STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1952
A18-1953
A18-1958
A18-1959
A18-1960
A18-1961

In the Matter of the NorthMet Project Permit
to Mine Application Dated December 2017
(A18-1952, A18-1958, A18-1959), and

In the Matter of the Applications for Dam Safety Permits 2016-1380
and 2016-1383 for the NorthMet Mining Project
(A18-1953, A18-1960, A18-1961).

Filed January 13, 2020
Affirmed in part, reversed in part, and remanded
Cleary, Chief Judge

Minnesota Department of Natural Resources

Ann E. Cohen, Evan Mulholland, Minnesota Center for Environmental Advocacy, St. Paul, Minnesota (for relators Minnesota Center for Environmental Advocacy, Duluth for Clean Water, Center for Biological Diversity, Save Lake Superior Association, Friends of the Cloquet Valley State Forest, Save Our Sky Blue Waters)

Margo S. Brownell, Evan A. Nelson, Maslon LLP, Minneapolis, Minnesota (for relator Friends of the Boundary Waters Wilderness)

Paula G. Maccabee, Just Change Law Offices, St. Paul, Minnesota (for relator WaterLegacy)

Sean Copeland, Tribal Attorney, Cloquet, Minnesota; and

Vanessa L. Ray-Hodge (pro hac vice), Sonosky, Chambers, Sachse, Mielke & Brownell, LLP, Albuquerque, New Mexico (for relator Fond du Lac Band of Lake Superior Chippewa)

Jonathan Katchen (pro hac vice), Sarah Koniewicz, Holland & Hart, LLP, Jackson, Wyoming; and

Sherry A. Enzler, General Counsel, Minnesota Department of Natural Resources, St. Paul, Minnesota (for respondent Minnesota Department of Natural Resources)

Monte A. Mills, Caitlinrose H. Fisher, Greene Espel PLLP, Minneapolis, Minnesota; and

Jay C. Johnson (pro hac vice), Venable LLP, Washington, District of Columbia (for respondents PolyMet Mining Corp. and Poly Met Mining, Inc.)

Eric E. Caugh, Zelle LLP, Minneapolis, Minnesota (for amici curiae Arne Carlson, John Gappa, Ron Sternal, and Alan Thometz)

Michael D. Madigan, Brandt F. Erwin, Blair A. Harrington, Megan J. Kunze, Madigan, Dahl & Harlan, P.A., Minneapolis, Minnesota (for amicus curiae Sierra Club)

Mehmet K. Konar-Steenberg, St. Paul, Minnesota (for amicus curiae League of Women Voters Minnesota)

Considered and decided by Cleary, Chief Judge; Hooten, Judge; and Smith, Tracy M., Judge.

S Y L L A B U S

I. Under Minn. Stat. § 93.483, subd. 3(a) (2018), the Minnesota Department of Natural Resources has an independent obligation to determine whether the statutory criteria for holding a contested-case hearing on a permit to mine are met.

II. Under Minn. Stat. § 93.483, subd. 3(a)(3), a contested-case hearing must be held on a permit to mine when "there is a reasonable basis underlying a disputed material issue of fact so that a contested case hearing would allow the introduction of information that would aid the commissioner in resolving the disputed facts in order to make a final decision on the completed application." This standard is met when there is probative, competent, and conflicting evidence on a material fact issue.

O P I N I O N

CLEARY, Chief Judge

In these consolidated certiorari appeals, relators Minnesota Center for Environmental Advocacy (MCEA) et al.,[1] WaterLegacy (WL), and the Fond du Lac Band of Lake Superior Chippewa (the band) challenge decisions by respondent Minnesota Department of Natural Resources (DNR) denying petitions for a contested-case hearing and issuing a permit to mine and two dam-safety permits to respondents PolyMet Mining Corp. and Poly Met Mining, Inc. (together PolyMet)[2] for a proposed copper-nickel-platinum group elements (PGE) mine known as the NorthMet project. The band also challenges the DNR's decision to transfer an existing permit to PolyMet.

We affirm the DNR's decision to transfer the existing permit. But we conclude that the DNR erred in interpreting Minn. Stat. § 93.483 (2018) and that the requirements for holding a contested-case hearing under that statute are met. We also conclude that the DNR erred by issuing a permit to mine without a definite term. Accordingly, we reverse

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[1] Counsel for MCEA also represents relators Duluth for Clean Water, Center for Biological Diversity, Save Lake Superior Association, Friends of the Cloquet Valley State Forest, and Save Our Sky Blue Waters. MCEA filed joint briefs with relator Friends of the Boundary Waters Wilderness, which is separately represented.

[2] Poly Met Mining, Inc. is a Minnesota corporation that is a wholly owned subsidiary of PolyMet Mining Corp., a publicly traded Canadian company. Both entities are listed as permittees on the permit to mine, while the dam-safety permits are issued to only Poly Met Mining, Inc.

the DNR's decisions to issue the permit to mine and dam-safety permits and remand for the DNR to hold a contested-case hearing.

FACTS

The permitting decisions challenged in these appeals were made in relation to the NorthMet project, which, if built by PolyMet, would be the first copper-nickel-PGE mine in Minnesota. Although the State of Minnesota has substantial regulatory experience with iron and taconite mining, copper-nickel mining would be new to the state and brings with it the potential for environmental impacts not experienced with iron-ore mining. As such, the NorthMet project has generated significant public interest and controversy. Of particular concern is the potential for acid mine drainage, which may occur if ore and waste rock containing sulfide minerals are exposed to oxygen and water, causing the release of soluble metals and sulfate in area surface waters and groundwaters.

A. The planned project

As planned, the NorthMet project would consist of a mine site six miles south of Babbitt, a plant site six miles north of Hoyt Lakes, and a transportation and utility corridor connecting the mine and plant sites. The entire project would be located in the St. Louis River Watershed, which drains to Lake Superior. Mining would occur on relatively undisturbed land, while the plant site would be at the location of a former taconite-processing facility that was operated by the LTV Steel Mining Company (LTVSMC). The project is planned to have three phases: an 18- to 24-month construction phase; a 20-year

mining-operations phase; and a reclamation,[3] closure, and postclosure phase of unknown duration.

At the mine site, mining would be conducted in three open pits. Ore would be separated from waste rock, and the waste rock would be categorized according to its sulfur content and placed on one of several permanent or temporary stockpiles. Over the 20-year mine life, approximately 225 million tons of ore and 308 million tons of waste rock would be removed from the NorthMet deposit.

Ore would be transported from the mine site to the plant site by rail. At the plant site, the ore would be crushed and processed at a beneficiation plant, producing copper and nickel concentrate and tailings.[4] The concentrates would be shipped off site as final products, and some nickel concentrate might be used as feedstock for an anticipated

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[3] The term reclamation is not defined by statute, and is defined by rule somewhat unhelpfully as the activities necessary to accomplish the requirements of the rules regarding mine siting, design, operations, and closure. Minn. R. 6132.0100, subp. 29 (2019). The final environmental-impact statement (FEIS) for the NorthMet project more meaningfully describes reclamation as:

> Actions intended to return the land surface to an equivalent undisturbed condition. Restoration of mined land to original contour, use, or condition. Steps or operations integral to mining that prepare the land for post-mining use are called reclamation. When the objective of reclamation is to return the land to pre-mining conditions and uses, it is sometimes called restoration.

The NorthMet project is designed to be progressively reclaimed, which means that reclamation activities would occur while the mining project is still in operation, allowing for a portion of the disturbed areas to be reclaimed prior to closure.

[4] As defined in the FEIS, tailings are "[w]aste byproducts of mineral beneficiating processes . . . consist[ing] of rock particles, which have usually undergone crushing and grinding, from which the profitable mineralization has been separated."

hydrometallurgical plant. The average ore-processing rate would be limited to 32,000 tons per day, according to PolyMet.

PolyMet proposes that tailings be transferred as slurry to a flotation tailings basin (the tailings basin),[5] which would be constructed, without a liner, on top of the existing LTVSMC tailings basin. A perimeter embankment, or dam, surrounds the existing tailings basin, and future "lifts" of the tailings basin dam would be built from LTVSMC bulk tailings using an upstream construction method.[6] New dam lifts would also incorporate a bentonite-amended oxygen-barrier layer (the bentonite amendment) on the exterior side of the basin. A rock buttress would be built to reinforce the stability of the dam, and a seepage-collection system would be built to collect water that seeps from the basin. Tailings would be placed under a wet cover (pond) intended to minimize reactivity. Over the 20-year mine life, approximately 225 million short tons of tailings would be placed in the tailings basin, which would be constructed to a final height of 250 feet.

Several years after beneficiation begins, PolyMet plans to build a hydrometallurgical plant, at which nickel concentrate would be further processed to extract and isolate PGEs, precious metals, and base metals. This further processing would create

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[5] As defined in the FEIS, a tailings basin is "[l]and on which is deposited, by hydraulic or other means, the material that is separated from the mineral product in the beneficiation or treatment of ferrous minerals including any surrounding dikes constructed to contain the material."

[6] As we discuss further herein, the upstream construction method entails adding materials to the dam in a stairstep fashion toward the inside of the tailings basin, and can be contrasted with the downstream construction method, which entails adding materials to the exterior of the dam.

waste byproducts that would be placed in a hydrometallurgical residue facility, which would be built on the site of the existing LTVSMC emergency basin, using a downstream construction method. The hydrometallurgical residue facility would be a double-lined cell, and it would be drained and covered following the completion of mining.

Following the approximately 20-year mine life, PolyMet proposes to complete reclamation, close the mine, and perform postclosure maintenance. The tailings basin would be "closed" under an approximately 900-acre pond, which would be maintained in the tailings basin indefinitely. Additional bentonite would be added to the beaches of the dam and the pond bottom. Postclosure, the NorthMet project would require mechanical water treatment for an indefinite period of time.

B. Environmental review and permit proceedings

Environmental review for the NorthMet project began in about 2004. *See In re Applications for Supplemental Envtl. Impact Statement for Proposed NorthMet Project*, No. A18-1312, 2019 WL 2262780, at *1 (Minn. App. May 28, 2019) (*SEIS Appeals*) (summarizing environmental-review process), *review denied* (Minn. Aug. 20, 2019). The DNR, in cooperation with the United States Army Corps of Engineers and the United States Forest Service,[7] issued a draft environmental-impact statement; a supplemental draft environmental-impact statement; and a final environmental-impact statement (FEIS). *Id.*

[7] In addition to numerous state permits, the NorthMet project requires a permit from the United States Army Corps of Engineers, which was approved on March 21, 2019. The project also involves a land exchange with the United States Forest Service, which was approved by the service on January 9, 2017 and effectuated by agreement on June 28, 2018.

In March 2016, the DNR issued a decision determining the FEIS adequate; no appeal was taken from that decision. *Id.*[8]

Following environmental review, PolyMet consulted with the DNR and submitted, as relevant here, applications for a permit to mine and two dam-safety permits, one for the tailings basin and one for the hydrometallurgical residue facility. Based on feedback from the DNR, PolyMet submitted revised applications, with final dam-safety-permit applications submitted in May of 2017 and a final permit-to-mine application submitted in December of 2017. The DNR issued a draft permit to mine and noticed public-comment periods for the permit to mine and the dam-safety permits. Each of the relators submitted comments on the permits during the public-comment periods. MCEA and WL also submitted petitions for a contested-case hearing on the permit to mine.

On November 1, 2018, the DNR issued three decisions: the first denied the petitions for a contested-case hearing and granted the permit to mine; the second granted the dam-safety permits; and the third transferred the existing permit for the LTVSMC tailings basin to PolyMet.

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[8] During the summer of 2018, WL, MCEA, and another environmental organization submitted petitions for a supplemental environmental-impact statement (SEIS), arguing that an SEIS was required based on changes to the project's waste-water-treatment plan and on financial information disclosed by PolyMet. *SEIS Appeals*, 2019 WL 2262780, at *2-7. The DNR denied the petitions for an SEIS, this court affirmed that decision, and the supreme court denied a petition for further review. *Id.* at *8.

C. Judicial proceedings

In December 2018, relators—environmental organizations that made many objections to PolyMet's proposal through the administrative processes—filed six separate certiorari appeals, three from the DNR's decision to deny a contested-case hearing and to issue the permit to mine (A18-1952, A18-1958, and A18-1959) and three from the DNR's decision to issue the dam-safety permits (A18-1953, A18-1960, and A18-1961).[9] The band's dam-safety-permit appeal also challenged the DNR's decision to transfer the existing permit for the LTVSMC tailings basin. This court consolidated all six appeals on the DNR's motion.[10]

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[9] Eight other appeals and one administrative-rules challenge have been filed with this court in relation to the NorthMet project. This court has issued two related unpublished opinions, one affirming the DNR's decision not to complete an SEIS, *SEIS Appeals*, 2019 WL 2262780, at *1, and one declaring valid the administrative rules governing nonferrous mining, *Minn. Ctr. for Envtl. Advocacy v. Minn. Dep't of Nat. Res.*, No. A18-1956, 2019 WL 3545839, at *1 (Minn. App. Aug. 5, 2019) (*MCEA v. DNR*), *review denied* (Minn. Oct. 29, 2019). In June 2019, we granted a motion for a transfer to district court in appeals taken from a decision by the Minnesota Pollution Control Agency (MPCA) to issue a National Pollutant Discharge Elimination System/State Disposal System permit for the project. *In re Issuance of Nat'l Pollutant Discharge Elimination Sys. / State Disposal Sys. Permit for the Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 25, 2019) (order). District court proceedings related to those appeals are ongoing. Still pending before this court are appeals taken from the MPCA's decision to issue an air-emissions permit for the project. *See In re Issuance of Air Emissions Permit for Polymet Mining, Inc.*, Nos. A19-0115, A19-0134.

[10] Before oral argument, this court issued an order granting a temporary stay of the permit to mine and dam-safety permits, pending further consideration, oral argument, and an order by this panel assigned to decide the appeal on the merits. Following oral argument, we issued an order extending the stay of the DNR permits pending a decision on the merits.

ISSUES

I. Is the DNR's decision to deny a contested-case hearing unsupported by substantial evidence, arbitrary and capricious, or affected by error of law?

II. Did the DNR err by issuing a permit to mine without a definite term?

III. Is the DNR's decision to transfer the existing tailings basin permit arbitrary and capricious?

ANALYSIS

In reviewing the DNR's decisions, this court may affirm or remand for further proceedings, or we may reverse the agency's decision if we determine that the decision is unsupported by substantial evidence, arbitrary or capricious, or affected by error of law. *See* Minn. Stat. §§ 93.50 (2018) (providing that DNR's decisions are subject to review under Minn. Stat. §§ 14.63-.69), 14.69 (2018) (providing standard of review); *see also In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance for Discharge of Treated Wastewater*, 672 N.W.2d 921, 926 (Minn. App. 2004) (discussing standard of review) (*Owatonna*). "[D]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (quotation omitted). But appellate courts "retain the authority to review de novo errors of law which arise when an agency decision is based upon the meaning of words in a statute." *Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 721 (Minn. 2008) (quotation omitted); *see also St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d

35, 39-40 (Minn. 1989) ("When a decision turns on the meaning of words in a statute or regulation, a legal question is presented. In considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise." (citation omitted)).

The DNR is the principal regulator of mining activities in Minnesota. *See generally* Minn. Stat. § 93.47 (2018). As relevant here, PolyMet was required to obtain from the commissioner of natural resources (commissioner) a permit to mine and two dam-safety permits. The permit to mine is governed by Minn. Stat. §§ 93.44-.51 (2018) (permit-to-mine statutes) and Minn. R. 6132.0100-.5300 (2019) (chapter 6132). Under the permit-to-mine statutes and chapter 6132, the DNR must determine whether an area proposed to be mined can be reclaimed using existing technology. *See* Minn. Stat. § 93.47, subd. 3 (directing DNR to adopt rules allowing such determination); Minn. R. 6132.4000 (providing permitting procedures); *MCEA v. DNR*, 2019 WL 3545839, at *8 (reasoning that permitting procedure under rules is procedure for determining whether area can be reclaimed).[11] If the commissioner determines that an area proposed to be mined cannot be

[11] The DNR argued in *MCEA v. DNR*, and reiterates in this case, that it satisfied the requirement of Minn. Stat. § 93.47, subd. 3, by establishing, through the rulemaking process, a list of areas where mining may not take place. *See* Minn. R. 6132.2000, subp. 2 (providing that list). But we construe the statute to more broadly require a procedure for addressing whether any particular area can be mined and reclaimed. *See MCEA v. DNR*, 2019 WL 3545839, at *8 (explaining that language in subdivision 3 was adopted at same time as the permit requirement, "making clear that permits should be denied if mining sites 'cannot be reclaimed' using existing techniques" (citing 1973 Minn. Laws ch. 526, § 3, at 1191)).

reclaimed using existing techniques, a permit to mine should be denied. *MCEA v. DNR*, 2019 WL 3545839, at *8.

The dam-safety permits are governed by Minn. Stat. §§ 103G.301-.315 (2018 & Supp. 2019) and Minn. R. 6115.0300-.0520 (2019). Under Minn. Stat. § 103G.315, subd. 3, the commissioner shall grant a permit "[i]f the commissioner concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare." The applicant bears the burden of proving that the standard is met, and the commissioner may include in the permit conditions related to the "method of construction or operation of controls as appear reasonably necessary for the safety and welfare of the people of the state." Minn. Stat. § 103G.315, subd. 6.

In addition to the specific statutory and regulatory provisions governing the permits in this case, the DNR's conduct is governed by the Minnesota Environmental Rights Act (MERA), Minn. Stat. §§ 116B.01-.13 (2018). As relevant here, MERA precludes the DNR from authorizing any conduct that is likely to impair, pollute, or destroy air, water, land, or natural resources if there is a "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land, and other natural resources from pollution, impairment, or destruction." Minn. Stat. § 116B.09, subd. 2.[12] "Economic considerations alone shall not justify such conduct." *Id.*

[12] A provision of the Minnesota Environmental Policy Act (MEPA), Minn. Stat. §§ 116D.01-.11 (2018 & Supp. 2019), contains a similar prohibition:

> No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural

With this regulatory framework in mind, we turn to relators' arguments on appeal.

I.

MCEA and WL assert that the DNR's decision to deny a contested-case hearing was based on legal error, arbitrary and capricious, and unsupported by substantial evidence. Under Minn. Stat. § 93.483, subd. 1, a petition for a contested-case hearing may be brought by "[a]ny person owning property that will be affected by" a proposed mining operation. Also under subdivision 1, "the commissioner may, on the commissioner's own motion, order a contested case hearing on the completed application." Minn. Stat. § 93.483, subd. 1. Under Minn. Stat. § 93.483, subdivision 3(a),

> The commissioner must grant the petition to hold a contested case hearing or order upon the commissioner's own motion that a contested case hearing be held if the commissioner finds that:
>
> (1) there is a material issue of fact in dispute concerning the completed application before the commissioner;
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> (2) the commissioner has jurisdiction to make a determination on the disputed material issue of fact; and
>
> (3) there is a reasonable basis underlying a disputed material issue of fact so that a contested case hearing would allow the introduction of information that would aid the

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> resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

Minn. Stat. § 116D.04, subd. 6.

> commissioner in resolving the disputed facts in order to make a final decision on the completed application.[13]

Minn. Stat. § 93.483 was added to the Minnesota Statutes by an omnibus bill signed by the governor on May 30, 2017, and became effective the following day as to all pending permit-to-mine applications. 2017 Minn. Laws ch. 93, art. 2, § 58, at 686-87, 746. PolyMet's permit-to-mine application was pending at that time.

Before May 31, 2017, Minn. Stat. § 93.481, subd. 2 (2016), provided for an objections process that could result in a contested-case hearing, and chapter 6132 includes provisions implementing the objections process. *See* Minn. R. 6132.4000, subps. 2, 3. The objections process was removed from the statutes governing mining when the contested-case-petition process was adopted in Minn. Stat. § 93.483. *See* 2017 Minn. Laws ch. 93, art. 2, § 57, at 685-86. Consequently, although the provisions in chapter 6132 implementing the objections process have not been removed from the rules, the objections process itself has been eliminated by statute. Accordingly, we apply Minn. Stat. § 93.483 as the controlling authority, and we reject arguments by MCEA and WL that the statute and rule should be harmonized. *See Berglund v. Comm'r of Revenue*, 877 N.W.2d 780, 785 (Minn. 2016) (rejecting reliance on requirement in rule that had been rendered obsolete by intervening legislative action and conflicted with plain language of statutes); *Special*

[13] The commissioner also must grant a contested-case hearing if sought by the permit applicant for any reason. Minn. Stat. § 93.483, subd. 4. PolyMet did not seek a contested-case hearing, and opposed MCEA's and WL's petitions for a contested-case hearing.

Sch. Dist. No. 1 v. Dunham, 498 N.W.2d 441, 445 (Minn. 1993) ("It is elemental that when an administrative rule conflicts with the plain meaning of a statute, the statute controls.").

In support of their petitions for a contested-case hearing, MCEA and WL submitted declarations from six of their members (the members) who live near the NorthMet project. Applying Minn. Stat. § 93.483, the DNR found that the members do not own property that will be affected by the NorthMet project and that they had not demonstrated that a contested-case hearing was required under the statutory criteria of Minn. Stat. § 93.483, subd. 3(a). On appeal, MCEA and WL argue that (A) the members own property that will be affected by the project; (B) the DNR has an independent obligation to determine whether a contested-case hearing is required under the statutory criteria; and (C) a contested-case hearing is required under the statutory criteria. We address each argument in turn.

A.

As we explain above, Minn. Stat. § 93.483, subd. 1, authorizes a petition for a contested-case hearing to be brought by "[a]ny person owning property that will be affected by the proposed [mining] operation." MCEA and WL argue that the members own property near the NorthMet project that will be affected by pollutants released by the project, pointing to evidence that pollutants will be discharged from the tailings basin into area surface waters and impact the quality of downstream waters. WL additionally asserts that its members will be affected by a foreseeable failure of the tailings basin dam, pointing to evidence that the construction method of the tailings basin poses an unreasonable risk of dam failure. Both MCEA and WL submitted affidavits from the members attesting to their property ownership and requesting a contested-case hearing.

The DNR rejected the asserted bases for concluding that the members' property will be affected, reasoning that each member "expresses concerns about speculative events that the DNR has already determined are unlikely to occur." In other words, the DNR rejected the requests for a contested-case hearing based on its determination—without a hearing—of some of the very issues that MCEA and WL sought to have addressed at a hearing.[14]

We review issues of statutory interpretation de novo, giving words and phrases their plain and ordinary meaning, and according deference to an agency's interpretation only if a statute is ambiguous. *See A.A.A. v. Minn. Dep't of Human Servs.*, 832 N.W.2d 816, 819, 822-23 (Minn. 2013); *see also* Minn. Stat. § 645.08 (2018) (providing that words and phrases in statutes should be construed according to common and approved usage). Minn. Stat. § 93.483 does not define the term "will be affected by," but "affected" is a broad term, meaning to be "[a]cted upon, influenced, or changed." *The American Heritage Dictionary* 28 (5th ed. 2011); *see also Black's Law Dictionary* 68 (10th ed. 2014) (defining "affect" as "[m]ost generally, to produce an effect on; to influence in some way").

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[14] The DNR also denied the petitions on the ground that the water-quality effects that the members assert are not within the DNR's jurisdiction because the MPCA is charged with protecting water quality in Minnesota. But Minn. Stat. § 93.483, subd. 1, does not require a nexus between the effects asserted by contested-case petitioners and the DNR's jurisdiction. Moreover, the DNR has both the power and the duty to protect all of Minnesota's natural resources, including water. *See* Minn. Stat. § 93.47, subd. 2 (requiring commissioner to consider factors including water pollution in adopting mining rules); Minn. Stat. § 116B.09, subd. 2 (requiring agency in permit proceedings to consider alleged impairment of water); *see also* Minn. Stat. § 116B.02, subd. 4 (defining "natural resources" to include water); Minn. R. 6132.0100, subp. 21 (same). The DNR is not relieved of its duty to protect the waters of the state merely because the MPCA also plays a regulatory role in this area.

Contrary to this broad definition, the DNR seems to posit that the only property that will be "affected by" the NorthMet project is property that is directly adjacent to the project. But the project is in a mining district adjacent to an industrial area. The DNR's interpretation would effectively preclude any nearby residential property owner from seeking a contested-case hearing, regardless of whether the effects of mining would extend to them. We agree with MCEA that adopting the DNR's interpretation would render illusory the right to a contested-case hearing, which would be contrary to the presumption that the legislature intends all parts of a statute to be effective and certain. *See* Minn. Stat. § 645.17(1)-(2) (2018) (stating that "the legislature intends the entire statute to be effective and certain" and "does not intend a result that is absurd, impossible of execution, or unreasonable"). We conclude that the DNR's decision denying a contested-case hearing was affected by an error of law in its overly narrow interpretation of Minn. Stat. § 93.483, subd. 1.

Furthermore, applying the common definition of "affected," we conclude that substantial evidence is lacking to support the DNR's finding that the members do not own property that will be affected by the NorthMet project. The members' affidavits provide substantial evidence of their ownership of property, predominantly downstream of the project, that will be affected, that is "[a]cted upon, influenced, or changed," by the release of pollutants from the tailings basin. *American Heritage*, *supra*, at 28. WL has provided substantial evidence—in the form of an inundation study conducted by PolyMet—that its members' properties will be affected by the risk of dam failure. The DNR counters that a dam break is unlikely and that it has concluded that the project "is not expected to have

significant adverse effects on downstream or upstream water quality." (Emphasis added.) Minn. Stat. § 93.483, however, only requires a demonstration that property will be affected, in the sense that it is influenced in some way. There is no requirement of "significant adverse effects."

The DNR also asserts that, if the members are considered affected property owners, "then the limitations imposed by the legislature on who has standing would be rendered practically meaningless." Although we need not determine the precise limit of the statutory language in these appeals, we are satisfied that the members fall well within its bounds. By the DNR's own calculations, each of the members lives within 66 miles of the NorthMet project, and the closest member lives just 8.6 miles away. In addition, most of the members live within the St. Louis River Watershed, the same watershed in which the project would be located. Under these circumstances, we reject the DNR's assertion that allowing the members (through MCEA and WL) to file contested-case petitions renders the limitations in Minn. Stat. § 93.483, subd. 1, meaningless.[15]

B.

In addition to arguing that its members are affected property owners, the MCEA argues that the DNR had an independent duty under Minn. Stat. § 93.483 to determine whether a contested-case hearing was required under the statutory criteria. We agree. As

[15] Because we conclude that the members own property that will be affected by the NorthMet project, we do not reach MCEA's alternative argument that Minn. Stat. § 93.483 violates constitutional equal-protection rights by discriminating between property owners and those who do not own property but will be comparably affected by a mining operation.

we note above, subdivision 1 of the statute provides that the commissioner "*may*, on the commissioner's own motion, order a contested case hearing on the completed application." Minn. Stat. § 93.483, subd. 1 (emphasis added). Subdivision 3 of the statute provides that "[t]he commissioner *must* . . . order upon the commissioner's own motion that a contested case hearing be held if the commissioner finds that" the statutory criteria are met. Minn. Stat. § 93.483, subd. 3(a) (emphasis added). Reading the subdivisions together, as we must, we conclude that the commissioner *may* order a contested-case hearing for any reason he or she deems sufficient,[16] but that the commissioner *must* order a contested-case hearing when the statutory criteria are met. *See, e.g., In re Annexation of Certain Real Prop. to City of Proctor*, 925 N.W.2d 216, 218 (Minn. 2019) ("We interpret a statute as a whole so as to harmonize and give effect to all its parts, and where possible, no word, phrase, or sentence will be held superfluous, void, or insignificant." (quotations omitted)); *see also* Minn. Stat. §§ 645.17(2) (providing that courts should be guided by presumption that legislature intends entire statute to be effective), 645.44, subds. 15, 15a (2018) (providing that "may" is permissive while "must" is mandatory).[17] Accordingly, we conclude that the

[16] For instance, the commissioner might determine, in a case such as this, that substantial public interest in a project warrants a contested-case hearing.

[17] Even were we to conclude that subdivisions 1 and 3 are irreconcilable, subdivision 3 would control over subdivision 1. *See* Minn. Stat. § 645.26, subd. 2 (2018) ("When, in the same law, several clauses are irreconcilable, the clause last in order of date or position shall prevail.").

DNR erred by failing to recognize its obligation to independently evaluate whether the statutory criteria for a contested-case hearing were met.[18]

C.

The commissioner must order a contested-case hearing if "there is a reasonable basis underlying a disputed material issue of fact so that a contested case hearing would allow the introduction of information that would aid the commissioner in resolving the disputed facts in order to make a final decision." Minn. Stat. § 93.483, subd. 3(a)(3).[19] Applying a similarly worded standard governing decisions by the MPCA,[20] our supreme court has held

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[18] We recognize that the statute states that the commissioner must order a contested-case hearing "upon the commissioner's own motion" when the criteria are met, Minn. Stat. § 93.483, subds. 1, 3(a), and that the commissioner did not make his "own motion" here. But we read that statutory language effectively to mean that the commissioner must act sua sponte—in other words, on the commissioner's own. The commissioner cannot avoid a contested case that is called for by the criteria simply by refusing to somehow make a "motion" to him or herself.

[19] As a threshold matter, there must exist disputed fact issues that are within the DNR's jurisdiction. *See* Minn. Stat. § 93.483, subd. 3(a)(1)-(2). The DNR does not dispute that the fact issues discussed herein are within its jurisdiction.

[20] Under Minn. R. 7000.1900, subp. 1 (2019), the MPCA must hold a contested-case hearing if

> A. there is a material issue of fact in dispute concerning the matter pending before the board or commissioner;
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> B. the board or commissioner has the jurisdiction to make a determination on the disputed material issue of fact; and
>
> C. there is a reasonable basis underlying the disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the board or commissioner in resolving the disputed facts in making a final decision on the matter.

that a contested-case hearing is not warranted when a party does no more than "raise questions or pose alternatives without some showing that evidence can be produced which is contrary to the action proposed by the agency." *In re Amendment No. 4 to Air Emission Facility Permit*, 454 N.W.2d 427, 430 (Minn. 1990) (*Amendment No. 4*); *see also In re N. States Power Co. (NSP) Wilmarth Indus. Solid Waste Incinerator Ash Storage Facility*, 459 N.W.2d 922, 923 (Minn. 1990) (*Red Wing*). Consistent with *Amendment No. 4* and *Red Wing*, this court has required that there be "some showing that evidence can be produced that is contrary to the action proposed by the agency." *Owatonna*, 672 N.W.2d at 929. Synthesizing these holdings, we conclude that the statutory criteria for holding a contested-case hearing are met when there is probative, competent, and conflicting evidence on a material fact issue.

The DNR urges this court to defer to the commissioner's determination that a contested-case hearing would not aid him in making a decision, suggesting that the decision whether to grant a contested-case hearing is entirely discretionary with the commissioner. This suggestion is inconsistent with the language of the statute and the caselaw. Under Minn. Stat. § 93.483, subd. 3(a)(3), the commissioner must determine whether "there is a reasonable basis underlying a disputed material issue of fact *so that* a contested case hearing would allow the introduction of information that would aid the commissioner in resolving the disputed facts in order to make a final decision on the completed application." (Emphasis added.) Nothing in the statutory language grants the DNR the unfettered discretion it seeks to employ. To the contrary, the statutory phrase "so that" reflects legislative judgment that a contested-case hearing will be helpful in cases where there are

genuine, material disputes of fact. *See American Heritage, supra,* at 1660 (defining "so" when used as a conjunction to mean "[f]or that reason," "therefore," "[w]ith the result or consequence that," and "[w]ith the purpose that"). And this court has held that a contested-case hearing *will* aid the commissioner when a genuine and material fact issue is raised. *Owatonna*, 672 N.W.2d at 930.

The DNR and PolyMet argue that a contested-case hearing is only warranted when a person introduces new evidence that the agency has not previously considered in environmental-review or permitting proceedings. We rejected a similar argument in *Owatonna*, 672 N.W.2d at 929. In that case, the MPCA argued that the relator was not entitled to a contested-case hearing because they produced no "new" evidence. *Id.* Like the DNR and PolyMet, the MPCA in that case relied on language in the supreme court's decision in *Red Wing*. *Id.*; *see Red Wing*, 421 N.W.2d at 404 (holding that contested-case hearing was not warranted when relators "failed to provide the agency or this court with any specific expert's names or with any indication of what specific *new facts* an expert might testify to at a contested case hearing"). But, as we explained in *Owatonna*, *Red Wing* was a case in which the relators offered only criticism of the MPCA's decision, the MPCA agreed that the issues needed further study, and the relators offered no evidence (new or otherwise) to contradict the agency's decision. *Red Wing*, 421 N.W.2d at 404. In short, the *Red Wing* relators sought a contested-case hearing to investigate or develop factual issues. *See id.* at 403-04 (recounting relators' argument that "even if the data is unavailable, that is not a proper basis for denying a contested case [hearing]," which would offer procedural benefits including discovery). The supreme court concluded that relators had

"the burden of demonstrating the existence of material facts that would aid the agency *before* they are entitled to a contested case hearing" and that they had not done so. *Id.* at 404 (emphasis added). In *Owatonna*, we held that the facts in *Red Wing* were distinguishable because in *Owatonna* the relator had submitted expert evidence on the factual disputes. 672 N.W.2d at 929. And we expressly "reject[ed] the MPCA's contention that because the MPCA board chose to disregard relator's evidence in the previous proceedings, a contested case [hearing] is precluded because relator's evidence is not 'new.'" *Id.* at 929-30. Reaffirming that analysis here, we reject the DNR's and PolyMet's arguments that a contested-case hearing was not required because MCEA and WL did not present "new" evidence.

We also reject the DNR's assertion that a fact issue does not meet the statutory criteria for a contested-case hearing if an agency has already considered an issue during environmental review. The purpose of environmental review "is to force agencies to make their own impartial evaluation of environmental considerations before reaching their decisions." *Iron Rangers for Responsible Ridge Action v. Iron Range Res.*, 531 N.W.2d 874, 880 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. July 28, 1995). "As an investigative tool, the EIS does not authorize or preclude an action and does not take the place of permit or other proceedings governing a particular project." *In re Enbridge Energy, Ltd. P'ship*, 930 N.W.2d 12, 20 (Minn. App. 2019). Thus, the fact that the DNR may have evaluated certain evidence in conducting environmental review does not excuse it from also evaluating that evidence in the permit proceedings, including for the purpose of determining whether a contested-case hearing is required. Moreover, as we note above,

nothing in Minn. Stat. § 93.483, subd. 3(a), limits contested-case hearings to "new" evidence. Given the exhaustive nature of environmental review, such a limitation, were it to exist, would make the right to a contested-case-hearing illusory.[21]

MCEA and WL have identified numerous factual issues on which they assert that a contested-case hearing is required, including factual issues in the following subject areas.

Upstream construction of the tailings basin dam

The NorthMet tailings basin dam would be constructed using an upstream construction method. Upstream construction can generally be understood as a method where the building blocks of a dam are added in a stair-step fashion travelling toward the inside of a tailings basin. In contrast, downstream construction is a method where the building blocks are added to the outside of the tailings basin dam. And a third type of construction, centerline construction, is a hybrid of the upstream and downstream methods. Although the upstream construction method has been the most commonly used method to build tailings basins, the DNR's own documents reflect that upstream construction is the least "robust" of the three dam construction methods.

MCEA and WL argue that a contested-case hearing was required to address whether upstream construction can comply with Minn. R. 6115.0410, subp. 8, which requires the commissioner to (1) base the approval or denial of a dam on "the potential hazards to the health, safety, and welfare of the public and the environment," and (2) determine whether

[21] There is no right to a contested-case hearing in relation to an agency's determination on the adequacy of an EIS. *See* Minn. Stat. § 116D.04 (governing EIS procedure); Minn. R. 4410.2800 (2019) (same).

the proposed dam will be adequate with respect to "[c]ompliance with prudent, current environmental practice throughout its existence," and Minn. R. 6132.2500, subp. 1, which states a goal that "[t]ailings basins shall be designed, constructed, and operated to be structurally sound." MCEA and WL argue that upstream construction poses an unreasonable risk of dam failure, citing a number of recent, catastrophic failures of tailings dams constructed with the upstream method, including the August 2014 failure of the Mount Polley dam in British Columbia, Canada.[22] They also argue that building the tailings basin on slimes (very fine particles of crushed rock) from the LTVSMC basin is not environmentally sound. In support of their petition for a contested-case hearing, MCEA and WL submitted evidence including reports from industry experts who opine on the risks of upstream tailings dam construction. One of these experts explains that upstream construction is "inherently less safe than downstream-type dam construction," and that "[t]he only reason" to use "upstream construction, over a conventional downstream-type approach, is to save money."

Bentonite amendment to the tailings basin

According to the DNR, "[t]he bentonite amendment is a thin layer of soil that will be 'amended' to incorporate a small percentage of bentonite, which will limit oxygen from

[22] We take judicial notice that on January 25, 2019, nearly three months after the DNR issued the permit decisions, another catastrophic dam failure occurred at the Córrego do Feijão tailings dam in Brumadinho, Brazil. *See* Minn. R. Evid. 201. Although we conclude that a contested-case hearing is required based on the record before the DNR at the time that it granted the permit to mine, the contested-case hearing held on remand should encompass up-to-date information on upstream construction and dam failures.

reacting with the [PolyMet] flotation tailings by creating a layer of saturated soil between the atmosphere and the [PolyMet] flotation tailings." The bentonite amendment would be applied to the face of the tailings basin dam, as it is constructed; to the exposed, "beach" areas on the interior of the basin, at closure; and to the pond bottom, at closure. According to the DNR, the bentonite amendment—together with the wet closure plan for the tailings basin and seepage-capture systems—is intended to "ensure that reactive mine waste within the [tailings basin] is stored in an environment such that the waste is no longer reactive," as is required by Minn. R. 6132.2200, subp. 2(B)(1). But there has been disagreement, even among DNR's own consultants, as to whether the bentonite amendment would be effective, and whether it would have other, negative effects. Most notably, one DNR consultant stated: "The bentonite seal is a hail Mary type of concept in my opinion. I believe it will exacerbate erosion and slope failure and will eventually fail . . . ." That same consultant stated: "The methods and assumptions used to place the bentonite to control the infiltration and tailings saturation are unsubstantiated, and wishful thinking. We do not believe it will function as intended, because of the unproven application methods."

MCEA and WL assert that a contested-case hearing is required to address whether the bentonite amendment can comply with Minn. Stat. § 93.481, subd. 2 (2018), which requires the commissioner to "determine that the reclamation or restoration planned for the operation complies with lawful requirements and can be accomplished under available technology and that a proposed reclamation or restoration technique is practical and workable under available technology." They assert that bentonite is neither an available technology (as to this particular use) nor a practical and workable technology. In support

of their petition for a contested-case hearing, MCEA and WL submitted evidence including reports from industry experts who opine on the risk that the bentonite will be ineffective and even detrimental because it will cause instability in the dam. One expert explained that the methods for applying the bentonite are "untested and unproven," and that

> [e]ven if a permanent pond can be maintained above the tailings, the success of wet closure in terms of minimizing oxidation of tailings hinges on the ability of the bentonite-amended layers in the dams and beaches to remain at or near saturation continuously for a long period of time. This is an unproven and untested approach, and lessons learned from studies on the field performance of near-surface earthen barriers indicate that these layers may not perform as intended over the long term.

That expert also concurred with the DNR's consultant that there is a possibility that the bentonite-amended layers "will exacerbate erosion of the underlying tailings on the dam faces, which would undermine dam stability."

Alternatives to wet closure of the tailings basin

PolyMet plans for wet closure for the NorthMet tailings basin, which means that the tailings will remain covered by a 900-acre pond indefinitely, and perhaps in perpetuity.[23] Wet closure can be contrasted with "dry closure," which involves draining a basin. Another tailings-management option is "dry stacking" or "filtered tailings," which involves

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[23] PolyMet states that the pond cover system would be required "until constituents have been depleted from the [tailings basin] that is subject to oxidation, and/or the release rates of constituents from the [tailings basin] have decreased to the point where water resource objectives can be achieved without the cover system." It is unknown if or when this would occur.

dewatering and stacking the tailings on a liner, without a basin. MCEA and WL argue that dry closure or dry stacking are the better environmental choices.[24]

Like upstream construction, wet closure is a controversial issue, and the DNR's own employees and consultants had reservations about approving a wet closure. The DNR's senior dam engineer "favor[ed] dry closure," and expressed concern that "the proposed wet cap will significantly increase the potential for a dam failure, and will result in costly monitoring and maintenance over the life of the project." One of the DNR's consultants shared the senior dam engineer's concerns, explaining:

> In its simplest form, the proposed tailings basin will be a big pile of highly erosive loose sand and silt. The wet closure will include a pond of water on top that saturates the sand/silt making it less stable and more likely to fail than the dry option.
>
> . . . .
>
> I envision that PolyMet's reclamation plan could work for a while, but I don't see how it will function forever without falling apart unless it is continuously maintained; which is a major leap of faith.
>
> . . . .
>
> I don't like the wet closure, because it is not a permanent closure. I believe it will eventually fail and release the sulfates.

[24] Relators argue that wet closure is prohibited by Minn. R. 6132.2200 and 6132.3200. Although no language in either of these rules categorically precludes wet closure, wet closure may be incompatible with the requirements of these and other rules, at least under some circumstances. Because we reverse the permit decisions based on MCEA's and WL's contested-case arguments, we do not reach the parties' legal arguments regarding wet closure.

MCEA and WL argue that a contested-case hearing is required to address whether the wet closure complies with the DNR's obligation not to authorize any conduct that is likely to impair, pollute, or destroy air, water, land, or natural resources if there is a "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land, and other natural resources from pollution, impairment, or destruction." Minn. Stat. § 116B.09, subd. 2; *see also* Minn. Stat. § 116D.04, subd. 6. Relators assert that wet closure poses an unreasonable risk of dam failure and will require perpetual seepage collection and mechanical treatment of water.[25]

In support of their petitions for a contested-case hearing, MCEA and WL submitted evidence including reports from industry experts who opine on the availability of alternative closure methods to reduce the risks of both dam failure and perpetual water treatment. One expert explains that "water remaining on and in the tailings acts as a deadly mobilizing agent should a catastrophic failure occur. Dry tailings can be mobilized if support is removed, but the distance they will move is orders of magnitude less than tailings saturated with water." In addition, relators point to a report by an independent review panel on the Mount Polley dam failure. That report identifies dry stacking as a best available technology for storage of tailings.

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[25] PolyMet plans to switch to passive water treatment when permitted to do so by the DNR. But it is anticipated based on modeling that mechanical water treatment would be required for at least 200 years at the mine site and 500 years at the plant site, and it is unknown when or if PolyMet would be permitted to switch to passive water treatment.

Financial assurance

Financial assurance provides a source of funds to be used by the DNR if PolyMet fails to perform reclamation activities—including closure and postclosure maintenance—that would be needed when operations cease (whether as planned or prematurely), as well as any corrective action that may be required by the commissioner under the permit. The DNR has required financial assurance for the NorthMet project, which can be made through a combination of deposits to a trust for the benefit of the state: irrevocable letters of credit (ILOCs), surety or reclamation bonds, and cash or cash equivalents. Specifically, PolyMet must:

- Provide $74 million in financial assurance at permit issuance, $10 million of which must be a deposit to the trust.

- Starting at Mine Year 1 (MY 1) and annually thereafter, provide financial assurance based on a formula intended to periodically adjust the estimated reclamation and long-term care costs. Required financial assurance is expected to range from $544 million for MY 1 to $1.039 billion at MY 11.

- For each of MY 1-8, deposit $2 million into the trust.

- Starting with MY 9, "ramp up" trust deposits, so that the trust is fully funded for long-term costs by MY 19. These ramped up costs will be determined by subtracting the current amount in the trust from the total expected to be required for long-term costs (currently estimated at $580 million) and dividing that number by the number of years left in the ramp up period.

PolyMet will also be required to provide environmental liability insurance, with $10 million in coverage at permit issuance and subsequent coverage amounts to be determined by the DNR.

Amici curiae Arne Carlson, John Gappa, Ron Sternal, and Alan Thometz (Carlson amici)[26] assert that a contested-case hearing is required to address whether the financial assurance required by the commissioner will be sufficient to cover reclamation and long-term costs. They argue that the financial assurance is insufficient because the payments to the trust are backloaded, because PolyMet will have difficulty obtaining financial-assurance instruments, and because the financial-assurance amounts are based on artificially low reclamation estimates without sufficient contingency cushions. They also assert that the insurance requirements are insufficient.

MCEA raised similar issues in its petition for a contested-case hearing and submitted evidence including an expert report that supports the Carlson amici's arguments on appeal. In particular, that expert concluded that the "end-loaded requirements will have a significant impact on project economics, particularly going forward from Year 9, which overall suggests the project is at significant risk of cessation beginning that year, particularly if metal prices were to become unfavorable." In addition, the Carlson amici

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[26] PolyMet argues that this court should not consider the financial-assurances issues raised by the Carlson amici because they were not addressed by any of the relators in their briefs. Because the issues were raised to the DNR by MCEA, relate to matters of significant public concern, and are well briefed by amici on appeal, we address them. *See Hegseth v. Am. Family Mut. Ins. Grp.*, 877 N.W.2d 191, 196 n.4 (Minn. 2016) (noting general rule about amicus-raised issues but noting that court "can consider any issue if the interests of justice so require" (citing Minn. R. Civ. App. P. 103.04)).

point to a statement from the DNR's own financial consultant that "the assurances should be converted into a funded trust or escrow account *within the first few years of operation*." (Emphasis added.)

Glencore

Glencore[27] is a Swiss-based company that owns a substantial interest in PolyMet, has provided much of the funding for the NorthMet project to date, and is expected to continue to provide funding. WL argues that a contested-case hearing is required to determine whether Glencore would be "engaged in a mining operation" with PolyMet, such that the permit must be issued jointly to Glencore and PolyMet. *See* Minn. R. 6132.0300, subp. 2. ("When two or more persons are or will be engaged in a mining operation, all persons shall join in the application, and the permit to mine shall be issued jointly.").

In support of a supplemental petition for a contested-case hearing,[28] WL pointed to evidence demonstrating Glencore's increasing equity interest in PolyMet, as well as significant involvement in the NorthMet project. With respect to Glencore's interest, PolyMet represented in its 2017 permit-to-mine application that Glencore "would own 35.1% of the common shares if all options and warrants were exercised by Glencore and

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[27] The parties have referred to Glencore plc and its wholly owned subsidiary Glencore AG collectively as "Glencore."

[28] The DNR argues that the supplemental petition was untimely, and thus suggests that this court not reach the issue. In light of our holding that the DNR had an independent obligation to determine whether a contested-case hearing is required, we reject the DNR's suggestion.

others." But in March 2018, PolyMet reported that Glencore's interest if all warrants were exercised had increased to 40.3%. With respect to Glencore's involvement in the NorthMet project, WL cited evidence of a marketing agreement, whereby Glencore committed to purchase all of PolyMet's products for the first five years of production; a financial advisory agreement; and a technical services agreement.[29]

We conclude that, with respect to each of the foregoing subject areas, MCEA and WL have made a "showing that evidence can be produced that is contrary to the action proposed by the agency." *Owatonna*, 672 N.W.2d at 929.[30] We acknowledge that the DNR developed a substantial record during environmental review and the permitting proceedings; that the DNR evaluated evidence submitted by all of the parties, including PolyMet, before issuing its decisions; and that, in many areas, the DNR relied on evidence that is contrary to that submitted by MCEA and WL to support its decisions. But the issue before us is not whether there is substantial evidence to support the DNR's decisions to

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[29] We take judicial notice that, on June 28, 2019, after all of the required permits for the NorthMet project had been issued, PolyMet announced that Glencore's interest had increased to 71.6% of PolyMet's total issued outstanding common shares. *See* Minn. R. Evid. 201. The DNR has represented to this court that it is investigating whether Glencore needs to be added as a co-permittee. Although we conclude that a contested-case hearing is required based on the record before the DNR at the time that it granted the permit to mine, the contested-case hearing held on remand should encompass up-to-date information on Glencore's interest in PolyMet and involvement with the NorthMet project.

[30] Our conclusion that the statutory criteria for a contested-case hearing is met based on our review of factual disputes in these areas is not intended to limit the scope of the contested-case hearing on remand. *See* Minn. Stat. § 93.483, subd. 5 ("If the commissioner decides to hold a contested case hearing, the commissioner shall identify the issues to be resolved and limit the scope and conduct of the hearing in accordance with applicable law, due process, and fundamental fairness.").

issue the permits. Rather, we inquire, as a threshold matter, whether there was probative, competent, conflicting evidence on material fact issues, such that a contested-case hearing was required *before* the DNR made its decisions. We conclude that there was such evidence. Accordingly, we reverse the DNR's decisions granting the permit to mine and dam-safety permits,[31] and we remand for the DNR to hold a contested-case hearing.

II.

Because we have reversed the DNR's decisions granting the permit to mine and dam-safety permits on the basis of MCEA's and WL's contested-case arguments, we need not, and do not, reach relators' remaining arguments about these permits, with one exception. In the interest of administrative and judicial efficiency, we address the argument, made by all of the relators, that the DNR erred by issuing a permit to mine without a definite term. This argument is based on the language of Minn. Stat. § 93.481, subd. 3(a) (2018), which provides: "A permit issued by the commissioner pursuant to this section shall be granted for the term determined necessary by the commissioner for the completion of the proposed mining operation, including reclamation or restoration." Minn.

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[31] The commissioner relied on Minn. Stat. § 103G.311, subd. 4, to waive a hearing on the dam-safety permits, and relators do not challenge that decision. In seeking to consolidate these appeals, however, the DNR explained that there is substantial overlap between the permit-to-mine and the dam-safety permits, as each permit was issued to "the same permittee for the same project" and is "based on the same underlying factual analysis." The DNR further explained that the permitting decisions were made on overlapping records, and that "[n]early all of the record documents pertaining to the Dam Safety Permits are also relevant to the Permit to Mine." Under these circumstances, we conclude that it is appropriate to reverse the decision issuing the dam-safety permits and remand for reconsideration following further development of the record through the contested-case hearing on the permit to mine.

R. 6132.0300, subp. 3, similarly provides that "[t]he term of a permit to mine shall be the period determined necessary by the commissioner for the completion of the proposed mining operation including postclosure maintenance."

The DNR argues that "nothing in the statute or rule require[s] a permit to have a fixed term." We disagree. The plain language of the statute expressly requires a "term," which is commonly understood as a fixed period of time. *See American Heritage*, *supra*, at 1796 (defining "term" as "[a] limited or established period of time that something is supposed to last").[32] Accordingly, we conclude that the DNR erred by issuing a permit without a fixed term, and direct that, for any permit issued following remand, the DNR shall determine and impose an appropriate, definite term.

III.

The band asserts that the DNR's decision transferring to PolyMet the permit for the existing LTVSMC tailings basin is arbitrary and capricious. The transfer is governed by Minn. R. 6115.0370, which prohibits the transfer of a Class I or II dam without a permit and provides that "[p]ermits shall be issued based on evaluation of the hazard class, the conditions, and the financial capabilities of the transferee." The DNR issued findings on the factors in the rule, explaining that the LTVSMC tailings basin dam is a Class II dam, but would become a Class I dam when enlarged by PolyMet; the dam's condition assessment is fair, per an October 2018 inspection by the DNR dam-safety unit; and the

[32] The DNR also asserts that the permit should remain in effect until outstanding water-quality issues are resolved. While this may be true as a policy matter, it does not overcome the plain language of the statute.

financial assurance being required of PolyMet requires PolyMet to be able to cover future maintenance of the LTVSMC dam. The band acknowledges these findings, but argues that they are arbitrary because the DNR failed to consider concerns about PolyMet's proposed use of the LTVSMC dam. Nothing in the rule requires the DNR to consider future use in determining whether to allow transfer of dam ownership. And to the extent that the band's arguments are directed at aspects of the NorthMet project, we agree with the DNR that those arguments are properly addressed in proceedings on the permit to mine and dam-safety permits.

D E C I S I O N

The DNR's decision to transfer the existing permit for the LTVSMC tailings basin was not arbitrary and capricious, and we affirm that decision. The DNR's decision to deny a contested-case hearing in relation to the NorthMet project was based on errors of law and unsupported by substantial evidence, and the DNR also erred by failing to include a definite term in the NorthMet permit to mine. For these reasons, we reverse the DNR's decisions granting the permit to mine and dam-safety permits for the NorthMet project, and we remand for the DNR to hold a contested-case hearing.

Affirmed in part, reversed in part, and remanded.