



Minnesota Center for
Environmental Advocacy



May 10, 2022

Commissioner Sarah Strommen
Minnesota Department of Natural Resources
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VIA EMAIL

**Re: Northshore Mining Co. Milepost 7 Tailings Basin
Need for Dam Safety Permit, Closure Cost Review, and Permit Term**

Dear Commissioner Strommen:

On February 7, 2022, the Minnesota Department of Natural Resources (“DNR”) denied petitions filed by the undersigned organizations (“Petitioners”) seeking environmental review of Northshore Mining’s (“NSM”) plan to relocate its railroad and expand dams at its tailings basin to allow increased tailings disposal (“DNR EAW Denial”). As demonstrated by the 82 single-spaced pages of DNR’s Findings of Fact, Conclusions, and Order, DNR should have granted these petitions because the proposed project is not within the scope of the environmental impact statements completed more than four decades ago.¹ However, DNR’s documentation also demonstrates that DNR has now addressed some of Petitioners’ concerns.² Petitioners therefore decided that an appeal of DNR’s decision would not be useful. However, we identified important permitting issues which we believe require DNR’s immediate attention and action. Given NSM’s recent record profits, coupled with its decision to idle work at this facility due to disputes over royalty payments, we believe the timing is right for DNR to work on these issues so that they are resolved in a timely manner whether the dam expansion project is proceeding or work is currently delayed on the expansion.

1. DNR must require NSM to apply for dam safety permits for Milepost 7’s dams.

In its EAW Denial, Finding 27, DNR notes that “Tailings dams in Minnesota are subject to DNR’s Dam Safety Program pursuant to Minn. Stat. § 103G.501 through 103G.561. Also see Minn. R. 6115.0300 through 6115.0520. Because the laws governing dam safety were not in place until 1979, the Master Permit regulates dam safety at Mile Post 7.”³ In its June 28, 2021

¹ See DNR EAW Denial, provided as a courtesy in Attachment 1, Findings ¶¶166-67, 170-74 (changes in dam construction since Final EIS process, applications, and permitting); ¶¶212-14 (extension of new dam construction by 10,400 feet beyond that anticipated in the Final EIS).

² See Findings ¶¶14, 92-95, 187-88, 270 (reduction in proposed dam height from 1,365 to 1,315 feet amsl); ¶185 (replacement of malfunctioning piezometers).

³ See also Finding ¶42. DNR’s April 19, 2021 Inspection Report states its Dam Safety Unit only began annual inspections of the Milepost 7 dams in 2020; previously, DNR Lands and Minerals

Environmental Review Internal Memo (“DNR 2021 Env. Rev. Memo”), DNR also noted that “[a]t the time of issuance, Reserve Mining Company (Reserve Mining [or “Reserve”]) was not issued separate dam safety permits, nor was it issued a permit to mine, because the implementing dam safety rules and mineland reclamation rules, had not yet been promulgated.”⁴

The very laws cited by DNR compel the commissioner to require that NSM obtain a dam permit for the Milepost 7 tailings basin dams. Minn. Stat. § 103G.531, subd. 1 states that the only exemption from dam permits is for dams in existence before 1937. Permits under chapter 103G are subject to “applicable law existing before or after the issuance of the permit.” Minn. Stat. § 103G.315, subd. 11(a)(3). Once laws governing dam safety were in place, the commissioner had a duty to require that Reserve/NSM apply for a tailings dam permit. DNR has had the authority to regulate dams by permit since 1979 and should have required Reserve to have acquired such a permit at the time Reserve was constructing the Milepost 7 dams. *See* Minn. Laws 1979, Ch. 779, sec. 8, resulting in December 1979 rulemaking (6 MCAR 1.5030).

DNR cannot validly claim to be regulating NSM under the old “Master Permit” because that permit was essentially superseded in 1985 by the issuance of a “permit to mine.”⁵ If the “Master Permit” relieved the project owner—formerly Reserve, now NSM—from the requirement to get any future permits, no permit to mine would have been issued in 1985. Under applicable rules, DNR also should have required NSM to obtain a dam safety permit when NSM acquired the tailings basin facility following the Reserve bankruptcy. Minn. R. 6115.0370 (“The owner shall not transfer the ownership of any Class I or II dam without a permit from the commissioner.”). DNR should also have required NSM to obtain approval of NSM’s changes to its dam designs (*i.e.*, from “downstream” to “upstream”) in the 1990s⁶ under the applicable dam safety rules. Minn. R. 6115.0350, subp. 1 (“Before commencing action, the owner shall make a separate application for each existing dam proposed to be changed”). As DNR states on its own website, “A permit is needed from the DNR to construct, alter, repair, remove or transfer ownership of a regulated dam.”⁷

DNR’s dam safety rules certainly require a dam safety permit before the current proposal can proceed. DNR has admitted that the current Milepost 7 dam project will alter public waters, raise the maximum storage elevation of the dams, and increase total dam length.⁸ Minn. R. 6115.0320, subps. 2, 6, 9, 14. DNR’s dam safety rules provide that a separate permit application is required for “each dam proposed to be enlarged.” Minn. R. 6115.0410, subp. 2.

last inspected the dams in 2016. DNR EAW Finding 20.aaa reference (“Ref.”), Attachment 2, at 2-3.

⁴ DNR 2021 Env. Rev. Memo, Attachment 3, at 2.

⁵ In fact, Minn. Laws 1971, Sec. 5, amended Minn. Stat. Ch. 93 to require a permit to mine issued by DNR.

⁶ *See* DNR EAW Denial, Findings ¶¶167, 170-75, 211.

⁷ DNR, Permit Guidelines for Dams, Attachment 4, last visited May 8, 2022 at https://www.dnr.state.mn.us/waters/surfacewater_section/damsafety/permit_guidelines.html

⁸ *See* DNR EAW Denial, Findings ¶¶26, 47, 58, 132, 214, 271-75.

Under DNR’s Chapter 6115 dam safety rules, the “permit and public hearing provisions” of Chapter 103G must apply to the new Milepost 7 dam safety permit. Minn. R. 6115.0500. These statutory provisions include Minn. Stat. § 103G.297, which requires specific findings (subd. 3), the establishment of a “term” (subd. 6), and permit conditions, including those necessary and practicable for restoring the waters to their former condition (subd. 7).⁹ In the Lake Superior Basin, Minnesota also recognizes “the importance and necessity of public participation in promoting management of the water resources of the basin.” Minn. Stat. § 103G.801, Art. 6, Section 6.1(1).

In addition to DNR’s duty to enforce the laws, DNR should require NSM to apply for a formal dam safety permit for practical reasons, consistency, and public transparency. As DNR states on its own website, “Dam safety permits are required to ensure the safe design, construction, operation, and maintenance of dams in order to protect the health, safety, and welfare of the public.”¹⁰ Issuance of a dam safety permit ensures that all information pertinent to a facility is submitted in an application that can be reviewed both by the DNR and the public and subsequently used for monitoring and enforcement. With NSM’s pending application to change, enlarge, and lengthen Milepost 7 dams, DNR must require NSM to apply for a dam safety permit that can be reviewed—as required by law—both by DNR and affected persons, particularly downstream communities.

2. DNR must set a term for the NSM permit to mine and Milepost 7 dam safety permit.

DNR is required to set a definite term for a permit to mine under Minn. Stat. § 93.481, subd. 3. *In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 758 (Minn. 2021). This statute applies both to ferrous and nonferrous mine facilities and requires that the commissioner determine the term necessary for “the proposed mining operation, including reclamation or restoration.” Minn. Stat. § 93.481, subd. 3(a). Because NSM has applied for an amendment to its permit to mine, DNR should amend the permit to mine to include the mandated term.

Since the existing 1985 permit to mine approval (“1985 Permit”) has no definite term,¹¹ establishing a permit term also represents a “substantial change” to the permit. Minn. Stat. § 93.481, subd. 3(b). DNR should follow the procedures required by Minn. R. 6130.5000, subp, 2, including public notice, to make this amendment.

Providing a definite permit term for the Milepost 7 tailings disposal facility is consistent with the August 23, 1977 Master Permit issued by DNR. By its terms, the Master Permit expired

⁹ NSM’s railroad relocation and dam extension project makes significant changes to the water diversions created to protect the tailings basin. *See* DNR EAW Denial, Findings ¶¶271-75.

¹⁰ DNR, Permit Guidelines for Dams, *supra* note 7.

¹¹ The “term” in the 1985 Permit has a *minimum* duration, but no limit based on reclamation or restoration. “The conditions of this permit apply to all mining and reclamation activities conducted from August 25, 1980 until the ores identified in the permit application are depleted. The operating life of the Peter Mitchell pit is projected to be at least 35 years.” 1985 Permit, Attachment 5 at 1.

in 1982, and provided that the “permit may be renewed” for “five-year intervals.”¹² Permits issued under Minnesota Statutes Chapter 103G must not exceed five years and require an application and good cause for extension. Minn. Stat § 103G.315, subd. 13.

3. DNR must review NSM’s financial assurance for Milepost 7 closure.

NSM stated in a December 15, 2020 letter to DNR that its financial assurance for Milepost 7’s closure costs is \$4 million in the form of an irrevocable letter of credit.¹³ This amount of financial assurance is palpably inadequate and would only cover a fraction of the Milepost 7 tailing basin’s closure costs. In its 2014-2018 Five-Year Operations Plan, NSM admitted that, when Reserve Mining shuttered its mine in 1986, the cost to close the basin, drain the pond, and reclaim the disturbed areas was estimated to be as high as \$70 million.¹⁴ NSM claims in this Operations Plan, without documentation of current costs, that its 1988 “Closure Consensus Plan” has reduced closure liabilities to “less than \$10 million.” *Id.*¹⁵ However, even in 1988, the costs for closure under the Closure Consensus Plan were more than \$18 million.¹⁶

Based on the information above, the financial assurance NSM currently holds is insufficient to cover the closure costs estimated in 1988, let alone current costs which will be greater due to inflation, new development, and enlargement of the Milepost 7 dams over the past 34 years. By law, DNR must review financial assurance on an annual basis:

The commissioner shall require a bond or other security or other financial assurance satisfactory to the commissioner from an operator. The commissioner shall review annually the extent of each operator's financial assurance under this section.

Minn. Stat. § 93.49. To protect the taxpayers of this state from the burden of paying for the cost of closure, DNR must immediately perform the mandated review, preferably with the assistance of an independent expert consultant, and require NSM to establish the required financial assurance before any further basin expansion is allowed.

4. DNR must disclose and update the dam break analysis for Milepost 7.

In response to Petitioners’ request that the DNR require NSM to perform a dam break analysis for Milepost 7, DNR supplied a heavily redacted 2012 Emergency Action Plan prepared by Barr Engineering with its DNR EAW Denial.¹⁷ First, DNR must provide this document free of redactions, since contingency plans and dam break analyses are public government data. Second, DNR must require NSM to provide a complete and updated dam break analysis that addresses all

¹² Ref. 10 to DNR 2021 Env. Rev. Memo, Attachment 6 at 4-5.

¹³ Ref. 7 to DNR 2021 Env. Rev. Memo (without images), Attachment 7 at 2.

¹⁴ Ref. 25 to DNR 2021 Env. Rev. Memo (excerpt), Attachment 8 at 29.

¹⁵ NSM’s 2019-2023 Five-Year Operations Plan does not state the amount that would be needed for financial assurance.

¹⁶ Tailings Basin Closure Consensus Plan, August 16, 1988, DNR EAW Denial, Finding 21.c Ref., Attachment 9 at 38.

¹⁷ Emergency Action Plan Milepost 7, Dec. 26, 2012 (“2012 Milepost 7 EAP”), DNR EAW Denial Finding 21.j Ref., Attachment 10.

downstream safety and environmental impacts and is based on the planned increase in height of dams to 1,315 feet amsl.

Minnesota Statutes Chapter 13 regulates dissemination and access to government data. All government data is public and shall be provided upon request unless the data is classified by statute or federal law as nonpublic or private data on individuals. Minn. Stat. § 13.03, subd. 1, subd. 3(c); *see also* Minn. Stat. § 13.02, subds. 7-14.¹⁸ Under Minnesota rules, Class I dam owners must “prepare and file for approval a contingency plan for notifying any persons whose lives, property, or health may be endangered by failure, misoperation, or other circumstances or occurrence affecting the dam.” Minn. R. 6115.0490. Proposers of new dams or dam enlargements must include both a “dam-break flood” and “emergency procedures and warning systems” analysis in their final dam design report and specifications. Minn. R. 6115.0410, subp. 6.

No Minnesota statute or federal law removes information on dam safety from public data. Federal law includes in its objectives a “public awareness initiative” to assist the public in responding to dam incidents. 33 U.S.C. § 467f(c)(4). Federal and state elements of the dam safety program “shall provide for the education of the public. . . in the hazards of dam failure, methods of reducing the adverse consequences of dam failure, and related matters.” 33 U.S.C. § 467f(d)(3)(C).

Second, DNR must require NSM to provide a complete and updated dam breach analysis, including the worst-case tailings dam flood; impacts on residences, schools, recreation, tribal, and cultural resources, impacts on infrastructure; and long-term as well as short term environmental impacts on air quality, water quality, fish, wildlife, and habitat, including aquatic life in Lake Superior.¹⁹ Judging from the table of contents and unredacted portions of the 2012 Milepost 7 EAP, neither the chemical composition of the materials that would be released, the effects of dam breach on the environment, nor the effects of dam breach on recreational, tribal, and cultural resources were analyzed in the EAP. In addition, the proposed project would increase dam height by approximately 90 feet to 1,315 feet amsl, rather than the 1,225 to 1,228 feet amsl dam evaluated in the 2012 Milepost 7 EAP²⁰ and would increase dam length by 10,400 feet.²¹ A new worst-case dam break and EAP must reflect the increased height, increased length, and increased maximum storage capacity of the Milepost 7 tailings dams.

In conclusion, DNR must (1) require NSM to apply for dam safety permit covering the Milepost 7 dams and their proposed enlargements; (2) set a finite term for mining operations, reclamation and restoration mandated by Minn. Stat. § 93.481, subd. 3 using the public permit amendment process; (3) review and require adequate financial assurance for closure of Milepost 7

¹⁸ With this letter, petitioners have provided a formal Minnesota Government Data Practices Act request for the unredacted and complete 2012 Milepost 7 EAP and any other emergency action plan or dam-break flood or dam breach analysis prepared for the Milepost 7 tailings dams.

¹⁹ *See* Steven H. Emerman, Ph.D., Evaluation of the Proposed Tailings Dam Extensions at the Cleveland-Cliffs Mile Post 7 Tailings Storage Facility, Northeastern Minnesota, Sept. 30, 2021, Attachment 11 at 60-61.

²⁰ 2012 Milepost 7 EAP, *supra* note 17, at 36, 39-41.

²¹ *See* DNR EAW Denial, Finding ¶214.

and related NSM mining facilities; and (4) require NSM to update and disclose its dam breach analysis for the Milepost 7 dams.

Sincerely yours,



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