

September 30, 2024

VIA EMAIL

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

Dear Commissioner-Designee Wilson:

The DNR Hearing Team agrees with Petitioners that you may take judicial notice of PolyMet’s August 14, 2024 press release (“Press Release”) for purposes of acknowledging that PolyMet is seriously considering substantial changes to the NorthMet Project. And aside from the Press Release, PolyMet’s September 16, 2024 letter to you further establishes that PolyMet is seriously considering fundamental changes to the Project. While this proceeding is not currently moot because PolyMet has not modified or withdrawn its permit application, there is a substantial risk of DNR issuing an advisory opinion on a purely legal issue given the substantial likelihood that PolyMet will implement material changes to the tailings basin design following its technical review. A stay is warranted in order to avoid the issuance of a purely advisory opinion.

I. You May Take Judicial Notice of PolyMet’s Consideration of Plans that Could Render the Bentonite Amendment Obsolete.

In arguing that judicial notice is inappropriate, PolyMet relies on Minn. Stat. § 14.60, subd. 2. That provision provides that “[n]o factual information or evidence shall be considered *in the determination of the case* unless it is part of the record.” Minn. Stat. § 14.60, subd. 2 (emphasis added). “Determination” is not defined by statute, but it is ordinarily defined as “a judicial decision settling and ending a controversy.”¹ Because a temporary stay of briefing

¹ “Determination,” *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/determination>; see also *In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 752 n.17 (Minn. 2021) (terms should be assigned ordinary dictionary definitions when not defined by statute).

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merely maintains the status quo without “settling and ending a controversy,” it does not constitute a “determination of the case.” Thus, the restriction that PolyMet identifies in Minn. Stat. § 14.60, subd. 2, does not apply to your decision whether to stay briefing pending completion of PolyMet’s technical review.²

Additionally, Minn. Stat. § 14.60, subd. 4, provides parties “an opportunity to contest the facts” of which an agency takes judicial notice. *See also* Minn. R. 1400.7300, subp. 4. Upon being granted such an opportunity by your September 6, 2024 letter, none of the parties contested the contents of the Press Release. To the contrary, PolyMet’s September 16, 2024 letter reaffirms the fundamental fact to be noticed—that PolyMet is performing an extensive technical review that may well result in material changes to the Project. Given that no party has contested this fact, judicial notice is appropriate.

Finally, PolyMet’s absolute approach—that the final agency decision maker can take no judicial notice of a public statement—leads to an absurd result if taken to its logical conclusion. Under PolyMet’s argument, if it had decided to terminate the Project but did not intend to withdraw its application because it might want to come back to the Project in the distant future, you would still be required to render a decision. Such a result is untenable.

II. PolyMet’s Statements in this Proceeding Further Underscore PolyMet’s Consideration of Plans that Could Render the Bentonite Amendment Obsolete.

The Hearing Team agrees with the Fond du Lac Band that the propriety of judicial notice has been rendered largely irrelevant in light of PolyMet’s statements in its September 16 letter to you. In that letter, PolyMet stated that it is conducting “four key studies” and that it “may propose changes, but it may not. What it does will depend on what its technical review shows.” PolyMet Letter at 3. Thus, even setting aside the statements in its Press Release, PolyMet’s record statements establish that it is conducting a technical review that may well result in significant changes to the Project.

PolyMet’s September 16 letter further states that this proceeding should continue regardless of potential changes to the Project because “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.” PolyMet Letter at 4. This statement indicates that PolyMet is seeking an advisory opinion from you on a purely legal matter, *i.e.* the meaning of the reactive mine waste rule, regardless of whether it proceeds with the factual plan at the heart of this proceeding—the bentonite amendment. No matter the potential value of such an advisory opinion, it is improper, as it conflicts with the very purpose of a contested case on a mining matter—to resolve a “material *issue of fact* in dispute.” Minn. Stat. § 93.483, subd. 3(a)(1)

² Even if the record restriction did apply, judicial decisions underscore the principle that an adjudicator may still consider non-record evidence “where the orderly administration of justice commends it.” *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 581 n.8 (Minn. 2021) (quotations omitted).

(emphasis added); *see also See Izaak Walton League of America Endowment, Inc. v. MDNR*, 252 N.W.2d 852, 854 (Minn. 1977) (“The existence of a justiciable controversy is prerequisite to adjudication. The judicial function does not comprehend the giving of advisory opinions.”).

III. Recent Developments Are Material to Your Reconsideration of the Decision in Your May 9, 2024 Letter.

Six months had passed between PolyMet’s February email to the Band and the Press Release in August. Despite that lengthy period, the Press Release shows that PolyMet still is no closer to proceeding with the plans set forth in the operative application. To the contrary, the Press Release indicates that PolyMet is even more firmly committed to reconsidering fundamental components of its Project, including how it will store tailings.

While PolyMet’s February email was directed to the Band and did not specify the particular studies PolyMet would be performing, the Press Release (the contents of which were reaffirmed by PolyMet’s September 16 letter on the record) constitutes a public commitment to perform “four key studies to assess whether new mining technology . . . can further enhance environmental safeguards and mining performance for our NorthMet Project.” The Press Release further specified the nature of PolyMet’s planned studies, which encompass “a variety of tailings storage options,” “water treatment technologies,” a potential increase in production, and carbon reduction measures.

The bentonite amendment is a feature of the application’s proposed tailings storage plan. Thus, changes to tailings storage could eliminate or alter the proposed bentonite amendment. Additionally, changes in “water treatment technologies” and production output could potentially impact the water quality modeling at issue in this case.³

In short, PolyMet’s Press Release and September 16 letter constitute clear, public evidence that PolyMet may soon make changes that would render this proceeding moot by removing the factual dispute over the effectiveness of the bentonite amendment, which was the sole reason for the current contested case hearing.

³ *See* OAH Official Record, OAH 60-2004-37824 PolyMet Official Record (“OAH Record”) at p. 14, FOF ¶ 21 (finding that bentonite’s “purpose is to reduce water and oxygen infiltration enough to meet the modeled values for hydraulic conductivity and percolation”); OAH Record at p. 24, FOF ¶ 93 (stating the values of hydraulic conductivity and percolation at which “water quality standards would be met”); OAH Record at p. 32, COL ¶ 15 (concluding that the “bentonite amendment is likely to achieve modeled values for hydraulic conductivity and percolation over time”).

IV. This Proceeding Should Be Stayed Pending a Decision from PolyMet Regarding its Technical Review.

While the Hearing Team agrees with Petitioners that you may, and should, consider PolyMet's plans to reevaluate core aspects of the Project, the Hearing Team disagrees with Petitioners' contention that this proceeding should be dismissed for lack of jurisdiction.⁴ Because PolyMet has not formally withdrawn its application for a permit to mine, jurisdiction lies. WaterLegacy's reliance on *Texas v. Biden*, 578 F. Supp. 3d 849 (S.D. Tex. 2022), is misplaced because the operator of the pipeline project there had publicly announced that the project was "terminated" and "dead," *id.* at 855, 857, such that the court lacked jurisdiction to adjudicate Texas' and other states' challenge to the President's prior revocation of a permit for the project. Here, by contrast, PolyMet has not even amended or withdrawn its application, let alone declared that the project is dead. Likewise, *Winona v. MPCA*, 449 N.W.2d 441 (Minn. 1990), is inapposite because there the agency was still in the process of preparing a supplemental environmental impact statement, such that a contested case hearing would be premature. Here, DNR is not currently in the process of conducting a formal environmental review for the NorthMet Project, so there is no agency process that needs to be completed before a contested case would be ripe.

All that said, given that PolyMet is seriously considering changes that could render this proceeding moot, it is prudent to issue a stay pending PolyMet's review and decision. A stay is a proper exercise of the agency's discretion over a briefing schedule to preserve the status quo. PolyMet points to *In re Surveillance & Integrity Review Section*, 996 N.W.2d 178 (Minn. 2023), for the proposition that you have only three choices: (i) accept the ALJ's recommendation; (ii) modify the ALJ's recommendation with an explanation of reasons; or (iii) reject the ALJ's recommendation with an explanation of reasons. However, because these restrictions apply to the final decision on the merits, they are inapplicable to a procedural decision whether to issue a temporary stay prior to the closing of the administrative record. Unlike the final decision, a decision to issue a stay prior to making a final agency decision is discretionary and has not been curtailed by any statute or judicial decision.

Your inherent authority to stay briefing is underscored by your previous orders in this case, including your September 6, 2024 order to stay merits briefing pending resolution of this very issue. Likewise, in your March 13, 2023 order, you stayed briefing pending resolution of the Band's request for dismissal. No party could reasonably contend that you lacked authority to stay briefing in those instances. Likewise, there is no support for the notion that you lack authority to stay briefing pending resolution of PolyMet's technical review. Indeed, none of the other parties have identified any authority supporting such a position. On the other side of the

⁴ The Commissioner-Designee lacks authority to deny the permit application outright, as the scope of this proceeding is limited to determining whether the proposed bentonite amendment is a practical and workable reclamation technique that will satisfy the reactive mine waste rule. OAH Record, at pp. 14352-53, Amended Notice and Order at ¶ 26.

ledger, courts have issued a stay of proceedings pending factual developments that could render the case moot. *See, e.g., Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 682 F. Supp. 1186, 1190 (N.D. Ala. 1988) (staying citizen suit under Clean Water Act against commercial plant, where case would likely be rendered moot by upcoming completion of plant's upgraded wastewater facility); *Williamsport v. United States*, 324 F. Supp. 369, 370 (M.D. Pa. 1971) (staying action pending railroad's contract decision that would render case moot).

The Hearing Team requests that this proceeding be stayed for a period of one year, which aligns with the Press Release's statement that the technical review will take place "over the next year." During the pendency of the stay, the Hearing Team requests that PolyMet submit status reports each quarter informing you and the parties of material updates to its technical review and expected impacts to the proposed bentonite amendment. If PolyMet makes a decision as to what, if any, changes it is making earlier than a year, it may be appropriate to lift the stay early. Once the stay is lifted, the parties should be given an opportunity to brief the issue of mootness. If this proceeding is not rendered moot, briefing on the parties' exceptions to the ALJ Report should be completed expeditiously.

Sincerely,

/s/ Jon W. Katchen

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