



May 9, 2024

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**Re: Letter Request from Fond du Lac Band of Lake Superior Chippewa, In the
Matter of the NorthMet Project Permit to Mine Application, OAH 60-2004-
37824**

Dear Counsel,

On March 11, 2024, I received a letter from the Fond du Lac Band of Lake Superior Chippewa (the “Band”) asserting that PolyMet, through a February 14, 2024 email from its Tribal Relations Advisor to the Band and other tribes (“February 14th email”), indicated an intent to abandon the design for the flotation tailings basin in PolyMet’s application for permit to mine. Based on this February 14th email, the Band requested that the current schedule for the parties to file exceptions be vacated or stayed, that PolyMet be required to confirm whether it will construct the bentonite amendment as proposed in its application, and that the other parties be given an opportunity to respond. The Band further asserted that if PolyMet could not confirm it would be constructing the bentonite amendment as described in its permit to mine application, DNR should deny the application and require PolyMet to submit a new application.

On March 26, 2024, PolyMet submitted a response letter in which it denied the Band’s assertion that PolyMet has abandoned the design for the flotation tailings basin. PolyMet stated that it intends to engage in a technical review of all aspects of the mining project and that any proposed changes to the flotation tailings basin will depend upon the outcome of that review. PolyMet noted that the technical review may recommend no changes to the permit application. Alternatively, PolyMet represented that if the technical review indicates that changes to the tailings basin are warranted, PolyMet would use the appropriate permit amendment process at that time. Additionally, PolyMet asserted that the Band’s request that PolyMet confirm it will build the bentonite amendment as proposed in its current application is beyond the authority of the Commissioner’s Designee for two reasons. First, new evidence may not be introduced at this stage

of the proceeding; and second, the Commissioner’s Designee’s authority is limited to issuing a decision upon the Administrative Law Judge’s (“ALJ”) report.

On April 2, 2024, DNR’s hearing team (“DNR”) submitted a response to the Band’s and PolyMet’s letters and expressed concerns on whether PolyMet intended to proceed with the bentonite amendment in its current permit application. DNR also raised a concern that this proceeding may become moot. To address this uncertainty, DNR requested that the Commissioner’s Designee stay the instant proceedings for nine months or until PolyMet files an application for an amended permit to mine setting forth a different design for the tailings basin. Alternatively, DNR suggested that a stay of the current proceedings could be avoided (or shortened) if PolyMet submits a letter to the parties definitively stating that it intends to construct and operate the tailings basin as described in Version 3.1 of PolyMet’s application for a permit to mine and commit that it will not propose any substantial changes to the tailings basin construction or operation during the pendency of the contested case or any subsequent judicial appeals.

On April 9, 2024, WaterLegacy and the Conservation Organizations submitted letters in response to the letters provided by the Band and DNR. Also on April 9, 2024, the Band submitted a letter replying to the arguments and recommendations raised in the other parties’ submissions. WaterLegacy asserted that PolyMet’s statements have rendered the proceeding moot, and also questioned the scope of the proceeding and the propriety of PolyMet’s conversion to NewRange Copper Nickel LLC (“NewRange”). WaterLegacy requested that the Commissioner’s Designee dismiss the instant contested case proceeding and deny PolyMet’s application for a mining permit. The Band likewise asserted that the instant proceedings have become moot and requested that the Commissioner’s Designee deny PolyMet’s permit application. The Conservation Organizations agreed PolyMet’s application should be denied on the basis that PolyMet’s statements in its March 26, 2024 letter regarding its intent to complete a technical review show that PolyMet is currently revising its plans, rendering its permit to mine application incomplete.

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 is denied and the Petitioners’ requests to dismiss these proceedings and deny PolyMet’s permit to mine application are also denied.

I. Evidentiary & Procedural Barriers to Terminating or Staying Proceedings for Prolonged Time.

- A. The Commissioner’s Designee does not have the authority to consider additional evidence at this stage in the proceeding.

The Band and other Petitioners argue that the February 14th email constitutes “evidence” and that I may consider such evidence at this stage in the proceedings. However, the Minnesota Administrative Procedure Act (“APA”) outlines different phases of contested case proceedings and circumscribes the time within which evidence may be submitted for inclusion in the administrative record. Relevant to the instant dispute, the APA distinguishes between the “hearing record” and the “contested case record.”

The “hearing record” includes all evidence, including documents, records, and witness testimony, that a party enters into evidence during a contested case proceeding. Minn. Stat. § 14.60, subd. 2. The “hearing” phase of the contested case must be overseen by an ALJ. Minn. Stat. § 14.50 (“All hearings of state agencies required to be conducted under this chapter shall be conducted by an administrative law judge assigned by the chief administrative law judge. . . .”). Evidence submitted during the hearing phase becomes part of the hearing record and the other parties to the case have the right to cross-examine witnesses who testify and the right to submit rebuttal evidence. Minn. Stat. § 14.60, subds. 2, 3; Minn. R. 1400.7300, subp. 2. Notably, “[n]o factual information or evidence shall be considered in the determination of the case unless it is part of the [hearing] record.” Minn. Stat. § 14.60, subd. 2; *see also* Minn. R. 1400.7300, subp. 2. The ALJ maintains the hearing record until the issuance of the judge’s final report, at which time the hearing record is transmitted to the agency. Minn. R. 1400.7400, subp. 1. Once the ALJ has transmitted the hearing record to the agency, none of the procedures for the introduction and contesting of evidence—the right of cross-examination,¹ the right to submit rebuttal evidence,² the requirement that the proceeding be overseen by a qualified ALJ³—remain in place.

In contrast, the “record” that remains open for purposes of receiving exceptions and argument from the parties on the ALJ’s report is the “contested case record.” Minn. Stat. § 14.61, subd. 2 (“In all contested cases where officials of the agency render the final decision, *the contested case record* must close upon the filing of any exceptions to the report and presentation of argument under subdivision 1 or upon the expiration of the deadline for doing so.”) (emphasis added). Thus, the “contested case record” includes all the documents in the “hearing record” transmitted to the Commissioner by the ALJ, in addition to any exceptions and argument provided by the parties after the hearing record has closed.

There is no statutory mechanism for a party to introduce new “evidence” once the hearing record has closed, the ALJ has issued its final report, and the exceptions process has begun. To the contrary, section 14.60, subdivision 2 requires that all evidence must be made part of the hearing record of the case and “no factual information or evidence shall be considered in the determination of the case unless it is part of the record.” *See also* Minn. R. 1400.8100, subp. 1 (“No factual information or evidence which is not part of the record shall be considered by the judge *or the agency* in the determination of a contested case.”) (emphasis added). Indeed, the Minnesota Supreme Court has held that a final agency decisionmaker overstepped his authority when he inappropriately considered information that was not in the hearing record. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 281-82 (Minn. 2001); *see also Matter of Determining Nat. Ordinary High-Water Level of Lake Pulaski*, 384 N.W.2d 510, 515 (Minn. Ct. App. 1986) (“All evidence to be considered must be in the record maintained by the administrative law judge. *See* Minn. R. 1400.7400, subp. 1 (1983). Factual information or evidence which is not part of the record may not be considered by either the administrative law judge or the agency when making its decision. Minn. R. 1400.8100, subp. 1 (1983). Thus, a request to provide additional information was inappropriate and the Commissioner was not obligated to respond to it.”). The Minnesota Court of Appeals has further clarified the “distinction between evidence,

¹ Minn. Stat. § 14.60, subd. 2.

² *Id.*

³ Minn. Stat. §§ 14.48, 14.50.

which must be submitted to the ALJ during a contested-case hearing, and argument, which may be made to the ALJ during the hearing and to the agency decision-maker following the hearing.” *Matter of Minnesota Living Assistance, Inc.*, 919 N.W.2d 87, 93 (Minn. Ct. App. 2018) (comparing Minn. Stat. § 14.60, subd. 2, which “requir[es] that evidence be made part of ‘hearing record,’” and Minn. Stat. § 14.61, subd. 1, which “allow[s] parties to file exceptions and arguments to the agency”) *rev’d on other grounds*, 934 N.W.2d 300 (Minn. 2019); *see also In re Midwest Oil of Minn., LLC*, No. A06-1731, 2007 WL 2245818, at *3 (Minn. Ct. App. Aug. 1, 2007) (recognizing that parties may file exceptions and present argument, “[b]ut no evidence that has not been agreed to may be submitted after the evidentiary record closes.”).⁴

Because there is no formal mechanism under the APA for the “officials of the agency [who will] render the final decision” to accept evidence after the “hearing record” has closed, but before the “contested case record” case closes after the filings of exceptions, I decline to consider the February 14th email at this stage of the proceeding.

- B. Assuming the Commissioner’s Designee *may* consider the February 14th email, the email does not justify a delay in these proceedings.

Even if I may consider the February 14th email, this email is insufficient to justify a delay of the instant proceedings or a denial of PolyMet’s permit to mine application. The February 14th email appears to be a communication from PolyMet’s Tribal Relations Advisor to the Band and other tribes indicating that PolyMet could potentially make changes to the tailings management facility. Petitioners argue that this email indicates PolyMet has abandoned its design of the flotation tailings basin. However, PolyMet has specifically denied the Band’s characterization of this email, stating that PolyMet has not abandoned its design for the tailings basin included in its permit application (Version 3.1) under review in this contested case proceeding.

As noted by PolyMet, Minnesota’s statutes contain specific procedures for applicants to apply for permits to mine and seek amendments thereto. Minn. Stat. § 93.481; Minn. R. 6132.4200. No party to the instant contested case proceeding asserts PolyMet has formally amended its permit to mine application before the DNR. In contrast, PolyMet confirmed in its March 26, 2024 letter that it will follow the statutory procedures if it ultimately proposes any changes to its permit to mine application. In the absence of a formal request by PolyMet to DNR requesting an amendment or withdrawal of its pending permit application, PolyMet’s current application (Version 3.1) remains the application under review in the instant contested case proceeding.

In the current situation, my options are determined by the APA. The Minnesota Supreme Court has held that once an ALJ issues a report with recommendations in a contested case proceeding, the reviewing agency head is limited under the APA to take one of three actions: (1) accept the ALJ’s report as the agency’s final decision; (2) modify the ALJ’s report; or (3) reject the ALJ’s report. *In re Surveillance & Integrity Review Section*, 996 N.W.2d 178, 186–87 (Minn. 2023) (“*SIRS*”). Each of these options results in a final agency decision. *Id.* at 186 (“[A] decision by the Commissioner that accepts, modifies, or rejects an ALJ’s report with recommendation is

⁴ The Minnesota Court of Appeals has recognized that unpublished decisions may be persuasive authority. *See State v. Bentley*, 502 N.W.2d 796, 800 (Minn. App. 1993).

one that results in final agency action.”). As such, the court in *SIRS* held that the agency representative did not have the authority to remand the matter to the ALJ as that action was not allowed in the statute and did not result in a final agency decision. *Id.* Therefore, in the absence of a formal withdrawal or amendment of PolyMet’s permit to mine application, the APA requires that the parties be allowed to file exceptions to the ALJ’s report, after which time I am required to issue a final decision consistent with one of the three options set forth in Minnesota statute.⁵

II. There is No Other Legal Basis to Terminate or Delay Proceeding

A. Polymet’s permit application has not been rendered incomplete.

The Conservation Organizations and the Band assert that PolyMet’s decision to undertake a technical review renders its permit to mine application incomplete. However, the Conservation Organizations cite to no authority to support the 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. Under Minnesota statute, an application for a mining permit is “complete” if it includes: (1) a proposed plan for reclamation or restoration; (2) a certificate evidencing that the applicant has public liability insurance; (3) an application fee; (4) a bond; and (5) a copy of the applicant’s advertisement of the proposed mining area for publication in the newspaper. Minn. Stat. § 93.481, subd. 1.

After determining an application is complete, “the commissioner shall publish a notice in the State Register and the EQB Monitor stating that the department has received an application for a permit to mine.” Minn. R. 6132.4000, subp. 1. After the applicant publishes notice in the local newspaper once each week for four successive weeks, the application is deemed filed. *Id.*; Minn. R. 6132.4900. 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).

⁵ In its April 2, 2024 letter, DNR proposed I stay the current proceeding for nine months or until PolyMet submits a letter confirming that PolyMet will not propose any substantial changes to the flotation tailings basin construction or operation during this proceeding, or any subsequent judicial appeals related to this contested case. As an initial matter, it is not clear what action by PolyMet other than an application for an amended permit (or a commitment not to amend its permit) would in DNR’s view justify the lifting of a stay in nine months’ time. Granting a stay may therefore result in a *de facto* indefinite suspension of the current proceedings even as no such suspension is contemplated in the APA.

Moreover, as explained above, Minnesota statutes provide a specific process for the filing of permit applications and amendments thereto. I am not aware of any legal authority that would authorize the Commissioner’s Designee to require PolyMet to forego its right to amend its permit as a condition for allowing the contested case to proceed. It is important to note, however, that a permittee is bound by the terms of its permit. *See* Minn. Stat. § 93.481, subd. 4(3) (“a permit may be ... revoked by the commissioner in case of any breach of the terms or conditions thereof[.]”). As such, if its permit is ultimately affirmed, PolyMet would be bound by the terms of this permit, including the proposed configuration and operation of its tailings basin. Any revision to the tailings basin design would require an amendment to PolyMet’s permit.

This determination of completeness by DNR controls unless and until PolyMet formally withdraws or seeks to amend its permit application.

B. The contested case proceeding is not moot.

WaterLegacy and the Band assert that PolyMet's statements regarding its intention to complete a technical review is an admission that PolyMet has abandoned the tailings basin design rendering this proceeding moot. WaterLegacy points to Minnesota case law holding that if circumstances render a decision unnecessary or an award of any sort of relief impossible, a case becomes moot. WaterLegacy and the Band argue that because PolyMet did not commit to construct the bentonite amendment as proposed in the application, any decision rendered by the Commissioner's Designee would be merely an advisory opinion.

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. Ct. 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. Ct. App. 2018) (internal quotations omitted). This judicial mootness analysis also applies to contested case proceedings. *See* Minn. R. 1400.5500.K. Here, the relief sought by Petitioners is the denial of PolyMet's permit to mine while the relief sought by PolyMet is the issuance of its permit to mine.

Here, no event has occurred that resolves the issues presented in this case. While Petitioners have asserted that a decision by the Commissioner's Designee is unnecessary because PolyMet has abandoned its design for the tailings basin, PolyMet has specifically denied that assertion. In the absence of formal action by PolyMet to withdraw or amend its application for a permit to mine, the issues in the instant case are not yet resolved.

Second, 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 accepting, modifying, or rejecting the ALJ's report. Therefore, this proceeding is not moot.

C. Other issues raised by the parties do not justify terminating the permit or dismissing the contested case proceeding.

WaterLegacy asserted that PolyMet's application should be denied because the application cannot be assigned to NewRange. PolyMet's conversion to NewRange was discussed in the pre-hearing conference on March 17, 2023 and all parties agreed to proceed with the hearing. OAH Transcript, Transcript of 03-17-23 PHC_FullSize, at pp. 7:2-12:23. WaterLegacy also raised challenges regarding the authority of the DNR to issue a notice and amended notice of the hearing as well as the scope of the hearing, arguments that were likewise raised before the ALJ. *See* OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 14123-50. Such issues are outside the scope of the current dispute, which is limited to responding to the Band's March 11, 2024 letter and the issues identified therein. Any arguments regarding the propriety and scope of the contested case are properly raised in a party's exceptions brief where other parties are provided an opportunity to respond. Any ruling on these arguments at this time would be premature.

III. Conclusion & New Briefing Schedule

No party has provided sufficient justification to stay the current proceedings or deny PolyMet's application. Accordingly, and for the reasons set forth above, the following rulings are issued forthwith: the Band's request to deny PolyMet's permit to mine application and dismiss these proceedings is *denied*; the DNR hearing team's request to stay these proceedings is *denied*; WaterLegacy's request to deny PolyMet's permit to mine application is *denied*; and the Conservation Organizations' request to deny PolyMet's permit to mine application is *denied*. Any other request for relief not specifically addressed herein is also *denied*.

Therefore, this proceeding will continue in the normal course with the filing of written exceptions. The revised schedule for filing written exceptions is below. Any party who elects to submit written exceptions and argument may do so **on or before 4:30 p.m.** on the dates, and subject to the page limits, as follows:

- **May 31, 2024:** PolyMet Mining, Inc. ("PolyMet") principal brief (45 pages);
- **June 7, 2024:** Minnesota Department of Natural Resources ("DNR") principal brief (45 pages);
- **July 12, 2024:** WaterLegacy ("WaterLegacy"), Fond du Lac Band of Lake Superior Chippewa ("Fond du Lac Band"), and the following Conservation Organizations: Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, Duluth for Clean Water, Center for Biological Diversity, Friends of the Cloquet Valley State Forest, Save Lake Superior Association, and Save our Sky Blue Waters ("Conservation Organizations") respective principal briefs (45 pages each);
- **August 2, 2024:** PolyMet and DNR respective reply briefs (20 pages each); and
- **August 23, 2024:** WaterLegacy, Fond du Lac Band, and Conservation Organizations respective reply briefs (20 pages each).

As set forth in Minn. Stat. § 14.61, subd. 2, the record will be closed on August 23, at 4:30 p.m.

Sincerely,

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