

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Other Civil

 Northeastern Minnesotans for Wilderness,

Court File No. 62-CV-20-3838

Plaintiff,

The Honorable Patrick Diamond

v.

 Minnesota Department of Natural Resources
 and Sarah Strommen, in her capacity as
 Commissioner of the Minnesota Department
 of Natural Resources,

**DNR’S MOTION FOR AN EXTENSION
 OF TIME TO RESPOND TO PUBLIC
 COMMENTS AND ISSUE ITS ORDER**

Defendants,

Twin Metals Minnesota LLC

Intervenor.

The Minnesota Department of Natural Resources (“DNR”) is currently engaged in an administrative review of the adequacy of its non-ferrous mining rules to protect the Boundary Waters Canoe Area Wilderness (“BWCAW”) as a result of the filing of this case, and an agreement reached between the DNR and the plaintiff Northeastern Minnesotans for Wilderness (“Plaintiff”) for that remand. The order remanding the matter to DNR (“Remand Order”) includes a deadline for DNR to make an initial decision on the adequacy of the rules by September 12. Despite diligent efforts, DNR cannot meet that deadline, and seeks relief from this Court.

DNR respectfully requests an extension until May 31, 2023 to issue its initial order. The extension is merited by DNR’s need to review the over 4,000 comments it received, finish consulting with experts, including the Minnesota Pollution Control Agency (“MPCA”), on issues outside the area of DNR’s expertise including air quality regulation, and complete technical review

necessary for the issuance of its order. The extension will serve the public interest in allowing the DNR to fully consider the thousands of public comments, which were detailed and highly technical, and to adequately prepare an appropriate order as well as to assess whether there is important technical literature known to DNR or MPCA technical experts that was not provided in the public comments.

Nor is there any harm to the parties in granting the extension. While the issue in this case concerns the adequacy of DNR's non-ferrous mining rules, not any specific project, Twin Metals Minnesota LLC ("Twin Metals") intervened because of the potential impact on its proposed mining project. However, Twin Metal's proposed project cannot proceed without environmental review, and environmental review was stopped in February 2022 after the Department of the Interior canceled two of Twin Metal's federal mineral leases. Moreover, neither the Plaintiff nor Twin Metals objects to an extension; they simply would prefer the extension be shorter. The DNR has been diligently working on its administrative review and analysis but needs the requested amount of time to fully address the issues discussed in more detail in the declaration of DNR's Assistant Commissioner Jess Richards submitted with this motion.

FACTS

In June 2020, Plaintiff filed this action alleging that DNR's rules for non-ferrous mining were insufficiently protective of the BWCAW. (Dkt. 3.) Plaintiff argues that DNR's rules do not create a sufficiently large buffer around the BWCAW, and that the buffer should be expanded. (*Id.*) On September 13, 2021, following multiple delays, this Court entered a remand order (Remand Order) requiring the DNR to issue a procedural order establishing a public comment process concerning the adequacy of the siting provisions of Minn. R. 6132.2000 and related rules to protect the Boundary Waters and the Rainy River Headwaters. (Dkt. 65.) The Remand Order also required that within one year, by September 12, 2022, the DNR should issue an order and

findings of fact (“Initial Order”) regarding whether the related rules were inadequate to protect the Boundary Waters and the Rainy River Headwaters after having considered any information submitted during the public comment period, evidence submitted by the parties, and any additional information available to the DNR. (*Id.*)

On November 9, 2021, the DNR opened a public comment period on the challenged rules that lasted until December 8, 2021. (Declaration of Jess Richards dated July 19, 2022 (“Richards Decl.”) at ¶ 3.)

DNR received over 4,000 public comments during the comment period. (Richards Decl. at ¶ 4.) In addition to the sheer number of comments, DNR received highly detailed comments, with voluminous attachments, many of which contain highly technical information. (*Id.* at ¶ 10.) For months, DNR staff have been meeting weekly to identify and commence the work needed to inform the agency decision and to issue a findings of fact and order including but not limited to: analyzing the comments, technical data, and journal articles; identifying other new scientific documents and major changes (including recent US Forest Service documents) related to nonferrous mining that should be analyzed and considered in the DNR’s analysis; identifying and preparing memos on the legal issues presented by the remand; establishing a common understanding of the task before the DNR and the scope of the DNR analysis; and identifying and, in some cases, retaining the necessary technical experts to assist the DNR in its analysis. (*Id.* at ¶ 6.). While the DNR has commenced this work there is much more to be done.

Because of the magnitude of work before the DNR in this matter, it became apparent that DNR did not have sufficient in-house staff to complete the work required to fully analyze the data before it, make a recommendation to leadership based on this analysis, and ultimately to make a decision on the adequacy of the rule. (*Id.* at ¶ 10.) If DNR were to do this work without outside

assistance, DNR would have been unable to do most of its ongoing mineral work for the pendency of the analysis. (*Id.*) DNR was not able to re-direct its entire Lands and Minerals Division technical staff to this project. (*Id.*) DNR leadership, therefore, determined that it was necessary to obtain a private contractor to assist with this project. (*Id.*) Although the state procurement process for outside vendors is a time consuming process that can take months to complete, DNR staff diligently developed a request for offer in order to obtain a contractor and successfully signed a contract to obtain assistance in this matter. (*Id.*)

In addition to hiring an outside firm to assist the DNR with the analysis of the data before it, the DNR has also been meeting and working with another state agency, the MPCA, to receive technical assistance on areas outside the DNR's area of expertise, such as the state and federal air quality regulations as they may affect the issue before the DNR. (*Id.* at ¶¶ 7, 17.) Based on its consultation with the MPCA, it is probable that DNR will need to locate additional experts in order to make an informed decision. (*Id.* at ¶ 17.) If those experts are not state employees, this will require another contracting process. (*Id.* at ¶ 10.)

DNR estimates that it should be able to complete its analysis of public comments, other technical data, and make a recommendation to agency leadership between December 2022 and January 2023. (*Id.* at ¶¶ 18-19.) Following that analysis, DNR staff will need to brief agency leadership, who will then need to consult and make a final determination. (*Id.* at 20.) DNR staff and leadership will then work with legal counsel to prepare the final agency decision, including completion of a comprehensive findings of fact, conclusions of law, and order by May 31, 2023. (*Id.*)

On July 19, 2022, DNR informed Plaintiff and Twin Metals that the DNR would need an extension until May 31, 2023 and asked if they had any objection. Plaintiff stated that it did not

object to an extension but would only agree to six months. Similarly, Twin Metals did not object to an extension but would only agree to three months. DNR needs a little over nine months to complete all the work discussed above and outlined in more detail in the declaration of its Assistant Commissioner Jess Richards. DNR, therefore, brought this motion.

ARGUMENT

Trial courts have broad discretion to modify and extend their own orders. Minn. R. Civ. Pro. 6.02 (“When...by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may...order the period enlarged”); *Lake Superior Cntr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 471 (Minn. Ct. App. 2006) (“The district court's extension of a time limit under Rule 6.02 is discretionary and will not be reversed absent an abuse of that discretion.”); *Shackman v. Cathedral High School*, No. A04-2435, 2005 WL 2077372, *2 (Minn. Ct. App. Aug. 30, 2005) (same); *see also Buck Blacktop, Inc. v. Gary Contracting & Trucking Co., LLC*, 929 N.W.2d 12, 20 (Minn. Ct. App. 2019). The DNR’s declaration shows there is cause to extend the one year timeline originally set in the Court’s Remand Order.

Extending the Remand Order will serve the public interest. The issues involved in this matter are significant and the public responded by submitting thousands of comments during the public comment period. Many comments were highly detailed and technical, including scientific journal articles and other documents to support the commenter’s position. All of the comments deserve and have required significant time to review properly. At the time the Court set its initial deadline of one year, neither the Court nor the parties had the benefit of knowing the number, extent or type of comments that would be submitted. Additionally, and because of the importance of this issue to the State, DNR does not believe it should base its decision solely on public comments but that it should also assess whether there is other relevant technical data known to the

DNR that might not be included or attached to the comments. DNR's declaration shows the extensive amount of work that it has already completed and the magnitude of work remaining. Moreover, after the public comment period closed, both parties have continued to provide information that they wish to DNR to review and consider in issuing its order. In sum, given the magnitude of data before the agency and the complexity of the issue it is in the best interest of the State that the DNR has the time to make a thoughtful, science-based decision.

Nor will any party be harmed by extending the Remand Order. Twin Metals' apparent reason for a more expeditious review is premised on a claim that this matter will delay development of its mineral holdings near Birch Lake. Because of the impact of the federal lease cancellations on the viability of the project submitted by Twin Metals, DNR stopped work on the state environmental review and closed the administrative record for management in accordance with the DNR's record retention policy.¹ *See* Minn. Stat. 116d.04, Subd. 2b, 6; *In re Envir. Impact Statement*, 849 N.W.2d 71, 83 (Minn. Ct. App. 2014) (identifying the timing for issuance of permits and citing Minn. Stat. 116d.04, Subd. 2b). At the time the Court issued its Remand Order, Twin Metals had advanced a proposal and environmental review was underway. That is no longer the case given the subsequent events. Given these federal and state actions it is improbable any delay associated with DNR's requested extension would adversely affect Twin Metals. Furthermore, Twin Metal's sudden interest in a speedy process rings hollow in light of the delays in this litigation associated with Twin's numerous motions and multiple requests for expedited appeals.

¹ The Department of Interior cancelled Twin Metals' two mineral leases in February 2022. <https://www.dnr.state.mn.us/input/environmentalreview/twinmetals/index.html> *see also* <https://files.dnr.state.mn.us/input/environmentalreview/twinmetals/dnr-letter-to-tmm-2-15-22.pdf>. The DNR also informed Twin of the significant challenges associated with its selected tailings basin site.

Nor is the Plaintiff harmed. Two significant federal mineral leases for the Twin Metals' Project have been withdrawn and likely will be tied up in litigation for months, if not years. Additionally, the U.S. Forest Service has issued a Draft Environmental Assessment (EA) regarding a proposal to withdraw lands from new federal mineral leasing in the Rainy River Watershed for the next 20 years. But given where the U.S. Forest Service is at in its process, it is unlikely to issue a final agency decision regarding the future of federal mineral leasing in the Rainy River watershed until at least well into 2023 and possibly 2024. Thus, it is virtually unforeseeable that a non-ferrous mining project in the Rainy River watershed will be advanced for the state's consideration within the nine-month extension period that the DNR is requesting here.

CONCLUSION

For the reasons set forth above, the DNR requests that the Court modify its Remand Order to allow the DNR until May 31, 2023 to respond to comments and issue its initial order.

Dated: August 10, 2022

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Oliver J. Larson

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ATTORNEY FOR MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

MINN. STAT. § 549.211 ACKNOWLEDGMENT

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions, including reasonable attorney fees and other expenses, may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.211 (2020).

Dated: August 10, 2022

s/ Oliver J. Larson

Oliver J. Larson
Assistant Attorney General
Atty. Reg. No. 0392946

EXHIBIT A

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Northeastern Minnesotans for
Wilderness,

Plaintiff,

Court File Number: 62-CV-20-3838

Case Type: Civil Other/Misc.

Judge Laura Nelson

v.

Minnesota Department of Natural
Resources and Sarah Strommen, in
her capacity as Commissioner of
the Minnesota Department of
Natural Resources,

Defendants,

Twin Metals Minnesota LLC

Intervenor.

**DECLARATION OF
JESS RICHARDS**

Jess Richards declares as follows:

1. I am an Assistant Commissioner of the Minnesota Department of Natural Resources.
2. This Court remanded the above-captioned matter to DNR on September 13, 2021, and directed the DNR to issue an order within one year as to whether Minn. R. 6132.2000, subp. 2A and 3A, together with the applicable environmental protections of state and federal laws, are adequate to protect the Boundary Waters Canoe Area Wilderness ("BWCAW") from pollution, impairment or destruction.
3. DNR issued a procedural order on October 4, 2021, establishing a public comment period starting on November 9, 2021, and ending on December 8, 2021. DNR accepted public comments on the issues remanded.
4. DNR received over 4,000 public comments during the public comment period.

5. Since the close of the public comment period, DNR has uploaded the comments into an eDiscovery database. DNR staff have read many of the comment letters and have begun technical review of the comment letters and attached journal articles or other references.

6. As more fully outlined below and for several months, DNR staff have met weekly to identify the work that needs to be done to issue a finding of fact and order including but not limited to analyzing the comments, technical data, and journal articles; identifying other new scientific documents and major changes (including recent US Forest Service documents) related to nonferrous mining that should be analyzed and considered in the DNR's analysis; identifying and preparing memos on the legal issues presented by the remand; establishing a common understanding of the task before the DNR and the scope of the DNR analysis; and identifying and, in some cases, retaining the necessary technical experts to assist the DNR in its analysis.

7. DNR staff and counsel have met with the Minnesota Pollution Control Agency ("PCA") staff and counsel about the DNR obtaining technical assistance from the PCA on areas outside of the DNR's areas of expertise.

8. DNR staff have reviewed the history of the Chapter 6132 rulemaking including the Statement of Need and Reasonableness, the hearing transcript, and related studies.

9. DNR has also researched and reviewed the history of the Boundary Waters Canoe Area Wilderness Act and associated Wilderness Act and is undertaking legal research on the multiple topics relevant to the remand.

10. DNR received highly detailed comment letters, with voluminous attachments, many of which contain highly technical information. Because of the magnitude of work before the DNR in this matter it became apparent that DNR did not have sufficient in-house staff to complete the work required to fully analyze the data before it and make a recommendation. If DNR were to do this work without outside assistance, DNR would be unable to do most of its ongoing mineral work for the pendency of the analysis. DNR is not able to re-direct its entire Lands and Minerals Division technical

staff to this project. DNR leadership, therefore, agreed that it was necessary to obtain a private contractor to assist with this project. DNR staff developed a request for offer in order to obtain a contractor and signed a contract to obtain assistance in this matter.

11. As outlined above, the DNR still needs to complete significant work in order to develop the required initial order in this matter. For example, the contractor DNR will need to break down comment letters into shorter individual comments, organize each of these comments into a spreadsheet, and code each of these comments with one of about 17 themes.

12. For each of these approximately 17 themes, DNR staff need to review representative comments, supporting documents and relevant considerations relating to that theme.

13. DNR staff will need to continue technical review of the comments and journal articles and other documents submitted in support of the comments.

14. While DNR staff have begun consultation with PCA staff on areas within PCA's regulatory control such as air quality, it is probable that DNR will need to locate additional experts through its contractor on particular topics in order to make an informed decision.

15. Only after completing its analysis of the legal and technical data and comments can the DNR develop a decision and supporting rationale on whether Minn. R. 6132.2000, subp. 2A and 3A, within the broader context of all applicable environmental protection of the state and federal laws, are adequate to protect the BWCAW from pollution, impairment, and destruction. DNR leadership will need to consider the staff analysis and relevant information in the record and make a decision as to the adequacy of the rule.

16. DNR staff and counsel will then need to convert the DNR decision to a findings of fact, conclusions of law and order that documents and explains the agency's decision.

17. Based on the significant work remaining in this matter, DNR estimates that it will need an additional nine and one-half (9-1/2) months to complete its order in this matter.

18. DNR estimates that its consultant will be able to complete the comment spreadsheet described above by August 2022.

19. DNR estimates that it will be able to complete its analysis of the public comments and other technical data and develop considerations for each theme, as described above, by December 2022 or January 2023.

20. DNR estimates that, subsequent to such analysis, its staff will be able to brief agency leadership and work with its lawyers to prepare the agency decision, including completion of a comprehensive findings of fact, conclusions of law and order by the end of May 2023.

21. Because DNR's current deadline for issuing its final order is September 12, 2022, DNR will need an extension until May 31, 2023.

I declare under penalty of perjury that everything I have stated in this document is true and correct to the best of my knowledge and belief.

Dated:

7/19/2022



Jess Richards

