

April 2, 2024

VIA EMAIL

Grant Wilson
Central Region Director
Minnesota Department of Natural Resources
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Re: In the Matter of the NorthMet Project Permit to Mine Application, OAH 60-2004-37824

Dear Commissioner-Designee Wilson:

After reviewing the Fond du Lac Band of Lake Superior Chippewa's (Band's) March 11, 2024 letter, and PolyMet's¹ March 26 response thereto, DNR's hearing team requests that the Commissioner-designee stay this proceeding for nine months² or, if PolyMet proceeds with a new design for the tailings basin, until PolyMet files an application for an amended permit to mine setting forth a different design for the tailings basin, whichever occurs earlier. The DNR hearing team would also agree to ending the 9-month stay early if PolyMet submits a letter to the parties definitively stating that it intends to construct and operate the tailings facility, including use of the proposed bentonite amendment, as described in Version 3.1 of PolyMet's application for a permit to mine. Such a confirmation should also state that PolyMet commits that it will not propose any substantial changes to the tailings basin construction or operation within the period of any ongoing proceedings of this contested case or subsequent litigation based on the outcome of this contested case.

Notably, the February 14, 2024 email from PolyMet to the Band, which the Band attached to its March 11, 2024 letter to the Commissioner-designee, is consistent with what PolyMet told DNR in a meeting on the same day. Given the uncertainty of whether PolyMet intends to proceed with

¹ During the course of this proceeding, PolyMet notified the Administrative Law Judge (ALJ) and the parties that "Poly Met Mining, Inc." is now known as "NewRange Copper Nickel LLC." The parties subsequently agreed to continue using the name "PolyMet" throughout this proceeding.

² The DNR hearing team believes this is a reasonable amount of time given PolyMet's statement in its March 26, 2024 letter that it is currently conducting a technical review of the tailings basin design that will last "many months and potentially more than a year."

the bentonite amendment at the tailings basin, coupled with DNR's fiduciary duty to be prudent in spending further public dollars on this matter, this approach will help ensure that the parties do not expend resources on an issue that may well become moot.³

In the event this proceeding does become moot, the parties may not have an opportunity to file exceptions to the ALJ's report. So as to avoid any misimpression that the DNR hearing team agrees with the ALJ's interpretation of the reactive mine waste rule, the hearing team notes for the record that it takes issue with the ALJ's interpretation of subparts (1) and (2) of the rule. With respect to subpart (1), the ALJ found, as a matter of fact, that "[t]he bentonite amendment is likely to achieve modeled values for hydraulic conductivity and percolation" and that "[m]odeling for the NorthMet Project indicates that water quality standards would be met" at these values.⁴ Yet rather than base his legal conclusions on these factual findings, the ALJ looked to the status of other permits that are under the jurisdiction of different agencies [Minnesota Pollution Control Agency (MPCA) and the U.S. Army Corps of Engineers (Corps)], are governed by different statutory and regulatory frameworks, do not pertain to bentonite or reclamation, and operate on very different time horizons than the permit to mine. In doing so, the ALJ improperly expanded the scope of this proceeding, which is limited to a single engineering control (bentonite) and a single phase of the Project (reclamation). The ALJ compounded this error by misinterpreting both the Corps' permitting decision and a judicial decision regarding MPCA's permit. As for subpart (2), the rule's use of the phrase "substantially all" requires a comparison of the amount of water moving through or over the mine waste relative to the overall volume of stored water. The ALJ improperly considered the absolute volume of water seeping through the tailings, without any consideration of the overall amount of water stored in the tailings basin or used in the NorthMet Project. The volume of water projected to seep through the tailings is a small fraction of the total water in the tailings basin and is not an inordinately large amount of water in the context of water-intensive industrial projects.

Again, the propriety of the ALJ's interpretation need not be determined at this time. The DNR hearing team simply notes its disagreement with the ALJ's interpretation of subparts (1) and (2) of the reactive mine waste rule to avoid any future attempts by others to give precedential weight to the ALJ's interpretation in this or other proceedings, as the matter has not been fully litigated.

The DNR hearing team requests an opportunity to opine on next steps either in nine months or after PolyMet either files an amended application for a permit to mine or confirms its intent to construct and operate the tailings facility, including use of the proposed bentonite amendment, as described in Version 3.1 of PolyMet's application for a permit to mine. Next steps may include the parties briefing whether an application has mooted the contested case or proceeding with the

³ The Commissioner-designee should not deny the permit to mine application, as the Band requests, because it is possible that PolyMet will proceed with a bentonite design. For this reason, the DNR hearing team's request is simply to stay proceedings without issuing any decision on the merits of the bentonite amendment or the permit to mine application.

⁴ Conclusions of Law at ¶ 15; Findings of Fact at ¶ 93.

filing of exceptions in a similar sequence to that set forth in the Commissioner-designee's letter dated December 20, 2023.

Sincerely,

/s/ Jon W. Katchen

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