

JUST CHANGE LAW OFFICES

PAULA G. MACCABEE, ESQ.

1961 SELBY AVE., ST. PAUL, MINNESOTA 55104, PMACCABEE@JUSTCHANGELAW.COM

OFF: 651-646-8890, CELL 651-775-7128

April 9, 2024

Commissioner-Designee Grant Wilson
Central Region Director
Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155

SENT VIA EMAIL

RE: NorthMet Project Permit to Mine Application, OAH 60-2004-37824

Dear Commissioner-Designee Wilson:

This letter is written on behalf of WaterLegacy, petitioner in the above-captioned matter, in response to the Commissioner-Designee's letter order dated March 19, 2024, directing that WaterLegacy and the Conservation Organizations submit written responses to letters from the Fond du Lac Band of Lake Superior Chippewa (the "Band") on March 11, 2024 ("Band Letter"); from counsel for NewRange Copper Nickel LLC ("NewRange") on March 26, 2024 ("NewRange Letter"); and from the Minnesota Department of Natural Resources department advocates on April 2, 2024 ("DNR Advocates Letter"). WaterLegacy appreciates the opportunity to respond to this correspondence and agrees with the Band that the Commissioner-Designee should deny the PolyMet permit to mine application.

Summary of Correspondence and WaterLegacy Request

The Band's March 11, 2024 letter disclosed that the Tribal Relations Advisor for NewRange¹ had sent an email to the Fond du Lac, Grand Portage, and Bois Forte Bands of Lake Superior Chippewa on February 14, 2024. In this email, NewRange stated that the company had "taken the opportunity to look at all aspects of the project to ensure we are still doing the project in the best way it can be done," that "[o]ne of the areas we are potentially looking at changing is the tailings management facility² (TMF)," that "global

¹ The parties and the Administrative Law Judge ("ALJ") agreed during the contested case hearings to refer to the various entities and ownership interests comprising NewRange as "PolyMet." ALJ Report and Recommendation ("ALJ R. & R.") at 1, n.1, OAH Official Record, OAH 60-2004-37824 PolyMet Official Record ("OAH Offic. R.") at p. 7. However, new representations made by NewRange on February 14, 2024, and this process responding to those representations are outside the scope of this understanding. To reduce confusion, WaterLegacy refers to the entity making these representations as "NewRange."

² The term "tailings management facility" or "TMF" is not used in PolyMet's Permit to Mine Application. Ex. 210. This term may refer to NorthMet flotation tailings management or the combined storage of both legacy LTV tailings and NorthMet flotation tailings.

standards have changed since its [the TMF's] initial design," that "there is a good chance we will propose some changes," and that these "potential changes might affect" current litigation regarding the TMF. The NewRange email also represented that NewRange would "share this same update this week with the DNR."

The Band requested that the DNR "vacate the schedule for submitting objections and arguments" and require PolyMet "to confirm whether it will construct the proposed bentonite amendment" to meet the specifications described in the permit to mine application. Band Letter at 3. The Band further proposed that "[i]f PolyMet cannot confirm it will construct the proposed amendment to meet the specifications described in the permit to mine application, DNR should deny the application and require PolyMet to submit a new application whenever it develops a new design for the FTB (or the TMF)." *Id.* at 3-4.

In its response, NewRange admitted that its February 14, 2024 email stated "there is a good chance [NewRange] will propose some changes" to the tailings facility, but denied that this email demonstrated that NewRange has "'abandoned' the tailings basin design that was reviewed in the contested case hearing." NewRange Letter at 1. NewRange counsel confirmed that "global standards have changed," and that NewRange management is looking at "all aspects of the project." *Id.* Rather than confirming that New Range will construct the bentonite amendment proposed in PolyMet's permit to mine application, counsel stated that whether NewRange proposes changes to the tailings basin design "will depend on the outcome of a thorough technical review that is still in its infancy," that it is "impossible to know until the review is over" what changes will be recommended, and that the review is not expected to be completed "for many months and potentially more than a year." New Range Letter at 2. New Range stated that "it remains important for everyone to know" the Commissioner-Designee's decision and requested that the exceptions process and decision resume. *Id.*

New Range counsel also argued that evidence in its own email and its own letter was outside the scope of the "record" under Minn. Stat. §§ 14.61 and 14.62. Thus, "Nothing in the contested case record shows that NewRange has abandoned its plans for the bentonite amendment." New Range Letter at 2-3. Counsel further asserted that the Commissioner-Designee's authority was limited by the DNR advocate's contested case hearing order and the scope of the ALJ's report. *Id.* at 3.

DNR department advocates, in turn, admitted that "the February 14, 2024 email. . . which the Band attached to its March 11, 2024 letter to the Commissioner-Designee, is consistent with what PolyMet told DNR in a meeting on the same day" and that there was "uncertainty [] whether PolyMet intends to proceed with the bentonite amendment." DNR Advocates Letter at 1-2. DNR department advocates proposed that the Commissioner-Designee "stay this proceeding for nine months or, if PolyMet proceeds with a new design

for the tailings basin, until PolyMet files an application for an amended permit to mine.” *Id.* at 1. DNR advocates then proposed that NewRange control the duration of the stay, which would be ended at any time if New Range submitted a letter stating it intended to construct and operate the tailings facility “including use of the proposed bentonite amendment, as described in Version 3.1 of PolyMet’s application for a permit to mine.” *Id.* at 1.

WaterLegacy requests that the Commissioner-Designee deny PolyMet’s permit to mine application on the following grounds: 1) whether or not NewRange will construct the bentonite amendment proposed in that application is uncertain and any decisions on the merits of the bentonite amendment would be purely advisory; 2) the Commissioner-Designee has authority to ensure that no further proceedings bypass the court’s ruling that DNR’s contested case hearing determine whether the bentonite amendment *as proposed in the permit application* will satisfy Minn. R. 6132.2200, subp.2(B)(2); and 3) PolyMet’s permit to mine application cannot be assigned to NewRange, and NewRange must submit a new application if it intends to proceed with the NorthMet mine project.

I. This Proceeding Should be Dismissed and PolyMet’s Application Denied Since NewRange Has Not Confirmed It Will Construct the Bentonite Amendment.

Whether or not NewRange admits that it has “abandoned” the bentonite amendment, it has done so in fact. It is undisputed that the New Range management team is now reevaluating the NorthMet project, that it has concluded “global standards have changed” since the tailings management facility was designed, that “there is a good chance” NewRange will propose changes to the tailings management facility, that potential changes might affect current litigation, and that “it is “impossible to know” for “potentially more than a year” whether NewRange will proceed with the bentonite amendment. These facts—contained in an email written by NewRange, the authenticity and content of which has been confirmed by its counsel, and in a letter written by its counsel—demonstrate that contested case proceedings on the bentonite amendment proposed in PolyMet’s application are moot.

If “an event occurs which makes a decision on the merits unnecessary or an award of effective relief impossible” while review is pending, the case should be dismissed as moot. *In re Inspection of Minn. Auto Specialties, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984); *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1977). The mootness doctrine “implies a comparison between the relief demanded and the circumstances of the case at the time of the decision to determine whether there is a live controversy that can be resolved.” *Id.* Generally, a matter “should be dismissed as moot when a decision on the merits is no longer necessary or an award of effective relief is no longer possible.” *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015). In these proceedings, PolyMet would not commit to construct the bentonite amendment proposed in its application, *infra* at 6; NewRange has now stated “there is a good chance” NorthMet tailings storage will change; and New Range

has no permit to mine application before the DNR. A decision on the proposed bentonite amendment would resolve only a theoretical dispute.

In addition, no exception to mootness applies. If any future mine project might propose a bentonite amendment despite current global standards, DNR approval would be required and time for judicial review afforded, so “this dispute is not capable of repetition, yet evading review.” *Dean*, 868 N.W.2d at 6. The assertion by NewRange counsel that “it remains important for everyone to know” the Commissioner-Designee’s decision, NewRange Letter at 2, is merely a request for an advisory opinion.

Moreover, to the extent that NewRange counsel seek to exclude its own written statements as outside the “record,” NewRange Letter at 3, the Commissioner-Designee should reject this sophistry. The record before the Commissioner-Designee does not close until the parties have filed their briefs and exceptions. Minn. Stat. § 14.61, subd. 2. The Commissioner-Designee is necessarily authorized to consider information not contained in the ALJ’s report, including information that may moot this proceeding. To do otherwise would require the parties to needlessly incur further fees and expenses that are not substantially justified. Minn. Stat. § 14.62, subd. 3.

II. The Commissioner-Designee Has Authority to Ensure No Further Proceedings Bypass the Court’s Direction on the Contested Case Hearing Issue.

WaterLegacy respectfully submits that this contested case hearing process has bypassed the commissioner’s delegation and the direction given by the Minnesota Supreme Court³ that “a contested case hearing is required to determine whether the bentonite amendment, *as proposed in the permit application*, is a ‘practical and workable’ reclamation technique *that will satisfy* the DNR’s reactive waste rule, Minn. R. 6132.2200, subp. 2(B)(2).” *In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 754 (Minn. 2021) (emphasis added).

The Commissioner-Designee has the authority and responsibility to ensure that further proceedings, if any, do not continue this flawed process. In a contested case, the

³ WaterLegacy reserves all rights to assert claims regarding flaws in the contested case process as well as to take exception to errors in the ALJ’s findings of fact on the “five specific factual disputes” selected by DNR department advocates and the ALJ’s omission of pertinent facts demonstrating that PolyMet’s bentonite amendment will not satisfy the Reactive Mine Waste Rule, Minn. R. 6132.2200, subp. 2(B)(2).

“agency decision-maker is required to consider all of the evidence presented and come to an independent reasoned decision rather than defer to the testimony of agency advocates.” *In re Excess Surplus Status of Blue Cross and Blue Shield of Minn.*, 624 N.W.2d 264, 266 (Minn. 2001). Where the “commissioner has reserved for the agency decision-maker the authority to issue the final findings of fact, conclusions of law and order” along with authority to make the final decision regarding other items, the department participates only “as an advocate in the matter.” *Id.* at 269. The delegated decision-maker “is presumed to have the expertise necessary to decide technical matters within the scope of the agency’s authority,” and “owes no deference” to any party, including department advocates. *Id.* at 278. Here, the Commissioner-Designee owes no deference to DNR department advocates either on the merits of this case or regarding its current and future procedural posture.

Commissioner Sarah Strommen’s Notice of Appointment on September 28, 2020, stated that “Grant Wilson shall exercise *all authority* delegated to the commissioner as the final agency decision maker in this matter as required by Minnesota Statute §§14.57–14.62.” OAH Offic. R. at p.14304 (emphasis added). Despite this delegation, DNR department advocates involved in granting and litigating the NorthMet permit issued the original Notice and Order for Hearing (“Notice”) on September 24, 2021, and an Amended Notice on February 14, 2022. OAH Offic. R. at pp. 14964-73, 14345-54. Authority to initiate a contested case proceeding when one is required by law is provided in Minn. Stat. § 14.57, and authority to amend the notice “if subsequent amendment of the issues is necessary” is provided in Minn. Stat. § 14.58. Although DNR department advocates asserted otherwise, *see* OAH Offic. R. at p.14090, actions under both of these statutory sections were within the scope of “all authority” expressly delegated by Commissioner Strommen in 2020.

General Counsel Sherry Enzler asserted that DNR department advocates issued the Notice and Amended Notice because the Commissioner-Designee and Senior Attorney Robert Cary “are behind a wall and know nothing about the NorthMet Project,” thus lack “the knowledge necessary to draft a Notice of Hearing in this matter.” Enzler Decl., Feb. 22, 2022, at ¶18, OAH Offic. R. at p. 14300. Perhaps due to this “knowledge” of DNR’s department advocates, the Notice and Amended Notice deviated from the court’s direction in *NorthMet*. The first Notice omitted the requirement that the hearing be cabined to the bentonite amendment “as proposed in the permit application.” Notice ¶ 26, OAH Offic. R. at p. 14972. The Notice then modified the court’s direction and stated that the bentonite amendment will “in conjunction with other engineering controls, collection and treatment, monitoring, and inspection requirements set forth in the Permit to Mine issued November 1, 2018, reduce oxygen and water infiltration” and satisfy the reactive mine waste rule. *Id.* When Petitioners, with the ALJ’s authorization, moved to provide evidence on the

inefficacy of “other engineering controls” on which DNR proposed to rely,⁴ department advocates promptly acted to issue an Amended Notice that removed the reference to “other engineering controls.” Letter of General Counsel Enzler, OAH Offic. R. at pp. 14342-44.

This Amended Notice again omitted the requirement that the hearing be bounded by the bentonite amendment “as proposed in the permit application” and again added language implying that to “reduce infiltration of oxygen and water into the stored tailings” would satisfy the reactive mine waste rule. Amended Notice ¶26, OAH Offic. R. at p. 14352. The Amended Notice also asserted that satisfying the reactive mine waste rule encompasses “five specific fact disputes,” none of which reflected requirements in the text of Minn. R. 6132.2200, subp. 2(B)(2). Amended Notice ¶ 26, OAH Offic. R. at p. 14353. Petitioners’ objected to and moved to vacate the Amended Notice. OAH Offic. R. at pp. 14123-50. However, the ALJ deferred to DNR department advocates and denied Petitioners’ motion to vacate the Amended Notice on June 27, 2022. OAH Offic. R. at pp. 14075-79. The ALJ then denied Petitioners’ motions to include evidence of seepage collection and other controls on July 29, 2022. OAH Offic. R. at pp. 14056-63.

In requests for admissions and discovery to DNR and PolyMet, Petitioners sought to limit the scope of the contested case, as the *NorthMet* case had directed, to the bentonite amendment “as proposed in the permit application.” Pet’rs’ Mem. Supporting Mot. for Summ. Disposition, Jan. 4, 2023 (“Pet’rs’ Mem.”), OAH Offic. R. at p. 13446-13465. Both DNR and PolyMet denied that the contested case was limited to the bentonite amendment described in PolyMet’s application. *Id.* at 13450-52; Decl. and Exhibits 1-13, OAH Offic. R. at 13470-13892. PolyMet also denied a request that it admit it did not “seek to change the Permit Application with regard to the bentonite amendments.” Pet’rs’ Mem., OAH Offic. R. at p. 13451; PolyMet Resp. No. 4, OAH Offic. R. at p.13479. Based on these discovery responses Petitioners requested summary disposition since—with respect to the bentonite amendment plan—PolyMet’s application was indeterminate, rather than a “completed application” that would support a contested case hearing process under Minn. Stat. § 93.483, subd. 1, subd. 3. Pet’rs’ Mem., OAH Offic. R. at pp. 13457-58. The ALJ issued no order and made no findings addressing Petitioners’ motion.

The Commissioner-Designee has full authority to ensure that further proceedings are within the scope of the *NorthMet* ruling and the DNR’s legal authority. Exercise of that authority supports denying that DNR has jurisdiction to approve PolyMet’s application.

⁴ Petitioners’ motions regarding Engineering Controls, Jan. 11, 2022 are available in the OAH Offic. R. at pp. 14558-84 and 14662-95. Expert reports and exhibits submitted with these motions are on the Petitioners Exhibits flash drive.

III. PolyMet's Application Should Be Denied Since DNR Lacks Authority to Assign the Application to NewRange or Issue a Permit on PolyMet's Application.

Further proceedings on PolyMet's permit application should also be dismissed since DNR lacks authority either to assign a permit application or to reissue the NorthMet permit to mine based on PolyMet's application. On April 28, 2021, the court reversed and remanded the DNR's issuance of the NorthMet permit to mine due to a lack of substantial evidence to deny a contested case hearing regarding the bentonite amendment and an error in failing to provide a definite permit term. *NorthMet*, 959 N.W.2d at 738, 754, 757. Since then, PolyMet has had no permit to mine, namely no "legal approval" to "conduct a mining operation." Minn. R. 6132.0100, subp. 24.

Counsel for NewRange asserted in March 2023, shortly before the contested case hearing, that Poly Met Mining Inc. had been "converted" to NewRange under Minn. Stat. § 302A.691, subd. 2(3), and that "NewRange plans to continue with this case under its new name." OAH Offic. R. at p. 8026. NewRange is a 50-50 joint venture of PolyMet US, Inc., a Delaware corporation formed in 2022, and Teck American, Inc. ("Teck"). See ALJ R. & R. at p.1, n. 1, OAH Offic. R. at p.7. In a pre-hearing conference, DNR advocates' counsel cautioned that "we don't believe the conversion statute allows NewRange to automatically step into PolyMet Mining's corporate shoes and become a party to the permit to mine, the permit to mine application." OAH Tr., Tr. of 03-17-23 Pre-Hr'g Conf. FullSize at p.8:10-13. Counsel further stated that the conversion statute, Minn. Stat. § 302A.691, subd. 2, "only applies to assets, property contracts, and liabilities" and "a permit to mine application, is none of these." *Id.* at p.8:14-17. PolyMet has a permit to mine application, but it has no permit to mine to construct the NorthMet project.

Minnesota statutes and rules allow the commissioner to approve assignment of a permit to mine under certain conditions. Minn. Stat. § 93.481, subd. 5 (assignment of a permit requires written approval of the commissioner and payment of a fee); Minn. R. 6132.4700 (a permit can be assigned only if the commissioner determines that the assignee will perform all legal obligations of law and the "permit to mine"). However, neither Minnesota statutes nor Minnesota rules provide DNR with express or implied authority to approve the assignment of a permit to mine application. *In re Hubbard*, 778 N.W.2d 313, 318, 321 (Minn. 2010) ("Administrative agencies are creatures of statute and they have only those powers given to them by the legislature," and where "statutes at issue do not unambiguously grant authority for the DNR" we hold that "the DNR did not have express authority."). The DNR also lacks "evident" implied statutory authority. *Id.* at 325; *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005) ("[n]either an agency nor the courts may enlarge the agency's powers beyond that which was contemplated by the legislative body").

The DNR also can no longer issue a NorthMet permit to mine based on PolyMet's 2017 application. Minnesota Rules require that "[w]hen two or more persons are or will be engaged in a mining operation, all persons shall join in the application." Minn. R. 6132.0300, subp. 2. A "person" means "a firm, partnership, corporation, joint venture, or other legal entity." Minn. R. 6132.0100, subp. 25. The NorthMet permit to mine application did not join PolyMet US, Inc. or Glencore, which is now the sole owner and parent company of PolyMet Mining Corp,⁵ and did not join NewRange, Teck American—PolyMet's 50-50 joint venture partner in NewRange—or any owner of Teck American. Exhibit 210 at p. 23, R.0065337 In fact, PolyMet's application expressly represented that other than Glencore's 29.1% ownership, PolyMet "does not have any partners, joint venture relationships, owners, other principal stockholders . . . managing agents, or subsidiaries involved in mining operations, or joint applicants." *Id.* at 24, R.0065338.

PolyMet's application no longer supports issuance of a NorthMet permit under Minnesota nonferrous mining rules. Should NewRange seek a permit to mine for the NorthMet project, it must submit a new permit to mine application joining all necessary parties irrespective of the method it selects to store tailings wastes. Continuing this advisory process before the Commissioner-Designee is unsupported and unjustified, since the PolyMet application for a NorthMet permit to mine cannot be granted.

Conclusion

For the foregoing reasons, WaterLegacy respectfully requests that the Commissioner-Designee dismiss these proceedings and deny PolyMet's permit to mine application.

Respectfully submitted,

/s/ Paula G. Maccabee

Paula G. Maccabee

Just Change Law Offices

1961 Selby Avenue

Saint Paul, Minnesota 55104

pmaccabee@justchangelaw.com

ATTORNEY FOR WATERLEGACY

⁵ The Commissioner-Designee can take notice of the undisputed fact verified by PolyMet, Glencore, and NewRange that since Nov. 7, 2023, PolyMet is a wholly-owned subsidiary of Glencore. See <https://polymetmining.com/investors/news/glencore-completes-acquisition-of-polymet/>, last visited Apr. 8, 2024.

WaterLegacy Response Letter

April 9, 2024

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cc. By Electronic Mail:

Robert Cary, Minnesota DNR
Counsel for Commissioner-Designee

Sherry A. Enzler, Minnesota DNR
Jonathan W. Katchen and Bryson C. Smith, Holland & Hart
Counsel for DNR Department Advocates

Monte A. Mills, Aaron P. Knoll, Farah N. Famouri, and Davida S. Williams, Greene Espel
PLLP
Jay C. Johnson and Kathryn A. Kusske Floyd, Venable LLP
Counsel for PolyMet and NewRange

Sean Copeland, Ian R. Young, Fond du Lac Band of Lake Superior Chippewa
Vanessa L. Ray-Hodge and Frank S. Holleman, Sonosky, Chambers, Sachse, Endreson &
Perry, LLP
Counsel for Fond du Lac Band of Lake Superior Chippewa

Melissa Lorentz, Joy Anderson, Heidi Guenther, Minnesota Center for Environmental
Advocacy
Counsel for Conservation Organization