

STATE OF MINNESOTA  
DEPARTMENT OF NATURAL RESOURCES

In the Matter of the NorthMet Project  
Permit to Mine Application

EXCEPTIONS AND ARGUMENTS OF  
PETITIONER FOND DU LAC BAND OF  
LAKE SUPERIOR CHIPPEWA

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## INTRODUCTION

The Fond du Lac Band of Lake Superior Chippewa (“Band”), pursuant to Minn. Stat. § 14.61 subd. 1, submits these exceptions and arguments on the ALJ’s November 28, 2023 Findings of Fact, Conclusions of Law, and Recommendations, concerning PolyMet’s<sup>1</sup> plan to use a proposed bentonite amendment to satisfy the reactive mine waste rule, Minn. R. 6132.2200 subpt. 2(B), at the flotation tailings basin (“FTB”) at the proposed NorthMet Project.

As the Band explains below, the Department of Natural Resources (“DNR”) should dismiss this proceeding or deny the permit to mine application. PolyMet is no longer committed to the plan described in its application. That renders this proceeding moot. It also makes it impossible for the DNR to rely on the hearing to make findings of fact on material issues, which concern a hypothetical plan, not a mining and reclamation plan.

If DNR does not dismiss, it should modify the ALJ’s Findings of Fact because they were in error, and instead accept Findings of Fact addressing the relevant issues in this proceeding. Given the ALJ’s Recommendations 2 and 3, which are manifestly correct, DNR should reject Recommendation 1 as unnecessary. DNR should reject Recommendation 4 because it violates Minn. R. ch. 6132. DNR should then accept the ALJ’s Recommendations 2, 3, and 5 and deny the application. The ALJ correctly found the proposed bentonite amendment will not render tailings in the FTB “no longer reactive,” and it will not prevent, during construction or at closure, “substantially all water” from moving “through or over” tailings in the FTB. Alternatively, DNR

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<sup>1</sup> The Band refers to the applicant as “PolyMet.” Since the Supreme Court remanded this matter for a contested case hearing, Poly Met Mining, Inc., the original applicant, converted to a new entity, NewRange Copper Nickel LLC. Another DNR decisionmaker has yet to determine who will be listed as a permittee, if the agency does decide to grant the permit to mine application. The Band refers to PolyMet and DNR’s litigation team collectively as “Respondents.”

should accept the ALJ's Recommendation 5 and deny the application because it lacks information required by Minn. R. 6132.2200 and 6132.2500.

### STANDARD OF REVIEW

DNR must give the ALJ's determinations "some weight," although it ultimately "has the authority to reverse factual determinations made by an ALJ." *In re Eller Media Co.*, 664 N.W.2d 1, 6-7 (Minn. 2003) (citing *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 847 (Minn. 1984)); *Bloomquist v. Comm'r of Nat. Res.*, 704 N.W.2d 184, 190 (Minn. App. 2005). "[F]ailure to explain on the record reasons for deviating from the ALJ's findings can be evidence of an arbitrary and capricious decision," *Bloomquist*, 704 N.W.2d at 190.

### EXCEPTIONS

#### I. PolyMet Bears the Burden of Proof.

PolyMet bears the burden to show, by a "preponderance of the evidence," that DNR should grant the permit. Minn. R. 1400.7300 subpt. 5. PolyMet bears this burden because it is "[t]he party proposing that certain action be taken . . . ." *Id.* A party "propos[es] that certain action be taken" when they propose to change the status quo. *In re Yanez*, 983 N.W.2d 89, 94-95 (Minn. App. 2022). And "Minnesota courts have consistently held that an applicant bears the burden of proof to show that an application should be granted." *Id.* at 94. *Accord In re City of White Bear Lake*, 247 N.W.2d 901, 904 (Minn. 1976) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof." (quotation omitted and emphasis added)). Here, PolyMet seeks to change the status quo by obtaining the privilege to construct and operate the NorthMet Project, which it does not have a right to do without a permit, *see* Minn. Stat. § 93.481 subd. 1. Although DNR previously granted a permit, the Supreme Court reversed and required DNR hold a hearing on the application. DNR will use the application, information developed at the hearing, and the ALJ's Recommendation—as well as information

gathered elsewhere, *see supra* at 1 n.1—to decide whether to grant the permit, *see* Minn. R. 1400.7300 subpt. 5.<sup>2</sup>

The ALJ erred by reasoning that the burden of proof lies on the Band, MCEA, and WaterLegacy (“Petitioners”) because “[t]his case stemmed from the denial of Petitioners’ request for a contested case hearing,” OAH Official Record, OAH 60-2004-37824 PolyMet Official Record (“OAH Record”), at pp. 31, 14066. The Supreme Court already reversed DNR and granted that request. The ALJ cited in support *MCEA v. Commissioner of Minnesota Pollution Control Agency*, 696 N.W.2d 398, 404 (Minn. App. 2005), *see* OAH Record at 14066 n.40, but that case concerned a relator’s request to change the status quo by *adding* conditions to an *existing* permit. *See Yanez*, 983 N.W.2d at 94-95 (proposing to revoke a license “seek[s] to change the status quo” and therefore “propos[es] that certain action be taken”). There is no existing permit here. Instead, *granting* PolyMet’s request for a permit would establish a *new* permit and change the status quo. Petitioners propose that the application be denied, which maintains the status quo. Therefore PolyMet, not Petitioners, bears the burden of proof. *Yanez*, 983 N.W.2d at 94-95.

## **II. DNR Should Correct the ALJ’s Findings of Fact, Adopt Relevant Findings Provided Below, and Reject Recommendation 1.**

The Band describes key facts that *must* be included in any Findings of Fact DNR makes on the Project. These facts show that the proposed bentonite amendment cannot satisfy the reactive mine waste rule and demonstrate why DNR should adopt the ALJ’s Recommendations 2 and 3. Because the proposed bentonite amendment will violate the reactive mine waste rule, it is unnecessary to make findings of fact on each sub-topic identified by Deputy Commissioner

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<sup>2</sup> *See In re NorthMet Project*, 959 N.W.2d 731, 738, 743, 759-60 (Minn. 2021) (stating court of appeals “reversed the decision to grant the permits” and affirming that decision in part). PolyMet leapfrogs this proceeding by arguing the standards for judicial review. *See* PolyMet Br. at 4-5, 36.

Narramore,<sup>3</sup> and DNR should reject Recommendation 1. The Band specifically objects to particular irrelevant or erroneous Findings, and otherwise joins the other Petitioners' exceptions to the ALJ's Findings of Fact, which further show why Recommendation 1 should be rejected.

**A. The Components of the FTB.**

PolyMet will permanently store flotation tailings in the FTB from when it begins depositing tailings in the FTB in Mine Year 1. Ex. 210, R.0065580.<sup>4</sup> The FTB will be constructed on top of an existing legacy tailings basin. Ex. 211, R.0715514-17. The legacy tailings in the basin were produced by prior mining and beneficiation, and they release substances that adversely impact natural resources. *See, e.g.*, Ex. 217, R.0034550-51. As PolyMet deposits flotation tailings, it will construct a series of dams out of "borrowed" legacy tailings, which will eventually contain 225 million tons of flotation tailings in the FTB. Ex. 210, R.0065585. At closure, the FTB will contain a permanent pond of water on top of the basin, although most tailings will neither be located under the pond nor submerged under pond water. *See, e.g.*, Ex. 14.07. Water will continually move out of the FTB pond, in part via seepage into underlying tailings. *See* Tr. Vol. 2, 31:23-32:5 (Radue).

Although there is no evidence that bentonite has been used to satisfy the reactive mine waste rule, PolyMet's permit to mine application proposes to amend the FTB with a bentonite

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<sup>3</sup> The DNR also does not need to adopt findings on each sub-topic identified in the Amended Notice and Order, because Deputy Commissioner Narramore lacked authority to issue it. The Amended Notice and Order effectively decided a pending motion that was within the ALJ's exclusive jurisdiction under Minn. R. 1400.7600 and limited the evidence that the parties could present at the contested case hearing in violation of Minn. Stat. § 14.60 and Minn. R. 1400.7600, OAH Record at 14126-33. Furthermore, Deputy Commissioner lacked authority to amend the Notice and Order under Minn. Stat. § 14.58, or issue a decision which determined the admissibility and relevance of evidence under Minn. Stat. § 14.60 subd. 1, because that authority had been delegated to Director Wilson, *see* OAH Record at 14303-04, 14136-37.

<sup>4</sup> The ALJ erroneously found PolyMet will produce tailings where ore is mined and transport it to the plant site. *See* Finding of Fact ("FOF") ¶ 5, OAH Record at 11. Tailings will be produced from the processing of ore at the beneficiation plant. Ex. 214, R.0067110.

layer, to achieve “required” modeled percolation rates that “must be achieved” and would allow a certain amount of water to move through tailings in the FTB. *See, e.g.*, Ex. 213, R.0067038; Tr. Vol. 1, 171:23-24 (Radue); Ex. 75 at 65:1229-31 (Radue) (discussing Ex. 216, R.0741677-78). PolyMet will add “approximately 3% by dry weight” of “granulated bentonite” to “an 18-inch thick layer” of legacy tailings on the dam slopes. Ex. 207 at 14; Ex. 210, R.0067143. The proposed bentonite amendment on the dams would be “overlain by an additional 30-inch layer” of legacy tailings. Ex. 207 at 15; Ex. 210, R.0065585. PolyMet will add “approximately 3% by dry weight” of “granulated bentonite” to “an 18-inch thick layer” of flotation tailings on the FTB beaches. Ex. 207 at 17; Ex. 210, R.0067832. The amendment on the beaches would be “overlain” by a 30-inch layer of flotation tailings. Ex. 207 at 17; Ex. 210, R.0067832. Bentonite could be applied to the bottom of the FTB pond through the water from a barge, in one of three ways: 1) broadcasting “granular or pelletized bentonite” across the pond surface; 2) injecting bentonite into the pond bottom by submerged equipment, using in a method “similar to the method used in agriculture to inject manure and fertilizers below the ground surface”; or 3) lowering a geosynthetic clay liner through the water. Ex. 207 at 9-10; Ex. 210, R.0067035-37, R.0067396. The FTB pond bottom amendment “may not be required” if the “hydraulic conductivity of the deposited flotation tailings without bentonite amendment may be as low as needed to maintain a positive pond water balance.” Ex. 207 at 8-9; Ex. 210, R.0067396.

Other elements of the Project, not located within or part of the FTB, are intended to capture and treat seepage from the FTB and the tailings basin as a whole. Ex. 210, R.0065522, R.0065583-84, R.0065670, R.0065699. The proposed bentonite amendment does not, and is not intended to, capture and treat seepage.

**B. Tailings Stored in the FTB Will Release Substances Before and After Application of the Proposed Bentonite Amendment.**

Tailings within the FTB will release substances that adversely affect natural resources, including sulfate, arsenic, chloride, copper, alkalinity, boron, calcium, magnesium, manganese, and barium. Ex. 210, R.0066845-48; Ex. 217, R.0034447-48. Both before and after application of the proposed bentonite amendment, tailings will release these substances into water that moves through or over tailings and that emerges from the tailings basin toe. *See* Ex. 216, R.0741214-15, R.0741251-61; Ex. 210, R.0066845.

Substances will be released from the mine waste in part as the result of chemical interactions between the waste and water seeping through the FTB. *See, e.g.*, Ex. 211, R.0717937 (“The chemical makeup of [seepage] water is affected by the reactions with tailings materials as it moves through the Tailings Basin.”). As PolyMet’s expert Tamara Diedrich explained, tailings deposited into the FTB “react with the surrounding environment through specific weathering reactions.” Ex. 78 at 8:134-135 (Diedrich). (Diedrich used “react” and “reactions” in her testimony as technical terms of art, not as “reactivity” is defined in the Rules. Tr. Vol. 3 at 99:6-9 (Diedrich).) “Weathering” results in the release of substances from tailings. *See* Ex. 78 at 11:181-85 (Diedrich); Tr. Vol. 3 at 102:3-9 (Diedrich) (agreeing that water that moves through tailings on FTB beaches will include constituents released from tailings).

**C. Water Will Enter and Exit the FTB Before and After Construction of the FTB.**

During closure, after application of the proposed bentonite amendment, 298 million gallons of water per year will infiltrate into the FTB, move through or over tailings in the FTB, and escape out the bottom. *See* Tr. Vol. 2 at 114:15-115:7 (Radue) (discussing Ex. 216, R.0741193 and a demonstrative exhibit); 56:11-22 (Radue) (discussing Ex. 75 at 49:941-45 (Radue)). This water will enter the legacy tailings basin and emerge from the tailings basin. *See, e.g.*, Ex. 216,

R.0741171 (seepage from the FTB is determined by adding the flows that emerge at the tailings basin toes, that are attributable to water movement through FTB); *id.*, R.0741681-82, R.0741727, R.0741757-62 (showing where FTB pond, beach, and dam infiltration will emerge along the tailings basin toe); Ex. 212, R.0066824 (“The FTB Seepage Containment System will collect tailings basin seepage from the FTB . . . .”); *id.*, R.0066820 (describing how placement of tailings in FTB will affect seepage through the tailings basin dam toes). Based the annual seepage rate of 298 million gallons, during the modeled period of 475 years after closure, 141.55 billion gallons of water would seep through reactive mine waste in the FTB.<sup>5</sup> Seepage will be even more substantial before the FTB pond bottom amendment is completed, which may not be until after ten years of closure. *See* Tr. Vol. 2 at 62:15-19 (Radue). For instance, over 730 gpm, or nearly 384 million gallons, will seep through the FTB pond bottom in Mine Year 10 alone, before the proposed bentonite amendment is applied to the FTB pond bottom. Ex. 216, R.0741190-92.

The proposed bentonite amendment will not prevent rain and melted precipitation from moving through or over exposed flotation tailings overlaying the proposed bentonite amendment on the FTB beaches, and some of that water will flow into the FTB pond. *See* Tr. Vol. 3 at 99:10-100:19, 101:11-103:6 (Diedrich); Ex. 78 at 14:242-47 (Diedrich); Ex. 212, R.0066822 (“Precipitation falling within the FTB will flow to the FTB Pond.”); Ex. 216, R.0741109 (constituent load “generated by the beaches will be transported to the FTB pond via the runoff from the FTB beaches”). Water that flows through and over this waste will infiltrate the FTB beaches or the FTB pond bottom, and emerge at the tailings basin dam toes, Ex. 216, R.0741681-

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<sup>5</sup> During the 475 years of closure, 408.975 billion gallons of water will move through the entire Tailings Basin, including both the FTB and the legacy basin. *See* OAH Record at 1507. The ALJ erroneously attributed this amount of water to the FTB alone over the 500-year modeled period, *see* OAH Record at 44.

82, R.0741727, R.0741757-62. Water will also move through and over legacy tailings overlaying bentonite on the FTB dams, *see* Ex. 210, R.0065585 § 10.2.5; Ex. 74 at 19:283 (Radue).

Water will also move through and over tailings via the pore spaces between tailings inside the FTB. Some of the tailings in the FTB will be saturated. Saturation refers to the amount of water in pore spaces between tailings. *See, e.g.*, Ex. 204, 9:8-10 & illustration (Thyne); Ex. 74 at 8:118-121 (Radue).<sup>6</sup> Although pore spaces in saturated tailings are mostly filled with water, that water does not necessarily remain stored in those spaces. Water is constantly escaping saturated tailings, and those tailings only remain saturated if water continues to infiltrate into them to replace the escaped water. Indeed, if saturated tailings in the FTB actually “stored” water, then the amount of saturated tailings in the basin would increase every single year as a result of the continuous infiltration of water into the FTB. That is not modeled to happen. Instead, saturation is maintained when water infiltrates into the tailings and replaces water that has flowed out of the tailings. Overall saturation decreases when less water infiltrates the tailings, and the movement of water within pore spaces changes zones of saturation within the FTB. That is shown by the record.

During operations, PolyMet will continuously spigot saturated tailings into the FTB. Ex. 211, R.0717937; Ex. 216, R.0741170-71. The places where tailings are spigotted will become more saturated than other parts of the tailings beaches, and so zones of saturation will move around the FTB beaches as spigotting locations change. Ex. 217, R.0034562. Water that escapes from these saturated tailings will move through and over flotation tailings, escape the FTB, and “flush” out through underlying legacy tailings, carrying contamination with it. *See* Ex. 216, R.0741228, 0741251. After closure, PolyMet stops producing tailings and stops spigotting saturated tailings

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<sup>6</sup> The ALJ’s Memorandum appears to accept PolyMet’s and DNR’s litigation teams’ assertion that water in saturated areas of the FTB is “stored” water. OAH Record at 42-43. But, as discussed further *infra* at 8-9, 35-36, 41, water in saturated areas is not “stored.”



in the FTB. One of the major purposes of the FTB pond is to maintain saturation in a layer of tailings under the pond after that source of water goes away. *See* Ex. 216, R.0741674; Ex. 211, R.0716423. As PolyMet decreases the net amount of water it puts into the FTB, the net amount of saturated tailings will also decrease as water escapes saturated zones and moves through and over tailings and out of the bottom of the FTB. *See* Ex. 216, R.0741172. (“Because seepage rates from the basin will likely exceed infiltration rates into the FTB at the beginning of closure, the phreatic surface is expected to lower through time until a new equilibrium is reached.”). As a result, “[u]pon closure, the Flotation Tailings below the bentonite-amended layer in the FTB Pond bottom will transition from a saturated to an unsaturated state.” Ex. 217, R.0034563; *see* Tr. Vol. 3 at 200:16-22 (Wenz).

That change will be substantial. After closure the level of saturation in the FTB will decrease by as much as seventy-one feet. *See* Ex. 216, R.0741682, R.0741805. Between Mine Year 25—that is, at closure—and Mine Year 50, approximately 4,248 acre-feet of saturated tailings under the FTB dams will cease to be saturated, while 444 acre-feet of unsaturated tailings will become saturated. *See id.*, R.0741802. In the same period, approximately 8,802 acre-feet of tailings under the FTB beaches will cease to be saturated while 1,637 acre-feet of unsaturated tailings will become saturated. *See id.*, R.0741804. That will all be the result of the movement of water within pore spaces between tailings.

**D. ALJ Findings About Other Engineering Controls and Water Quality Standards are Incorrect and Wrong**

In his Findings of Fact, the ALJ made irrelevant or incorrect findings that should be corrected. The ALJ’s Summary of the Case refers to the FTB as “essentially a lake.” OAH Record at 8. That was wrong, as the FTB will be primarily tailings, stored in a mound or hill, most of which will not be submerged. *Cf.* OAH Record at 13 (showing Ex. 14.07). The ALJ’s FOF ¶ 10

erroneously refers to “four key areas” of the FTB that include “a seepage capture system” and “a wastewater treatment system.” OAH Record at 12. Neither of these systems are part of the FTB, *see, e.g.*, Ex. 210, R.0066315. The ALJ’s FOF ¶¶ 93 and 96 say that modeling for the Project shows that “water quality standards would be met” at modeled hydraulic conductivity and percolation rates. OAH Record at 24-25. Water quality standards are outside of the scope of this hearing because DNR lacks jurisdiction over them, *see infra* at 19-20. Moreover, the parts of the record the ALJ cited do not say that the Project will meet all applicable water quality standards. And the ALJ’s memorandum contradicts these findings. As the ALJ noted, post-hearing decisions by the United States Army Corps of Engineers and the Minnesota Supreme Court also show that the project will not meet water quality standards. *See* OAH Record at 40-41; *infra* at 27-32.

### **III. The DNR Should Not Adopt the ALJ’s Alternative Proposed Special Recommendations**

DNR should not adopt the ALJ’s Recommendation 4 that, if the permit is reissued, it should include the 2018 permit conditions and DNR’s litigation team’s proposed special conditions. *See* OAH Record at 33, 45. Doing so would violate the Minnesota Rules.

The 2018 permit to mine contained special conditions 88-89g, which permitted PolyMet to provide bentonite amendment workplans ninety days *after* the permit to mine would be issued. Ex. 220, R.0115753-54. The workplans would show whether the proposed bentonite amendment would “perform as intended to meet all applicable standards, statutes and regulations” and would “include a detailed construction quality assurance and quality control and a schedule for implementation of the workplan and any anticipated phases of work that may result.” Ex. 220, R.0115753-54. And within sixty days after DNR approved these workplans, PolyMet would provide to DNR adaptive management plans “that describe the action or actions that would need to be implemented if water quantity, water quality, or dam safety objectives are not met through

the use of the bentonite amendments.” *Id.* R.0115754 (SC 89g). In its post-hearing brief, DNR’s team proposed amending these special conditions to require PolyMet provide more detail about proposed testing and the contents of the work plans *after* permitting. OAH Record at 1370-74.

DNR should not adopt these special conditions. They violate Minn. Stat. § 93.481 subd. 1(1) and Minn. R. 6132.2200 and 6132.2500. A permit to mine application must include a “proposed plan for [] reclamation,” Minn. Stat. § 93.481 subd. 1(1). When “granting a permit,” the Commissioner “shall determine” that the plan “complies with lawful requirements.” *Id.* subd. 2. The plan must include the “engineering design, methods, sequence, and schedules of reclamation including closure and postclosure maintenance that address the goals and meet the requirements of parts 6132.2000 to 6132.3200, including anticipated reclamation research.” Minn. R. 6132.1100 subpt. 6(C). The “requirements of parts 6132.2000 to 6132.3200” include that a design for a reactive mine waste storage facility “describe all materials, construction, and operating performance specifications and limitations that must be maintained to ensure protection of natural resources.” *Id.* 6132.2200 subpt. 2(C)(1); *see id.* 6132.2500 subpt. 2(B)(2) and (6) (using same language as Minn. R. 6132.2200 subpt 2(C)(1) and making 6132.2200 applicable to tailings basins that store reactive mine waste). Because they are “requirements,” the permittee *must* satisfy them to obtain a permit to mine. *See MCEA v. Minn. DNR*, No. A18-1956, 2019 WL 3545839 at \*6 (Minn. App. Aug. 5, 2019).<sup>7</sup> However, the special conditions would allow PolyMet to submit information, *after* the permit to mine is granted, specifying materials, construction, and operating performance specifications and limitations of the proposed bentonite amendment. The Minnesota

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<sup>7</sup> This final judgment on the merits is binding as a matter of collateral estoppel against DNR and PolyMet, who were parties to that action and had a full and fair opportunity to be heard on the meaning of Rule chapter 6132 there. *See* Minn. Stat. § 480A.08 subd. 3; *Ellis v. Minneapolis Comm’n on Civil Rights*, 319 N.W.2d 702, 704 (Minn. 1982).

Statutes and Rules require that this information be included in the proposed mining and reclamation plan that is part of the permit application. DNR would use this information, provided *after* permitting, to decide if the bentonite amendment satisfies “all applicable standards, statutes and regulations.” However, DNR must make this conclusion *before* the permit is issued.

PolyMet makes specific arguments about how these special conditions should be amended in ways that would benefit it. PolyMet Br. § III. PolyMet’s amendments would not save the special conditions from violating Minn. R. 6132.2200 and .2500. For instance, PolyMet says that it should not be required to engage in large-scale testing using surrogate tailings, as allowed by proposed new special conditions 88(3), 89, 89d(3), and 89e, *see* OAH Record at 1371-73. PolyMet says that is because it needs actual flotation tailings to prove the bentonite plan can work, and actual flotation tailings can only be produced once mining begins. PolyMet Br. at 36-38. But if PolyMet requires post-permitting information to show whether the proposed bentonite amendment can work, then its plan is not consistent with the requirements of Minn. R. 6132.2200 subpts. 2(B) and (C)(1) and .2500 subpt. 2(B)(2) and (6), which require enough information to confirm the efficacy and elements of the proposed bentonite amendment design *before* permitting.

## ARGUMENTS

The ALJ was correct to recommend that the permit to mine application be denied. For the following reasons, DNR should either dismiss this case as moot, or accept the ALJ’s Recommendations 2, 3, and 5, and deny the permit to mine application.

### **I. PolyMet’s “Technical Review” Has Made It Impossible to Grant the Permit to Mine Application.**

The permit is moot, and this proceeding should be dismissed. PolyMet admitted in a letter filed with Director Wilson on March 26, 2024, that “the [PolyMet] management team is looking at ‘all aspects of the project’” as part of “a thorough technical review that is still in its infancy.”

PolyMet Mar. 26 Ltr. at 1-2. PolyMet clarified that whether it continues with the current tailings basin design depends on the results of that “thorough technical review,” that the scope of changes to the tailings basin design are unknown, and that the scope of changes

is impossible to know until the review is over, and [PolyMet] does not expect that to happen for many months and potentially more than a year. If [PolyMet] wants to propose changes then, and it prevails here, it would go through the appropriate permit amendment process.

*Id.* at 2. PolyMet’s letter, which is indisputably part of the record, confirms that the tailings basin design—including the proposed bentonite amendment—depends on a new, internal review and planning process, not DNR’s permitting process. The results of PolyMet’s review are so speculative that PolyMet in its letter could not make any statements supporting the accuracy or certainty of the application pending before DNR. And it also confirmed the contents of an earlier email from a PolyMet employee which the Band submitted to the Director on March 11, asserting that all elements of the NorthMet Project were subject to change based on PolyMet’s own review.

These submissions show PolyMet has abandoned its “requisite personal interest that must exist at the commencement of the litigation” and “continue throughout its existence . . . .” *Dean v. City of Winona*, 868 N.W.2d 1, 4-5 (Minn. 2015) (quoting *Friends of Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). PolyMet’s voluntary action has mooted its application, whether or not PolyMet withdraws it.<sup>8</sup> PolyMet’s design will now depend on its technical review, not its permit application. For that reason, granting the application would not give PolyMet “effective relief,” because it would not grant PolyMet permission to do what it actually intends to do. *See Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. App.

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<sup>8</sup> If PolyMet withdrew its application, this proceeding would be moot for that reason, as well. There is no procedure in Minn. R. ch. 6132 by which PolyMet can amend its application once it is deemed “complete,” even if that determination is arbitrary and capricious, contrary to law, or lacks substantial evidence. Any “amendment” would be a withdrawal of the existing application.

2004). PolyMet’s plans are now entirely unknown, so any permit decision would be only advisory. And because this proceeding is constitutionally moot, DNR cannot rely on procedural provisions of statutes to grant the permit application. *See In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (lack of mootness is a “constitutional prerequisite to the exercise of jurisdiction”).<sup>9</sup>

Even if the permit application were not moot, PolyMet’s change in plans is fatal to the permit application. As the Band has explained,<sup>10</sup> the evidence, testimony, and arguments developed in the contested case hearing concerned the design for the proposed bentonite amendment described in the permit to mine. The ALJ’s findings relate to that proposed design. But that design is a dead letter. The facts developed at the hearing no longer relate to PolyMet’s plan for the proposed bentonite amendment, whatever that plan may end up being. The facts *cannot* support *any* conclusion that PolyMet will satisfy the reactive mine waste rule. DNR therefore cannot adopt the ALJ’s Findings of Fact on the “material issue” of whether the proposed bentonite amendment will comply with the reactive mine waste rule, *see* Minn. Stat. § 14.62 subd. 1. DNR must instead accept the ALJ’s Recommendations 2, 3, and 5 on the alternative basis that the permit application lacks information to show PolyMet’s compliance with that rule.

As a result of PolyMet’s admissions, the application should be denied for yet another reason. The application is now legally insufficient because it lacks information about the materials, construction, and operations of the FTB that *must* be included in a proposed mining and

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<sup>9</sup> The PolyMet employee’s e-mail was properly before DNR. Procedural provisions of statutes or rules cannot blind the agency to constitutional mootness. Although Director Wilson determined otherwise in a May 9, 2024 decision, the cases he cited do not hold otherwise. Neither considered evidence showing a case was constitutionally moot. *Compare* Band Apr. 9 Ltr. *with In re Minn. Living Assistance, Inc.*, 919 N.W.2d 87, 93 (Minn. App. 2018), *rev’d on other grounds* 934 N.W.2d 300 (Minn. 2019), *and In re Midwest Oil of Minn., LLC*, No. A06-1731, 2007 WL 2245818, at \*3 (Minn. App. Aug. 1, 2007). Additionally, *Minnesota Living Assistance* concerned waiver, which is not implicated here since PolyMet abandoned its plan after the ALJ issued his recommendation.

<sup>10</sup> *See* Band Apr. 9 Ltr. at 2 (citing Band Mar. 11 Ltr. Br. at 3).

reclamation plan in a permit to mine application. As described *supra* at 11-12, a permit to mine application must include a proposed mining and reclamation plan describing how any reactive mine waste storage facilities will be constructed and operated. See Minn. Stat. § 93.481 subd. 1(1); Minn. R. 6132.2200 subpt. 2(C)(1), 6132.2500 subpts. 2(B)(2), (6). The permit to mine application purported to include that information for the FTB, including the proposed bentonite amendment.<sup>11</sup> Now, due to PolyMet’s abandonment of its plan, the permit to mine application does not describe what PolyMet actually plans to do at the tailings basin, including whether it will build the FTB or the proposed bentonite amendment as described in the application. The design, methods, sequence, and schedules for the FTB and proposed bentonite amendment, including materials, construction, and operating performance specification and limitations, are undefined. That information *must* be part of this application. But it is not, so the application must be denied.

## **II. The FTB Must Satisfy the Reactive Mine Waste Rule.**

Even if the DNR concludes that the case is not moot or that the permit should not be denied for the reasons just described, the DNR should still affirm the ALJ’s Recommendations 2, 3, and 5, and deny the permit to mine application because proposed bentonite amendment will fail to satisfy the reactive mine waste rule. The Band first explains why the reactive mine waste rule applies, and the regulatory and factual reasons why the waste in the FTB are reactive, and then explains why the reactive mine waste rule is not satisfied here.

### **A. Tailings in the FTB Will Be Reactive.**

Tailings stored in the FTB will be reactive mine waste. DNR’s litigation team’s interpretation of the definition of “reactive mine waste” is simply wrong, and a veiled attempt to circumvent the requirements of Minn. R. 6132.2200 subpt. 2(B)(1).

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<sup>11</sup> As the Band explains *infra* Arguments § IV, the proposed bentonite amendment also came short of this standard before PolyMet made these new admissions.

The Court of Appeals has explained that in Minn. R. ch. 6132, “DNR defined terms when they were used ‘in a way that was unique,’ but otherwise intended common meanings of terms.” *MCEA*, 2019 WL 3545839 at \*10. *Accord* Ex. 336, R.730356. Thus, to the extent the terms are undefined in the rules, they should be given their “plain and ordinary meaning,” starting with dictionary definitions, *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 605 (Minn. 2016) (citing *State v. Brown*, 792 N.W.2d 815, 822 (Minn. 2011)). The plain meaning of phrases in statutes or rules is determined by “separat[ing] a phrase into its ‘component terms’ and then reconstruct[ing] it to determine its meaning if the phrase is not a term of art, lacks a technical meaning, and is not otherwise defined in the statute or rule.” *Id.* (citing *Nelson v. Schlener*, 859 N.W.2d 288, 293 (Minn. 2015); *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 790 (Minn. 2011)). Under the dictionary and rules of grammar, the plain meaning of “reactive mine waste” is clear.

“[M]ine waste” is defined as “a material, such as surface overburden, rock, lean ore, leached ore, or tailings that in the process of mining and beneficiation has been exposed or removed from the earth.” Minn. R. 6132.0100 subpt. 16. “Reactive mine waste” is defined as “waste that is shown through characterization studies to *release* substances that *adversely impact natural resources*.” Minn. R. 6132.0100 subpt. 28 (emphasis added). Those two necessary component terms in Subpart 28 each have their own plain meanings.

“Release” is not defined in Minn. R. ch. 6132. Its plain meaning, when used to refer to an inanimate object, is to “set free” or “let go.” *See New Oxford Am. Dictionary* 1474 (3d ed. 2010) (“*Oxford*”) (“allow or enable to escape from confinement; set free”); *Am. Heritage Dictionary* 1483 (5th ed. 2018) (“*Heritage*”) (“to set free from physical restraint or binding; let go”); *see also Larson v. Nw. Mut. Life Ins. Co.*, 855 N.W.2d 293, 302 (Minn. 2014). “Adversely impact natural resources” is defined in Minn. R. 6132.0100 subpt. 3, as “an unacceptable level of impact on the



natural resources as determined by the commissioner based on an evaluation which considers the value of the resource and the degree of impact.” The “natural resources” which are “impacted” are also defined in the Rule, as “*all* mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational, historical, scenic, and aesthetic resources in accordance with [Minn. Stat. § 116B.02 subd. 4].” *Id.* subpt. 21 (emphasis added). “All” is not defined in the Rule, but when applied to an indefinite noun like those used in subpart 21, “all” means “any whatever.” *Oxford* at 41; *accord Heritage* at 45; *see City of Spokane v. Fed. Nat’l Mortg. Ass’n*, No. CV-13-0020-LRS, 2013 WL 3288413, at \*2-3 (E.D. Wash. June 28, 2013); *State ex rel. Mager v. State Tchrs. Ret. Sys. of Ohio*, 915 N.E.2d 320, 323 (Ohio 2009); *Critical Intervention Servs., Inc. v. City of Clearwater*, 908 So.2d 1195, 1196-97 (Fla. App. 2005).

Read together, waste is “reactive mine waste” when it was exposed or removed from the earth in the process of mining and beneficiation, and it lets go or sets free substances that would adversely impact any natural resources defined in Minn. R. 6132.0100 subpt. 21. That rule applies to flotation tailings and legacy tailings stored in the FTB, as the record plainly shows. *See supra* Exceptions § II(B). Indeed, the Commissioner has already determined that flotation tailings that will be stored in the FTB will be reactive. Ex. 219, R.0115575, R.0115578-79 (¶¶ 215-16, 230-32). The remaining question is whether the proposed bentonite amendment will satisfy the reactive mine waste rule.

**B. Respondents’ Alternative Interpretations of Reactivity are Wrong.**

No party contests that the tailings are reactive. However, Respondents adopt interpretations of “reactive mine waste” which stray from the text.

DNR’s team asserts that “release” as used in Minn. R. 6132.0100 subpt. 28 means “to allow a substance to flow out from somewhere.” DNR Br. at 13-14. If DNR’s team stopped there, that could be consistent with the plain meaning of “release.” Substances may “flow out” into any other

medium that contacts the waste—including air or water inside or outside of a storage facility. But DNR’s team goes further and impermissibly inserts words into the Rule that are not found there to limit its meaning. *Cf. Energy Pol’y Advocs. v. Ellison*, 980 N.W.2d 146, 156 (Minn. 2022) (“We may not add language to a statute; rather, we must apply the plain language of the statute as written.” (quotation omitted)). They do so by claiming that waste is not reactive if “it is stored in an environment such that substances do not flow out from the storage environment and cause impacts to natural resources that the commissioner determines are unacceptable,” and then wrongly suggest that, in this case, the impacts are “unacceptable” only if the flows “result in violation of water quality standards.” DNR Br. at 13-14. Similarly, PolyMet asserts that the definition of “adversely affect natural resources” means that mine waste is only reactive if it causes releases from a reactive mine waste facility that have “‘an unacceptable level of impact’ on natural resources.” PolyMet Br. at 27.

Respondents first err by ignoring that the Commissioner already determined that the tailings in the FTB are reactive mine waste. They then stumble by asserting that reactivity depends on the environment in which waste will be stored and how substances move out of that environment. But the definition of “reactive mine waste” says nothing about the environment of storage or the circumstances under which substances are stored. The context in which Minn. R. 6132.0100 subpt. 28 appears also defeats this argument. *See State v. Prigge*, 907 N.W.2d 635, 638 (Minn. 2018) (plain meaning is understood by looking to dictionary definitions and context). Reactivity is determined through “mine waste characterization studies” of mine waste. Minn. R. 6132.0100 subpt. 28; *see* Minn. R. 6132.1000 subpt. 2. Those studies are conducted through “analyses and laboratory tests,” Minn. R. 6132.1000 subpt. 2, that take place *before* an application is ever submitted, Minn. R. 6132.2200 subpt. 2(A). Subpart 2(B)(1) of the reactive mine waste

rule then expressly requires that one of the ways a reactive mine waste storage facility can be approved is if it will “modify the physical or chemical characteristics of the mine waste, or store it in an environment, such that the waste is *no longer* reactive.” Minn. R. 6132.2200 subpt. 2(B)(1) (emphasis added). Reactivity is upstream from storage facility design.

DNR’s team fumbles again by asserting reactivity can be determined by violation of water quality standards. *See* DNR Br. at 14. This would authorize DNR to ignore impacts to other natural resources that DNR must review when determining whether waste is reactive. The Commissioner is required to evaluate the impact that a released substance would have on a host of natural resources identified in the Rules, not just water. Minn. R. 6132.0100 subpts. 3, 21. DNR’s litigation team refers to water as the “focal point” of these proceedings. DNR Br. at 14 n.13. But the Rules do not allow DNR to elevate one resource above others. DNR must consider *all* resources. That makes good sense here, as substances carried via water would encounter other resources which are not subject to water quality standards.

The team’s interpretation also exceeds DNR’s authority. DNR only has the powers the Legislature allows it to exercise. *See In re Qwest’s Wholesale Serv. Qual. Standards*, 702 N.W.2d 246, 259 (Minn. 2005). Any reasonable doubt about whether the legislature has given an agency certain power should be resolved against the exercise of such power. *See id.* at 259; *Great N. Ry. v. Minn. Pub. Serv. Comm’n*, 169 N.W.2d 732, 735 (Minn. 1969). The Legislature assigned the authority to enforce water quality standards, by issuing “orders, permits,” “standards,” and “rules” “to prevent, control or abate water pollution,” to the Minnesota Pollution Control Agency (“MPCA”), not DNR. Minn. Stat. § 115.03 subd. 1(a)(5); *accord In re Cities of Annandale & Maple Lake*, 731 N.W.2d 502, 510 (Minn. 2007). Moreover, Minn. R. 6132.0100 subpt. 28 nowhere mentions water quality standards. It cannot be read to incorporate those standards

silently, as under Minnesota law, a Rule can only incorporate another Rule or Statute by reference by doing so expressly, Minn. Stat. § 14.07 subd. 4(a). And indeed, when Minn. R. ch. 6132 incorporates standards from other Rules or statutes, it does so expressly. *See, e.g., id.* 6132.2200 subpt. 2(B)(2) (requiring disposal of seepage water “in compliance with federal and state standards”); *id.* 6132.5300 subpt. 1 (incorporating Minn. R. ch. 8420); *id.* 6132.2000 subpt. 6 (incorporating Minn. Stat. § 103G.005 subd. 19); Minn. R. 6132.0100 subpt. 21 (incorporating Minn. Stat. § 116B.02 subd. 4).

DNR decisionmakers have agreed. In the 2018 findings of fact on the now-vacated permit to mine, DNR concluded that a contested case hearing on this permit to mine application could not be used to “make a determination on any disputed material issue related to water quality” because “DNR does not have jurisdiction over water quality. MPCA does. . . . The *MPCA is the state agency responsible for adopting and enforcing water quality standards in Minnesota under the [federal Clean Water Act (‘CWA’).]*” Ex. 219, R.0115683-84, ¶ 784 (citing Minn. Stat. § 103A.204(a) and *Annandale & Maple Lake*, 731 N.W.2d at 510) (emphasis added). *See also id.* R.0115697, ¶ 820 (“MPCA is the state agency responsible for adopting and enforcing water-quality standards in Minnesota under the [CWA].”). Since DNR lacks authority over water quality standards, it cannot determine whether mine waste is reactive by applying those standards to discharges from a reactive mine waste storage facility.

For the reasons shown, DNR should reject Respondents’ interpretation of the meaning of “reactive mine waste.” DNR should instead follow what that rule plainly says: That mine waste is reactive if it lets go or sets free substances that adversely impact natural resources, *see supra* Arguments § II(A).

### III. The Proposed Bentonite Amendment Does Not Satisfy the Reactive Mine Waste Rule.

The proposed bentonite amendment is not “practical and workable” because will not achieve what it must do: Satisfy the reactive mine waste rule. *Compare* DNR Br. at 9-11 and PolyMet Br. 21-23. The ALJ correctly so concluded, and so his Recommendations 2, 3, and 5 should be adopted.

It was entirely proper for the ALJ to interpret the meaning of the reactive mine waste rule in his recommendation. The Supreme Court ordered a remand for this hearing on whether the proposed bentonite amendment would “satisfy the DNR’s reactive waste rule . . . .” *NorthMet*, 959 N.W.2d at 754. The DNR’s Notice and Order and Amended Notice and Order both asked the ALJ to determine whether the proposed bentonite amendment would “satisfy the reactive mine waste rule,” which is a legal question. OAH Record at 14352-53, 14972.<sup>12</sup> An ALJ has authority to interpret the law to make a recommendation on the question presented. *See, e.g., In re Baker*, 907 N.W.2d 208, 210, 213 & n.7 (Minn. App. 2018); *In re Rogers*, No. OAH 84-2001-30915, 2014 WL 4209278, at \*29-35 (Off. Admin. Hr’gs May 23, 2014). So, despite PolyMet’s urging to the contrary, PolyMet Br. at 21, the ALJ had to interpret the reactive mine waste rule and decide what it means as part of his recommendation.

The reactive mine waste rule is satisfied if a reactive mine waste storage facility is designed to either:

- (1) modify the physical or chemical characteristics of the mine waste, or store it in an environment, such that the waste is no longer reactive; *or*
- (2) during construction to the extent practicable, and at closure, permanently prevent substantially all water from moving through or over the mine waste and provide for the collection and disposal of any remaining residual waters that drain from the mine waste in compliance with federal and state standards.

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<sup>12</sup> For this reason, the invalidity of the Amended Notice and Order does not prevent DNR from accepting the ALJ’s recommendation on the meaning of the reactive mine waste rule.

Minn. R. 6132.2200 subpt. 2(B) (emphasis added). As we describe further below, the reactive mine waste rule establishes two principal alternatives for compliance. A permittee can ensure waste is “no longer reactive,” by preventing the waste from releasing substances. *See id.* subpt. 2(B)(1); *infra* § III(A)(1). Or, even if the permittee does not stop the waste from being reactive, they can prevent essentially any water from moving through or over the waste and capture and treat any residual water that drains from the waste, *see id.* subpt. 2(B)(2); *infra* § III(B)(1). The rule does not mandate one approach to comply with the Rule. But the permittee *must* satisfy the requirements of at least one Subpart, because they are “requirements” of Minn. R. 6132.2200 subpt. 2. *See MCEA*, 2019 WL 3545839 at \*6.

The ALJ correctly determined that the proposed bentonite amendment will not satisfy either alternative. His recommendations on those issues should be affirmed.

**A. The Proposed Bentonite Amendment Will Not Store the Waste in an Environment Such That it Will No Longer Be Reactive.**

**1. Mine Waste is No Longer Reactive When it Ceases to Release Substances that Adversely Impact Natural Resources.**

Subpart 2(B)(1) requires a permittee to design a facility to end the reactivity of mine waste. Subpart 2(B)(1) gives a permittee ways of accomplishing that requirement. Under the first option, a permittee can “modify” waste’s physical or chemical characteristics—which means to “make partial or minor changes to [those characteristics],” *Oxford* at 1124—“such that the waste is no longer reactive.” Respondents do not claim that the proposed bentonite amendment is intended to do this. Nor could they, as bentonite does not change the characteristics of the tailings. And the ALJ correctly found that the proposed bentonite amendment is not intended to satisfy this option. Instead, Respondents assert that the amendment will meet the second option: “store [the waste] in an environment so that it is no longer reactive.”

To meet the second option of subpart 2(B)(1), a permittee may “store” the waste “in an environment such that the waste is no longer reactive.” The phrases “store” and “environment” are not defined in the Rule, but those words have plain, common meanings. To “store” means “to leave or deposit in a store, warehouse, or other place for keeping, preservation, or disposal.” *Webster’s Third New International Dictionary* 2252 (2002) (“*Webster’s*”). See *In re Valet Living*, No. A20-0817, 2021 WL 772622, at \*3 (Minn. App. Mar. 1, 2021); *Crawford v. Cnty. Council*, 290 A.3d 571, 581-82 (Md. 2023). An “environment” is a “general set of conditions or circumstances,” *Heritage* at 596-97, “surroundings,” or “something that . . . surround[s] permeatingly,” *Webster’s* at 760 (incorporating definition of “environs”), and “a particular set of surroundings or conditions which something or someone exists in or interacts with,” *In re Carter*, 2024 N.H. 30, ¶ 9 (citing version of Oxford English Dictionary). Reading these together, Subpart 2(B)(1) is satisfied when the conditions or surroundings in the place where waste is kept or disposed of render it no longer reactive.

Because Subpart 2(B)(1) is plain, it is not necessary to look at the history behind its adoption. But that history supports the Rule’s plain meaning. DNR explained in its SONAR that in order to meet what is now Subpart 2(B)(1), “measures would have to be taken to prevent substances, that adversely impact natural resources, from forming within the mine waste. If no such substances are allowed to form, it can reasonably be expected that no impact will occur.” Ex. 336, R.0730374. Testimony at the Rules hearing also urged that the original text of Subpart 2(B)(1) be revised, so it can be met by “modifying the environment *and not the waste*” such that the waste “is unable to react.” Ex. 107, R.0234394-95 (emphasis added).<sup>13</sup> Again, this testimony is

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<sup>13</sup> Both the plain meaning of the reactive mine waste rule and the history of its promulgation therefore dispose of Respondents’ assertions that the ALJ’s interpretation renders part of Subpart 2(B)(1) redundant or does not give all parts meaning. See DNR Br. at 16; PolyMet Br. at 28.

consistent with the plain meaning of Subpart 2(B)(1): Reactivity can be stopped by changing the waste, or designing the storage environment so that it does not allow the waste to react.<sup>14</sup>

**2. The Proposed Bentonite Amendment Will Not Stop the Tailings from Releasing Substances that Adversely Impact Natural Resources.**

The ALJ properly interpreted Subpart 2(B)(1) consistent with this plain meaning. As the ALJ explained, “reading the Reactive Waste Rule alongside the regulatory definitions, a waste is no longer reactive if, as a result of its storage, it cease to release the substances that made it reactive in the first place into natural resources.” OAH Record at 40. The ALJ’s determination that the proposed bentonite amendment will fail to do that, OAH Record at 40-42, is amply supported by the record. The tailings in the FTB will release substances as the result of chemical interactions between the waste and materials that come into contact with it, including water seeping through the FTB. *See supra* Objections § II(B); *see, e.g.*, Ex. 211, R.0717937 (“The chemical makeup of water is affected by the reactions with tailings materials as it moves through the Tailings Basin.”); Ex. 78. at 8:134-35, 11:181-85 (Diedrich); Tr. Vol. 3 at 102:3-9 (Diedrich). As a result, seepage that has moved through or over tailings and emerged from the tailings basin toe will contain substances that adversely affect natural resources. *See supra* at 6 (citing Ex. 216, R.0741214-15, R.0741251-61; Ex. 210, R.0066845-48). These substances were also released by tailings during characterization. *See id.* (citing Ex. 217, R.0034447-48).

For the foregoing reasons, DNR should accept the ALJ’s recommendation that the proposed bentonite amendment will not satisfy Subpart 2(B)(1).

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<sup>14</sup> Although a resort to further extrinsic evidence is unnecessary, this interpretation is also consistent with Diedrich’s testimony that tailings react to the environment in which they are stored, causing release of substances. *See supra* at 6. Subpart 2(B)(1) allows a permittee to prevent that by designing the environment to prevent chemical interactions that cause such releases. This also shows that PolyMet’s claim that “[t]he only way to make tailings ‘cease’ releasing substances is to ‘modify’ their ‘physical or chemical characteristics,’” *see* PolyMet Br. at 28-29, is plainly wrong.



### 3. Respondents' Contrary Interpretations of Subpart 2(B)(1) Are Wrong.

Respondents do not contest the ALJ's conclusions that the tailings will "release" substances as that term is typically understood or that those substances will adversely impact natural resources. They also do not contest that such substances will leave the FTB. Instead, they urge that the proposed bentonite amendment meets Subpart 2(B)(1) because water that escapes the FTB will be captured and treated by other systems. DNR Br. at 14-15; PolyMet Br. at 29-31.

That does not satisfy Subpart 2(B)(1). As discussed above, Subpart 2(B)(1) requires that reactive waste either be modified or "store[d] in an environment, such that the waste is no longer reactive." This means that the conditions of storage cause the waste to stop being reactive. Capture and treatment of water outside of a waste storage facility is not a method of storing waste. Nor, despite Respondents' assertions, are the seepage capture system and the wastewater treatment system part of the "environment" in which waste is stored. They are not part of the "conditions or circumstances" in the FTB or the conditions that "surround" the waste "permeatingly." No waste will be located where they will be constructed. The systems are not part of the FTB, which is where reactive mine waste will be stored. Ex. 210, R.0065699, R.0066315, R.0066325. Finally, treatment of water *after* substances are released from the waste does nothing to render the waste no longer reactive. Indeed, capture and treatment to remove substances is required *because* the waste continues to be reactive. Waste will release substances into water within the FTB that eventually seeps from the tailings basin, carrying those substances with it.

If more were needed, Subpart 2(B)(1) cannot be satisfied by capture and treatment of water for the simple reason that Subpart 2(B)(1) says nothing about capture and treatment. When the Rules allow compliance by capture and treatment, they say so. Subpart 2(B)(2), by contrast, expressly provides that a permittee may meet the reactive mine waste rule through "collection and disposal" of residual waters. The ALJ should not interpret Subpart 2(B)(1) to have the same

meaning as these very different terms in Subpart 2(B)(2). *See State v. Thompson*, 950 N.W.2d 65, 69 (Minn. 2020) (“when different words are used in the same context, we assume that the words have different meanings so that every word is given effect” (quotation marks omitted)); *State v. Thonesavanh*, 904 N.W.2d 432, 437 (Minn. 2017). And, again, although reliance on regulatory history is not necessary, the SONAR expressly explained that a proposed “method, that consists of merely collecting contact water and treating it in order the [sic] meet water quality discharge standards, without a substantial effort to minimize the amount of water contacting the waste, has been rejected.” Ex. 336, R.0730374. Yet that is precisely what Respondents now propose will meet Subpart 2(B)(1).<sup>15</sup>

DNR’s team’s interpretation that Subpart 2(B)(1) can be met by compliance with water quality standards is wrong, as well. *See* DNR Br. at 14-15. Just as reactivity under Minn. R. 6132.0100 subpt. 28 does not depend on water quality standards, neither does compliance with Subpart 2(B)(1). Subpart 2(B)(1) says nothing about water quality standards and cannot be understood to have incorporated them *sub silentio*. *See supra* at 19-20. And, as already explained, DNR lacks jurisdiction over water quality standards. *Id.* DNR’s litigation team’s position would authorize DNR to exercise jurisdiction that the Legislature has never allowed it to wield, by determining compliance with water quality standards and then issuing permits based on compliance with those water quality standards.<sup>16</sup>

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<sup>15</sup> The SONAR further explained that, in order to meet Subpart 2(B)(1), “measures would have to be taken to prevent substances, that adversely impact natural resources, from forming within the mine waste. If no such substances are allowed to form, it can reasonably be expected that no impact will occur.” Ex. 336, R.0730374. In contrast, Respondents propose allowing substances to form and capturing them later.

<sup>16</sup> DNR’s litigation team engages in wordplay by arguing that DNR’s “independent” permitting authority allows it to decide compliance with water quality standards and issue permits without waiting for other agencies’ determinations. DNR Br. at 22-23 & n.18. DNR has independent

DNR’s team says its interpretation does not “undermin[e] the permitting authority of other agencies,” DNR Br. at 23, but it asserts DNR has the power to interpret other agencies’ rules and issue permits based on them. That plainly undermines other agencies’ power. And it especially concerns the Band, as applicable water quality standards in this case include the Band’s standards. The Band is treated as a State under the CWA, 33 U.S.C. § 1377(e), and has issued water quality standards for waters on its Reservation that are downstream from, and would be affected by, the Project’s proposed operations. As the Minnesota Supreme Court has recognized, “the Band’s ‘federally-approved water quality standards “are part of the federal law of water pollution control.’”” *In re Proposed NorthMet Project*, 993 N.W.2d 627, 657-58 (Minn. 2023) (quoting *Fond du Lac Band of Lake Superior Chippewa v. Wheeler*, 519 F. Supp. 3d 549, 564 (D. Minn. 2021) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992))). The Band’s water quality standards are thus a “relevant environmental standard” for the Project, which the Band can evaluate and apply as to the Project. *See* 33 U.S.C. § 1341(a)(2). And DNR has no power to implement or interpret the Band’s standards.<sup>17</sup>

#### **4. The Proposed Bentonite Amendment Does Not Prevent Violations of Water Quality Standards.**

Even if DNR’s litigation team were correct that it can determine compliance with Subpart 2(B)(1) by evaluating compliance with water quality standards, the proposed bentonite amendment would not prevent discharges from the FTB from violating applicable water quality standards. The Army Corps of Engineers (“Corps”), relying on decisions of the United States Environmental Protection Agency (“EPA”) and the Band, and the Minnesota Supreme Court have issued decisions

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authority to make permitting decisions based on criteria *other than water quality standards*, which are other agencies’ domain.

<sup>17</sup> In other cases, DNR’s team’s interpretation would also offend the sovereignty of downstream States. *See id.* (downstream State will determine violations of its water quality requirements).

that show discharges from the Project cannot satisfy violate water quality standards. Decision Mem. of June 6, 2023, No. MVP-1999-05528-TJH (Army Corps of Eng'rs June 6, 2023) (“404 Decision”), *available at* OAH Record at 1278-1304; *Proposed NorthMet Project*, 993 N.W.2d 627. EPA, the Band, and the Supreme Court actually have jurisdiction to consider compliance with water quality standards. DNR’s litigation team’s efforts to distinguish these decisions fail.

To be clear, these decisions are not relevant to whether the proposed bentonite amendment satisfies Subpart 2(B)(1), because that part of the Rule does not incorporate water quality standards. And the ALJ’s recommendation does not rely on these decisions. Although DNR’s litigation team repeatedly asserts that he did, the ALJ clearly concluded *only in the alternative* that even if the DNR litigation team’s interpretation of Subpart 2(B)(1) were correct, these decisions show the NorthMet Project still fails to meet applicable water quality standards. OAH Record at 40-41. The ALJ’s conclusion provides another basis for affirmance, *if and only if* DNR accepts the team’s interpretation of Subpart 2(B)(1). The Band therefore explains the meaning of those decisions, assuming only *arguendo* that they are relevant.

**i. The Army Corps’ Decision on the Clean Water Act Section 404 Permit Shows the Proposed Bentonite Amendment Will Not Meet Water Quality Standards.**

On June 3, 2023, the Corps revoked a permit it had previously issued to PolyMet under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. 404 Decision at 3. The prior permit had allowed PolyMet to deposit dredge and fill materials into wetlands as part of its operations at the NorthMet Project. *Id.* The U.S. EPA then determined, under authority granted to it by 33 U.S.C. § 1341(a)(2), that the Project may affect the water quality on the Band’s Reservation, which is downstream from the Project. 404 Decision at 3. It notified the Band, which is treated as a State for § 1341(a)(2) purposes. *See supra* at 27. Exercising that authority, the Band determined that the Project would violate its downstream water quality standards. *See* 33 U.S.C. § 1341(a)(2)

(“such other State” may “determine[] that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State”). The Band objected to the 404 permit and requested an administrative hearing. EPA evaluated the Band’s objections and agreed with its conclusion that the Project would violate water quality standards.

The Corps then held a hearing at which it gathered evidence from the Band, EPA, PolyMet, and the public. Relying heavily on the scientific, technical reviews by both the Band and EPA, the Corps concluded that “the Band and EPA have determined that discharges from the project would cause a violation of the Band’s water quality requirements for mercury and specific conductance” and that “[b]ased on information submitted to the Corps during the public hearing process, the Corps was not able to identify conditions under CWA Section 404 that would ensure compliance with the Band’s water quality requirements.” 404 Decision at 22.<sup>18</sup>

DNR’s litigation team either misunderstands or misstates the significance of this ruling. DNR’s team suggests that the Section 404 permit concerns only the mine site, and not “the use of bentonite or tailings.” DNR Br. at 18-19. In fact, the Corps evaluated whether the Band and U.S. EPA had determined discharges from the Project would violate water quality standards. 404 Decision at 3-4. The Band and EPA have concluded that the Project’s discharges, including seepage from the FTB and discharges from the wastewater treatment system, would violate water quality standards for methylmercury and specific conductance in downstream waters. *See* 404 Decision at 9.

The Corps agreed with and relied on EPA’s and the Band’s conclusions that PolyMet had failed to model whether it will be able to remove mercury or methylmercury from discharges from

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<sup>18</sup> DNR’s team wrongly says the 404 Decision dealt only with “concerns” about the Project. DNR Br. at 18-19.

the wastewater treatment system, 404 Decision at 1-2, 19, and credited EPA's conclusions that discharges from the Project "under CWA Sections 404 and 402" would violate the Band's water quality requirements for specific conductance, *id.* at 20-21. Destruction of wetlands at the Project site will exacerbate these violations, *id.* at 19-21, but clearly the Corps' decision was not limited to those effects. The Corps did not limit its conclusion to a particular time period, *cf.* DNR Br. at 21. Nor did it suggest that the Project could ever meet water quality standards, *cf.* DNR Br. at 19. That is not for the Corps to decide, as the Band and EPA determine compliance with applicable water quality standards. Based on those determinations the Corps concluded "there are no conditions that can ensure compliance with the water quality requirements of the [Band]." 404 Decision at 22. For these reasons, the 404 Decision makes clear that the proposed bentonite amendment does not prevent violations of water quality standards.

**ii. The Supreme Court's Decision on the NPDES/SDS Permit Shows the Proposed Bentonite Amendment Will Not Meet Water Quality Standards.**

In *Proposed NorthMet Project*, the Minnesota Supreme Court remanded the MPCA's NPDES/SDS permit for the NorthMet Project. (The Court of Appeals had already reversed the permit on other grounds, *In re Proposed NorthMet Project*, Nos. A19-0112, et al., 2022 WL 200338, at \*7-9 (Minn. App. Jan. 24, 2022).) The permit would have allowed PolyMet to discharge wastewater, including water that seeps through the FTB and is diverted by the seepage capture system, into surface water near the Plant Site. 993 N.W.2d at 637-38. It would have also allowed polluted water that has moved through the FTB to seep into groundwater below the tailings basin. 993 N.W.2d at 663-64. The Supreme Court's decision on that permit is fatal to the DNR team's argument that the FTB meets water quality standards.

The Supreme Court found as to surface water quality issues, that the issuance of the permit was arbitrary and capricious based in part on procedural irregularities and other danger signals.

*See id.* at 643. The Court was unable to meaningfully review whether the permit complied with the CWA because MPCA had intentionally excluded materials from the administrative record showing EPA believes the permit would violate the CWA. *Id.* at 642-43. The Court remanded for further proceedings. *Id.* at 658-61. And a super-majority of the Court noted that the MPCA “cannot legally issue a permit that fails to ensure compliance with the Band’s [water quality] standards.” *Id.* at 669 (McKeig, J., concurring, joined by Hudson, Chutich, Thissen, & Moore, J.J.). The Band has already concluded the Project *will* violate the Band’s water quality standards. *Supra* at 28-29. For that reason alone, *Proposed NorthMet Project* shows DNR cannot conclude that discharges from the Project comply with applicable CWA water quality standards.

*Proposed NorthMet Project* also establishes that the proposed bentonite amendment does not prevent violations of ground water quality standards. The Supreme Court remanded MPCA’s permit for the additional reason that seepage from the bottom of the FTB violates state groundwater quality standards, Minn. R. 7060.0600. That Rule prohibits a “discharge or deposit” of pollutants into groundwater above the water table that “may actually or potentially preclude or limit of the use of underground water as a potable water supply” or that “may pollute the underground waters.” Minn R. 7060.0600 subpt. 2; *Proposed NorthMet Project*, 993 N.W.2d at 663-65.

DNR’s ligation team argues that the *Proposed NorthMet Project* decision is beside the point, but all its arguments fail. DNR’s team says the decision concerned a five-year period during operations, not reclamation and closure. DNR Br. at 20-21. But Subpart 2(B)(1) governs a facility that stores reactive mine waste with no time limitation, *see* Minn. R. 6132.2200 subpt. 2(B)(1), and the FTB will store mine waste during operations as well as reclamation and closure, *supra* at 4. The team then argues that *Proposed NorthMet Project* “does not implicate the predictive modeling on which DNR relied.” DNR Br. at 20. PolyMet’s modeling confirms that seepage

containing contaminants will escape the FTB and enter groundwater. *See supra* at 6. Indeed, the *Proposed NorthMet Project* Court relied on evidence, part of the record of this case and based on PolyMet’s modeling, that shows the route of water seepage out of the FTB. *Compare* 993 N.W.2d at 662 *with* Ex. 212, R.0066804. The team then argues that the Court never found the Project would not meet water quality standards. DNR Br. at 20. While the Supreme Court found that the permit could not be relied on at all to show the Project meets surface water quality standards, it also plainly found the Project would violate groundwater quality standards.

DNR’s team asserts the state ground water standards do not count because the *Proposed NorthMet Project* concerned “groundwater within the seepage containment system,” whereas Subpart 2(B)(1) is concerned only with “adverse impacts on natural resources’ beyond the ‘environment’ in which the waste is ‘stored.’” DNR Br. at 20. Flotation tailings would be stored in the FTB, and so groundwater outside of the FTB is not part of the “environment” in which tailings will be “stored.” DNR’s team then argues that the groundwater quality rule is irrelevant because it “does not contain an unacceptable-impact qualifier.” DNR Br. at 21 n.15. The rule plainly provides it is an unacceptable impact if contaminants that are “discharge[d] or deposit[ed]” into groundwater may “pollute” the waters or “actually or potentially limit the use of the underground waters as a potable water supply,” because it prohibits such discharges or deposits. *See Proposed NorthMet Project*, 993 N.W.2d at 663 (quoting Minn. R. 7060.0600 subpt. 2). The team’s efforts to distinguish the Court’s decision should, therefore, be rejected.

**B. The Proposed Bentonite Amendment Will Not Prevent Substantially All Water From Moving Through or Over Tailings.**

The ALJ also correctly determined that the proposed bentonite amendment would not satisfy Subpart 2(B)(2) of the reactive mine waste rule. Respondents’ contrary arguments do not unsettle that conclusion.



**1. Subpart 2(B)(2) Is Satisfied When A Permittee Prevents Essentially Any Water from Moving Through or Over Tailings.**

Under Subpart 2(B)(2), the permittee must “during construction to the extent practicable, and at closure” do two things: “permanently prevent substantially all water from moving through or over the mine waste;” and “provide for the collection and disposal of any remaining residual waters that drain from the mine waste in compliance with federal and state standards.” Minn. R. 6132.2200 subpt. 2(B)(2). The proposed bentonite amendment will fail to meet either requirement because it will allow huge amounts of water to move through and over reactive mine waste. DNR should accept the ALJ’s recommendation that the amendment violates Subpart 2(B)(2).

Unlike Subpart 2(B)(1), Subpart 2(B)(2) does not require a permittee to render waste no longer reactive. Instead, a permittee must “permanently prevent substantially all water from moving through or over the mine waste.” We now explain the plain meaning of this phrase.

First look to the amount of water which the permittee must prevent from moving. “Substantially all” has two component terms. “Substantially” means “to a great or significant extent” or “for the most part, essentially.” *Oxford* at 1736.<sup>19</sup> “All,” when applied to an indefinite noun, means “any whatever,” *see supra* at 17. Subpart 2(B)(2) therefore requires a permittee who does not render waste no longer reactive, to prevent essentially or to a great extent *any* water from moving over or through the waste. *See Atmel Corp. v. Info. Storage Devs., Inc.*, 997 F. Supp. 1210, 1229 (N.D. Cal. 1998) (“normal meaning” of substantially all is “all but an insignificant amount”).

Second, look to the movement of water that the permittee must prevent. The permittee must “permanently” prevent water from moving “through or over the mine waste.” “Permanently”

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<sup>19</sup> “Substantially” is the adverbial form of “substantial,” which itself means “of considerable importance, size, or worth.” *Id.*; *accord Heritage* at 1738. A facility which allows a substantial amount of water move through or over waste does not “prevent substantially all water” from moving through or over the waste.

means “in a way that lasts or remains unchanged indefinitely; for all time.” *Oxford* at 1305. The following words “through or over” each have their own meaning because they are separated by the disjunctive “or.” *Thompson*, 950 N.W.2d 65, 69 (Minn. 2020); *State v. Loge*, 608 N.W.2d 152, 155 (Minn. 2000). “Through” means “moving in one side and out of the other side of,” *Oxford* at 1808, or “[a]mong or between, in the midst of,” *Heritage* at 1814. “Over” means “expressing passage or trajectory across,” *Oxford* at 1247, or “[t]hrough the extent of; all through,” *Heritage* at 1254. To give distinct meanings to both words, then, water moves “through or over” waste when it either goes from one side of the tailings to another or moves within tailings.

Taken together, Subpart 2(B)(2) plainly requires that during construction to the extent practicable and after closure, a reactive mine waste storage facility must always prevent essentially any water from moving across or in the midst of reactive mine waste.

## **2. Huge Amounts of Water Would Move Through or Over Tailings.**

The ALJ correctly found that the proposed bentonite amendment would fail to meet Subpart 2(B)(2). After application of the proposed bentonite amendment, 298 million gallons of water per year will move through tailings in the FTB. *Supra* at 6 (citing Tr. Vol. 2 at 56:11-22 (Radue), 114:15-115:7 (Hull); OAH Record at 6935). Seepage will be even more substantial before the FTB pond bottom amendment is completed; over 730 gpm, or nearly 384 million gallons, will seep through the FTB pond bottom in Mine Year 10 alone. *Supra* at 7 (citing Ex. 216, R.0741190-92). This water will move “through or over” waste, escape out of the bottom of the FTB, and seep out of the tailings basin. *See supra* at 6-7 (citing Ex. 216, R.0741171, R.0741681-82, R.0741727, R.0741757-62; Ex. 212, R.0066820, 0066824).

Clearly, this is a considerable amount of water. Because the proposed bentonite amendment allows this much water to move through the tailings, it does not prevent “substantially all” water from moving through or over those tailings. The ALJ correctly so concluded. OAH

Record at 42-44. Other facts in the record provide alternative bases to accept his conclusion that the proposed bentonite amendment will not satisfy Subpart 2(B)(2).

The proposed bentonite amendment will not cover some of the reactive mine waste in the FTB. It does not prevent any water from moving through or over that uncovered waste. After the proposed bentonite amendment is added to the FTB beaches, *uncovered* flotation tailings will be overlaid on top of the proposed bentonite amendment. Precipitation will move through or over those tailings, unhindered by bentonite, and some will accumulate in the FTB pond. *See supra* at 7-8 (citing Tr. Vol. 3 at 99:10-100:19, 101:11-103:6 (Diedrich); Ex. 78 at 14:242-47 (Diedrich); Ex. 212, R.0066822; Ex. 216, R.0741109). These beaches, and the FTB pond, will be exposed to the elements, and water that collects in the FTB pond will infiltrate through reactive mine waste and emerge at the tailings basin dam toes. *See id.* Legacy tailings, which are stored in the FTB because they compose the FTB dams and are disposed there permanently, will lie on top of the proposed bentonite amendment on the FTB dams, *see supra* at 8 (citing Ex. 210, R.0065585 § 10.2.5; Ex. 74 at 19:283 (Radue)). The bentonite will do nothing to stop precipitation from moving through or over that reactive mine waste, either.

That is not all. Water will move through the pore spaces in tailings inside the FTB. “Upon closure, the Flotation Tailings below the bentonite-amended layer in the FTB Pond bottom will transition from a saturated to an unsaturated state.” *Supra* at 8 (citing Ex. 217, R.0034563; Tr. Vol. 3 at 200:16-22 (Wenz)). The change in saturation will be caused by water moving out of pore space in saturated zones and escaping out of the bottom of the FTB. *See id.* at 8-9 (citing Ex. 216, R.0741172). As a result of these changes, after closure the level of saturation in the FTB will decrease by as much as seventy-one feet, *id.* at 9 (citing Ex. 216, R.0741682, R.0741805), as a net of approximately 10,969 acre-feet of tailings cease to be saturated, *id.* (citing Ex. 216, R.0741802,

R.0741804). That is a substantial movement of water “through or over” tailings, that will result in water both moving within the FTB and escaping out of the FTB, via the pore spaces between tailings.

Finally, as the Band noted in response to the ALJ’s request for post-hearing briefing, and contrary to PolyMet’s assertion, PolyMet Br. at 35-36, *Proposed NorthMet Project* and the 404 Decision show that PolyMet will not “provide for the collection and disposal of any remaining residual waters that drain from the mine waste in compliance with federal and state standards.” Minn. R. 6132.2200 subpt. 2(B)(2). PolyMet’s discharge of residual waters from the FTB will violate the Band’s water quality standards. The Band’s standards “are part of the federal law of water pollution control.” *Proposed NorthMet Project*, 993 N.W.2d at 658. And waters that drain from the waste into groundwater will violate state groundwater quality standards. *Proposed NorthMet Project*, 993 N.W.2d at 664-65.

**3. DNR’s Team’s and PolyMet’s Contrary Interpretation of Subpart 2(B)(2) is Wrong.**

Respondents have not disputed how much water will move through the FTB. They instead argue compliance with Subpart 2(B)(2) based on a faulty interpretation of the Rule and a misguided claim that water in saturated tailings is “stored.”

Respondents first say that “through” and “over” should be interpreted to mean essentially the same thing – from one side to the other. DNR Br. at 24; PolyMet Br. at 32. Notably, the proposed bentonite amendment would fail to meet that standard, since large amounts of water will infiltrate the top of the FTB and escape out of the bottom. *See supra* at 6-7, 34. But that interpretation is not consistent with Subpart 2(B)(2), which uses “through *or* over” to describe prohibited movement of water. *See supra* at 33-34; *Loge*, 608 N.W.2d at 155; *Thompson*, 950 N.W.2d at 69. If water moves within or among tailings in the FTB, that violates Subpart 2(B)(2).

That makes sense when considering three-dimensional spaces in which water might enter waste, move within it, and then exit through the same or different sides without being said to have traveled from “one” side to “the other.” *See* Tr. Vol. 3 at 102:9-103:2 (Diedrich) (testifying water will rinse substances into the pond from the FTB beaches); Ex. 216, R.0741106 (showing water flow both vertically and horizontally through FTB dams and legacy basin). So movement of water within the FTB also violates Subpart 2(B)(2).

Respondents also argue that “substantially all” is a relative term and should be gauged against other amounts of water associated with the Project in various ways. DNR Br. at 25-26; PolyMet Br. at 33-34. The relative approach does not account for the plain meaning of the term “substantially all water.” *Supra* at 33; *see also* MCEA, 2019 WL 3545839 at \*10; *Jaeger*, 884 N.W.2d at 605. That term, as explained above, is an absolute limitation that precludes essentially any water from moving through or over reactive mine waste. Respondents’ relativity argument also improperly inserts new words into the Rule to narrow its meaning. Subpart 2(B)(2) nowhere identifies any source of water to which seepage must be compared to determine whether “substantially all water” has been prevented from moving through or over waste. Respondents instead point to sources of water of their own choosing, nowhere mentioned in Subpart 2(B)(2).

Respondents’ principal proposal is that DNR should compare seepage to “stored” water. DNR Br. at 26; PolyMet Br. at 34-35. But that inserts an irrelevant consideration into the Subpart 2(B)(2) analysis.<sup>20</sup> Water that “moves” carries substances along with it, and so the amount of water that moves through or over reactive mine waste storage facility is what matters. In fact, Subpart 2(B)(2) was amended to *exclude* consideration of water that contacts waste but does not

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<sup>20</sup> DNR’s team also compares seepage to water PolyMet appropriates for uses at the mine site. DNR Br. at 29-30. But those amounts do not relate to FTB design or operations.

move “through or over” it. *See* Ex. 108. It simply does not matter for compliance with Subpart 2(B)(2) that reactive mine waste storage facilities may contain water. *See* PolyMet Br. at 33. But as the Band already explained, *supra* at 7, 35-36, and explains further below, *infra* at 41, water in saturated tailings in the FTB or the FTB pond is not “stored,” so this comparison stumbles from the starting gate. And despite PolyMet’s suggestion otherwise, water may “drain” from any place where it may be found or passes through, not just places where it is stored. *Compare* PolyMet Br. at 33 *with Heritage* at 544 (when describing action of a liquid, “drain” means “to flow off or out”). And so the use of “drain” in Subpart 2(B)(2) provides no basis for a “storage” comparison, either.

DNR’s team also missteps by asserting that water PolyMet may appropriate for all Project purposes provides “context” for interpreting Subpart 2(B)(2). DNR Br. at 29-30. Subpart 2(B)(2) says nothing about water used under appropriations permits. It concerns the conditions of waste in a storage facility, not uses of water elsewhere for other purposes. And the proper context—the actual provisions of the Rule, *see Prigge*, 907 N.W.2d at 638—further shows why DNR’s team’s approach is wrong. The purpose of the reactive mine waste rule is to “prevent the release of substances that result in the adverse impacts on natural resources.” Minn. R. 6132.2200 subpt. 1. Mining projects can use very large amounts of water. Even a very small percentage of that amount is still a deluge. If such a flood moved through and over reactive waste, it would cause the release of significant amounts of substances and defeat the purpose of 6132.2200.<sup>21</sup>

Also unavailing is DNR’s litigation team’s reliance on cases concerning the use of “substantially all” as a term of art in other specialized legal contexts. *See* DNR Br. at 25-26, 27-

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<sup>21</sup> PolyMet’s comparison to a gallon jug is therefore a red herring. *See* PolyMet Br. at 35. PolyMet’s assertion that half of the contents of a tailing basin might not be a “substantial” amount of water, *id.*, is unsupported by the record and is unrealistic by DNR’s own description of non-ferrous metallic mineral mining projects, *see* Ex. 219, R.0115587 n.9.

28. Those do not overcome the Rule’s plain meaning. For instance, DNR’s team cites a Seventh Circuit case concluding that “substantially all” has come to have a “special legal meaning” in the tax context. *Cont’l Can Co. v. Chi. Truck Drivers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1158 (7th Cir. 1990).<sup>22</sup> (Unsurprisingly, the Seventh Circuit elsewhere found that term would be commonly understood to mean essentially all. *See Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 301-03 (7th Cir. 1979).) DNR’s team also cites *U.S. Bank N.A. v. Angeion Corp.*, 615 N.W.2d 425, 432-43 (Minn. App. 2000), which interpreted a contract’s reference to “substantially all” of a corporation’s assets in the context of shareholder-protection statutes, where “substantially all” depends on evaluating the “qualitative and quantitative” characteristics of a corporation’s assets. The ways in which “substantially all” might be used in these legal contexts is not relevant here. In Minn. R. ch. 6132, the “common meanings of terms” control when terms are undefined in the Rule itself. *MCEA*, 2019 WL 3545839 at \*10. Using technical terms instead would confound the plain meaning of Subpart 2(B)(2). *See State v. Schouweiler*, 887 N.W.2d 22, 25-26 (Minn. 2016).

Moreover, even if they did not concern terms of art, the statutes or contract at issue in those cases used “substantially all” to mean something plainly different than how the term is used in

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<sup>22</sup> DNR’s team cites another case which relied on *Continental Can* as precedent in the tax context and so is distinguishable for the same reason. *Cent. States, Se. & Sw. Areas Pension Fund v. Robinson Cartage Co.*, 864 F. Supp. 748, 750 n.3 (N.D. Ill. 1994), *aff’d* 55 F.3d 1318 (7th Cir. 1995). *Smothers v. United States*, No. 75-C-19, 1979 WL 1295, at \*3 (S.D. Tex. Jan. 22, 1979), *aff’d* 642 F.2d 894 (5th Cir. Unit A Apr. 1981), and *Moffatt v. Commissioner*, 42 T.C. 558, 578 (1964), *aff’d* 363 F.2d 262 (9th Cir. 1966), stated only that an adjudicator must evaluate facts to determine when this term of art is satisfied. *Moffatt* also illustrates the limits of comparison to tax law. On appeal, the Ninth Circuit determined “substantially all the assets” should be determined in light of a rule requiring consideration of factors not analogous to this context, to wit: “the nature of the properties retained by the transferor, the purpose of retention, and the amount thereof.” 363 F.2d at 267. *Kforce Flexible Solutions, LLC v. Department of Employment & Economic Development*, No. A06-601, 2007 WL 656458, at \*2 (Minn. App. Mar. 6, 2007), is also a tax case, in which the agency had defined “substantially all” as a term of art, *see* Minn. R. 3315.3210 subpt. 5 (2003).

Subpart 2(B)(2). They specifically refer to a limited portion of a definite group of items: “substantially all of *the contributions*” to a fund, *Continental Can*, 916 F.2d at 1155 (quoting 29 U.S.C. § 1383(d)(2)); “substantially all of *the employees*” of an employer, *Robinson Cartage*, 864 F. Supp. at 753 (citing 29 U.S.C. § 1383(b)(1)(A)); “substantially all of *the assets of the transferor*,” *Moffatt*, 42 T.C. at 572 n.4 and *Smothers*, 642 F.2d at 899-900 (both quoting 26 U.S.C. § 354(b)(1)(A)); “substantially all of *its assets*,” *Angeion*, 615 N.W.2d at 429; and “substantially all *the assets of another employer*,” *Kforce*, 2007 WL 656458, at \*2 (citing Minn. Stat. § 268.051 subd. 4(a) (2003); Minn. R. 3315.3210 subpt. 5 (2003)) (emphasis added to all citations). “The” is a “word of limitation that indicates a reference to a specific object.” *State v. Hohenwald*, 815 N.W.2d 823, 830 (Minn. 2012). When a statute captures all possible things, rather than a subset of a specific group, it “use[s] words to that effect”: For instance, referring to “all” or “any” without “the.” *Id.* at 830-31; see *Clark v. Ritchie*, 787 N.W.2d 142, 149 (Minn. 2010).

Subpart 2(B)(2) did just that. It refers to “substantially all water” with no limiting article. “Substantially all water” therefore refers to essentially any water. It does not mean a portion of another quantity of water in or around the Project, as “substantially all *the water*” might. And Subpart 2(B)(2) nowhere indicates a reference to a specific body or source of water that is to be kept away from waste. It simply refers to “water.” Subpart 2(B)(2) is therefore unlike these tax- and business-context statutes. DNR’s team’s attempt to compare them depends on impermissibly inserting words into Subpart 2(B)(2) and changing its meaning.

But even if PolyMet and DNR’s litigation team’s comparison theory had a textual basis, the proposed bentonite amendment would still come up short. The water they say is “stored,” is not. By focusing on that water, DNR’s team and PolyMet only draw attention to the proposed bentonite amendment’s violation of Subpart 2(B)(2).



**4. Even if DNR’s Team’s and PolyMet’s Interpretations Were Correct, the Proposed Bentonite Amendment Fails to Satisfy Them.**

PolyMet and DNR’s litigation team compare saturated tailings and annual seepage, but they do so based on a false premise. They assert water in the FTB and saturated pore space is “stored” in the FTB. *Cf.* DNR Br. at 25-26; PolyMet Br. at 34-35. Not so. In fact, much of that water is moving “through and over” tailings as it makes its way from the top of the FTB to escape out the bottom. For that reason, saturated tailings must be replenished with water to maintain saturation. *See supra* at 8-9 (citing Ex. 211, R.0716423, R.0717937; Ex. 216, R.0741674). That is illustrated by the change in saturation in the FTB after closure. After PolyMet stops spigotting saturated tailings into the FTB, the amount of water entering the FTB will decrease. Water will continuously flow out of the saturated tailings in the FTB, causing the net amount of saturated tailings to decrease. *See* Ex. 216, R.0741172. That water will be moving through and over tailings in the FTB. And, as shown above, water will continually be escaping the FTB pond, *supra* at 6-7, so that is not a place of “storage,” either. When PolyMet and DNR argue that there is a lot of water in saturated zones at any given moment, they are really describing a large volume of water moving through tailings, in violation of the reactive mine waste rule.

The comparison to one year’s worth of seepage also concerns only a small part of the scope of Subpart 2(B)(2). The amount of water moving through the tailings in any one year is shocking and violates the reactive mine waste rule on its own.<sup>23</sup> But Subpart 2(B)(2) does not impose annual limits on water movement. It requires a permittee to “permanently prevent” the movement of water. The amount of seepage on the modeled time frame of closure is truly staggering. PolyMet’s model runs for 500 years after PolyMet would begin mining operations, Tr. Vol. 3. at 182:18-22

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<sup>23</sup> DNR’s team refers to the use of water by towns or other businesses, but those facts are not in the record, and those amounts of water are substantial. *See* DNR Br. at 29 & n.27.

(Engstrom), which is approximately 475 years after closure and the application of all portions of the proposed bentonite amendment, *see* Ex. 210, R.0065370. Based on a 298 million gallon a year seepage rate, the seepage through reactive mine waste in the FTB during the first 475 years of closure is 141.55 billion gallons. *Supra* at 7. That dwarfs the water in saturated pore spaces.

DNR's litigation team says that it is "unsure" if other facilities could meet the plain meaning of Subpart 2(B)(2). DNR Br. at 30-31. A lack of knowledge is not proof of anything. In contrast, DNR's witness at the rulemaking hearing explained over thirty years ago that liners can "prevent *all water from contacting*" reactive mine waste. Ex. 338, R.0234138 (emphasis added). How that is done in any particular instance depends on the particular facts of a proposed project, and those facts are properly evaluated when a permit application is submitted to DNR.

**IV. DNR Should Adopt the ALJ's Recommendation to Deny the Permit to Mine Application on the Alternative Basis that the Permit Application is Not Complete.**

The DNR should adopt the ALJ's recommendation to deny the permit, on the alternative basis that the conservation organizations urged in Sections 1 and 2 of their motion for summary disposition. OAH Record at 13457-64. The record of the contested case hearing demonstrates that PolyMet did not provide information in its permit application about the proposed bentonite amendment that must be part of mining and reclamation plan under Minn. R. 6132.2200 subpt. 2(C). Therefore, the DNR lacks jurisdiction to issue the permit. DNR should deny the permit, and any decision to approve the permit would be arbitrary and capricious, contrary to law, and lack substantial evidence to support it.

DNR only has statutory authority to grant, deny, or order a contested case hearing on an application that the Commissioner "has deemed complete," Minn. Stat. § 93.481 subd. 2. After the application "is deemed [by DNR] complete and filed," DNR may "order a contested case hearing on the completed application." Minn. Stat. § 93.483 subd. 1. The word "complete" is

Minn. Stat. § 93.481 subd. 1 is unambiguous and is commonly used as an adjective to mean “[h]aving all necessary or normal parts, components, or steps; entire.” *Heritage* at 377. For an application to be “complete,” it must include everything made necessary by Minnesota statute and rules, including a “proposed plan for the reclamation,” Minn. Stat. § 93.481 subd. 1(1). That must show compliance with Minn. R. 6132.2200 subpt. 2(C)(1) and 6132.2500 subpt. 2(B)(6). *See* Minn. R. 6132.1100 subpt. 6(C); *supra* at 11.

However, the record makes clear that there is no “completed application,” because PolyMet has not provided information about the proposed bentonite amendment that must be included in the mining and reclamation plan.<sup>24</sup> During discovery, PolyMet made clear that the “construction” of the proposed bentonite amendment is unknown, *cf.* Minn. R. 6132.2200 subpt. 2(C)(1), as are the “engineering design, methods, and sequence” of its application, *cf.* Minn. Stat. § 93.481 subd. 1(1). In particular, when responding to interrogatories during discovery, PolyMet admitted that “[h]ow PolyMet executes the Bentonite Amendment Plan depends on results of the lab and field studies that PolyMet *will perform.*” OAH Record at 13622-23 (emphasis added). PolyMet further responded with respect to the FTB pond bottom amendment in particular that “*during the field-testing phase*, the selected contractor will be required to demonstrate that the means and methods selected for bentonite application to the pond bottom meet the specified [conductivity standard].” OAH Record at 13627. DNR also admitted that PolyMet’s application does not specify a method of application for the pond bottom amendment. OAH Record at 13656-57.

PolyMet also stated that its Bentonite Amendment Plan “is contained” in additional documents, including DNR’s permit approval reversed by the courts, DNR’s findings, and a 2019

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<sup>24</sup> The Commissioner’s determination that the application is “complete” was, therefore, contrary to law, arbitrary and capricious, and lacking substantial evidence.

Test Plan submitted after the final permit to mine was approved. OAH Record at 13672-73. That 2019 Test Plan, Ex. 293, provides that PolyMet will determine many details about the construction of the proposed bentonite amendment to be determined after permitting, in violation of Minn. R. 6132.2200 subpt. 2(C)(1). The 2019 Test Plan states that for the pond bottom, “[t]he choice of application method *selected at the time of closure* [i.e., after Mine Year 25] will be dependent on a number of factors, including results of laboratory testing, material pricing and PolyMet/contractor preference.” Ex. 293, R.0715216. The “selected contractor” will then “demonstrate the means and methods for bentonite application that will yield the desired bentonite application as dictated by laboratory test results.” *Id.*, R.715216. Testimony at the hearing confirmed that construction equipment has not been selected and that it may be specially modified or constructed, although that is not currently known. Tr. Vol. 1 at 94:1-22; 140:24-141:11; 144:8-17, 146:2-16, 147:3-4, 147:13-23 (Radue). And PolyMet’s witness Radue refused to confirm what construction methods could be used. *See* Tr. Vol. 1 at 142:23-143:2 (Radue).

The 2019 Test Plan further suggests that the FTB pond bottom amendment might not be used at all, because the “hydraulic conductivity of the flotation tailings may alone be sufficiently low to achieve a positive pond water balance,” Ex. 293, R.715216, but that cannot be known until lab testing, *see id.*, which will only occur *after* PolyMet has been depositing tailings for months, *id.* R.715216, R.715209, R.715228. And the 2019 Test Plan says that bentonite itself could be replaced by other materials entirely. *Id.*, R.0715205. Radue confirmed that PolyMet might use “LTV fine tailings and slimes” instead of bentonite, Ex. 74 at 64:1063-64 (Radue), although he admitted that he could not recall PolyMet ever proposing how those other materials might be applied, *see* Tr. Vol. 2 at 8:25-9:9 (Radue), and the permit to mine does not propose using them.

This evidence shows PolyMet’s mining and reclamation plan does not include all required information and there is not a “completed application.” To be sure, the proposed bentonite amendment is a fundamental part of the FTB. And a completed application must describe all “engineering design, methods, sequence, and schedules” of the FTB, including “all materials, construction, and operating performance specifications and limitations that must be maintained to ensure protection of natural resources.” *See supra* at 11. Yet the application does not specify a method of application for the pond bottom amendment, does not provide information about the equipment that will be used to apply bentonite to the tailings beaches or dam slopes, and gives no operating performance specifications or limitations to define or achieve a uniform distribution of bentonite on the pond bottom. DNR and PolyMet instead rely on documents that are not part of the application, including the 2019 Testing Plan, and undefined other documents that they say will be produced in the future, to describe the elements and functioning of the bentonite plan.

Moreover, PolyMet *cannot* meet its burden to show that the proposed bentonite amendment complies with the reactive mine waste rule. In its 2019 Testing Plan and testimony, PolyMet refused to describe how the proposed bentonite amendment will be constructed, with what equipment, and whether bentonite will actually be used at all. Without confirming that information, PolyMet cannot demonstrate whether the bentonite amendment will meet the reactive mine waste rule. And PolyMet cannot meet its burden at the permitting stage by relying on speculation or general promises that it will produce information in the future after future testing or in compliance with special conditions of the permit to mine. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).

## CONCLUSION

For the foregoing reasons, the DNR should accept the ALJ’s Recommendations 2, 3, and 5 and deny the permit to mine application. DNR should reject Recommendations 1 and 4.

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Respectfully submitted,

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