

April 9, 2024

Grant Wilson
Commissioner's Designee
Central Region Director
Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155
grant.wilson@state.mn.us



VIA E-MAIL

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

Dear Director Wilson:

Conservation Organizations (“COs”)¹ thank you for the opportunity to respond to the Fond du Lac Band of Lake Superior Chippewa’s March 11, 2024 filing and subsequent submissions of PolyMet² and the Minnesota Department of Natural Resources Hearing Team.³

This letter is limited to the response requested by this Designee. COs reserve the right to respond to the Hearing Team’s characterization of the reactive mine waste rule and to make any other substantive or procedural arguments within the scope of the proceedings.

In short, PolyMet’s March 26, 2024 letter speaks directly to DNR’s continuing jurisdiction over the contested case and PolyMet’s former permit-to-mine application. Because there is no longer a complete application upon which a permit could be granted, this Designee has the delegated power—and responsibility—to deny the application.

1. Without a complete permit-to-mine application, the Department of Natural Resources lacks authority to adjudicate the contested case and issue a permit.

A complete application is necessary to DNR’s jurisdiction. The procedures in the permit-to-mine statute are premised on a “complete” application for a permit to mine. Minn. Stat. § 93.481, subd. 2. And the purpose of a contested-case hearing is to resolve a dispute “concerning

¹ The Conservation Organizations are the Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, Duluth for Clean Water, Center for Biological Diversity, Friends of the Cloquet Valley State Forest, Save Our Sky Blue Waters, and the Save Lake Superior Association.

² The permit application in the record names PolyMet Mining, Inc. as the applicant. DNR Milestone Exhibits, 0065281, at p. 35. That entity has since been converted to NewRange Copper Nickel LLC. However, the parties have continued to refer to the applicant as “PolyMet,” and COs will continue to do so here.

³ COs will refer to the DNR staff and counsel who participated in the contested case as the “Hearing Team,” to you as the “Designee,” and to the Minnesota Department of Natural Resources as a whole as “DNR.”

the completed application” before DNR makes a final decision “on the completed application.” Minn. Stat. § 93.483, subd. 3.

“Complete” means: “Having all necessary or normal parts, components, or steps; entire.” *The American Heritage Dictionary* 377 (5th ed. 2011); *see State v. Cummings*, 2 N.W.3d 528, 533 (Minn. 2024) (using dictionary definitions to interpret statute). DNR rules require a permit application to specify the proposed “engineering design, methods, sequence, and schedules of reclamation including closure and post closure maintenance.” Minn. R. 6132.1100, subp. 6(C). And a “reactive mine waste storage facility design” must “describe all materials, construction, and operating performance specifications and limitations that must be maintained to ensure protection of natural resources.” Minn. R. 6132.2200, subp. 2(C)(1).⁴

The “completed application” requirement, Minn. Stat. § 93.483, subds. 1, 3(a)(1), is essential to ensuring that the contested case is conducted in accordance with “fundamental fairness,” *id.* subd. 5. Only the applicant has control over the contents of the application. If the applicant were able to change elements of the application at any time during the course of the contested case, the other parties would be deprived of their right to develop and submit responsive evidence. Post-hearing modification would also violate the general rules governing contested cases, which require allowing parties “a reasonable time to prepare to meet . . . new issues or allegations” *before* the evidentiary hearing. *See* Minn. R. 1400.5600, subp. 5.

Here, PolyMet produced a permit application in December 2017, dubbed Version 3.1.⁵ DNR issued a permit based on that application.⁶ The courts reversed that permit decision and ordered DNR to conduct a contested-case hearing before making a new decision on whether to issue the permit. *In re NorthMet Project Permit to Mine Application Dated December 2017*, 959 N.W.2d 731, 759-60 (Minn. 2021). This contested case followed.⁷

PolyMet’s March 26, 2024 letter establishes that it is actively revising its plans. PolyMet has already started a “thorough technical review” that may take over a year. PolyMet Letter, at 2. The PolyMet “management team is looking at ‘*all aspects* of the project’” and “there is a *good chance* [PolyMet] will propose some changes.” *Id.* at 1 (emphasis added). Because PolyMet says it is actively revisiting all elements of the former application, there is no complete application underlying this contested case—and consequently, no permit that could be granted.

⁴ Although DNR may impose “modifications or conditions” on a proposed permit, Minn. Stat. § 93.481, subd. 2, the word “modification” indicates that there is already a proposal in existence upon which changes can be made. *See American Heritage Dictionary* 1132 (defining “modify” as “[t]o change in form or character; alter”).

⁵ DNR Milestone Exhibits, 0065281. *See also* DNR Milestone Exhibits, 0115520, p. 27, ¶ 98 (referring to review of Version 3.1 for “completeness”).

⁶ DNR Milestone Exhibits, 0115735, at p. 1.

⁷ During the contested-case proceeding, there were already indications that PolyMet hoped to shift its plan. Following discovery, COs filed a summary disposition motion arguing that PolyMet no longer had a complete application, but the ALJ denied that motion without issuing findings or conclusions. *See* OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 13445, 13450-51. COs reserve the right to raise arguments regarding denial of that motion.

The permit-to-mine statute simply does not authorize DNR to adjudicate or grant an application that is under revision. Accordingly, this Designee should deny the pending application.

2. The Commissioner’s Designee has authority to resolve jurisdictional and procedural issues in the contested case.

PolyMet argues that denial of the application is outside the scope of this Designee’s authority. PolyMet is incorrect.

The DNR Commissioner delegated her powers and duties “to Act as Final Agency Decision-Maker in any contested case hearing arising out of the DNR Permit to Mine appeal currently pending in the Minnesota Supreme Court” pursuant to Minn. Stat. §§ 93.48 - 93.483, §§ 14.57 - 14.62.⁸ The Notice of Appointment says: “Grant Wilson shall exercise *all authority* delegated to the commissioner as the final agency decision maker in this matter as required by Minnesota Statute §§14.57 -14.62.”⁹

Deciding underlying jurisdictional issues is within the scope of a contested-case proceeding. The permit-to-mine statute requires these proceedings to be conducted “in accordance with applicable law, due process, and fundamental fairness.” Minn. Stat. § 93.483, subd. 5. During the time period in which the matter is referred to an administrative law judge (“ALJ”), the ALJ has a duty to recommend summary dismissal if there is no genuine issue of material fact or the matter becomes nonjusticiable. Minn. Rs. 1400.5500(K). The agency decisionmaker is empowered to decide those same issues upon certification from the ALJ, Minn. R. 1400.7600, or after receiving the ALJ’s recommendation, Minn. Stat. § 14.62.

Here, there is an underlying jurisdictional issue as to whether PolyMet has a “complete application,” which is a prerequisite to DNR’s authority to adjudicate the contested case and grant a permit. *See In re Valley Branch Watershed Dist.*, 781 N.W.2d 417, 421-22 (Minn. Ct. App. 2010) (concluding that an agency action would have been outside the scope of statutory authority); *Malloy v. Comm’r of Human Services*, 657 N.W.2d 894, 896 (Minn. Ct. App. 2003) (“An agency’s determination is void and subject to collateral attack if made without, or in excess of, statutory power.”). Because agency action of any kind must be based on its statutory authority, it is this Designee’s responsibility to determine whether the agency retains jurisdiction. *See In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (stating that questions of jurisdiction should be considered during the course of litigation even if not raised by parties). By its terms, the Commissioner’s delegation includes resolving that jurisdictional defect.

3. If the Hearing Team’s request for a stay is granted, the stay should be set for a fixed time period.

The Hearing Team requests a stay of these proceedings for nine months or “until PolyMet files an application for an amended permit to mine setting forth a different design for the tailings basin, whichever occurs earlier.” In the event that this Designee grants the Hearing Team’s request, COs respectfully request that any stay be set on a fixed schedule, without the contingency

⁸ OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 14303.

⁹ *Id.* at pp. 14304 (emphasis added).

described by the Hearing Team. A stay that could be lifted at any time would burden all parties except PolyMet. PolyMet is responsible for the development of its proposal and has sole knowledge of its intentions, except to the extent that it chooses to share information or is ordered to do so. With an unpredictable schedule, the other parties could be caught by surprise and with limited time to prepare briefing that would be helpful to this Designee.

At the end of such a stay, any further briefing should begin an update from PolyMet and DNR on the status of the technical review and any ongoing discussions regarding the application, with an opportunity for Petitioners to respond. COs respectfully submit that this Designee should consider new information if necessary to resolve whether there is ongoing jurisdiction for these proceedings. *See* Minn. Stat. § 14.61, subd. 2 (providing that the administrative record remains open until the filing of exceptions). *See also State ex rel. Great N. Ry. Co. v. Dist. Court of Sixteenth Judicial Dist.*, 36 N.W.2d 336, 342 (Minn. 1949) (discussing lack of extrinsic evidence to support jurisdictional argument); *Kehr v. Kail*, No. A13-1457, 2014 WL 902834, at *2 (Minn. Ct. App. Mar. 10, 2014) (observing that extrinsic evidence can be considered for the purpose of determining subject-matter jurisdiction).

To summarize, this Designee should deny the pending “application” as incomplete. In the alternative, COs request that any stay be set for a specified time period, at which point PolyMet and the Hearing Team should be required to provide further information, with an opportunity for Petitioners to respond.

Respectfully submitted,

/s/ Melissa Lorentz

Melissa Lorentz

Joy R. Anderson

Heidi Guenther

MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY

1919 University Avenue West, Suite 515

St. Paul, Minnesota 55104

mlorentz@mncenter.org

janderson@mncenter.org

hguenther@mncenter.org

lassistants@mncenter.org

Counsel for Conservation Organizations including

Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, Duluth for Clean Water, Center for Biological Diversity, Friends of the Cloquet Valley State Forest, Save Lake Superior Association, and Save Our Sky Blue Waters

cc: Robert Cary
Counsel for Commissioner’s Designee

(Additional counsel on next page.)

Monte A. Mills, Aaron P. Knoll, Farah N. Famouri, and Davida S. Williams,
Greene Espel PLLP
Jay C. Johnson and Kathryn A. Kusske Floyd, Venable LLP
Counsel for PolyMet

Sherry A. Enzler, Minnesota DNR
Jonathan W. Katchen and Bryson C. Smith, Holland & Hart
DNR Hearing Team

Sean Copeland, Tribal Attorney
Ian R. Young, Staff Attorney
Vanessa L. Ray-Hodge and Frank S. Holleman,
Sonosky, Chambers, Sachse, Endreson & Perry, LLP
Counsel for Fond du Lac Band of Lake Superior Chippewa

Paula G. Maccabee, Just Change Law Offices
Counsel for WaterLegacy