

**MINNESOTA  
DEPARTMENT OF NATURAL RESOURCES**

*In the Matter of the NorthMet Project Permit to Mine Application*

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**POLY MET MINING, INC.'S REPLY BRIEF  
REGARDING THE ADMINISTRATIVE LAW JUDGE'S  
FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

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## INTRODUCTION

The goal of the Reactive Mine Waste Rule (the “Rule”) is “to prevent the release of substances” that have “adverse impacts on natural resources.” Minn. R. 6132.2200, subp. 1. PolyMet’s tailings management plan meets that goal. By using a bentonite amendment as part of a wet closure that minimizes how much oxygen reaches the tailings, and by capturing and treating water that drains from the tailings, PolyMet will protect the natural resources around its site.

Petitioners’ cramped reading of the Rule takes the focus off natural resource protection. In their view, the only ways to satisfy the Rule are to stop the tailings from generating any harmful substances, regardless of whether those substances will actually harm natural resources, or to prevent any water from entering the tailings, regardless of whether the small percentage that seeps out is captured and treated. This reading not only conflicts with the Rule’s plain meaning, it thwarts one of the nonferrous mining rules’ larger purposes: “promoting orderly development of nonferrous metallic mineral mining.” Minn. R. 6132.0200.

Petitioners also fight the facts found in the contested case hearing. They think their witnesses were more credible and persuasive than PolyMet’s and DNR’s. But that is hardly reason to overthrow the ALJ’s detailed factual findings, which rest on his first-hand view of the hearing evidence and live testimony. And while the Commissioner’s Designee may reweigh the evidence, departing from the ALJ’s findings requires a reasonable explanation of why the Commissioner’s Designee sees things differently. Minn. Stat. § 14.62, subd. 1; see *In re Excess Surplus*, 624 N.W.2d 264, 278 (Minn. 2001). Petitioners’ arguments fail that test.

## ARGUMENT

### I. The Supreme Court’s limited remand set the scope of the hearing.

Before Petitioners’ legal and factual arguments can be addressed, their misconceptions about the Minnesota Supreme Court’s decision ordering the contested case hearing must be cleared up. Those misconceptions matter because Petitioners use them to twist the questions that were before the ALJ. Correcting them shows that, per DNR’s hearing order, this case is narrow.

#### A. Because the Court did not reverse PolyMet’s permit to mine, Petitioners bore the burden of proof.

Petitioners start with the premise that the Supreme Court “reversed” PolyMet’s permit to mine.<sup>1</sup> This premise lets them conclude that PolyMet bears the burden of proof because it is asking DNR to “grant the permit.”<sup>2</sup> But the Minnesota Supreme Court did not reverse the permit to mine. It reversed, on nearly every point, “the *decision of the court of appeals.*” *Permit to Mine*, 959 N.W.2d 731, 738 (Minn. 2021) (emphasis added).<sup>3</sup> On the one contested case point that the Court affirmed, and on the permit term issue, the Court ordered a “remand to the DNR to conduct the contested case hearing required by this decision” and to set a permit term. *Id.*

Such a remand for further proceedings does not reverse the permit. Indeed, the Minnesota Administrative Procedure Act distinguishes between permit reversal and remand to the agency. Minn. Stat. § 14.69. Applying this distinction, the Supreme Court explained that when it reviews an agency decision, it may choose to

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<sup>1</sup> FdL Br. at 2; CO Br. at 3; WaterLegacy Br. at 5–6.

<sup>2</sup> FdL Br. at 2; *see* WaterLegacy Br. at 6.

<sup>3</sup> The Band glances at this fact but suggests that the Supreme Court’s partial affirmance of the court of appeals’ decision included an affirmance of the lower court’s permit reversal. FdL. Br. at 2–3 & n.2. That argument ignores the Supreme Court’s explicit statements about remand. *Permit to Mine*, 959 N.W.2d at 738, 759–60. That the Supreme Court affirmed some of the court of appeals’ reasoning does not mean it adopted the same remedy.

“affirm, remand, or reverse” that decision. *Permit to Mine*, 959 N.W.2d at 749. It chose to remand. *Id.* at 738, 759–60.

Petitioners are right that the party proposing agency action bears the burden of proof. Minn. R. 1400.7300, subp. 5. But because the permit to mine was remanded, not reversed, Petitioners are wrong that PolyMet is the party proposing agency action.<sup>4</sup> *Petitioners* asked for this contested case. The Supreme Court’s remand ordered DNR “to conduct the contested case hearing” they requested, *Permit to Mine*, 959 N.W.2d at 738, not to consider anew whether PolyMet’s application should be granted.<sup>5</sup> As a result, the parties seeking the contested case—Petitioners—are the ones asking the agency for relief. Minn. Stat. § 93.483, subd. 2(a)(2) (requiring a petitioner to describe the “specific relief requested or resolution of the matter”).<sup>6</sup> The ALJ was thus right to see that Petitioners bore the burden of proof.

**B. Because the remand was limited to bentonite’s effectiveness, other aspects of the permit are not at issue.**

Petitioners also stray from the Supreme Court’s decision in describing the scope of the remand. In their view, the Supreme Court both “reversed” PolyMet’s permit and “required DNR to hold a hearing on the [permit] application.”<sup>7</sup> They accordingly argue that other issues should have been included in the contested case hearing.<sup>8</sup> This argument again misreads the Supreme Court’s decision.

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<sup>4</sup> FdL Br. at 2; CO Br. at 17; WaterLegacy Br. at 6.

<sup>5</sup> The agency can, of course, deny PolyMet’s permit based on the outcome of the contested case. But that does not mean the permit has already been reversed.

<sup>6</sup> The court of appeals has also held under other statutes that a party seeking a contested case bears the burden. *See Minn. Ctr. for Env’t Advoc. v. Comm’r*, 696 N.W.2d 398, 404 (Minn. Ct. App. 2005); *Matter of Enbridge Line 3 Replacement Project*, No. A20-1513, 2021 WL 3853422, at \*13–14 (Aug. 30, 2021).

<sup>7</sup> FdL Br. at 2.

<sup>8</sup> CO Br. at 44.

The Supreme Court affirmed DNR’s decision to deny a hearing on “the other factual issues raised” in the contested case petitions. *Permit to Mine*, 959 N.W.2d at 738. In so doing, the Supreme Court recognized that the court of appeals had specifically addressed just five of the “numerous factual issues” raised in those petitions. *Id.* at 750 n.13. Because Petitioners had focused on those “same five specific issues” in the Supreme Court—never addressing, for example, “waste storage and seepage containment”—the Court saw “no need to address other issues” that “might fall within” the petitions. *Id.*; *see id.* at 738, 742 n.11 (listing the issues raised in the petitions).<sup>9</sup> Thus, the Supreme Court had its eyes open when it declined to order a contested case on all “the other factual issues raised” in the contested case petitions. *Id.* at 738, 742 n.11, 750 n.13. As a result, the effectiveness of the seepage collection and treatment system is not properly before the Commissioner’s Designee.

The Supreme Court also never questioned the completeness of PolyMet’s application, even referring to it as “PolyMet’s *completed* permit to mine application.” *Id.*, at 737 (emphasis added); *see id.* at 742 (noting that PolyMet’s “permit to mine application was deemed complete and filed”). And until the contested case,<sup>10</sup> neither had Petitioners. Their belated incompleteness argument, which they did not make in the court of appeals or the Supreme Court, is waived. *See Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006) (“[F]ailure to address an issue in [a] brief constitutes waiver of that issue.”).

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<sup>9</sup> The Band did not file a contested case hearing petition. *Id.* at 737 n.3. The remaining Petitioners’ failure to raise these other issues in the Supreme Court waived their argument here.

<sup>10</sup> FdL Br. at 43–44; WaterLegacy Br. at 43–44.

**C. The Court never questioned the lawfulness of permit conditions.**

Finally, Petitioners suggest that the Supreme Court’s decision rejects the use of special permit conditions to satisfy statutory requirements.<sup>11</sup> It does not. When the Supreme Court talked about the permit’s “special conditions,” it was only to say that they could not “substitute for the substantial evidence required to support DNR’s decision” denying a contested case. *Permit to Mine*, 959 N.W.2d at 754. Nothing in that statement ruled out post-permit testing conditions altogether.

The post-permit testing in the special conditions is not meant to show that bentonite is effective.<sup>12</sup> Instead, post-permit testing will allow PolyMet to tailor its use of bentonite to the specific conditions at the site—to choose an installation method that is “effective, efficient, and economical” and to “establish and validate optimal bentonite dosages. . . .”<sup>13</sup> If Petitioners were right that engineering details like these must be specified in the permit,<sup>14</sup> it would violate statutory policy by rendering the rules “overly prescriptive and inflexible” rather than creating “maximum flexibility” for both “the regulated party and the agency” to protect natural resources. Minn. Stat. § 14.002.

Following this statutory direction, the court of appeals has held that the non-ferrous mining rules must “build in enough flexibility, while still providing basic direction on how reclamation can be achieved.” *Minn. Ctr. for Env’t Advoc. v. Minn. Dep’t of Nat. Res.*, A18-1956, 2019 WL 3545839, at \*7 (Minn. Ct. App. Aug. 5, 2019) (quoting the SONAR for the rules). The rules accordingly allow the permitted reclamation plan for each mine “to be custom designed to account for each site and

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<sup>11</sup> WaterLegacy Br. at 25; see FdL Br. at 11; CO Br. at 30.

<sup>12</sup> See Ex. 74 (Radue Direct) at 39:600–609, 67–68:1121–1124; Ex. 75 (Radue Rebuttal) at 1:12–15, 7–8:121–147, 40:768–773; Tr. Vol 3 at 45:5–12 (Diedrich).

<sup>13</sup> See Ex. 293 at R.0715206, Work Plan for Pilot and Field Scale Testing.

<sup>14</sup> FdL Br. at 11.

operation’s uniquely specific characteristics.” *Id.* The mining statute also specifically authorizes “conditions” on permits to mine. *See* Minn. Stat. § 93.481, subd. 2 (allowing permits “with or without modifications or conditions”); *id.* § 93.483, subd. 5 (allowing DNR to “develop a proposed permit or permit conditions”). For all these reasons, putting special conditions on PolyMet’s permit is lawful.

## **II. The bentonite amendment is “practical and workable.”**

Petitioners never address the distinction between the statute’s requirement that a reclamation technique be “practical and workable” and the Rule’s requirements for managing reactive mine waste.<sup>15</sup> Instead, they simply assert that bentonite is not practical and workable unless it satisfies the Rule.<sup>16</sup> But that interpretation of the statute cannot be right. As PolyMet explained in its principal brief, the statute segregates “lawful requirements” from the “practical and workable” technology requirement.<sup>17</sup> *See* Minn. Stat. § 93.481, subd. 2. Bentonite is “practical and workable” technology under the statute because, as a factual matter, it is likely to work in the real world as PolyMet plans.<sup>18</sup> Whether PolyMet’s plans will satisfy the Rule is a different question about compliance with “lawful requirements.”

## **III. PolyMet’s plans satisfy the Reactive Mine Waste Rule.**

Petitioners’ primary legal argument is that PolyMet cannot satisfy either prong of the Rule.<sup>19</sup> NorthMet tailings, they say, will neither be “store[d] in an environment” where they are “no longer reactive” nor managed in a way that “prevent[s] substantially all water from moving through or over” them. Minn. R. 6132.2200,

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<sup>15</sup> *See* PolyMet’s Principal Br. at 21–23.

<sup>16</sup> FdL Br. at 21; WaterLegacy Br. at 25.

<sup>17</sup> PolyMet’s Principal Br. at 22–23.

<sup>18</sup> ALJ report at 25; *see id.* at 26 (finding in PolyMet’s favor on the fact issues).

<sup>19</sup> *See* PolyMet’s Principal Br. at 25–26. PolyMet agrees that the Commissioner’s Designee must address the Rule’s meaning. *See* CO Br. at 11–12.



subp. 2(B). Yet their briefs reveal that the remaining disputes over the Rule’s text are narrow. And the Rule’s context helps show why PolyMet’s plans are lawful.

**A. The tailings will be stored “in an environment” where they are “no longer reactive.”**

Everyone agrees that the NorthMet tailings qualify as reactive mine waste under the Rule.<sup>20</sup> Everyone also agrees that subpart 2(B)(1) of the Rule lets PolyMet keep those tailings in a “storage facility” that is designed to “store [them] in an environment” where they are “no longer reactive.”<sup>21</sup> Minn. R. 6132.2200, subp. 2(B)(1). The central dispute is what the Rule means by “no longer reactive.”

I. The nonferrous mining rules define “reactive mine waste” as “waste that is shown through characterization studies to release substances that adversely impact natural resources.” Minn. R. 6132.0100, subp. 28. Petitioners see the second part of this definition—“adversely impact natural resources”—as merely auxiliary to the first part. To them, an initial finding that waste can “release” harmful substances means that “waste is ‘no longer reactive’” only when it stops “releasing substances.”<sup>22</sup> In other words, because reactivity turns on waste’s “chemical and physical properties,” Petitioners argue that the only way for it to be “no longer reactive” is to counteract those “reactive properties.”<sup>23</sup>

But there is a better way to read the Rule. That reading starts by recognizing that “adversely impact natural resources” is not an auxiliary phrase. To the contrary, “adversely impact natural resources” has its own definition: “[A]n unacceptable level of impact on the natural resources as determined by the commissioner based on an evaluation which considers the value of the resource and the degree of impact.”

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<sup>20</sup> FdL Br. at 17; WaterLegacy Br. at 11.

<sup>21</sup> FdL Br. at 22–23; CO Br. at 6; WaterLegacy Br. at 11.

<sup>22</sup> FdL Br. at 22.

<sup>23</sup> CO Br. at 6.

Minn. R. 6132.0100, subp. 3. This separate definition shows that whether something adversely impacts natural resources is a context-dependent, practical decision. It does not fit with Petitioners' claim that once a waste is found to release a harmful substance, the only way to find it "no longer reactive" is to stop it from releasing that substance. Instead, the separate definition of "adversely impact natural resources" shows that waste is "no longer reactive" whenever it stops having "an unacceptable level of impact" on the relevant natural resources.

This reading of the Rule makes even more sense in light of the Rule's specific goal and the nonferrous mining rules' larger goals. The Rule's specific goal is to manage reactive mine waste in a way that "prevent[s] the release of substances that *result in* the adverse impacts on natural resources." Minn. R. 6132.2200, subp. 1 (emphasis added). It is the outcome—protection of natural resources—that matters, not the means. This focus on the result over the means creates the flexibility to fulfill the nonferrous mining rules' overall purposes, including both "control" of "possible adverse environmental effects" and "promoting orderly development of nonferrous metallic mineral mining." Minn. R. 6132.0200; *see* Minn. Stat. § 93.44 (declaring a similar policy). Petitioners' reading of subpart 2(B)(1), by contrast, would set an impossibly high bar for mining by requiring permit applicants to either "directly modify" the tailings or completely "isolate the tailings from oxygen."<sup>24</sup>

2. Petitioners resist PolyMet's reading of subpart 2(B)(1) by pointing to the Rule's November 1992 Statement of Need and Reasonableness. That SONAR, it is true, talks about preventing harmful substances "from forming within the mine waste."<sup>25</sup> But when the SONAR was written, the draft rule said that a facility must

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<sup>24</sup> CO Br. at 6.

<sup>25</sup> FdL Br. at 23 (quoting SONAR, Ex. 336, R.0730374).

“modify” waste to stop reactivity.<sup>26</sup> Because that language did not make clear that the “primary” way to control reactivity is to keep waste “under water”—better known as wet closure—mining experts asked DNR to clarify the Rule.<sup>27</sup> DNR responded by adding the “or store it in an environment” clause. *See* 17 Minn. Reg. 2207-09 (Mar. 15, 1993). PolyMet’s plan to put the NorthMet tailings in a pond-covered tailings basin is just the kind of wet closure that DNR had in mind when it changed the Rule. Such underwater storage cannot prevent all oxygen from reaching the tailings, as Petitioners would have it, but it helps create an environment that protects natural resources—and protecting natural resources is the Rule’s goal.

Nor is underwater storage the only way that PolyMet’s tailings management plan protects natural resources. The overall “environment” in which the tailings are stored also includes a seepage capture and treatment system that prevents water leaving the tailings basin from reaching natural resources.<sup>28</sup> Petitioners respond to this point by claiming that “capture and treatment” is not part of the “conditions that ‘surround’ the waste ‘permeatingly.’”<sup>29</sup> But their argument reads the Rule’s use of the word “environment” too narrowly. An environment is a “general set of conditions or circumstances”; the example in the dictionary is “a terrible *environment* for doing business.”<sup>30</sup> Used that way, the meaning of “environment” is not qualified by

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<sup>26</sup> 17 Minn. S.R. 958 (Nov. 2, 1992) (published draft of Minn. R. 6132.2200).

<sup>27</sup> R.234376; *see* Ex. 107 at R.234394 (requesting a change to the rule’s language because underwater storage “does not really change the chemical characteristic of the sulfite”). If the Rule barred wet closure, it would not “promot[e] orderly development of nonferrous metallic mineral mining,” Minn. R. 6132.0200.

<sup>28</sup> *See* PolyMet’s Principal Br. at 29.

<sup>29</sup> FdL Br. at 25.

<sup>30</sup> *Environment*, Am. Heritage Dictionary 597 (5th ed. 2018) (emphasis added).

the adverb “permeatingly.”<sup>31</sup> Instead, consistent with the purposes of the nonferrous mining rules, the Rule’s use of “environment” gives DNR and permit applicants flexibility to create waste storage conditions that will not harm natural resources. PolyMet’s seepage capture and treatment plan achieves that goal.<sup>32</sup>

Finally, Petitioners argue that even under PolyMet’s reading of subpart 2(B)(1), PolyMet’s tailings management plan will not protect natural resources.<sup>33</sup> This argument misunderstands DNR’s permitting role. Under the Rule, DNR must conclude that PolyMet will store tailings in an environment where they are no longer reactive—i.e., an environment that protects natural resources. *See* Minn. R. 6132.0100, subp. 28 (defining “reactive mine waste” as waste that will “adversely impact natural resources”); *supra* at 7–9. That conclusion turns on the judgment of the DNR commissioner, not the findings of any other agency. Minn. R. 6132.0100, subp. 3 (An “unacceptable level of impact” is “determined by the commissioner.”). So even if the U.S. Army Corps of Engineers or the Minnesota Pollution Control Agency thought that the tailings basin would violate the water quality standards that they enforce, DNR could still conclude under the applicable definition that PolyMet is satisfying subpart 2(B)(1) by protecting natural resources.

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<sup>31</sup> The word “permeatingly” does not appear in the definitions of “environment” cited by the Band. It is included only in one of the definitions for the rarely used verb “environ.” *See* FdL Br. at 23 (citing *Webster’s Third New Int’l Dictionary* 760). “Permeatingly” makes no sense in the context of the Rule.

<sup>32</sup> The phrase “store it in an environment” covers capture and treatment even though those words do not appear in subpart 2(B)(1). *See* FdL Br. at 25–26. The term “environment” is broad enough to include capture and treatment as well as any number of other waste storage conditions. Subpart 2(B)(2), on the other hand, specifies “collection and disposal,” implicitly excluding any other methods of dealing with “residual waters” under that subpart.

<sup>33</sup> FdL Br. at 26–32; CO Br. at 8–9; WaterLegacy Br. at 11–16.

3. In sum, PolyMet’s tailings management plan complies with subpart 2(B)(1)’s plain language because it stores tailings in an environment that protects natural resources. No other reading of subpart 2(B)(1) satisfies both the Rule’s goal of protecting natural resources and the state’s larger goal of promoting nonferrous mining development.

**B. PolyMet will “prevent substantially all water from moving through or over” the tailings.**

Petitioners’ reading of subpart 2(B)(2) focuses first on the total volume of water that will touch the tailings.<sup>34</sup> Again, there is no dispute on that point. The dispute instead is over what the Rule means when it talks about water moving “through or over” the tailings. Minn. R. 6132.2200, subp. 2(B)(2).

1. PolyMet’s principal brief explained that subpart 2(B)(2) did not bar water from “contacting” mine waste.<sup>35</sup> Indeed, DNR struck the word “contacting” from the prohibition in the draft rule and replaced it with the phrase “through or over.” 17 Minn. S.R. 2208 (Mar. 15, 1993). Because the terms “through” and “over” connote a movement “out” of or “across” something, this change shifted the rule’s focus from water *touching* the waste to water *escaping* the waste.<sup>36</sup>

Petitioners argue that PolyMet’s dictionary-based definitions of “through” and “over” are too closely aligned. For those words to have different meanings, they say, “through” must include movement “in the midst of” the tailings.<sup>37</sup> Thus, they read subpart 2(B)(2) as applying to water that moves “through the pore spaces

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<sup>34</sup> FdL Br. at 33, 34–36; CO Br. at 10; WaterLegacy Br. at 20–21.

<sup>35</sup> PolyMet’s Principal Br. at 31–32.

<sup>36</sup> The related change from “come into contact with” to “drain from” shows the same focus: Water can only “drain from” a place where it is stored. 17 Minn. S.R. 2208.

<sup>37</sup> FdL Br. at 34.

inside” the tailings basin.<sup>38</sup> Since water moves continually inside the tailings basin, Petitioners conclude that PolyMet’s plan cannot satisfy subpart 2(B)(2).<sup>39</sup>

The flaw in Petitioners’ reasoning is their over-emphasis on the argument that “through” and “over” should not be read “to mean essentially the same thing—from one side to the other.”<sup>40</sup> On that basis, Petitioners add “within or among” to the meaning of “through.”<sup>41</sup> But both “through” and “over” can connote movement from one side to the other without meaning the same thing.<sup>42</sup> “Through” means passing in the middle of something, like going *through* a tunnel, while “over” means traveling across something, like going *over* a bridge. In this way, the two terms are meaningfully different.<sup>43</sup> Subpart 2(B)(2) thus applies to water that escapes a storage facility by moving either over the top of, or through the middle of, the waste. This reading is reinforced by subpart 2(B)(2)’s requirement to collect and dispose of any water that does escape.<sup>44</sup>

Petitioners’ contrary reading makes less sense because it reinstates the ban on “contacting” waste that DNR removed from the final version of the Rule. If

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<sup>38</sup> FdL Br. at 35.

<sup>39</sup> FdL Br. at 35–36.

<sup>40</sup> FdL Br. at 36.

<sup>41</sup> FdL Br. at 36.

<sup>42</sup> See PolyMet’s Principal Br. at 32 (citing Am. Heritage Dictionary 1254, 1814).

<sup>43</sup> There is no reason to expect “through” and “over” to have dramatically different meanings. Subpart 2(B)(2) uses them together to describe ways in which water might interact with mine waste. This linkage points to the “associated words canon,” which says that grouped words often have related meanings. *Matter of Surveillance & Integrity Review*, 999 N.W.2d 843, 857 (Minn. 2024). Petitioners’ effort to differentiate “through” from “over” violates this common-sense canon. Contrary to Petitioners’ claims, when water stays “inside” the tailings basin, FdL Br. at 35, it is not moving “through.”

<sup>44</sup> The seepage capture system will collect both surface and groundwater that leaves the tailings basin. PolyMet’s Principal Br. at 1, 34–35.

subpart 2(B)(2) required PolyMet to prevent “substantially all” water from moving “through the pore spaces in tailings inside” the basin,<sup>45</sup> it would mean that almost no water could ever contact the tailings. As Petitioners put it, the phrase “substantially all water” is “an absolute limitation that precludes essentially any water from moving through or over reactive mine waste.”<sup>46</sup> Since Petitioners view “through or over” as including movement “within” the tailings, their reading “precludes essentially any water” from *contacting* the tailings. But if that were what “through or over” meant, DNR would not have removed the ban on “contacting” from the final rule.

2. Petitioners also point to the lack of a “limiting article” in the phrase “substantially all water.”<sup>47</sup> As they see it, the phrase “substantially all water” in the Rule “does not mean a portion of another quantity of water in or around the Project, as ‘substantially all *the* water’ might.”<sup>48</sup> But this distinction asks too much of the Rule, which could not possibly identify specific waters relevant to any future non-ferrous mine. Nor does the distinction matter if PolyMet is right about the phrase “moving through or over.” On PolyMet’s reading, “water” in subpart 2(B)(2) simply means any water that reaches the tailings. So long as the facility stops “substantially all” of that water from escaping, it satisfies the Rule.<sup>49</sup>

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<sup>45</sup> FdL Br. at 35.

<sup>46</sup> FdL Br. at 37; *see* WaterLegacy Br. at 21 (“Subpart 2(B)(2) was adopted to prevent substantially all water from contacting reactive wastes”). By adopting this extreme view, Petitioners’ depart from the ALJ’s reasoning.

<sup>47</sup> FdL Br. at 40.

<sup>48</sup> FdL Br. at 40 (emphasis in original).

<sup>49</sup> Petitioners separately suggest that the word “residual” in subpart 2(B)(2) refers to “a slight amount of water” escaping the waste. CO Br. at 11. That suggestion overreads the word “residual,” which simply means “[t]he quantity left over at the end of a process; a remainder.” *Residual*, Am. Heritage Dictionary 1494.

3. As a last resort, Petitioners point out that subpart 2(B)(2) is not about “annual limits”—it applies “permanently.”<sup>50</sup> They contrast that permanence with the annual, post-closure seepage numbers that the ALJ cited,<sup>51</sup> pointing out that far more water seeps from the basin during the entire closure period.<sup>52</sup> But that larger volume does not change the *proportion* of water that escapes. PolyMet will use precipitation and captured seepage to maintain post-closure water levels in the tailings basin.<sup>53</sup> So, each year, 99.56% of the water in the basin will stay there, while just 0.44% will escape. Even if you multiply those volumes by 475 years, as Petitioners do,<sup>54</sup> the total seepage volume will still be 0.44% of the total volume that stays in the basin.<sup>55</sup> Because the basin retains 99.56% of the water that reaches the tailings, it complies with subpart 2(B)(2) by preventing “substantially all water from moving through or over” them and by capturing and treating any water that escapes.<sup>56</sup>

#### **IV. The ALJ’s findings of fact on bentonite’s effectiveness were based on substantial evidence and should be affirmed.**

Petitioners also object to many of the ALJ’s factual findings. Those objections rarely claim that the ALJ’s findings lack record support. Instead, Petitioners argue

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<sup>50</sup> FdL Br. at 41.

<sup>51</sup> ALJ Report at 36.

<sup>52</sup> FdL Br. at 41–42.

<sup>53</sup> Tr. Vol. 3 at 20:18–25, 21:1–9; Ex. 79 at 113–120 (Diedrich Rebuttal); see PolyMet’s Proposed Findings ¶ 186.

<sup>54</sup> FdL Br. at 42.

<sup>55</sup> WaterLegacy’s effort to calculate how much seepage the bentonite amendment prevents is beside the point. See WaterLegacy Br. at 21–23. Subpart 2(B)(2) applies to a “reactive mine waste storage facility,” and the bentonite amendment is just one part of PolyMet’s facility.

<sup>56</sup> The Band’s claim that the volume of water leaving the basin would release “significant amounts” of harmful substances ignores this seepage capture and treatment. FdL Br. at 38.



that the ALJ should have given their experts and evidence more weight.<sup>57</sup> The Commissioner's Designee should reject those arguments.

**A. Any changes to the ALJ's factual findings must be adequately explained and supported.**

Courts review an agency's factual findings for substantial evidence. Minn. Stat. § 14.69. In this context, that means factual findings made by the Commissioner's Designee "must be affirmed" as long as they are "adequately explained" and "reasonable on the basis of the record." *Permit to Mine*, 959 N.W.2d at 749. Thus, if the Commissioner's Designee independently reviews and affirms the ALJ's already-explained factual findings, the only question for a court is whether those findings are supported by substantial evidence. *In re Excess Surplus*, 624 N.W.2d at 274. To reject or modify an ALJ's factual findings, on the other hand, an agency must "include the reasons for each rejection or modification." Minn. Stat. § 14.62, subd. 1. This statutory rule, taken together with section 14.69's substantial evidence requirement, means that overruling an ALJ's factual findings requires both substantial evidence for the new findings and an adequately explained, record-supported explanation for any changes to the ALJ's findings. So while the ultimate standard of review is not higher when an agency rejects an ALJ's findings, rejecting an ALJ's findings without enough explanation can be arbitrary and capricious. *See In re Excess Surplus*, 624 N.W.2d at 278.

As PolyMet discussed in its principal brief, the ALJ's factual findings here are supported by substantial evidence.<sup>58</sup> For that reason, if the Commissioner's Designee reviews and agrees with those findings, they should be affirmed. *See Permit to Mine*, 959 N.W.2d at 749. Petitioners disagree with the ALJ on the facts, mostly

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<sup>57</sup> See FdL Br. at 2–12; CO Br. at 12–45; WaterLegacy Br. at 26–45.

<sup>58</sup> See PolyMet's Principal Br. at 4–20.

because they think their witnesses were more credible than the ALJ apparently did. But Petitioners ignore that the ALJ had the only first-hand chance to “evaluate the witnesses’ credibility.” *Matter of Waters*, 977 N.W.2d 874, 887 (Minn. Ct. App. 2022). That first-hand chance is why assessing witness credibility rests “within the province of the factfinder”—in this case, the ALJ. *Matter of Friedenson*, 574 N.W.2d 463, 466–67 (Minn. Ct. App. 1998) (citation omitted). Any departures from the ALJ’s credibility findings—even when those findings are made “implicitly”—must therefore be reviewed “more critically.” *Waters*, 977 N.W.2d at 886–87 (discussing the standard of review in *In re Excess Surplus*).

Because Petitioners’ objections rest on credibility determinations, and because their factual claims enjoy less support in the record than the ALJ’s findings, overturning the ALJ’s factual findings would be arbitrary and capricious.<sup>59</sup>

**B. Petitioners’ key factual arguments misconstrue the record.**

Having already discussed in its principal brief why the ALJ’s factual findings are supported by substantial evidence, PolyMet need not rebut all of Petitioners’ exceptions. What follows thus focuses on a few points where additional explanation may be helpful.

**I. The studies and real-world examples in the record show that bentonite will be effective.** Petitioners argue that the ALJ was wrong as a factual matter to conclude that the bentonite amendment was “practical and workable”

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<sup>59</sup> Petitioners cite a case involving the federal section 8 housing program as setting the standard for the ALJ’s factual findings here. CO Br. at 16 (citing *Carter v. Olmsted Cnty. Hous. & Redev. Auth.*, 574 N.W.2d 725, 729–30 (Minn. App. 1998)). But, as might be expected in a case involving federal housing assistance, the court of appeals in *Carter* found its standard a federal case. 574 N.W.2d at 729–30 (quoting *Garthus v. Sec’y of Health & Hum. Servs.*, 847 F. Supp. 675, 689 (D. Minn. 1993)). The cases involving Minnesota’s Administrative Procedure Act set a different standard. See *Waters*, 977 N.W.2d at 886–87.

because, they say, PolyMet’s “examples of bentonite applications” were too different from its proposal.<sup>60</sup> This point parallels their post-hearing argument that finding a proposal “practical and workable” requires nearly identical, real-world examples.<sup>61</sup> But as PolyMet explained in its principal brief, Petitioners’ reading of the statute would unjustifiably limit the kinds of evidence DNR can consider.<sup>62</sup> And from a purely factual perspective, Petitioners ignore that PolyMet provided both real-world examples<sup>63</sup> and academic literature<sup>64</sup> showing that its bentonite proposal will work. The ALJ rightly relied on this evidence, and Petitioners give no good reason for concluding otherwise.

**2. The record shows that bentonite will stay saturated.** In a similar vein, Petitioners argue that the record does not support a conclusion that bentonite can maintain water saturation above the requisite 85%.<sup>65</sup> This argument fails from the start because Petitioners overstate the record on how much saturation is necessary for success. What they call an agreement between “DNR’s consultants and Petitioners’ experts” is no more than one 2012 email from one DNR consultant<sup>66</sup> and

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<sup>60</sup> CO Br. at 14–15.

<sup>61</sup> See OAH Record at 1607 (CO Posthearing Br. at 5).

<sup>62</sup> See PolyMet’s Principal Br. at 23–24.

<sup>63</sup> See, e.g., Ex. 76 at 267–270 (Hull); Tr. Vol. 3 at 8:5–8, 10:3–20; Ex. 42.01; Ex. 60 (Machado Lake); Ex. 76 at 272–285 (Hull); Ex. 42.02 (Calumet River); Ex. 76 at 299–304 (Hull); Ex. 42.04 (Grasse River); Tr. Vol. 2 at 69:18–25, 130:14–17 (Minorca Mine).

<sup>64</sup> For instance, Woysner and Yanful concluded that an intermediate clay layer will retain a high degree of saturation after a 20-year simulation for a cover system like PolyMet’s bentonite-amended tailings on its dam sides. Ex. 74 at 303–21 (Radue). And the conclusions of the Whistle Mine study support that a properly installed bentonite amendment would have cut down oxygen flux by about 90%. Tr. Vol. 1 at 133:12–21; Tr. Vol. 3 at 71:23–25; Ex. 200.24; Ex. 79 at 360–392 (Diedrich); Ex. 105 at 4:21–5:6 (Wenz).

<sup>65</sup> WaterLegacy Br. at 17–18.

<sup>66</sup> Ex. 261, R.735730 (Kempton email).

four lines of pre-filed testimony from one of their experts.<sup>67</sup> In any case, the full record shows that the bentonite will be kept saturated by several water sources, including precipitation, atmospheric water vapor, water stored in the pond, water stored in the tailings, and water from the 30-inch tailings layer on top of the bentonite amendment.<sup>68</sup> Testimony at the hearing elaborated on why PolyMet will meet modeled levels of bentonite saturation<sup>69</sup> and could mitigate if saturation is too low.<sup>70</sup> This is more than substantial evidence to show that the bentonite amendment will stay saturated.

**3. The record shows that cation exchange will not consequentially reduce bentonite’s effectiveness.** Petitioners’ key argument against the bentonite amendment is that cation exchange will cause bentonite to lose its effectiveness over time.<sup>71</sup> The ALJ rejected this argument, concluding instead that cation exchange will not consequentially reduce bentonite’s effectiveness.<sup>72</sup> PolyMet’s principal brief documents the substantial evidence underlying the ALJ’s conclusion, including the evidence that the water in the tailings basin will have relatively low cation concentrations.<sup>73</sup> Petitioners respond by arguing that even weak ionic solutions reduce bentonite’s effectiveness.<sup>74</sup> But the ALJ knew about this argument too. That awareness manifests in the ALJ’s findings, which discuss the effect of “low-ionic-strength

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<sup>67</sup> Ex. 200 at 7:11–15 (Malusis).

<sup>68</sup> Ex. 74 at 303–336, 434–443, 1252–1254, 1281–1285 (Radue); Ex. 77 at 177–79 (Hull); Tr. Vol. 2 at 88:9–18; Ex. 75 at 1052–69 (Radue); Ex. 63; Ex. 64.

<sup>69</sup> See Tr. Vol. 1 at 133:12–134:17, 135:13–20, 159:19–160:17 (describing why PolyMet will meet its modeled values using Van Genuchten parameters).

<sup>70</sup> See Tr. Vol. 2 at 33:14–34:12; Tr. Vol. 1 at 76:6–10.

<sup>71</sup> CO Br. at 32–38; WaterLegacy Br. at 31, 33–34, 37–39.

<sup>72</sup> OAH Record at 9, 32–33 (ALJ report at 3, 26–27).

<sup>73</sup> PolyMet’s Principal Br. at 12–14.

<sup>74</sup> CO Br. at 33–36; WaterLegacy Br. at 33, 37–38.

solutions” and conclude that such solutions will not cause “consequential levels of cation exchange.”<sup>75</sup> The record supports that conclusion,<sup>76</sup> and Petitioners’ reasons for reaching a different one are unpersuasive.

**4. The record shows that bentonite will remain effective over the long term.** Petitioners also argue more broadly that factors other than cation exchange could degrade the bentonite amendment over time, including wet-dry cycling, root penetration, freeze-thaw cycling, and animal burrowing.<sup>77</sup> Again, the ALJ rejected these arguments, finding that while some degradation would occur,<sup>78</sup> the bentonite would remain “effective over the long term and would not suffer degradation to the extent that hydraulic conductivity increases above the modeled values.”<sup>79</sup> PolyMet’s principal brief reinforces the ALJ’s conclusion by providing even more record evidence to support it.<sup>80</sup> Petitioners’ rebuttal re-cites the evidence they presented at the hearing, which the ALJ rejected.<sup>81</sup> That is not enough to overturn the ALJ’s reasonable, record-supported conclusions.

**5. In these and all other instances** when the ALJ sided with PolyMet’s and DNR’s experts over Petitioners’, the ALJ’s decision rested on his implicit assessment of the experts’ credibility and, more importantly, substantial evidence in the record. Thus, the ALJ’s factual findings should be affirmed.

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<sup>75</sup> ALJ report at 17.

<sup>76</sup> Tr. Vol. 4 at 65:5–69:5 (estimated that the impact would be an immaterial “one order of magnitude.”); Ex. 205 at 10:10, 14:14 (Thyne); Tr. Vol. 4 at 213:19–214:2, 214:11–14 (estimated “one to one and a half orders of magnitude”).

<sup>77</sup> WaterLegacy Br. at 38–41; CO Br. at 40–44.

<sup>78</sup> ALJ report at 19–20.

<sup>79</sup> ALJ report at 26.

<sup>80</sup> PolyMet’s Principal Br. at 15–19. PolyMet’s principal brief also explains why Petitioners’ lead witness, Craig Benson, lacked credibility. *See id.* at 19–20.

<sup>81</sup> WaterLegacy Br. at 38–41; CO Br. at 40–44.

## CONCLUSION

PolyMet asks the Commissioner's Designee to issue a final decision in this contested case, under Minnesota Statutes 14.61 through 14.63, that:

- Rejects or modifies the ALJ's interpretation of Minnesota Statutes section 93.481, subd. 2 and Minnesota Rules 6132.2200, subp. 2(B)(1) and (2);
- Affirms the ALJ's findings on the five fact issues in DNR's hearing order; and
- Grants the other relief described in PolyMet's principal brief.

Respectfully submitted,

Dated: August 30, 2024

**GREENE ESPEL PLLP**

*s/ Monte A. Mills*

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