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

Dear Designee Wilson:

Your May 9 letter explained why it was inappropriate to accept new evidence about NewRange's technical review of its tailings basin. Since then, nothing has changed. Minnesota law does not allow new evidence—including judicially noticed evidence—after a contested case hearing. And even if it did, DNR's evidence is not materially different from the evidence you addressed on May 9. Thus, a stay of this nearly completed contested case remains inappropriate.

I. Judicial notice of NewRange's news release is inappropriate.

You declined to consider a February email discussing NewRange's planned technical review because "[t]here is no statutory mechanism for a party to introduce new 'evidence' once the hearing record has closed, the ALJ has issued its final report, and the exceptions process has begun." May 9 Letter at 4. Indeed, the applicable statute requires that "[a]ll evidence" must "be made part of the hearing record." Minn. Stat. § 14.60, subd. 1; *see* Minn. R. 1400.7300, subp. 2 (same). That hearing record closes when the ALJ transmits it to the agency decisionmaker. Minn. R. 1400.7400, subp. 1. From then on, section 14.60, subdivision 2 (as well as Minnesota Rule 1400.8100, subpart 1) bars consideration of "factual information or evidence . . . unless it is part of the record."

DNR thinks that this system for establishing the record has a loophole. It says that under section 14.60, subpart 4, "the final agency decision-maker may take

judicial notice of certain facts." DNR Reply Br. at 2–3. But that is not what subpart 4 says. Subpart 4 says that agencies "may take notice of judicially cognizable facts" *if* the parties are told about those facts "in writing either before or during [the] hearing," in a "preliminary report," or "by oral statement on the record." Minn. Stat. § 14.60, subd. 4. Those three methods of giving notice are not available *after* the hearing. For the same reason, the rules governing contested cases specify that the ALJ "may take notice of judicially cognizable facts but shall do so on the record . . . ." Minn. R. 1400.7300, subp. 4.

This reading of the statute and rules fits with idea that once the hearing ends, the opportunity to present evidence is over. *See* May 9 Letter at 4. Judicially cognizable facts are still facts, and DNR is offering them as evidence. When those facts involve "[s]ubsequent events" like NewRange's news release, taking judicial notice of them is especially "inappropriate." *Hibbing Taconite Co. v. Minn. Pub. Serv. Comm'n*, 302 N.W.2d 5, 11 (Minn. 1980).

DNR's footnoted reference to the Supreme Court's decision in *In re Excess Surplus* does not demand anything different. DNR Reply Br. at 4 n.3. DNR fails to mention that the Court in that case rejected the agency's effort to cite extra-record publications in support of its decision. *In re Excess Surplus*, 624 N.W.2d 264, 281–82 (Minn. 2001). The Court's mention of using section 14.60, subdivision 4 in connection with "information outside the record" was thus dicta. *Id.* The Court's holding was that the agency "overstepped [its] authority by considering materials outside the record." *Id.* at 282.

The same conclusion would apply here if you took judicial notice of NewRange's news release. Section 14.60 makes clear that "[a]ll evidence"—including evidence that is judicially noticed—must "be made part of the hearing record." Minn. Stat. § 14.60, subd. 2. Because NewRange's news release is not part of the hearing record, it cannot be part of the ongoing exception process.

II. The information in the news release is not materially different from the information in the February 14 email.

Even if it were appropriate to consider information outside the record like NewRange's news release, nothing in that news release is materially different from the information in the February email that you addressed in your May 9 letter.

NewRange has been consistent: It told the Chippewa bands in February that it was "potentially looking at changing" some aspects of its project. It confirmed to you in March that it was considering changes, explaining that whether it makes any such changes would depend on the outcome of a "thorough technical review" that was in its "infancy." March 26 Letter at 2. In August, NewRange publicly announced that its technical review—in the form of "four key studies"—was underway. News Release at 1. That announcement reiterated that the "tailings storage options" NewRange is "studying" include "keeping the current design detailed in [its] permits." *Id.*

NewRange has also consistently said that if it proposes any changes to its project, those changes would "be subject to supplemental environmental review and permitting." News Release at 1; *see* March 26 Letter at 2 (stating that if NewRange wants to "propose changes," it will "go through the appropriate permit amendment process"). Because NewRange has neither sought such an amendment nor withdrawn its application, you concluded in May that the "current application (Version 3.1) remains the application under review." May 9 Letter at 5. The same conclusion should still apply today.

DNR calls NewRange's news release "mounting evidence" that the project will not be built as proposed and wonders why NewRange would "announce" its study if it did not intend changes. DNR Reply Br. at 2. But saying the same thing twice is not "mounting evidence"; it is just following through with a plan. NewRange told the Chippewa bands in February that it planned a technical review. Six months later, in materially identical terms, it told the public about that same review. Each time, it made clear that it may "keep[] the current design" for the tailings basin. News Release at 1. In other words, NewRange may propose changes, but it may not. What it does will depend on what its technical review shows. As for why NewRange would disclose the technical review to the public, the news release speaks for itself. NewRange values "transparency and engagement" with all stakeholders. That openness should not be turned against it.

III. The Commissioner's Designee lacks authority to issue a stay unless NewRange withdraws or amends its permit.

DNR's request for a stay faces another insurmountable obstacle, which it confronts only in a footnote. As your May 9 letter explains, "once an ALJ issues a report with recommendations in a contested case," the agency decisionmaker has

just three choices: "(1) accept the ALJ's report as the agency's final decision; (2) modify the ALJ's report; or (3) reject the ALJ's report." May 9 Letter at 5 (citing *In re Surveillance & Integrity Review Section*, 996 N.W.2d 178, 186–87 (Minn. 2023)). An "indefinite suspension" like the one proposed by DNR is not one of those choices. *Id.* at 6 n.5.

DNR's responds to the May 9 letter by observing that "[t]here do not appear to be any cases that address whether the APA has stripped DNR's authority to issue a stay in this circumstance." DNR Reply Br. at 3 n.4. But that cautious observation ignores the Supreme Court's decision in *In re Surveillance & Integrity Review*. True, the Court there does not explicitly foreclose the possibility of a stay. It does, however, emphasize that the APA's "contextual backdrop" includes "a time limitation . . . for the issuance of a final decision." *In re Surveillance & Integrity Review*, 996 N.W.2d at 186. Against this backdrop, the Court held that a "remand" to the ALJ is not one of the agency's "three options." *Id.* at 187. Neither is a stay.

DNR's claim that no cases address its authority to issue a stay also ignores the statute's express discussion of extending the agency's 90-day deadline. Under section 14.62, the agency has 90 days "after the record of the proceeding closes" to choose among its three options. Minn. Stat. § 14.62, subd. 2a. If one of the parties can show "good cause," then "the chief administrative law judge may order a *reasonable extension*" of that deadline. *Id.* (emphasis added). That express statutory extension provision undercuts DNR's claim that agencies have a separate, unwritten power to stay the entire decisionmaking process indefinitely. *See Chrz v. Mower Cnty.*, 986 N.W.2d 481, 486 (Minn. 2023) (explaining the "presumption that any omissions in a statute are intentional," especially when that statute "is uncommonly detailed and specific" (internal quotation marks omitted)).

Finally, even if the APA authorized an indefinite stay, it would not be fair to enter one now. This is not a case where the permit applicant has applied for a new or amended permit, or where the parties agree that changed circumstances justify a stay. Here, the parties have spent vast amounts of time and resources litigating this contested case, to the point that entering a stay now would prejudice NewRange. What is more, the agency's interpretation of the reactive mine waste rule will govern all future nonferrous mining projects, making a final decision in this contested case particularly valuable. *See* March 26 Letter at 2. This case should thus proceed to a final decision.

In sum, your May 9 Letter got things right. Post-hearing evidence like NewRange's news release is not admissible. Even if it were, the information in the news release is not materially different from the information in NewRange's February email to the bands. And since that information did not withdraw or amend NewRange's permit application, you should proceed with a decision accepting, modifying, or rejecting the ALJ's report.

Sincerely,

Jay C. Johnson

cc: Counsel of Record