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

Director Wilson:

I write on behalf of the Fond du Lac Band of Lake Superior Chippewa ("Band"), petitioner in the above-captioned matter, regarding recent developments related to the Permit to Mine Application which is pending before the Department of Natural Resources ("DNR"). After the Administrative Law Judge ("ALJ") issued the Findings of Fact, Conclusions of Law, and

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March 11, 2024  
By Email

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Recommendation in the above-captioned case, PolyMet<sup>1</sup> has since disclosed to the Band that it is investigating potential new designs for the flotation tailings basin ("FTB") and developing "general ideas of our path forward" for major elements of the FTB. For the reasons described below, DNR must now vacate or stay the schedule for filing objections and arguments and require PolyMet to confirm that its application with respect to the use and application of the bentonite amendment will not change before proceeding on the ALJ's Findings of Fact, Conclusions of Law, and Recommendation.

The ALJ issued his Findings of Fact, Conclusions of Law, and Recommendation on November 28, 2023. The Findings of Fact were based on the proposed bentonite amendment to the FTB described in the permit to mine application and exhibits and testimony that were developed during the contested case hearing on the proposed bentonite amendment. The proposed bentonite amendment is an integral part of the design of the FTB. The FTB is a reactive mine waste storage facility that "must" satisfy the reactive mine waste rule, Minn. R. 6132.2200 subpt. 2(B). DNR cannot grant the permit to mine application unless the application describes how the FTB will be constructed and maintained to satisfy the reactive mine waste rule. *See* Minn. Stat. § 93.481 subd. 1 (a permit to mine application "shall submit such information as the commissioner may require"); Minn. R. 6132.2200 subpt. 2 ("A mining operation must meet the requirements in items A through D," which include the reactive mine waste rule); *id.* 6132.1100 subpt. 6(C) (a mining and reclamation plan in a permit to mine application "shall describe" the "engineering design, methods, sequence, and schedules of reclamation including closure and postclosure maintenance that address the goals and meet the requirements of parts 6132.2000 to 6132.3200"). The ALJ's Findings of Fact, Conclusions of Law, and Recommendation explained how the proposed bentonite amendment would be constructed, the specifications it is intended to meet, and how it will allow the movement of water over and through reactive mine waste stored in the FTB.

Subsequently, a PolyMet representative revealed in a February 14, 2024 email to the Band and other tribes (attached here) that it is likely going to change the design of the FTB (which it tellingly now calls the "tailings management facility" or "TMF"<sup>2</sup>) to some as-yet-unknown design. In particular, PolyMet's representative asserted that "global standards have changed since [the FTB's] initial design" and that after going through an "internal process to identify needs and potential improvements," PolyMet believes that "there is a good chance we will propose some

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<sup>1</sup> Poly Met Mining, Inc. has converted into NewRange Copper Nickel LLC. The Band uses "PolyMet" here to refer to the applicant and respondent in this proceeding. *See* OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 6921-6922 n.1.

<sup>2</sup> Possibly, PolyMet is using the phrase "TMF" to refer to the entire tailings basin, which will eventually include the FTB and the existing LTVSMC tailings basin. If that is the case, PolyMet should explain that and whether and how the redesign of the entire tailings basin will affect the proposed bentonite amendment on the FTB, as part of the briefing which the Band requests below.

changes.” PolyMet solicited input from the Band and other tribes in order to reconsider “safety,” “protection of water quality,” “location,” and other fundamental elements of the FTB design, asserting that “[e]verything is on the table.” PolyMet further stated with regard to the re-design of the FTB that “[w]e anticipate in the next couple of months to have some general ideas of our path forward.” PolyMet also asserted that “[w]e know there is current litigation regarding the [FTB], and potential changes might affect that. We may have some ideas about how to manage that process so that rights are preserved but we’re not wasting [people’s] time.”

PolyMet’s statements show it has abandoned its current design for the FTB. Although PolyMet sought to soft-pedal its change of course, its acknowledgment that “global standards have changed since [its] initial design,” solicitation for input on all aspects of the FTB design because “[e]verything is on the table,” and admission that it is still trying to determine “some general ideas of our path forward,” all show that PolyMet no longer intends to comply with the FTB design included in the permit to mine application and has not yet selected another design.<sup>3</sup> The parties admitted evidence and developed testimony and arguments on a proposed bentonite amendment that was designed as an integral part of the FTB, which must be described in the permit to mine application. Because PolyMet has abandoned this key element of its proposed mining and reclamation plan, the permit to mine application now lacks information that *must* be included in it. *See* Minn. Stat. § 93.481 subd. 1; Minn. R. 6132.1100 subpt. 6(C); *id.* 6132.2200 subpt. 2(C)(1). Moreover, the ALJ’s Findings of Fact were based on the evidence, testimony, and arguments developed in the contested case hearing, all of which concerned the design for the proposed bentonite amendment described in the permit to mine. 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.<sup>4</sup>

In light of this new information, DNR should vacate the schedule for submitting objections and arguments on the ALJ’s Findings of Fact, Conclusions of Law, and Recommendation, require PolyMet to confirm whether it will construct the proposed bentonite amendment and whether it will construct any such amendment to meet the specifications described in the permit to mine application, and give the other parties the opportunity to respond. At a minimum, DNR should stay the briefing schedule and order a supplemental briefing schedule, in which PolyMet must explain whether it will construct a bentonite amendment to meet those specifications and the other parties may respond. If PolyMet cannot confirm it will construct the proposed bentonite

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<sup>3</sup> The Band reserves the right to submit additional arguments on the permit to mine application as it learns more information about PolyMet’s changes to the FTB design.

<sup>4</sup> The ALJ correctly determined in the Conclusions of Law and Recommendation that the proposed bentonite amendment fails to satisfy the reactive mine waste rule. The ALJ did not consider, and DNR cannot determine on this record, whether another design might satisfy the reactive mine waste rule.

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amendment to meet the specifications described in the permit to mine application, DNR should deny the application and require PolyMet to submit a new application whenever it develops a new design for the FTB (or the TMF). PolyMet cannot reasonably object to this, because it has itself acknowledged that a change in plan will affect continuing proceedings.

Please direct any response to this letter, as well as any further communications in this matter, to all the Band's attorneys who have appeared in the above-captioned case, including all outside counsel at the Sonosky Chambers firm.

Respectfully submitted,

*/s/ Frank S. Holleman*

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Enclosure

## Ian R. Young

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**From:** Jenna Lehti <Jenna.Lehti@newrangecoppernickel.com>  
**Sent:** Wednesday, February 14, 2024 11:01 AM  
**To:** Jaylen Strong; cholm@boisforte-nsn.gov; cchavers@boisforte-nsn.gov; tara.geshick@boisforte-nsn.gov; robertdeschampe@grandportage.com; Lori Anishnabie; Trustlands.admin@grandportage.com; Nancy Schuldt; Michelle J. LaFave; Kami L. Diver; Thomas Howes  
**Subject:** [External] NewRange Project Update and Monthly Report

--- Always use caution when opening attachments or clicking links received in any email. Thank you FDL IT Division---

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Good morning!

Below is a project update as well as some other updates. Don't hesitate to reach out to discuss!

Since the formation of NewRange in February of 2023, we've taken the opportunity to look at all aspects of the project to ensure we are still doing the project in the best way it can be done, including listening to voices that may not have been heard. We will share this same update this week with the DNR and USACE but wanted to share with you first.

One of the areas we are potentially looking at changing is the tailings management facility (TMF). The design has lot of history, but global standards have changed since it's initial design. We went through an internal process to identify needs and potential improvements and at this point think there is a good chance we will propose some changes. We know there is current litigation regarding the TMF, and potential changes might affect that. We may have some ideas about how to manage that process so that rights are preserved but we're not wasting peoples' time.

We think this provides a great opportunity for us to work together to ensure we are listening to concerns you have raised, including safety and protection of water quality, brownfield cleanup, location, etc. Everything is on the table and we're hoping for early input from you. We don't yet have any concrete proposals but are hoping as we move forward, we can work closely with you and your staff. We anticipate in the next couple of months to have some general ideas of our path forward and hope to meet with you again. Please don't hesitate to reach out to myself or our General Manager, Tannice McCoy with any questions or concerns.

### Other updates:

- FDL, GP, and BF have all asked for a presentation around mining and critical minerals. As we work to put that together, please keep an eye out for a request for available dates so we can get the presentation scheduled. We'll plan on a joint meeting with all three tribes. Our hope is to start these in May.
- Would like to schedule a meeting with all three 1854 tribes to discuss preferences for us to hire a tribal monitor(s).
- Bois Forte will be coming on site to visit the sugar bush this spring. I am working with BF staff to find a day in April or May that works. FDL and GP are also more than welcome to join! Please let me know if you are interested so we can find times that work for you.

**Jenna Lehti**

*Tribal Relations Advisor*

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# NewRange Copper Nickel