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

Director Wilson:

The Fond du Lac Band of Lake Superior Chippewa ("Band") hereby files this letter response to the submissions of PolyMet<sup>1</sup> and the Department of Natural Resources ("DNR") litigation team (hereinafter "PolyMet Ltr." and "DNR Ltr.", respectively). PolyMet's Letter confirms this case is moot. For that reason, DNR lacks jurisdiction, and you must exercise your delegated authority to deny the permit to mine application. Because the case is moot, the DNR

<sup>1</sup> We continue to refer to the applicant and respondent in this case as PolyMet, although the PolyMet Letter refers to that entity as "NewRange." See OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 6921-6922 n.1.

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litigation team's proposal for a nine-month stay is nonsensical. Additionally, the Band responds to the DNR litigation team's merits arguments to preserve those responses for any possible appeal.

Neither PolyMet nor DNR's litigation team contest the accuracy of the email attached to the Band's March 11 letter. PolyMet confirms and expands on the information provided in the email, explaining 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 Ltr. at 1-2. This includes a review of the "tailings basin." PolyMet clarified that whether it continues with the current tailings basin design depends on the results of that "thorough technical review," which

may recommend no changes to the basin at all. Or it may recommend changes that are irrelevant to the issues in the contested case hearing. It 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.

PolyMet Ltr. at 2.

PolyMet's Letter confirms that the tailings basin design—which includes the design of the flotation tailings basin ("FTB")—now depends on the outcome of an entirely new review and planning process, the results of which are so speculative that PolyMet cannot make any statements supporting the accuracy or certainty of the design in the application pending before DNR. All PolyMet presently represents is that the outcome "is impossible to know until the review is over." *Id.* As the Band explained in its March 11 Letter Brief ("FDL Ltr. Br."), PolyMet's admission that it has no idea whether it will follow the permit to mine application design means that the application now lacks information required under Minn. Stat. § 93.481 subd. 1 and Minn. R. 6132.1100 subpt. 6(C) and 6132.2200 subpt. 2(C)(1). FDL Ltr. Br. at 3.

These representations also confirm that PolyMet has mooted out this proceeding and any decision by DNR would be purely advisory. As the Band pointed out in its Letter Brief, "DNR cannot adopt Findings of Fact based 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, because that design is a dead letter." FDL Ltr. Br. at 3. PolyMet has withdrawn any commitment to the proposed bentonite amendment plan it proposed in its permit to mine application, and therefore PolyMet's "requisite personal interest that must exist at the commencement of the litigation" in order to have a justiciable action no longer "continue[s] 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)). A decision on that element of PolyMet's application would only provide general advice about a hypothetical plan. PolyMet might or might not take that advice into account in its technical review, which is encompasses more than the bentonite amendment and could result in a revised plan that makes sweeping changes to how the entire

tailings basin is designed, constructed, and remediated. PolyMet admits that, even if it succeeds here, its ultimate choice of plan depends on its own internal review, and it would seek other administrative approvals to implement it. PolyMet Ltr. at 2 (“If [PolyMet] wants to propose changes [after its review], and it prevails here, it would go through the appropriate permit amendment process.”) Adjudicators can neither use mooted disputes to “issue advisory opinions, nor decide cases merely to establish precedent.” *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989).<sup>2</sup>

Because the case is now moot, DNR should reject the DNR litigation team's request for a nine-month stay. Mootness is a “jurisdictional question,” *Dean*, 868 N.W.2d at 4 (citing *Schmidt*, 443 N.W.2d at 826). DNR cannot stay a proceeding over which it lacks jurisdiction. The DNR litigation team's proposal that the stay be lifted if PolyMet makes statements in letters to the parties does not cure this problem. PolyMet has just represented that its independent review is separate from the permitting process, and, even if it obtains a permit to mine, it may seek amendment of its permit based on its own review. PolyMet Ltr. at 2. All PolyMet can credibly offer now is that it will agree to litigate a hypothetical plan in parallel to its independent technical review to develop a new final plan. These proceedings or subsequent related litigation do not resolve a live controversy and could be completely irrelevant to whatever PolyMet eventually does, so the DNR should reject the nine-month stay proposal.

PolyMet tries procedural objections to keep DNR from looking behind the curtain of its performance. PolyMet Ltr. at 2-3. It argues that you should not consider its February email to the Band, or the information in it, because under Minn. Stat. § 14.62, DNR's decision must be “based on the record.” That is a non sequitur. The record does not close until after the filing of all exceptions and presentation of argument on the ALJ's report. Minn. Stat. § 14.61, subd. 2; *In re Trinity Home Health Care Servs.*, 996 N.W.2d 178, 183 & n.5 (Minn. 2023). PolyMet's letter—which admits the accuracy of, reiterates, and expands on the contents of the February email—is itself unquestionably a part of the record. See Minn. R. 1400.7400 subpt. 1 (“The record in a contested case shall contain . . . all memoranda or data submitted by any party in connection with the case.”). PolyMet also argues that the Commissioner's—and therefore your—authority is

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<sup>2</sup> Although PolyMet and DNR's litigation team did not assert either exception to mootness might apply, neither does. This case is not “capable of repetition, yet evading review,” because proceedings on permit to mine applications are not “too short to be fully litigated before [the permit application] ceases or expires.” *Dean*, 868 N.W. at 5 (quoting *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005)). Nor is this an issue of statewide significance that should be decided immediately, because there is no large class of people in Minnesota who could be immediately affected by the proposed bentonite amendment but would lack effective relief if this case is deemed moot. See *Dean*, 868 N.W.2d at 6-7 (discussing *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435 (Minn. 2002), *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000), and *In re Tschumy*, 853 N.W.2d 728 (Minn. 2014) (plurality op.)).

limited by DNR's hearing order<sup>3</sup> under Minn. Stat. § 93.483 subd. 5, but that section of the Minnesota Statutes requires that the limitations on the "scope and conduct of the hearing" must be "in accordance with applicable law, due process, and fundamental fairness." The doctrine of mootness is "applicable law" in a contested case governed by Minn. Stat. ch. 14 and Minn. R. pt. 1400, *see In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 614 (Minn. Ct. App. 2007), and a lack of mootness is a "constitutional prerequisite to the exercise of jurisdiction," *Schmidt*, 443 N.W.2d at 826. For these reasons, the hearing order does not prevent DNR from denying a permit that has become moot, and the statutory exception process, *see* Minn. Stat. § 14.61, does not establish jurisdiction over a moot contested case or the authority to grant a moot permit.

Finally, although the DNR's litigation team admits that merits issues are not before DNR now and should not be decided, it nevertheless briefs them. DNR Ltr. at 2. The Band responds to those arguments now, to preserve its position in the event that DNR denies the permit to mine application and PolyMet subsequently appeals. Below, we address each part of Minn. R. 6132.2200 subpart 2(B).

The DNR litigation team's argument on Subpart 2(B)(1) ignores the actual basis for the ALJ's decision. The ALJ rejected the argument that Subpart 2(B)(1) simply requires compliance with water quality standards and concluded that "waste is no longer reactive if, as a result of its storage, it ceases to release the substances that made it reactive in the first place into natural resources." OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at p. 40. Neither PolyMet nor DNR's litigation team has contested that the tailings basin will continue to release those substances even if the proposed bentonite amendment is constructed as described in the permit to mine application. Therefore, the ALJ's conclusion was properly based on the meaning of Subpart 2(B)(1), his factual findings, and the record. *See* OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 1487-1500.

The ALJ then concluded *only in the alternative* that even if the DNR litigation team's narrower interpretation of Subpart 2(B)(1) were correct, the NorthMet Project still fails to meet water quality standards, citing to recent decisions regarding whether the NorthMet Project meets applicable water quality standards. OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 40-41 (citing *In re Proposed NorthMet Project*, 993 N.W.2d 627 (Minn. 2023); Decision Mem. of June 6, 2023, No. MVP-1999-05528-TJH (Army Corps of Eng'rs June 6, 2023)). The DNR litigation team treats this as the sole basis for the ALJ's ruling on the meaning and applicability of Subpart 2(B)(1). The ALJ's determination was correct, *see* OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 104-105, 130-131, but it was not

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<sup>3</sup> The Band reserves its position that the Amended Hearing Order is invalid and the case is governed by the original Hearing Order. OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 6926 n.7, 14,123-14,147. But whether DNR's litigation team refers here to the amended order, or the original order, neither prevents you from dismissing this moot case for the reasons we describe *infra*.

the basis of his ruling. In response, the team takes the absurd position that it is improper to consider the decisions of agencies or courts with jurisdiction over water quality standards when deciding whether the NorthMet Project can meet water quality standards. The DNR litigation team also flatly misstates the law in suggesting that the ALJ erred by considering some rulings because the reactive mine waste rule only applies during "reclamation." Subpart 2(B)(1) has no time limitation. It applies to a facility that stores reactive mine waste at any time. *See* Minn. R. 6132.2200 subpt. 2(B). But DNR does not have to unravel these tangled arguments, because Subpart 2(B)(1) does not require compliance with water quality standards, and the ALJ's ruling was not based on the Project's compliance with water quality standards.

Moving to Subpart 2(B)(2), DNR's litigation team notably does not attack the ALJ's determination, well supported by his findings and the record, that the proposed bentonite amendment will allow a massive amount of water to seep into tailings at the FTB. OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 43-44. Instead, the team argues the ALJ improperly determined that this violates Subpart 2(B)(2), based on their own misinterpretation that this subpart "requires a comparison of the amount of water moving through or over the mine waste relative to the overall volume of stored water." DNR Ltr. at 2. DNR's litigation team is wrong, and the ALJ was right. Subpart 2(B)(2) plainly requires that a reactive mine waste storage facility design "prevent substantially *all* water from moving through or over the mine waste . . . ." Minn. R. 6132.2200 subpt. 2(B)(2) (emphasis added). "Substantially all water" is an absolute term, not a relative one. OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 1503, 6930. The DNR litigation team's argument also rests on the false premise that water is "stored" in parts of the FTB and tailings basin that are "saturated." In fact, water will move into, through, and out of "saturated" tailings, and the areas of tailings that are saturated will change over time as the water table rises and falls in different parts of the FTB and water moves out of saturated areas. OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 1503-1506. In fact, as the record shows, the water that DNR's litigation team says is "stored in the basin" is continually moving through and over reactive mine waste as part of a dynamic system, and the bentonite amendment, as proposed in the permit to mine application, is designed to allow that to happen. *Id.*

For the foregoing reasons, DNR should immediately deny PolyMet's permit to mine application.

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Respectfully submitted,

*/s/ Frank S. Holleman*

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