

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the NorthMet Project Permit
to Mine Application

**ORDER DENYING PETITIONERS'
MOTION TO NULLIFY OR VACATE THE
AMENDED NOTICE OF HEARING**

This matter is pending before Administrative Law Judge James E. LaFave upon a Joint Motion to Nullify or Vacate¹ (Joint Motion) the Amended Notice and Order for Hearing Conference and Hearing (Amended Notice) filed by the Minnesota Department of Natural Resources (Department or DNR). The record on the Joint Motion closed on March 29, 2022.

Jon W. Katchen and Bryson C. Smith, Holland & Hart, LLP, and Sherry Enzler General Counsel, represent the Department.

Monte A. Mills and Aaron P. Knoll, Greene Espel, PLLP, together with Jay C. Johnson and Kathryn A. Kusske Floyd, Venable, LLP, represent Poly Met Mining, Inc. (PolyMet).

Anne E. Cohen and Melissa Lorentz, The Minnesota Center for Environmental Advocacy (MECA), represent the Friends of the Boundary Waters Wilderness, Duluth for Clean Water, Center for Biological Diversity, Friends of the Cloquet Valley State Forest, Save Our Sky Blue Waters, and the Save Lake Superior Association (collectively, the Conservation Organizations).

Paula G. Maccabee, Just Change Law Offices, represents WaterLegacy.

Vanessa L. Ray-Hodge, Sonosky, Chambers, Sachse, Mielke & Brownell, LLP, and Sean Copeland, Legal Advisor, represent the Fond du Lac Band of Lake Superior Chippewa.

For the purposes of this order, the Conservation Organizations, WaterLegacy and the Fond du Lac Band of Lake Superior Chippewa will be referred to as the Petitioners.

¹ The Joint Motion is titled "Petitioner's Joint Memorandum in Support of Motion to Nullify or Vacate DNR's Purported Amended Order."

Based on all the files, records, and proceedings in this matter,

IT IS HEREBY ORDERED:

The Joint Motion is **DENIED**.

Dated: June 27, 2022


JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

I. Procedural Background

On January 11, 2022, the Conservation Organizations and the Fond du Lac Band of Lake Superior Chippewa filed a Motion Regarding Evidence of Dam Safety and a Motion Regarding Evidence of Integrated Controls. On January 11, 2022, WaterLegacy filed a Motion to Include Evidence of Tailing Dam Safety and a Motion to Include Evidence Related to Integrated Engineering Controls (collectively the Motions). PolyMet and the DNR responded to the Motions on January 24, 2022, and the Administrative Law Judge held a hearing on the Motions on January 31, 2022.

While the Motions were still under advisement, on February 14, 2022, the Department filed the Amended Notice. Petitioners filed a letter on February 18, 2022, objecting to the Amended Notice and requested briefing on three issues. On February 22, 2022, the Department filed the Declaration of Sherry Enzler, General Counsel of the Minnesota Department of Natural Resources (Enzler Declaration). The Enzler Declaration averred that Department Commissioner Sarah Strommen has appointed Grant Wilson as the agency decision-maker in this case. A copy of the delegation filed with the Minnesota Secretary of State was attached to the Enzler Declaration.²

On March 15, 2022, with the permission of the Administrative Law Judge, Petitioners filed the Joint Motion. The Department and PolyMet responded to the Joint Motion on March 29, 2022. The record on Petitioners' Joint Motion closed that day. Consideration of Petitioners' earlier motions regarding the scope of the hearing was stayed pending resolution of the Joint Motion.

² Enzler Declaration at Ex. A.

II. Issues Raised in the Joint Motion

Petitioners argue that the Department does not have the authority to issue the Amended Notice under the Minnesota Administrative Procedure Act (MAPA) and its implementing rules. In addition, Petitioners assert the Amended Notice conflicts with the decision of the Minnesota Supreme Court remanding this matter for further proceedings.³ On these grounds Petitioners request that the Administrative Law Judge vacate the Amended Notice or declare that it is null and has no effect. Petitioners also contend that the DNR issued the Amended Notice based on irregular procedures and ex parte contacts, and that Petitioners have been prejudiced because they incurred costs and spent time complying with the First and Second Prehearing Orders.

III. Analysis

A. The Department Had the Authority to Issue the Amended Notice

The Minnesota Supreme Court held the Department has the discretion to identify the issues and limit the scope of this contested case hearing.⁴ It necessarily follows that the Department also has the discretion to determine whether the notice of hearing should be amended.

Minn. Stat. § 14.58 (2020) broadly authorizes an agency's amendment of a notice of hearing. The statute states:

The notice shall state ... the issues involved, but if, by reason of the nature of the case, the issues cannot be fully stated in advance of hearing, **or if subsequent amendment is necessary**, they shall be stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto.⁵

The phrase "if subsequent amendment is necessary" is expansive and the determination as to whether to amend the issues identified for hearing rests within the discretion of the Commissioner

Minn. R. 1400.5600, subp. 5 (2021), provides further authority for an agency's amendment of a notice of hearing. The rule allows the agency to amend the notice of hearing, as a matter of right, "at any time prior to the start of the evidentiary hearing" provided that if new issues or allegations are raised, that "parties shall have a reasonable time to prepare and meet the new issues or allegations."⁶ The only time a judge must approve a proposed amendment to the issues occurs is if the agency seeks to amend after the start of the hearing.⁷

³ *In the Matter of the NorthMet Permit to Mine Application Dated December 2017*, 959 N.W.2d 731 (Minn. 2021).

⁴ *Id.* at 738 n.4; Minn. Stat. § 93.483, subp. 5 (2020).

⁵ Minn. Stat. § 14.58 (emphasis added).

⁶ Minn. R. 1400.5600, subp. 5.

⁷ *Id.*

Petitioners maintain that the issues in the original notice of hearing differ from those in the Amended Notice; Petitioners note that, at the first prehearing conference, the parties discussed filing motions to clarify the issues, and the Department did not object to the proposed motions. The Administrative Law Judge accepts as true that Petitioners spent time and resources preparing prehearing motions. The Department did not request that the motions be certified to the Commissioner, and those motions were pending as of the time the Amended Notice was filed.

Notwithstanding those circumstances, the law expressly provides that the Department may amend a notice of hearing prior to the time that the hearing begins. The Department was not required to provide Petitioners with advance warning that it intended to file the Amended Notice. Further, based on the procedural posture of this case, there will be ample time for Petitioners to review the Amended Notice and to prepare to address the issues now identified.

Petitioners argue the Department did not demonstrate there was anything about the “nature” of the case to support amending the issues or that amendment of the issues through the Amended Notice was “necessary.” They further maintain that the Department improperly filed the Amended Notice while the Motions were pending before the Administrative Law Judge, and the Amended Notice essentially decided the Motions. These arguments are unpersuasive.

By statute and rule, because the contested case hearing has not yet begun, the Department had the authority to amend the issues in the notice of hearing if it deemed it necessary to do so. There are no strictures on that discretion based on the pendency of particular matters within the case. Necessarily, a revision to the issues identified in a notice of hearing may cause a substantive shift of the matters to be decided. As a result, an administrative law judge may order a continuance of pending proceedings to allow the responding party time to prepare to address such new issues. The fact that motions are pending and under advisement, however, does not prevent an agency from amending the notice.

B. The Department Did Not Follow Irregular Procedures or Engage in Improper Ex Parte Contacts in Connection with the Amended Notice

There is no basis upon which to conclude that the Department’s decision to file the Amended Notice resulted from inappropriate ex parte contacts or resulted from irregular procedures. The Department’s letter of February 14, 2022, which accompanied the filing of the Amended Notice, explains “run-of-the-mill” discussions that any attorney representing an agency might have during a contested case proceeding. Moreover, the Enzler Declaration puts to rest any concerns regarding who will act as the agency decision-maker in this case.

Petitioners have not shown that the Department failed to comply with statute or rule in connection with the Amended Notice. Further, neither authority governing amendment of a notice of hearing contemplates an examination of an agency’s internal

decision-making process, or that the Administrative Law Judge may disallow an amendment prior to the hearing based on such a process. Petitioners, therefore, are not entitled to the extraordinary remedy they seek.

C. The Petitioners are Not Unfairly Prejudiced

Prejudice is “damage or detriment to one’s legal rights or claims.”⁸ In the context of an amendment to a notice and order for hearing “prejudice” is the lack of time to respond to the new issues or allegations.⁹

The Department filed its Amended Notice early in the proceedings. To-date, no hearing dates have been set and a discovery schedule has not been ordered. Petitioners spent time and resources preparing and responding to motions. That is the nature of litigating a contested case proceeding and does not evidence unfair prejudice for Petitioners. Further, as contemplated by Minn. R. 1400.5600, subp. 5, Petitioners will have ample time to address the allegations and issues set forth in the Amended Notice. Petitioners, therefore, have not been prejudiced and the relief they request is not warranted.

IV. Conclusion

Based on the foregoing, Petitioners’ Joint Motion is **DENIED**. This matter will be set on for a prehearing conference pursuant to a subsequent order that will issue shortly.

J. E. L.

⁸ Black’s Law Dictionary 1299 (9th ed. 2009).

⁹ See Minn. Stat. 14.58, Minn. R. 1400.5600, subp. 5.