

Is anyone protecting Minnesota's waters?

By C.A. Arneson | Monday, May 24, 2010

ELY, MINN. — There is a sardonic saying that "Dilution is the solution to pollution." Agency actions in Minnesota say "Delusion is the solution to pollution" as officials disregard violations, make deals and deny pollution exists.

Cliffs Erie failed to correct pollution problems for decades when the LTV and Dunka mine sites were operating. Then PolyMet purchased LTV for the price of scrap and set in motion events that could turn Minnesota's waters into sulfide-mining cesspools. PolyMet proposed using the old LTV site for the first "official" copper-nickel mine in Minnesota.

In January 2010, The Center for Biological Diversity, together with the Save Lake Superior Association and the Indigenous Environmental Network, filed an "intent to sue" demanding that Cliffs Erie clean up its LTV and Dunka sites before any sulfide mining proposals could be considered, particularly PolyMet's plans for the seriously contaminated LTV site. The lawsuit covered only violations accrued since 2005.

In February, the Draft Environmental Impact Statement (DEIS) for PolyMet's NorthMet Project received the lowest rating possible from the U.S. Environmental Protection Agency (EPA): Environmentally Unsatisfactory — Inadequate, or EU-3. The EPA stated that the NorthMet project "will result in environmentally unsatisfactory water quality impacts" and that the "analyses of the hydrogeological profiles" was inadequate.

Such a low rating is rarely given. The Minnesota Department of Natural Resources (DNR) and the U.S. Army Corps of Engineers were the cooperating agencies responsible for the content and release of the DEIS.

A consent decree in March

Then on March 25, the Minnesota Pollution Control Agency (MPCA) entered into a consent decree with Cliffs Erie, a ludicrous settlement for excessive violations of Minnesota water standards. The MPCA rushed to protect Cliffs Erie from violations the company and agencies had ignored for years, the consent decree shielding Cliffs from the potential impact of a plethora of federal/state water-

quality violations.

Biological Diversity's "intent to sue" listed 309 violations of the permit limits. Multiplying just the 309 violations by the maximum fine allowed, \$37,500 per violation per day, the total maximum penalty — had Cliffs been subjected to fines — would be approximately \$12 million. If the calculations also included additional amounts for many of those violations that are monthly, thus multiplied by 30, the total maximum penalty would be off the charts. For example, one violation at \$37,500 per day for 30 days would be an additional maximum penalty of \$1,125,000 added to the \$12 million total.

It's impossible to fathom why the MPCA fined Cliffs Erie a paltry \$58,000!

Why not allow the multimillion-dollar lawsuit to proceed with its purpose of gaining substantial, necessary funds for extensive remediation? Or why not negotiate a consent decree with merit? It also appears the MPCA chose, in the consent decree, which violations to address and which to overlook. When is a permit violation not a violation?

Three weeks ago I called the MPCA to verify the figures, and was told they would have to get back to me. No one has.

Why is the MPCA encouraging industry to pollute by giving minimal fines, and not taking into account costs a company saved by not correcting problems, thereby allowing the public to lose when our waters are degraded for industry profits?

The costs of compliance — and benefits of delay

When a company finds itself in permit violation it is supposed to fix the problem. This costs the company in the form of spending or borrowing money, paying interest, paying staff to manage the fix, and maintaining ongoing operation and maintenance of the fix. It also amounts to money that then cannot be used to increase production, maintain or replace production equipment, or make profits.

The longer the company can delay fixing the problem, avoiding the cost involved, the more money it has available for production or increased profits. This delay also lowers the cost of operations for the company, enabling it to undercut competitors who have spent money on regulatory compliance.

The EPA determines such "avoided costs" using a computer program called BEN. Developed by accountants and economists, BEN calculates avoided costs in permit violations. The "economic

benefit of noncompliance" penalty has been upheld by federal administrative law judges.

The MPCA is avoiding "avoided costs" in penalty determinations.

Rules set the standards

In Minnesota, waters of the state are protected by Minnesota rules (regulations) that have the force of law. Water regulations are drafted by the MPCA, have public input, are approved by administration law judges and the Legislature, and are overseen by the EPA to insure compliance with federal regulations. These rules set the standards for what will or will not be considered water pollution, similar to the speed limit on highways.

Imagine a Minnesota citizen receiving 309 speeding tickets and still having a license.

Industries that discharge into federal and state waters are issued federal permits (NPDES). These permits contain the relevant specific limits the industries are required to meet in order to discharge into specific water. Industries are required to report to MPCA on their discharge quality on a scheduled basis.

If an industry finds itself discharging over the limits (noncompliance), it is supposed to correct the problem itself. If it fails to do so, the MPCA is supposed to notify the industry of its noncompliance. If the noncompliance continues, the MPCA can fine the company and put it on a schedule for compliance, with additional fines if the schedule is not met. Since the permits are both federal and state, the EPA also can enter into the actions if they find the state response inadequate or find the state needs assistance.

If the state and federal governments both fail to enforce the regulations, the Federal Clean Water Act (Section 505) allows citizens to sue for compliance. The law allows up to \$37,500 per day per violation. Before such a suit can be taken to court the citizens must give a 60-day notice regarding their "intent to sue" to the industry and the MPCA. This allows the industry and the MPCA a last chance to come into compliance.

Since 2005 Cliffs Erie has violated water limits in its three permits. The company did not correct the violations on its own, the MPCA ignored the violations, and EPA oversight was nonexistent. Finally the environmental groups gave both the MPCA and Cliffs Erie the 60-day notice that they intended to file suit for the violations. MPCA and MPCA managers who call the industry their "clients" came to the rescue.

With little regard for the public or Minnesota's waters, the MPCA settled with Cliffs Erie. In the process the agency killed the distinct possibility of meaningful mitigation at LTV and Dunka. In the process it failed to do its job.

More study

What other action did the MPCA take? It allowed yet more "study" of the pollution issues. "Short-term mitigation evaluation plans" in the consent decree do not constitute compliance.

The Dunka mine, essentially a sulfide mine, has been "studied" for more than 34 years and still pollutes our waters. Compared to any one of the numerous proposed sulfide mines, Dunka is minuscule. What damage would a 500 square mile sulfide-mining district inflict on our lake districts in another 34 years? Especially without compliance or enforcement?

Industry is essentially being told to come to Minnesota; in Minnesota we will allow you to circumvent and undercut our water regulations. Just bring jobs.

The public is being told our agencies and many politicians will trade our water, our health, our sustainable resources, our long-term economic welfare, and our matchless recreational opportunities for those jobs.

Sulfide mining would damage Lake Superior and the Boundary Waters Canoe Area Wilderness. These waters "belong" not just to all Minnesotans but also to the nation. Minnesota's charge is protecting them.

Twice the citizens of Minnesota have voted in favor of environmental constitutional amendments. We need to speak up again, in defense of what defines us: our waters.

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