (internal quotations and citations omitted).

Here, Defendant EPA moves for a voluntary remand of its lack of notice to the Band in light of this Court’s holding that “EPA had a legal duty to make a ‘may affect’ decision” under CWA Section 401(a)(2). ECF No. 77 at 31. EPA intends to “deal with the problem afresh” by taking new agency action and making a determination under Section 401(a)(2) as to whether discharges from the project “may affect” the waters of another state. *Homeland Security*, 140 S.Ct. at 1908. EPA intends to make this determination within ninety days after the Court’s issuance of a remand order. Accordingly, because EPA intends to “reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge,” and intends to do so within a reasonable time, the Court should grant EPA’s motion for a voluntary remand here. *UFCW*, 2020 WL 4218211, at *1.

II. There are no extraordinary circumstances that would justify denial of EPA’s request for a remand here.

While courts have found that remand may be inappropriate if it would “unduly prejudice the non-moving party,” or if the request is frivolous or in bad faith, neither of these unusual concerns are present here. *UFCW*, 2020 WL 4218211, at *1, *see also SKF*, 254 F.3d at 1029. EPA has requested that the Corps consider suspending the CWA Section 404 Permit in the event of a remand to allow EPA to make a determination under CWA Section 401(a)(2), and to allow the Corps to conduct further proceedings if required, or appropriate. Grillot Decl., Exhibit 1 – Letter from EPA to the Corps (March 4, 2021). This request is

therefore not frivolous or in bad faith. Further, this relief does not prejudice the Band, nor PolyMet. The Band and PolyMet do not oppose this motion.

III. A stay of the remaining claims in the case during the pendency of a remand is appropriate here because EPA's reconsideration on remand may result in further proceedings that would obviate the Band's remaining claims.

The Court should stay the Band's remaining claims during the pendency of the remand, including a stay of the parties' deadline to submit a Joint 26(f) Report on March 5, 2021. Should EPA make an affirmative "may affect" determination, Section 401(a)(2) requires EPA to notify the state whose water quality may be affected, the licensing or permitting agency, and the applicant of that decision. *See* 33 U.S.C. § 1341(a)(2). Such notice would trigger additional proceedings. First, CWA Section 401(a)(2) would allow the Band (or state whose water quality may be affected) to, within sixty days, provide written notice of its objections to the PolyMet Section 404 permit and to request a public hearing on its objections. Should the Band (or affected state) make such a request, the Corps "shall hold such a hearing." *Id.* At that hearing, EPA submits its evaluation and recommendations regarding the objections. *Id.* The Corps may then include conditions on the CWA Section 404 Permit based on the recommendations of the Band, EPA, "and upon any additional evidence, if any, presented" at the hearing, "as may be necessary to insure compliance with applicable water quality requirements" or, if such conditions cannot insure such compliance, forbear from issuing the license or permit. *Id.*

In light of the potential for further CWA Section 401(a)(2) proceedings, EPA has sent a letter to the Corps requesting that the Corps consider suspending PolyMet's CWA

Section 404 Permit in the event that the Court grants this motion.⁴ Grillot Decl., Exhibit 1. This would allow for completion of any subsequent proceedings as contemplated by CWA Section 401(a)(2). Allowing this process to move forward – before litigating the remaining claims against the Corps – would conserve the Court’s and the parties’ resources.

CONCLUSION

For the foregoing reasons, the Court should grant this motion for voluntary remand and stay the remaining claims in the Amended Complaint during the pendency of the remand.

DATED: March 4, 2021

Respectfully submitted,

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⁴ The Corps has authority, under its regulations, to suspend a permit if such a suspension is “in the public interest.” 33 C.F.R. § 325.7(c). Once suspended, the Corps may then after “a reasonable period of time” take action to “reinstate, modify, or revoke” the permit. *Id.* The Corps may modify a permit if, “as a result of reevaluation of the circumstances and conditions of a permit,” the District Engineer determines that modification is required by “the public interest.” *Id. at* § 325.7(b).

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