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September 23, 2024

Commissioner-Designee Grant Wilson **SENT VIA EMAIL**
Central Region Director
Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155

RE: **NorthMet Project Permit to Mine Application, OAH 60-2004-37824**

Dear Director Wilson:

WaterLegacy appreciates the opportunity to respond to the DNR Hearing Team's request for an indefinite stay of these contested case proceedings and your September 6, 2024 letter.

You may take judicial notice of the NewRange August 14, 2024 press release (Press Release) as a widespread public dissemination of information that the NorthMet tailings storage plan is uncertain. The press release presents information that is materially different from that discussed in your letter of May 9, 2024 and demonstrates the need to reconsider justiciability in these proceedings. DNR's authority to order an indefinite stay is uncertain, but DNR has the authority to deny PolyMet's permit application or dismiss these proceedings for lack of jurisdiction.

I. Judicial notice of the NewRange press release for the purpose of determining jurisdiction is appropriate.

The "contested case record" includes both the "hearing record" and any exceptions and argument to the report of the administrative law judge. Minn. Stat. § 14.61, subd. 2. The DNR Hearing Team's request in its reply argument that the final agency decision-maker take judicial notice of the Press Release is properly raised.

It is always timely for a court or a decision-maker to take judicial notice of adjudicative facts. Minn. R. Evid. 201(f) ("Judicial notice may be taken at any stage of the proceeding."). Indeed, a decision-maker may take judicial notice, whether requested or not, *id*. at (c), and "shall take judicial notice if requested by a party and supplied with the necessary information." *Id*. at (d). *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp*., 954 N.W.2d 572, 581 n.8 (Minn. 2021) (Holding even when documents are not in the record, "we are empowered to take judicial notice of public records and may look beyond the record where the orderly administration of justice commends it")(internal quotation

omitted); *see also United Power Ass'n v. Comm'r of Revenue*, 483 N.W.2d 74, 77 n.3 (Minn. 1992) (taking judicial notice of a permit "as a matter of public record").

Unlike the February 14, 2024 email to the Fond du Lac Band of Lake Superior Chippewa (the "Band"), a private communication for which the Band provided foundational evidence, the New Range Press Release is a matter of public and widespread distribution.[1] Specific assertions in the Press Release are subject to reasonable dispute, but the fact that NewRange has widely disseminated plans to study a "variety of tailings storage options" not included in PolyMet's permit to mine application is now generally known or capable of accurate and ready determination. Minn. R. Evid. 201(b). It is appropriate to take judicial notice of the Press Release for the limited purpose of demonstrating uncertainty and conflicting options with respect to the proposed NorthMet project. *In re Denial of Contested Case Hearing Requests*, 993 N.W.2d 627, 656 (Minn. 2023) (taking judicial notice of reports and comments for "the limited purpose of demonstrating ongoing federal concern"); *Bierbach v. Digger's Polaris*, 965 N.W.2d 281, 293 n.9 (Minn. 2021) (Chutich, J., concurring and dissenting) (taking judicial notice of conflicting scientific studies to show the fact that a conflict exists).

It would not be appropriate for the decision-maker to consider statements in the Press Release as factual evidence regarding the reactive mine waste issues in this contested case. Minn. R. 1400.7400, subp. 1; Minn. R. 1400.8100, subp. 1; *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 282 (Minn. 2001). But the argument made by NewRange counsel in their September 16, 2024 letter that Minnesota law does not allow *any* new evidence after a contested case hearing is a bridge too far.[2]

Subsequent events that demonstrate a case is no longer justiciable must be considered whenever they arise because courts and agencies may only make decisions over which they have jurisdiction. *Growe v. Simon*, 2 N.W.3d 490, 499 (Minn. 2024) ("We cannot exercise jurisdiction over petitioners' claim unless a justiciable controversy exists"); *Izaak Walton League of America Endowment, Inc. v. State, Dep't of Nat. Res.*, 252 N.W.2d 852, 854 (Minn. 1977) ("The existence of a justiciable controversy is prerequisite to adjudication" and "does not comprehend the giving of advisory opinions."). Contested cases are explicitly subject to the mootness doctrine under MAPA. Minn. R. 1400.5500(K); *In re J.V.*, 741 N.W.2d 612,

[1] NewRange Embarks on Project-Wide Studies to Further Enhance Environmental Safeguards and Project Performance, August 14, 2024, last visited Sept. 20, 2024, https://www.newrangecoppernickel.com/newrange-embarks-on-project-wide-studies-to-further-enhance-environmental-safeguards-and-project-performance/,.

[2] *Hibbing Taconite Co. v. Minn. Pub. Serv. Comm'n*, 302 N.W.2d 5, 11 (Minn. 1980), cited by NewRange, is also inapplicable. In that case, a trial court's judicial notice of subsequent events was found inappropriate to determine the merits of a rate of return, not justiciability.

614 (Minn. App. 2007). The necessity for jurisdiction applies to a DNR permit to mine contested case statutes, which require that "the commissioner has jurisdiction to make a determination on the disputed material issue of fact." Minn. Stat. § 93.483, subd. 3(a)(2).

A recent federal case relied on a news release stating that a pipeline project would be terminated to dismiss the case a case as moot and lacking jurisdiction. *Texas v. Biden,* 578 F. Supp. 3d 849, 854, 857 (S.D. Tex. 2022) (citing *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001) ("If events outrun the controversy . . .the case must be dismissed as moot.")). *See also Growe v. Simon*, 2 N.W.3d at 500-01 (relying on publicly disseminated press releases to find one claim justiciable and another claim unripe and subject to dismissal).

It is appropriate under applicable law to take judicial notice of the Press Release for the purpose of determining whether the controversy before the decision-maker is moot or otherwise not justiciable.

II. The information in the NewRange Press Release is materially different from that of the February 2024 email, so a different response is justified.

The New Range Press Release is materially different from the February 2024 email to the Band, not only because it was public and widely disseminated, but because the Press Release identified a specific tailings storage alternative that would render this contested case proceeding irrelevant.[3] The New Range Press Release, stated that "we are ***sharing our plans*** before studies are complete" and identified the option of "***relocating tailings storage to nearby unused mining pits***" to "minimize impact" on the environment. (emphasis added). This option would render any decision on bentonite amendment tailings purely hypothetical.

The Press Release added a qualification that "keeping the current design" is also an option, so NewRange may argue there is no abandonment of the ***possibility*** of using bentonite. However, the Hearing Team correctly noted "[m]ounting evidence" that NewRange is "unlikely to construct the project . . . submitted to DNR in its present form." Hearing Team Br. at 2. Further, the Hearing Team stated its concern that NewRange "may be asking the final agency decision-maker to issue an advisory opinion on the reactive mine waste rule for a project design that may never materialize." *Id.*

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[3] Although the February 2024 email to the Band discussed changing tailings management because "global standards have changed since it's (sic.) initial design," global industry standards for tailings storage facilities primarily address tailings dam design and safety, not whether bentonite should be applied. *See e.g.*, Ex. 202.06 (Global Industry Standard on Tailings Management).

Uncertainty regarding the NewRange plan for NorthMet tailings storage renders a decision on the reclamation plan in the PolyMet permit to mine application moot and any decision on a potential NewRange application for tailings storage premature. *See City of Winona v. Minn. Pollution Control Agency*, 449 N.W.2d 441, 442 (Minn. 1990) (a contested case hearing prior to review of an alternative that could reduce environmental impacts "would be premature" when "even the facts on which a decision yet to be made are unknown."). The Supreme Court recently emphasized, "We decide present problems, not hypothetical ones." *Growe v. Simon*, 2 N.W.3d at 499.

The NewRange Press Release also provides material information regarding the parties in charge of the NorthMet project that suggests a DNR decision on the bentonite plan would be an advisory opinion. The Press Release highlights that "NewRange brings a new team" to "our NorthMet project." It states, "NewRange Copper Nickel is a 50:50 joint venture of subsidiaries of Teck Resources Limited and Glencore AG, holding the NorthMet and Mesaba deposits" and is a "stand-alone company." None of these NewRange entities were parties to the NorthMet permit to mine application or permit. [4]

NewRange may desire an advisory opinion favoring the low-cost bentonite amendment concept for tailings management. However, its Press Release demonstrates that this new stand-alone company has no direct interest in the NorthMet permit to mine application under consideration in these proceedings. Where parties no longer have the "requisite personal interest" in a case, that case should be "dismissed as moot." *Dean v. City of Winona*, 868 N.W.2d 1, 4-5 (Minn. 2015).

The NewRange Press Release has provided material new information demonstrating that the DNR's pending decision on the PolyMet permit to mine application's bentonite plan is moot, while any decision on a NewRange project is premature until NewRange settles on a tailings storage design and applies for a permit.

III. Dismissal of these proceedings is more appropriate than the granting of a stay.

The DNR Hearing Team proposed an indefinite stay "until PolyMet makes a final and definitive determination" on whether or not it will proceed with an "alternate project" based on the "inherent authority" that every court has "incidental to the power inherent in every court to control the disposition of causes on its docket" Hearing Team Br. at 32-3 , citing *Weitzel v. State*, 883 N.W.2d 553, 559 (Minn. 2016). This argument rests on tenuous grounds.

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[4] Ex. 210, R.0065337 (PolyMet Permit to Mine Application); Ex. 220, R.0115735 (PolyMet Permit to Mine).

The DNR is not a court, and its authority in this proceeding is established by MAPA and substantive statutes pertaining to mining. The case of *Anchor Casualty Co. v. Bongards Co-Operative Creamery Ass'n*, 253 Minn. 101, 91 N.W.2d 122, 126 (1958) (implying agency authority to promptly reverse an erroneous decision) cited by the Hearing Team, pre-dates MAPA and has not been extended to imply blanket agency authority to stay proceedings.[5]

DNR has couched its request as an indefinite stay of Petitioners' reply arguments and exceptions, rather than the agency's final decision, seemingly avoiding the prohibition in Minn. Stat. § 14.62, subd 2a that limits extensions after the record closes and requires that extensions be approved by the chief administrative law judge. This statute has recently been strictly construed to preclude an agency from remanding a case to the ALJ. *In re Surveillance & Integrity Review Section*, 996 N.W.2d 178, 186–87 (Minn. 2023).

WaterLegacy knows of no case either authorizing or precluding the DNR from approving an indefinite stay of briefing to avoid the statutory time limit for issuing a final decision. However, this stay would appear to be an enlargement of statutory powers that is not "fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *In re Otter Tail Power Co.*, 942 N.W.2d 175, 179-80 (Minn. 2020). The ALJ report was issued 300 days ago. The Press Release states that NewRange "is embarking" on studies "over the next year." It is neither fair nor fairly evident that the DNR has authority to delegate to NewRange or its study process the schedule of petitioners' arguments or the agency's ability to reach a final decision in contested case proceedings.

NewRange is neither a party to nor has committed to "the bentonite amendment as proposed in the permit application," which is the subject of this contested case proceeding. *In re NorthMet Project Permit to Mine Application Dated December 2017,* 959 N.W.2d 731, 754 (Minn. 2021). The DNR decision-maker lacks jurisdiction to make a final decision on the "completed application," and this proceeding does not include the entities required to be on that application. Minn. Stat. § 93.483, subd. 1, subd. 3 (a)(2)-(3); Minn. R. 6132.0100, subp. 25; 6132.0300, subp. 2; 6132.1100, subp. 4.

At this juncture, denial or dismissal of PolyMet's proposed permit to mine application is the appropriate, orderly, and just course of action. When NewRange has completed its studies, it may submit a new permit to mine application for whatever NorthMet technology it selects. Should the DNR decide to grant a stay to prevent closure of this record, it should expire no later than January 1, 2025, after which time the PolyMet permit to mine application should be denied or these proceedings dismissed due to a lack of jurisdiction.

[5] *See Rowe v. Dep't of Employment & Econ. Dev.*, 704 N.W.2d 191, 195-96 (Minn. App. 2005) (denying agency authority to amend decision after 30-day statutory appeal period).

Respectfully submitted,

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