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September 23, 2024

VIA E-MAIL

Grant Wilson  
Commissioner's Designee  
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Re: In the Matter of the NorthMet Project Permit to Mine Application, OAH 60-2004-37824

Director Wilson:

Pursuant to Director Grant Wilson's letter of September 6, 2024 ("Sept. 6 Letter"), Petitioner Fond du Lac Band of Lake Superior Chippewa ("Band") files this letter response. PolyMet<sup>1</sup> has abandoned its plans for the flotation tailings basin and proposed bentonite amendment described in the permit to mine application. Construction, operation, and reclamation

<sup>1</sup> The Band continues to follow the parties' agreement to refer to the applicant and respondent as PolyMet. See Band Exceps. & Args. at 1 n.1; Band Mar. 11 Ltr. at 2 n.1 (citing OAH Official Record, OAH 60-2004-37824 PolyMet Official Record, at pp. 6921-6922 n.1).

of the Project, including the proposed bentonite amendment, now depend on an uncompleted “technical review,” not the plan described in the application. The evidence showing mootness is either in the record or is judicially noticeable. Accordingly, this proceeding and the permit application are moot, and this contested case should be dismissed.

## Background

In its February 14, 2024, email to the Band, PolyMet said that it was reconsidering its design for the Project and that “[e]verything is on the table.” *See generally* Band Exceps. & Args. at 13; Band Mar. 11 Ltr. at 2-3. PolyMet confirmed in its March 26 Letter to Director Wilson that it was engaged in a “thorough technical review that is still in its infancy” and its plans for the proposed Project are “impossible to know until the review is over[.]” *See generally* Band Exceps. & Args. at 12-14; Band Apr. 9 Ltr. at 2. PolyMet’s August 14 Press Release (“Press Release”) is further confirmation that it currently has no plan for the proposed Project.

PolyMet explains in the Press Release that it is now “embarking on four key studies.” Press Release at 1. Those studies are necessary to inform its proposed bentonite amendment. They will include a review of the tailings basin, to decide whether to “keep[] the current design detailed in permits,”<sup>2</sup> use a centerline dam design, or “relocat[e] tailings storage to nearby unused mining pits.” *Id.* PolyMet is also determining whether it may produce 40,000 tons of metals a day and “shorten the mine plan from 20 years to 15 years.” *Id.* at 2. PolyMet may also attempt to sequester carbon in tailings, possibly using “various” undescribed “techniques[.]” *Id.*<sup>3</sup> These key Project elements will dictate the location, storage, deposition, amounts, and composition of flotation tailings (reactive mine waste) and the flotation tailings basin (a reactive mine waste storage facility), and changes will call into question the entirety of the environmental review previously completed for the proposed Project. Other public statements by PolyMet further confirm and explain the scope of changes contemplated by PolyMet’s studies.<sup>4</sup> The outcome of these studies

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<sup>2</sup> PolyMet does not have a permit to mine or a NPDES permit because both of those permits have been vacated. *See* Band Exceps. & Args. at 2-3 & n.2,30-31. And PolyMet’s Clean Water Act Section 404 permit has been revoked. *Id.* at 28-29.

<sup>3</sup> PolyMet is also considering how to implement water treatment technologies. *Id.* These are not relevant to the reactive mine waste rule. *See* Band Exceps. & Args. at 19-20, 26-27. But they may relate to the DNR litigation team’s position on how a reactive mine waste storage facility can comply with Subpart 2(B)(1). *See id.* at 27-32. PolyMet is also considering transporting ore in different ways in an effort to produce less greenhouses gas. Press Release at 2.

<sup>4</sup> In public statements in August, a PolyMet representative asserted that PolyMet was considering centerline and downstream dam construction and “[o]bviously, footprints would increase significantly with those options,” that depositing tailings in “holes out there” would involve “reclamation as we go along,” that “40,000 tons [a day] is just a far superior design in terms of efficiency out there” than 32,000 tons which “[o]bviously, there’s a financial benefit to us in processing faster.” *Council Gets Update on New Range Project*, Ely Echo (Aug. 30, 2024), <https://www.elyecho.com/article/1938,council-gets-update-on-new-range-project>. The statements reported in this article are judicially noticeable evidence of mootness. *See infra* at 4-5.

will necessarily control whether the proposed bentonite amendment is even needed as part of the plan, and if it is, whether changes to the design of the proposed bentonite amendment are needed and whether the amendment complies with the reactive mine waste rule.

PolyMet confirms the indeterminacy of its plans in its September 16 Letter. PolyMet acknowledges the Press Release “publicly announced that its technical review—in the form of ‘four key studies’—was underway.” PolyMet Ltr. at 3. PolyMet states that “the ‘tailings storage options’ NewRange is ‘studying’ include ‘keeping the current design detailed in [its] permits,’” *id.* (alteration in original); *see supra* n.2, although it avoids commenting on the dramatically different other options it is considering for tailings basin design, production rates, and tailings composition. However, PolyMet confirms its plan is now conjectural: “NewRange may propose changes, but it may not. *What it does will depend on what its technical review shows.*” PolyMet Ltr. at 3 (emphasis added). PolyMet therefore contemplates that it *may eventually* do what is in the application, while admitting that it may do something else. Apparently it has only just started the process required to decide. That renders the application broad speculation. For DNR to proceed on the permit is therefore not just a waste of time and resources, it will result in an advisory opinion.

The application and this contested case are therefore moot. Mootness is a fundamental constitutional doctrine *see Winkowski v. Winkowski*, 989 N.W.2d 302, 308 n.7 (Minn. 2023) (citing *In re Senate*, 10 Minn. 78, 81 (1865)), which applies to contested case hearings, *see* Minn. R. 1400.5500(K); *In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 614 (Minn. App. 2007). The proceeding is moot because PolyMet lacks a “requisite personal interest” in the application “that must exist at the commence of the litigation” and “continue 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)). DNR’s decision on the application would not give PolyMet any “effective relief” because that decision would not grant PolyMet permission to do what it actually intends to do. *See Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. App. 2004). Indeed, it is impossible for DNR to provide “effective relief” because PolyMet does not know what it will do, as its plans will be dictated by the outcome of its own technical studies, not any final decision from DNR. Thus, any decision by DNR on the application would merely advise whether a hypothetical plan, that may never be used, may comply with the reactive mine waste rule. DNR has no authority to issue such an opinion. *See In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989).<sup>5</sup>

#### **I. Director Wilson May Consider Evidence of Mootness.**

PolyMet’s September 16 Letter makes judicial notice of the Press Release a red herring. In that letter, PolyMet describes the nature of its technical review, including the indeterminacy of its current plans. That firmly establishes in the record of this case that PolyMet has abandoned its

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<sup>5</sup> PolyMet’s change in plans also provides a basis to reject the ALJ’s Findings of Fact and an alternative basis to accept Recommendations 2, 3, and 5, and means that the application does not include information required by Minn. Stat. 93.481 subd. 1(1) and Minn R. 6132.2200 subpt. 2(C)(1) and 6132.2500 subpts. 2(B)(2) and (6). *See* Band Exceps. & Args. at 14-15.

application plan and that what it does next depends on its technical review, which is nowhere near complete. *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.”). Therefore, regardless whether judicial notice is available for the Press Release, DNR may consider PolyMet’s change in plans. *See* Band Exceps. & Args. at 12-13; Band Apr. 9 Ltr. at 3; *see also* *Hawley v. City of Blaine*, 937 N.W.2d 766, 766-67 (Minn. 2020) (dismissing based on representations in filings).

DNR may also take judicial notice of the Press Release under both Minn. R. 1400.8100 subpt. 2, which provides that “[t]he judge *and agency* may take administrative notice of general, technical or scientific facts within their specialized knowledge *in conformance with Minnesota Statutes, section 14.60*” (emphasis added), and Minn. Stat. 14.60 subdiv. 4, which provides that “[a]gencies may take notice of *judicially cognizable facts*” in contested case hearings (emphasis added). Judicial notice is appropriate as to a fact “not subject to reasonable dispute” if it is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *In re Block*, 727 N.W.2d 166, 176 (Minn. App. 2007) (citing Minn. R. Evid. 201(b)). The accuracy of the Press Release’s contents cannot reasonably be questioned because PolyMet itself publicly released them and has now conceded that they accurately describe PolyMet’s plans. *See State v. Friberg*, 435 N.W.2d 509, 514 (Minn. 1989) (taking judicial notice where fact “not refuted or challenged by either party indicating that that there was no disagreement with the fact”). Therefore, the contents of the Press Release are judicially noticeable evidence of PolyMet’s current intentions and lack of commitment to any particular plan.

It does not matter that the Press Release came out after the ALJ issued a recommendation, since it implicates mootness. DNR *must* consider new evidence that allegedly makes this case moot. “The mootness doctrine . . . implies a comparison between the relief demanded and the circumstances of the case *at the time of decision* in order to determine whether there is a live controversy that can be resolved.” *In re Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997) (emphasis added). It is proper—and necessary—to consider events occurring after the record closes that may make a case moot. *See, e.g., In re Child of K.O. & D.W.*, 4 N.W.3d 359, 364 n.1 (Minn. App. 2024) (citing *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 584 n.3 (Minn. 1977)); *Sprenger v. Jacobs*, 305 N.W.2d 747, 748 (Minn. 1981); *In re Qwest Operating Cos.*, No. P-421/PA-10-1012, slip op. at § H, 2011 WL 1405150 (Minn. Pub. Utils. Comm’n Mar. 31, 2011).<sup>6</sup>

DNR cannot rely on rules or statutes to ignore its *constitutional* obligation to inquire into mootness, which is “applicable law” governing this proceeding, *see* Minn. Stat. § 93.483 subd. 5; *see also* Band Exceps. & Auths. at 14 n.9; *State v. Irby*, 848 N.W.2d 515, 521-22 (Minn. 2014) (describing canon of constitutional avoidance). And it is proper to take judicial notice of evidence of mootness. *Hous. & Redev. Auth. ex rel. City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d

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<sup>6</sup> PolyMet asserts it is “inappropriate” to take judicial notice of “subsequent events.” PolyMet Ltr. at 4 (citing *Hibbing Taconite Co. v. Minn. Pub. Serv. Comm’n*, 302 N.W.2d 5, 11 (Minn. 1980)). *Hibbing* did not concern mootness. When evidence allegedly shows mootness, the rule is the opposite of what PolyMet claims: The adjudicator *must* consider the evidence. *See infra* at 4-5.

885, 888 (Minn. 2002). That defeats PolyMet’s arguments that Minn. Stat. § 14.60 and Minn. R. 1400.7300 only allow notice to be taken during the hearing or of evidence introduced during the hearing. See PolyMet Ltr. at 1-2.

## **II. A Stay is Not Justified Because the Case is Moot**

A stay is improper because the application—and therefore this proceeding—are moot. Since DNR cannot exercise jurisdiction over a moot proceeding, this case should be dismissed. Just as DNR cannot ignore evidence that a case is constitutionally moot, *supra* at 4-5, it also cannot exercise jurisdiction over a moot application, including by staying it. Band Apr. 9 Ltr. at 3-4; Band Excepts. & Args. at 14. Although PolyMet says that a ruling on the merits of its application “would be particularly valuable” for precedential purposes, PolyMet Ltr. at 4, that does not provide a justiciable basis to proceed. Even if “the parties would like to have a precedent established, courts ‘will not pass on the merits of a particular question merely for the purpose of setting precedent.’” *Makitalo v. Sears, Roebuck & Co.*, 1995 WL 326574, at \*3 (Minn. Workers’ Comp. Ct. App. May 9, 1995) (quoting *In re Minn. Auto Specialties, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984)).

*In re Trinity Home Health Care Services*, 996 N.W.2d 178 (Minn. 2023) (also “*In re Surveillance & Integrity Review*” or “*SIRS*”), does not preclude DNR from dismissing for mootness. Cf. Wilson May 9 Ltr. at 5-6. *Trinity* held that an agency lacks statutory authority to remand a contested case after exceptions and arguments close. 996 N.W.2d at 186 (discussing Minn. Stat. § 14.62 subd. 2a). Mootness was not presented or considered in *Trinity*, and Minn. Stat. § 14.62 cannot authorize DNR to exercise unconstitutional power over a moot case. Dismissal for mootness would accept the ALJ’s recommendation that the application should be dismissed, on a modified basis—so dismissal is consistent with *Trinity*.

## **III. DNR Should Impose Conditions That Require Transparency from PolyMet.**

This proceeding should be dismissed, not stayed. But assuming, only *arguendo*, that DNR determines it has the authority and should issue a stay, then the stay should be conditioned to ensure that PolyMet’s review is timely and PolyMet shares all relevant information:

First, PolyMet must provide a timeline for its technical review and submit monthly status reports on its internal review, describing with specificity the state of its technical review and whether it plans to withdraw its application. Then, once PolyMet’s technical review is completed: Within fifteen (15) days, PolyMet shall provide to the parties, and file with Director Wilson in the record of this proceeding, a detailed written explanation of how its plan has changed, any changes it proposes for the permit to mine application, and supporting documentation, including copies of the technical reviews; and within forty-five (45) days of those documents being provided, Director Wilson shall set a schedule for letter briefs on whether PolyMet’s changes have mooted or otherwise impacted the pending contested case, whether it would be appropriate for the petitioners to complete briefing their exceptions and arguments, or whether further briefing is warranted.

If PolyMet cannot meet these requirements, then DNR should direct it to withdraw its application and resubmit.

Respectfully submitted,

/s/ Frank S. Holleman

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