September 23, 2024

Grant Wilson
Commissioner's Designee
Central Region Director
Minnesota Department of Natural Resources
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VIA E-MAIL

Re: In the Matter of the NorthMet Project Permit to Mine Application,
OAH 60-2004-37824

Dear Director Wilson:

Conservation Organizations ("COs") write in response to the Minnesota Department of Natural Resources ("DNR") Hearing Team's request to take judicial notice of PolyMet's August 14, 2024 press release and to stay this proceeding.

In short, this Designee may take judicial notice of undisputed facts related to the August 14th press release for the limited purpose of determining whether DNR retains jurisdiction. Specifically, this Designee should take notice of the fact that PolyMet has publicly announced it is "embarking on" specific studies and naming changes to essential elements of its permit-to-mine application. These new facts reinforce the lack of a complete application to adjudicate.

COs maintain that a stay is unnecessary. Because PolyMet's statements demonstrate that it is attempting to proceed without a complete application, this proceeding should be dismissed, and Version 3.1 of the application should be denied. But if this Designee does grant a stay, COs request that this Designee require periodic status updates and allow briefing on jurisdictional issues when the stay is lifted.

1. **This Designee may take judicial notice of the August 14th press release for the limited purpose of determining whether DNR retains jurisdiction over this proceeding.**

The Minnesota Administrative Procedure Act ("MAPA") does not allow for consideration of new substantive evidence after a contested-case hearing has closed. However, judicial notice may be taken for limited purposes, without consideration of facts that are meant to be adjudicated as part of the hearing. Notice of undisputed and readily verifiable facts—here, that PolyMet issued a press release and stated that it is embarking on a specified review process—is appropriate for the purpose of determining whether this Designee has jurisdiction to adjudicate this matter.

New information may be considered only for the purpose of addressing ongoing jurisdiction.

As this Designee observed in the May 9th Decision, MAPA does not contemplate the introduction of new substantive evidence after the hearing. However, in that decision, this

Designee did not consider whether new information could be considered for the limited purpose of determining jurisdiction.

MAPA provides: "No factual information or evidence shall be considered *in the determination of the case* unless it is part of the record." Minn. Stat. § 14.60, subd. 2 (emphasis added). *See also* Minn. R. 1400.7300, subp. 2 (stating that only information in the record "shall be considered in the determination of the case"). However, consideration of whether an agency retains jurisdiction over a proceeding is not "the determination of the case." *Cf. Beuning Family LP v. County of Stearns*, 817 N.W.2d 122, 126 (Minn. 2012) (concluding that an order determining that an agency had statutory authority to address an appeal did not "determine [the] appeal" under the relevant statute). Rather, jurisdiction is a *prerequisite* to the determination of the case. *See In re Hibbing Taconite Mine & Stockpile Progression*, 888 N.W.2d 336, 344 (Minn. Ct. App. 2016) ("[I]f the DNR did not have statutory authority to initiate the contested-case proceedings that culminated in the commissioner's issuance of the final order, then that order is void.").

The contours of DNR's jurisdiction are set forth in statute. *Id.* at 345. The Legislature created the contested-case process to resolve disputes "*concerning the completed application . . .* in order to make a final decision *on the completed application*." Minn. Stat. § 93.483, subd. 3(a) (emphasis added). Because the very purpose of a contested-case proceeding is to resolve issues "concerning the completed application," there can be no "determination of the case" on an application that is incomplete or hypothetical. Accordingly, MAPA does not preclude this Designee from considering PolyMet's undisputed statements as relevant to the issue of whether there remains a complete application to adjudicate.

Judicial notice may be taken for the limited purpose of confirming undisputed facts.

Judicial notice may taken of facts that are "not subject to reasonable dispute" and "are capable of accurate and ready determination to sources whose accuracy cannot reasonably be questioned." *In re Welfare of Clausen*, 289 N.W.2d 153, 156-57 (Minn. 1980) (quoting Minn. R. Evid. 201(b)). Here, there is no dispute that PolyMet issued the August 14th press release and made the statements therein, and the fact that PolyMet made such statements cannot reasonably be questioned.

Statements regarding the efficacy and legality of PolyMet's plans, however, remain disputed. When, as here, the relevant document includes substantive facts that remain disputed, judicial notice may be taken for limited purposes of confirming only the relevant undisputed facts. For example, in a separate but related matter, the Minnesota Supreme Court took judicial notice of communications from the U.S. Environmental Protection Agency ("EPA") for the sole purpose of confirming that a disagreement had occurred between agencies. *See In re Denial of Contested Case Hearing Requests*, 993 N.W.2d 627, 656-57 (Minn. 2023). The court declined to take notice of the substance of EPA's comments. *Id.* at 657.

Here, issues raised are (1) whether DNR retains jurisdiction over this proceeding, or alternatively, (2) whether it is appropriate to suspend the briefing schedule for a period of time. Because jurisdiction is a prerequisite to any agency action, it is appropriate for this Designee to consider whether there continues to be a complete application to adjudicate and to take notice of undisputed facts relevant to that consideration.

PolyMet does not dispute that it issued a press release publicly stating that PolyMet is "embarking on" the four studies described in the August 14th press release, including a study on tailings storage. Nor does PolyMet dispute that it is considering the specific changes set forth in the press release. Because these facts are not in dispute, this Designee may consider them for the limited purpose of addressing whether there remains a statutory basis to adjudicate this matter.

Again, this does not mean that the statements in the press release should be considered for their substantive content. Other facts remain disputed, including PolyMet's statements regarding the environmental impact and efficacy of its proposals. Judicial notice of these kinds of facts, or inferences based on these statements, would be inappropriate if used for the purpose of determining whether the bentonite proposal is a practical and workable method to satisfy the reactive mine waste rule.

2. The August 14th press release presents new information that is material to whether there is a complete application to adjudicate.

The August 14th press release is different from PolyMet's previous representations in both nature and specificity. These differences are relevant to whether there remains a complete application that can serve as a basis for DNR jurisdiction.

The press release announces to the public that a review process is currently underway.

First, the press release is different in nature from PolyMet's February 14th email, because it is a public-facing announcement that PolyMet has already "embarked on" four specific studies. Significantly, PolyMet now announces: "Proposed changes . . . *will include* multiple opportunities for public comment and feedback." (Emphasis added.) This is a concrete promise to the public.

This commitment demonstrates that PolyMet is attempting to proceed outside of the prescribed process for obtaining a permit to mine. PolyMet claims that it can amend its permit application later. However, there is no procedure set forth in statute or rule for amending a permit application after it has been deemed complete.

To the contrary, the permit-to-mine statute and rules set forth specific steps, including: (1) submitting a permit application with all required elements, (2) agency receipt and review of objections, (3) a contested case if necessary, and (4) a permit decision. Minn. Stat. §§ 93.481, .483; Minn. R. 6132.4000. Adjudicating Version 3.1 of the application, then allowing PolyMet to change essential elements of the application, would violate these procedures.[1]

Because there is no path for proceeding on two different proposals—nor a process for amending an application this far down the road—PolyMet's statements to the public are inconsistent with its attempts to obtain a decision on Version 3.1 of its application.

[1] Although the August 14th press release discusses public engagement, voluntary receipt of public comment outside of the regulatory process would not preserve public rights to agency consideration of comments.

The press release discusses changes to specific elements of a complete application.

The press release also specifies potential changes to essential elements of the application—a shift from PolyMet's previous statements that it did "not yet have any concrete proposals." The specified changes are relevant to whether there remains a complete application.

To briefly review, a complete application must specify the engineering design, sequence, and schedules. Minn. R. 6132.1100, subp. 6(C). The design must include a description of "all materials, construction, and operating performance specifications." Minn. R. 6132.2200, subp. 2(C)(1). And the applicant must show the proposed status of mining, as well as construction of the tailings basin, over the course of specified time intervals. Minn. R. 6132.1100, subp. 7(D).

The press release announces that PolyMet is now "embarking on four key studies" on "tailings storage, water science, efficient production, and carbon reduction." The study of "tailings storage options" includes a centerline dam design, which would be a different structure than the upstream method specified in Version 3.1 of PolyMet's permit-to-mine application.[2]

Significantly, the press release announces for the first time that PolyMet is "studying how to . . . increase production from 32,000 tons per day to 40,000 tons per day." This increase is a significant departure from application Version 3.1, which specified that the "maximum annual average ore production rate will be 32,000 tons per day."[3] Version 3.1 further specified the amount of flotation tailings that would be produced annually,[4] and it set forth a schedule in which the tailings would be used as a construction material for the tailings basin.[5] These specifications were included in project modeling.[6]

Changing the flotation tailings basin design and rate of construction alter the fundamental components of a permit-to-mine application, including those that inform reclamtion. The new information released by PolyMet reinforces that there is no "complete application" for this Designee to adjudicate.[7]

3. If a stay is granted, this Designee should require periodic updates and allow further briefing on jurisdictional or procedural issues.

Alternatively, if this Designee grants a stay, COs agree with PolyMet that a stay should be limited in time. To facilitate the process of lifting a stay, PolyMet and the Hearing Team should be required to submit status updates every three months. Status updates should include the changes

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[2] Ex. 210, R.0065580, 0065585, 0068947.
[3] *Id.*, R.0068941. *See also id.*, R.0065542 (design processing parameters in tons per day).
[4] *Id.*, R.0067107. *See also id.*, R.0065542 (design processing parameters in tons per day).
[5] *Id.*, R.0067107, 0067147.
[6] *See* Ex. 216, R.0741773 (stating that tons-per-day ore processing rate is a deterministic input for plant site modeling); *id.*, R.07413337 (comparing tailings production and pollutant loading).
[7] As previously argued, COs maintain that key elements of the bentonite plan are missing from the proposal that was presented in the contested case. *See* OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, Memorandum in Support of Motion for Summary Disposition, at pp. 13447-61. Those missing specifications alone are enough to warrant denial of the application.

that are being evaluated, whether there has been communication with DNR about such changes, when PolyMet intends to receive public comment, and whether any further procedural steps are in discussion. Before a stay is lifted, COs further request the opportunity to brief jurisdictional or procedural issues.

Respectfully submitted,

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