From: Charles Dayton
To: MN_Review, Environmental (DNR)
Subject: Talings basin dam at Milepost 7
Date: Thursday, May 18, 2023 8:03:51 AM

During the permitting process for the original permit to dispose of taconite tailings at Milepost 7, I was a lawyer representing Save Lake Superior association and the Sierra C;lub. . I was present and participated actively in the hearing before former DNR Commissioner Wayne Olsen (which were quite lengthy) and each phase of the process that followed, including the Agency hearings, the 3 judge District Court hearings and the Minnesota Supreme court.

Before proceeding with the allowance of an expansion at Milepost 7, DNR should take this opportunity for further study as recommended by Water Legacy and others for these reasons:

The denial of the permit for Milepost 7 was recommended by a former DNR commissioner and accepted by both the PCA and DNR on the basis of evidence produced over a six month hearing.

The reversal of those permit denials by a 3 judge district court of biased Northern Minnesota Judges and a disingenuous Minnesota Supreme Court was a product of concern for loss of jobs in northern Minnesota, as a result of Reserve Mining Company's threats of closure if the permits were denied. It was not based on the record. It is not entitled to weight in your decision, but the denial of the permits by MPCA and DNR is.

,Here is a quote from the Minnesota Supreme Court's opinion:

The hearing officer appointed by PCA and DNR took testimony from 160 witnesses, *817 received 1,000 exhibits, and generated an 18,000-page transcript in the 9 months during which Reserve's permit was being considered by him. His findings, conclusions, and recommendations were adopted by the agencies without further evidence and incorporated into resolutions and orders denying permits at Mile Post 7 and encouraging an application for permits at Mile Post 20.
In commenting on the dam to be erected at Mile Post 7, the hearing officer expressed the opinion that the possibility of errors and omissions in construction were increased by the passage of time, and that tailings dams are more difficult to build than conventional water storage dams and are more susceptible to faulty construction. He indicated a lack of confidence in the likelihood of "close cooperation and mutual faith between the designer and the mining operator." The bedrock, he found, would present no problems in dam stability, and the clay samples in the area provided suitable foundation. However, Mile Post 7 would be a major, complex engineering project, resulting in one of the largest dams in the United States, and would be located 3 miles from Lake Superior and 600 vertical feet above it. He found a major failure of the dam

would be catastrophic. In that event, eight residences below the dam would be affected and the tailings would be deposited in Lake Superior with no opportunity for recapture. As between Mile Post 7 and a damsite where the consequences of failure would not be so severe, the hearing officer concluded that prudence would dictate the choice of a safer site, "even if the probability of dam failure is small.

Your Record of Decision relies heavily on the Supreme Court decision but does not provide a discussion of the Administrative law Judge Wayne Olsen's analysis nor that of the agencies themselves. You do not provide adequate citations to those documents nor discuss their reasoning, even though they, rather than the judges, have the expertise that the judges did not. I was not able to find a citation to Olsen's recommendations or the Agencies decisions, except at the Min Historical Society. Why did you not cite them adequately?

The administrative hearing had evidence of other dam failures, including the Teton Dam which collapsed during the hearing.

That history is important to your present consideration of the request to enlarge the tailings basin dam. I assume that you have reviewed the record of the hearings in the 70's on the safety of this dam and the tailings airborne particles contamination. As you know, the PCA board itself **denied the permit**, then the permit decision was reversed by a 3-judge district court that was obviously biased. All three were judges from the northern part of the state, and paid no attention to the expertise of the hearing examiner nor to the MPCA and DNR which had ruled against the permit and the dam.. The Supreme court made a disingenuous decision with ridiculous reasoning. I am aware on good authority that Reserve Mining telephoned the Supreme Court just before the oral argument and said that if the Court ruled against them, they would close the Silver Bay plant and 3,000 workers would be out of work., And the Supreme Court even noted that threat in its opinion. The point is that the agency board, which should have been given deference because of expertise, was pushed aside because of concern for jobs in Silver Bay. There is no doubt in my mind about it.

The disingenuity of the Court in this case is most obvious in its discussion of Milepost 20 which the agencies found to be a "feasible and prudent alternative" under the Minnesota Environmental Rights. The opinion speaks of Milepost 20 (which is apparently "just woods" as is about 16 million acres in Minnesota) as "wilderness" as if it could be compared with the beautiful and unique valley in the North Shore ridge. And the opinion notes that the people who live near Milepost 7 (of which there was no evidence) are as entitled to protection from airborne particulates as the people of Silver Bay. Baloney!

I have to say that the decision of the Minnesota Supreme Court in this case was the most disappointing, disheartening and disingenuous of my career as an environmental lawyer in Minnesota. It is not entitled to deference.,

Charles Dayton

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