

March 26, 2024

t 202.344.4698
JCJohnson@Venable.com

Grant Wilson
Commissioner-Designee
Minnesota Department of Natural
Resources
500 Lafayette Road
St. Paul, MN 55155
grant.wilson@state.mn.us

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

Dear Commissioner-Designee:

In a letter dated March 11, 2024, counsel for the Fond du Lac Band asked you to vacate the schedule for filing exceptions to the Administrative Law Judge's decision. You then set a schedule for responding to the Band's request. This letter explains why Poly Met Mining, Inc.—now known as NewRange Copper Nickel LLC—thinks that the Band's request should be denied and the exceptions process should move forward.

The Band's request rests on the premise that NewRange "has abandoned its current design for the" tailings basin. Band Letter at 3. That premise is incorrect.

To support its argument, the Band points to a February 14 outreach email from NewRange's Tribal Relations Advisor. That email does not say that the design of the tailings basin will change; it says that NewRange is "potentially looking at changing" the design and that "there is a good chance [NewRange] will propose some changes." Those statements, on their face, do not support the Band's claim that NewRange has "abandoned" the tailings basin design that was reviewed in the contested case hearing.

It is true that "global standards have changed" since the NorthMet project permit to mine issued more than five years ago. Indeed, global standards are always evolving, and NewRange wants to be sure it keeps meeting them. That is why the NewRange management team is looking at "all aspects of the project." But that does

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not mean—and the February 14 email does not say—that the NorthMet project as designed falls short of any standards or that any changes are necessary.

Whether NewRange ultimately proposes any changes to the tailings basin design will depend on the outcome of a thorough technical review that is still in its infancy. That review may recommend no changes to the basin at all. Or it may recommend changes that are irrelevant to the issues in the contested case hearing. It is impossible to know until the review is over, and NewRange does not expect that to happen for many months and potentially more than a year. If NewRange wants to propose changes then, and it prevails here, it would go through the appropriate permit amendment process.

NewRange told the Minnesota Chippewa Bands about its planned technical review because it sees them as key stakeholders and wants to listen to them. It is trying to involve them as its technical review starts so it can consider and address their concerns, which may or may not result in project design changes that implicate the issues in the contested case. Unfortunately, the Fond du Lac Band chose to use NewRange's outreach a month later as an exhibit to its current request. Holding that outreach against NewRange would make it harder to engage the Chippewa Bands in good faith, which remains one of NewRange's top goals.

The bottom line is that NewRange has not “abandoned” the bentonite amendment that is the subject of the contested case hearing. Indeed, it remains important for everyone to know the Commissioner-designee's decisions on the ALJ's factual findings and novel interpretation of the reactive mine waste rule. The requirements of the reactive mine waste rule are particularly critical because they would implicate not only the current design but likely any other design that NewRange or anyone else might propose. NewRange thus asks that the Commissioner-designee resume the exceptions process and proceed to a final decision in this contested case under Minnesota Statutes sections 14.61–14.63.

Separately, the Fond du Lac Band argues at the end of its letter that the Commissioner-designee should deny NewRange's entire permit to mine application unless NewRange can “confirm” that it will build the “proposed bentonite amendment.” For at least two reasons, such relief is beyond the Commissioner designee's authority.

First, the Band's request relies on extra-record evidence. Section 14.61 allows parties to file exceptions to the ALJ's report. It does not allow them to introduce

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new evidence like the email attached to the Band's letter. Section 14.62 similarly says that the decision in a contested case must be "based on the record." Nothing in the contested case record shows that NewRange has abandoned its plans for the bentonite amendment.

Second, the Band's requested relief is not authorized by the applicable statutes. Under Minnesota Statutes section 93.483, subdivision 5, the issues in the contested case—and thus the Commissioner-designee's authority—were limited by DNR's hearing order. The ALJ's statutory role was to "make a report" on those issues. Minn. Stat. § 14.50. That report must be given to the parties, who can file "exceptions" to it. Minn. Stat. § 14.61, subd. 1. Those exceptions to the ALJ's report should now be presented to the Commissioner-designee so he can make a final decision. *Id.* It would thwart this statutory scheme to deny NewRange's entire permit application for reasons that are (1) outside the scope of DNR's order, (2) not discussed in the ALJ's report, and (3) not properly part of any exceptions to the ALJ's report.

For all these reasons, NewRange asks that the Commissioner-designee set a new schedule for timely submission of exceptions to the ALJ's order that will lead to a final decision in the contested case.

Sincerely,



Jay C. Johnson

cc: Counsel of Record