DEPARTMENT OF NATURAL RESOURCES

November 25, 2024

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Re: Minnesota Department of Natural Resources' Request to Stay, In the Matter of the NorthMet Project Permit to Mine Application, OAH 60-2004-37824

Dear Counsel,

On August 30, 2024, the Minnesota Department of Natural Resources' hearing team ("DNR") submitted its Reply Brief Regarding ALJ Report, wherein it requested this matter be stayed, asserting that PolyMet, though a press release dated August 14, 2024 ("August 14th press release"), indicated its intent to amend its application for permit to mine. The DNR requested I take judicial notice of the press release and stay this matter until such time as PolyMet makes a final determination as to whether it will propose changes to the NorthMet project. I issued a letter to all the parties on September 6, 2024 inviting the other parties to provide comment on whether I should take judicial notice of the August 14th press release, and if so, whether I should issue a stay in this case.

On September 16, 2024, PolyMet submitted a response letter asserting that judicial notice is unavailable at this stage of the proceeding and that even if judicial notice were available, the information presented in the August 14th press release is not materially different than that contained in the February 14th email from PolyMet's Tribal Relations Advisor to the Fond du Lac Band of Lake Superior Chippewa (the "Band") and other tribes ("February 14th email"), which I addressed in my May 9, 2024 decision letter ("May 9th Decision"). PolyMet further asserted that because it has not withdrawn or amended its application, I lack authority to issue a stay.

On September 23, 2024, WaterLegacy, the Conservation Organizations, and the Band submitted letters in response to the DNR's Reply Brief and PolyMet's response letter. WaterLegacy asserted that taking judicial notice of the August 14th press release is permissible

for the purpose of determining whether this matter remains justiciable and whether jurisdiction remains proper. WaterLegacy further asserted that the August 14th press release is materially different from the February 14th email, justifying a different response. Specifically, the press release suggests that a decision on PolyMet's permit application would be an advisory opinion. However, WaterLegacy asserts that dismissal of the present proceedings is more appropriate than a stay because it is unclear whether there is statutory authority to issue a stay and because the proper entities are not parties to the present proceedings.

The Conservation Organizations asserted that new information may be considered for the purpose of addressing ongoing jurisdiction and that judicial notice may be taken of the August 14th press release for the limited purpose of confirming undisputed facts, including that PolyMet issued the press release stating that it is engaging in a study on the tailings storage and considering specific changes thereto. The Conservation Organizations further asserted that the August 14th press release is materially different from the February 14th email, that it demonstrates PolyMet's present application is incomplete, and that PolyMet has no mechanism for amending its application at this stage. According to the Conservation Organizations, PolyMet's permit application should therefore be denied and this proceeding should be dismissed.

The Band asserted that, while judicial notice is available under both Minn. R. 1400.8100, subp. 2 and Minn. Stat. § 14.60, subd. 4, because PolyMet confirmed the contents of the August 14th press release and the indeterminacy of its plans in its September 16 response letter, the question of judicial notice need not be answered. Rather, because PolyMet described the nature of its technical review in briefing to the Commissioner's Designee, PolyMet's abandonment of its plan is established in the record and may be considered. Moreover, any evidence indicating this matter is moot must be considered. The Band asserts that PolyMet's statements that it is considering other designs for the tailings basin renders the application speculative and a decision on the permit will be merely an advisory opinion. According to the Band, the case is moot and should therefore be dismissed.

On September 30, 2024, DNR submitted a reply letter wherein it reiterated the appropriateness of taking judicial notice of the August 14th press release, noting also that PolyMet has confirmed in record statements that it is engaging in a technical review that may result in significant changes to the NorthMet project. According to DNR, these statements show that the issuance of a decision would be merely advisory. DNR, however, disagrees with Petitioners' contentions that this proceeding should be dismissed as PolyMet has neither amended nor withdrawn its application.

After careful consideration of the arguments raised by each of the parties and for the reasons set forth herein, DNR's request to stay the proceedings for a defined period of time is **GRANTED** and the Petitioners' requests to dismiss these proceedings and deny PolyMet's permit to mine application are **DENIED**.

I. The Commissioner's Designee's Authority to Take Official Notice.

A. The Commissioner's Designee may take official notice at this stage of the proceeding.

Minn. Stat. § 14.60, subd. 4 authorizes agencies to take official notice of judicially cognizable facts, so long as the parties are given an opportunity to contest the facts noticed. Likewise, Minn. R. 1400.8100 acknowledges the right of both an administrative law judge ("ALJ") and the agency to take official notice. While the term "judicially cognizable fact" is not defined in the statute, the Minnesota Rules of Evidence contemplate facts that may be judicially noticed.[1] Specifically, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Minn. R. Evid. 201.

Minnesota courts have recognized an agency's authority to take official notice of facts at this stage in the proceeding. In *In re Excess Surplus Status of Blue Cross & Blue Shield ("In re Excess"),* following a contested case hearing and issuance of a recommended decision from the ALJ, the agency decisionmaker entered a final decision ultimately rejecting the recommendation. 624 N.W.2d 264 (Minn. 2001). On appeal, the Minnesota Supreme Court considered whether the agency decisionmaker had properly considered certain publications and web sites which had not been made part of the record. *Id.* at 282. While the court ultimately concluded that the commissioner's designee did not properly consider such evidence because it did not comply with the procedural requirements of section 14.60, the court acknowledged that such evidence may be considered at such stage of the proceeding if done so properly. *Id.* at 281–82. Specifically, it stated: "[t]o properly consider such evidence . . . an agency decision-maker must take official notice of information outside the record, notify the parties in writing, and provide them an opportunity to respond." *Id.*

In *In re Application of Northern States Power Co.*, the Minnesota Court of Appeals addressed the authority of the Minnesota Public Utilities Commission (the "PUC") to consider documents from a prior case following the issuance of a recommended decision by an ALJ. 440 N.W.2d 138 (Minn. App. 1989). In that case, in its final decision, the PUC relied upon a cost study from a prior proceeding. *Id.* Certain of the parties sought reconsideration of the PUC's final decision, arguing that because the study was not made part of the record, the PUC should reopen the record to allow the author to be cross-examined, which the PUC denied. *Id.* at 140. Ultimately, the Minnesota Court of Appeals remanded, finding prejudicial error because the record did not contain the documents relied upon by the PUC. *Id.* at 141. Notably, the court recognized that, while the PUC did not do so, "the Commission was authorized to take official notice of documents in a prior case" so long as the parties are "allowed the opportunity to contest the facts which are officially noticed." *Id.*

[1] I recognize that under the Minnesota Administrative Procedures Act, contested cases are not governed by the strict rules of evidence that apply to the trial of cases in Minnesota courts. ALJs have, however, looked to the Minnesota Rules of Evidence in determining the propriety of taking official notice under section 14.60. *See, e.g.*, *In the Matter of the Application of N. States Power Co. For Authority To Increase Rates For Elec. Serv. In the State of Minn., et al.*, OAH Case No. 65-2500-38476, 2023 WL 4544272, at *2 (2023); *In the Matter of the Appeal By M.M. of Order of Denial of Child Foster Care License Application*, OAH Case No. 80-1800-33624, 2017 WL 413186, at *8 (2017).

Minnesota courts have therefore recognized an agency's ability to take official notice of facts following the issuance of an ALJ's recommendation in a contested case proceeding in certain circumstances. Based on this precedent, I may take official notice of certain facts at this stage of the proceeding.

B. The Commissioner's Designee may take official notice of the August 14th press release.

In accordance with Minn. Stat. § 14.60, subd. 4, and the decisions above, the parties have been given an opportunity to contest the facts in the August 14th press release. Through my letter to the parties dated September 6, 2024, each of the parties were given an opportunity in which to respond to DNR's request for official notice and to stay the instant case. As set forth above, each party filed a written submission. No party disputed the existence or contents of the August 14th press release.

Moreover, courts have recognized the propriety of taking judicial notice of websites and press releases in certain circumstances. *See In re Excess*, 624 N.W.2d 264 (recognizing that mailed publications and websites may be officially noticed by notifying the parties and providing an opportunity to respond); *Goglow Enters., LLC v. GP MBM, LLC,* No. 23-2698, 2024 WL 3443883, at *1 n.1 (D. Minn. July 15, 2024) (noting that the court takes judicial notice of information provided on a party's website); *In re Resideo Techs., Inc., Sec. Litig.*, No. 19-CV-2863, 2021 WL 1195740, at *9 (D. Minn. Mar. 30, 2021) (explaining that the court will take judicial notice of certain exhibits filed with the Securities and Exchange Commission and other publicly available documents including press releases and presentation materials, because they "are beyond reasonable dispute and can be accurately and readily determine from sources whose accuracy cannot reasonably be questioned.")[2]; *Bloomington Hotel Invs., LLC v. Cnty. of Hennepin*, No. 27-CV-19-6973, 2022 WL 2347868, at *4 n. 31 (Minn. Tax Ct. 2022) *aff'd in part, vacated in part, remanded,* 993 N.W.2d 875 (Minn. 2023) (relying on Minnesota Rule of Evidence 201(b)(2), the court cited to the Centers for Disease Control Website in taking judicial notice that the World Health Organization characterized COVID-19 as a pandemic and the United States declared a state of emergency in March 2020).

Based upon the foregoing, I take official notice of the August 14th press release for the purpose of demonstrating PolyMet's intent to consider alternatives to the tailings basin storage design component of its pending permit application.

C. The form and substance surrounding the August 14th press release are materially different from those addressed in the Commissioner's Designee's May 9th Decision.

The form and substance of the August 14th press release are materially different from the February 14th email addressed in my May 9th Decision. First, the August 14th press release is not a private email, but rather a press release issued to the public at large. PolyMet has acknowledged and confirmed both its authenticity and its content.

[2] The court in *In re Resideo* relied upon Federal Rule of Evidence 201, which is substantially similar to Minnesota Rule of Evidence 201.

The February 14th email stated that PolyMet is "potentially looking at changing . . . the tailings management facility," that it has gone "through an internal process to identify needs and potential improvements," and that "there is a good chance" it will propose changes, but it does not "yet have any concrete proposals…."

In contrast, the August 14th press release is much more specific, stating:

1. Over the next year PolyMet is engaging in four key studies to assess new mining technology and sustainability developments.
2. That PolyMet has a new team of experts on tailings storage, water science, efficiency, and carbon reduction.
3. That proposed changes may be subject to additional environmental review and permitting and will include opportunities for public comment.
4. That PolyMet is studying specific tailings storage options, including: (1) keeping the current design, (2) refining the current design to use a centerline dam design, or (3) relocating the tailings storage to nearby unused mining pits.
5. That PolyMet is reviewing water treatment technologies, including new opportunities to address water quality and management challenges from historic and proposed new mining operations, protect the local environment, and safeguard water quality.
6. That PolyMet is considering an increase in production from 32,000 tons per day to 40,000 tons per day, which could shorten the mine plan from 20 years to 15 years.
7. That PolyMet is exploring techniques to sequester carbon in the mine tailings.

Not only do these statements indicate a strong likelihood that PolyMet may amend or abandon its current tailings basin design, but they also raise additional issues which may directly impact the analysis of the tailings basin design. A change in water treatment technologies, an increase in production, and/or sequestration of carbon in the mine tailings may all impact both modeled projections and the efficacy of the tailings basin storage design.

II. DNR's Request for Stay is Granted.

A. The Commissioner's Designee has the discretion to stay the case for a defined period of time.

The general purposes of the Minnesota Administrative Procedure Act ("MAPA") include, among other items, the purpose "to simplify the process of judicial review of agency action as well as increase its ease and availability." Minn. Stat. § 14.001. Moreover, it is the intent of the MAPA "to strike a fair balance between [its] purposes and the need for efficient, economical, and effective government administration." *Id.*

Staying the present proceedings for a defined period of time does not run counter to the requirements of the MAPA. As explained in my May 9th Decision, I declined to enter a stay as circumstances at that time would have implicated a *de facto* indefinite stay, resulting in a potentially indefinite delay in rendering a final decision. That is not the case now. Specifically, in the February 14th email, PolyMet stated that while it was "looking at changing . . . the tailings management facility" it didn't yet "have any concrete proposals" and it did not articulate a

timeline for reaching a decision. Conversely, the August 14th press release states that "over the next year" PolyMet would be "embarking on four key studies" and further identifies proposals related to the tailings management facility, including "refining the current design to use a centerline dam design" or "relocating tailings storage to nearby unused mining pits." This is starkly different from the vague and undefined assertions in the February 14th email.

PolyMet suggests that *In re Surveillance & Integrity Review Section ("SIRS")* precludes me from issuing a stay. 996 N.W.2d 178 (Minn. 2023). In *SIRS*, the Minnesota Supreme Court addressed whether the Department of Human Services ("DHS") exceeded its statutory authority by remanding a case to an ALJ. *Id*. at 180. There, in 2019, DHS terminated a provider of nursing, personal-care-assistant, and homemaking services for noncompliance with program requirements. *Id*. at 181. A contested case proceeding followed, including a three-day evidentiary hearing before an ALJ, who subsequently issued a report and recommendation that termination from the program was inappropriate. *Id*. at 182. The report then went to the commissioner of DHS for a final decision. *Id*. at 183. The parties submitted written exceptions, the record closed, triggering the commissioner's deadline to issue a final decision under Minn. Stat. § 14.61, subd. 2. *Id*. On the deadline to accept, reject, or modify the ALJ's recommendation, DHS remanded to the ALJ to reweigh and reconsider certain evidence. *Id*. at 183–84. On appeal, the Minnesota Supreme Court held that the commissioner's options were limited to (1) accepting the ALJ's report as the agency's final decision; (2) modifying the ALJ's report; or (3) rejecting the ALJ's report. *Id*. at 187. In reaching this conclusion, the court considered the 90-day time limitation of Minn. Stat. § 14.62, subd. 2a as important "contextual backdrop" for the issuance of a final agency decision. *Id*. at 186. In doing so, the court rejected DHS's arguments for a remand, stating that such an option "allows [DHS] to send the case back to the ALJ indefinitely [and] does not result in a final decision in the matter." *Id*. at 187. The court ultimately determined that the commissioner erred by remanding to the ALJ for further proceedings.

SIRS is distinguishable. First, the current matter involves my authority to issue a temporary stay, not a remand, to an ALJ. Nothing in *SIRS* discusses the authority of an agency decisionmaker to issue a temporary stay of proceedings. Second, unlike *SIRS*, the record of this proceeding has not yet closed under section 14.61, subd. 2. The time limitation that concerned the *SIRS* court is not implicated here. Third, the issuance of a temporary, definite stay does not raise the same worry about indefinitely remanding a case to avoid a final decision. *Id*. at 187. Here, DNR requests the matter be stayed for one year to afford PolyMet the necessary time to decide whether it will propose changes to the tailings basin. PolyMet stated in the August 14th press release, that it intends to conduct the studies regarding that decision "over the next year." Therefore, a stay until such time as PolyMet completes its studies would be a stay for a defined period of time. Once the stay period has been lifted, and assuming PolyMet has completed its pending review, the matter will indeed proceed to a final agency decision in the form of one of the three final decision options recognized by the *SIRS* court. In short, the current matter is distinguishable from *SIRS* in: (1) the type of action undertaken by the agency decisionmaker, (2) the procedural posture, and (3) the concerns presented to the *SIRS* court.

Accordingly, granting the requested stay would not result in a violation of the MAPA as applied in *SIRS*. Instead, the authority to grant a stay in these circumstances is consistent with the stated intention to strike a fair balance between the purposes of the MAPA, including simplifying the review of agency action, and the need for "efficient, economical, and effective government

administration." Minn. Stat. § 14.001.[3] As discussed further, a stay will prevent the exertion of resources for a permit application which may indeed be later amended or abandoned.

B. Courts have consistently recognized a court's authority to control its docket, including discretion to issue stays.

It is well-established that "'[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Ricci v. Ameriquest Mortg. Co.*, No. 27-CV-05-2546, 2006 WL 6253011, at *3 (Minn. Dist. Ct. Aug. 18, 2006) (quoting *Landis v. N Am. Co.*, 229 U.S. 248, 255 (1936); *Twin Cities Galleries, LLC v. Media Arts Group, Inc.*, 431 F. Supp.2d 980, 983 (D. Minn. 2006)). [4] While stays are frequently issued during the pendency of appeals, courts have recognized that stays may be issued "in a variety of circumstances." *Asi, Inc. v. Aquawood*, *LLC*, No. 19-CV-0763, 2020 WL 13519442, at *3 (D. Minn. Jan. 6, 2020).

In considering whether to issue a stay, courts must "'weigh competing interests and maintain an even balance.'" *Id.* at *18 (quoting *Landis*, 299 U.S. at 255). In considering whether to grant a stay in an analogous situation, the Minnesota Supreme Court has stated that "the trial court has broad discretion in deciding which of the various factors are relevant in each case" and "a court need only analyze the relevant factors." *Webster v. Hennepin Cnty.*, 891 N.W.23 290, 293 (Minn. 2017). These factors may include injury to a party or parties absent a stay and the

[3] This interpretation is buttressed by the presumption that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable." Minn. Stat. § 645.17(1). To conclude that an agency decisionmaker has no authority to issue a temporary stay would mean that briefing schedules could not be stayed for any of the reasons that are otherwise commonplace, such as initiating settlement discussions or adjusting for an unexpected illness. In fact, in this very case I have previously issued temporary stays of the proceedings, and no party contested my authority to do so.

[4] Petitioners state that the current decision is before the agency, not a court. While correct, my authority to issue a temporary stay is consistent with the stated intention of the MAPA, as discussed above. I further note that the Minnesota Rules of Civil Appellate Procedure, although not directly applicable, defines "trial court" as "the court *or agency* whose decision is sought to be reviewed." Minn. R. Civ. App. P. 101.02, subd. 4 (emphasis added). Indeed, the Minnesota Court of Appeals recently compared a final agency decision to that of an appellate court. *McNitt v. Minnesota IT Servs*., No. A23-1948, 2024 WL 4586230, at *3 (Minn. Ct. App. Oct. 28, 2024) ("Here, the agency, via the commissioner's first order, rejected the ALJ's recommendation for summary disposition and remanded for further proceedings, much as an appellate court would do if it reversed a grant of summary judgment and remanded to the district court for further proceedings."). The analogy is thus not hard drawn. The caselaw discussing a judge's ability to stay proceedings is, at the very least, persuasive authority given my role as a quasi-judicial decisionmaker.

public interest, including the effective administration of justice. *Id.* Courts have also recognized the additional considerations of conserving judicial resources, controlling the docket, and preventing unnecessary inequity or hardship to the party opposing issuance of the stay. *Asi, Inc.*, 2020 WL 13519442, at *3; *Edens v. Volkswagen Grp. of Am., Inc.*, No. 16-CV-0750, 2016 WL 3004629, at *2 (D. Minn. May 24, 2016).

In the present case, and at the present time, all relevant factors weigh in favor of granting a stay. First, DNR, the Petitioners, and the public would be harmed in the absence of a stay due to the potential for significant effort and public funds to be exerted for a matter which may become moot. Moreover, if PolyMet ultimately amends or withdraws its application, the DNR and likely the Petitioners will be tasked with addressing the new or amended application. In other words, continuing with the present proceedings may result in an unnecessary application of significant time and resources.

Conversely, PolyMet will not experience unnecessary hardship or inequity by the granting of a stay. As set forth in PolyMet's August 14th press release, the company is engaging in various studies related to the tailings basin, water treatment, and other aspects of the NorthMet Project. Presumably, PolyMet would not move forward with construction or operation of the tailings basin while engaging in such internal review given the potential that it may make material changes to the NorthMet Project, including possible relocation of the tailings storage facility, based upon the outcome of the studies.

PolyMet asserts that it would not be fair to issue a stay because the parties have spent vast amounts of time and resources litigating the contested case. I agree that significant efforts have been undertaken. However, the present concern is about the *additional* time and resources that will be expended, resources that PolyMet's own press release has signaled may become moot. I also note that pursuant to the parameters described below, if PolyMet chooses to proceed with the bentonite amendment as set forth in its permit application, it may petition to have the stay lifted.

Lastly, the concern about issuing an advisory opinion is significant. As discussed above, the press release details a host of different options that PolyMet may undertake, including changes to the location, design, depositions, amounts, and/or composition of flotation tailings. These options specifically implicate the issues involving the tailings basin that are currently before me. At this stage it is unknown to what extent each of these options renders the current application moot. It is known, however, that the only option in which the application is certainly *not* moot is if the current application remains the same—an option which PolyMet has not committed to. Instead, PolyMet opposes the stay because "the agency's interpretation of the reactive mine waste rule will govern all future nonferrous mining projects, making a final decision in this contested case particularly valuable." This only reinforces the concern about issuing an advisory interpretation of the reactive mine waste rule. Indeed, courts have cited the avoidance of advisory opinions as a justification for granting a stay. *See Kimery v. Broken Arrow Pub. Schs*, No. 11-CV-0249, 2011 WL 2912696, at *5 (D. Okla. July 18, 2011) ("[G]ranting a stay would further the Court's interest in judicial economy and the avoidance of advisory opinions[.]").

Accordingly, the granting of a stay will conserve resources and aid in the effective administration of justice. The stay will prevent significant expenditure of time and resources for a matter that may become moot if PolyMet amends or withdraws its permit application, as well as avoid the issuance of an advisory opinion.

C. Parameters of the stay.

For the reasons set forth above, I grant DNR's request for stay until August 14, 2025, representing a period of one year from the date of the August 14th press release. PolyMet shall provide status updates on the following dates:

February 10, 2025
May 5, 2025
July 14, 2025

If, before the expiration of the stay, PolyMet chooses to proceed with the bentonite amendment as set forth in its permit application, or otherwise believes new circumstances warrant a lifting of the stay, it may petition to have the stay lifted. As such, I retain the discretion to lift the stay prior to August 14, 2025, and to seek additional briefing from the parties as necessary and appropriate.

III. There is No Basis to Terminate this Proceeding.

Despite Petitioners' various assertions that PolyMet's permit application has been rendered incomplete, that this proceeding is currently moot, and as to the propriety of PolyMet's conversion to NewRange Copper Nickel LLC, for the reasons set forth in my May 9th Decision, these reasons do not provide a basis to terminate the present proceedings.

First, PolyMet's permit to mine application was deemed complete and filed on January 29, 2018. *In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 742 (Minn. 2021). Parties cite no authority for position that a pending application is rendered "incomplete" by the possibility that the permit application (or the permit itself) may be amended in the future. As such, the determination of completeness by DNR controls unless and until PolyMet formally withdraws or seeks to amend its permit application.

Second, as explained in my May 9th Decision, the Minnesota Court of Appeals has held that an action is moot "if an event occurs that resolves the issue or renders it impossible to grant effective relief." *Isaacs v. American Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. App. 2004). Conversely, a matter is not moot "when a party could be afforded effective relief." *Verhein v. Piper*, 917 N.W.2d 96, 100 (Minn. App. 2018) (internal quotations omitted). Here, no event has occurred that definitively resolves the issues presented in this case. Moreover, it remains possible to grant effective relief to the parties in the instant case. The mere possibility that PolyMet may revise its permit application in the future does not render it impossible for me to grant relief by issuing a final decision.

Finally, any assertions as to the propriety of PolyMet's conversion to NewRange or the parties to the application are outside the scope of the present dispute.

IV. Conclusion.

For the reasons set forth above, the current proceedings are stayed until August 14, 2025, unless such stay is lifted before that time as set forth herein. PolyMet shall comply with the deadlines set forth herein for submission of periodic status updates regarding the internal studies contemplated in its August 14th press release.

Sincerely,

Grant L. Wilson Digitally signed by Grant L. Wilson
Date: 2024.11.25 08:21:49 -06'00'

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