STATE OF MINNESOTA

IN SUPREME COURT

A18-1952
A18-1953
A18-1958
A18-1959
A18-1960
A18-1961

Court of Appeals

Hudson, J.
Thissen, J., took no part

In the Matter of the NorthMet Project Permit
to Mine Application Dated December 2017
(A18-1952, A18-1958, A18-1959), and

In the Matter of the Applications for
Dam Safety Permits 2016-1380 and 2016-1383
for the NorthMet Mining Project
(A18-1953, A18-1960, A18-1961).

Filed: April 28, 2021
Office of Appellate Courts

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S Y L L A B U S

1. Allegations that property owned by a person will be affected by the proposed mining operations is sufficient to satisfy the standing requirement in Minn. Stat. § 93.483, subd. 1 (2020), to file a petition for a contested case hearing.

2. The Minnesota Department of Natural Resources has discretion under Minn. Stat. § 93.483, subd. 3(a) (2020), to decide whether a contested case hearing will aid the commissioner in resolving a disputed material issue of fact related to a completed application for a permit to mine.

3. Under Minn. Stat. § 93.483, subd. 3(a)(3), when reviewing the commissioner's decision to deny a petition for a contested case hearing, the reviewing court must determine whether the petitioner has shown that the decision by the Minnesota Department of Natural Resources regarding a specific disputed material issue of fact was not reasonably supported by substantial evidence in the record.

4. Minnesota Statutes § 93.481, subd. 3(a) (2020), requires the commissioner of the Minnesota Department of Natural Resources to set a definite, fixed term of years for a permit to mine.

5. The court of appeals erred in reversing the dam-safety permits on the basis that a contested case hearing was ordered on the permit to mine because the two permits are governed by distinct statutory standards.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

HUDSON, Justice.

On November 1, 2018, the Minnesota Department of Natural Resources (DNR) issued a permit to mine and two dam-safety permits to Poly Met Mining, Inc. (PolyMet) to build and operate Minnesota's first copper-nickel mine. The DNR's Findings of Fact,

Conclusions, and Order of Commissioner[1] for the permit to mine also denied respondents' petitions for a contested case hearing on various factual issues related to PolyMet's completed permit to mine application. Respondents Minnesota Center for Environmental Advocacy (MCEA),[2] WaterLegacy, and Fond du Lac Band of Lake Superior Chippewa (the Band) appealed from the decisions to grant the permit to mine and the dam-safety permits, and the decision to deny their contested case petitions.[3] After consolidating the appeals, the court of appeals reversed the DNR's decision to grant the permit to mine and remanded to the DNR to hold a contested case hearing on the issues raised by the respondents. *In re NorthMet Project Permit to Mine Application Dated Dec. 2017*, 940 N.W.2d 216, 238 (Minn. App. 2020). The court also reversed the decision to issue the

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[1] The terms "the DNR," the "DNR commissioner," and "the commissioner" are used interchangeably throughout the opinion. Each refers to the same entity, the DNR, and its commissioner who has the final decision-making authority for the DNR. *See* Minn. Stat. § 84.027, subds. 1–2 (2020) ("The commissioner of natural resources shall be the administrative and executive head of the department. . . . The commissioner shall have charge and control of all the public lands, parks, timber, waters, minerals, and wild animals of the state and of the use, sale, leasing or other disposition thereof . . . .").

[2] References to "MCEA" in the opinion refers collectively to the Minnesota Center for Environmental Advocacy and the other environmental organizations it jointly represented throughout the litigation, including Duluth for Clean Water, Center for Biological Diversity, Friends of the Cloquet Valley State Forest, Save Lake Superior Association, and Save Our Sky Blue Waters.

[3] The Minnesota Center for Environmental Advocacy (on behalf of itself, the Center for Biological Diversity, and the Friends of the Boundary Waters Wilderness) and WaterLegacy petitioned for a contested case hearing. Respondent Fond du Lac Band of Lake Superior Chippewa (the Band) did not, but it did challenge on appeal the DNR's decision to issue the permit to mine and dam-safety permits.

dam-safety permits in order to allow for reconsideration of those permits after the contested case hearing on the permit to mine. *Id.*

We conclude that the court of appeals adopted an incorrect legal standard to evaluate the DNR's decision to deny the petitions for a contested case hearing. By disregarding the DNR's discretion, the court of appeals erred in its interpretation of Minn. Stat. § 93.483, subd. 3(a) (2020). Under a substantial-evidence standard, we conclude that a contested case hearing is required on the effectiveness of the proposed bentonite amendment for PolyMet's proposed tailings basin. Regarding the other factual issues raised in respondents' petitions, however, we conclude that the DNR did not abuse its discretion in denying the petitions for a contested case hearing because substantial evidence supports those decisions. We further conclude that the court of appeals was correct in reversing the decision to grant the permit to mine because the DNR erred by issuing the permit without an appropriate fixed term. Finally, we conclude that the court of appeals erred in reversing the two dam-safety permits. Accordingly, we affirm in part and reverse in part the decision of the court of appeals and remand to the DNR to conduct the contested case hearing required by this decision and, thereafter, to determine and fix the appropriate definite term for the permit to mine as necessary.[4]

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[4] We recognize that, in addition to challenging the DNR's denial of a contested case hearing, respondents also challenged the legal sufficiency of the permit to mine and dam-safety permits granted by the DNR. Our decision today focuses primarily on the DNR's decision to deny respondents' petitions for a contested case hearing on the permit to mine. Because we conclude that the DNR must hold a contested case hearing on the proposed bentonite amendment, we believe that a decision on the legal sufficiency of the permits is premature. The DNR has the authority to identify the issues and scope of the contested case hearing, Minn. Stat. § 93.483, subd. 5 (2020), and may decide to address issues raised

FACTS

PolyMet proposes to develop a mine and associated processing facilities to extract copper and nickel from the NorthMet Deposit in northeastern Minnesota. If approved, the mine would be the first of its kind in the state. Minnesota has a long history of regulating iron and taconite mining. Although years of study and regulatory activity have been underway to prepare for copper-nickel mining, this is the first permit to mine of its kind. Further, the proposed NorthMet project brings with it potential environmental impacts unique to this type of mining. In particular, the mine waste generated by extracting and processing sulfide ore has the potential to release acid rock drainage, which occurs if either the sulfide ore or waste rock is exposed to oxygen or water. If so exposed, the sulfide ore and waste rock would release toxic metals and sulfate that could seep into nearby surface waters and groundwaters. As a result, the NorthMet project has generated significant public interest and controversy.

The NorthMet Project. As proposed by PolyMet, the NorthMet project will be located along the eastern flank of the Mesabi Iron Range, near the towns of Babbitt and Hoyt Lakes in St. Louis County. The project would consist of three main facilities: a mine about six miles south of Babbitt; an ore processing plant about six miles north of Hoyt Lakes; and a transportation corridor connecting the two sites. The entire project would be located within the St. Louis Watershed, which drains into Lake Superior. The proposed

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by this appeal regarding the legal sufficiency of the permits. Therefore, we need not remand to the court of appeals to address the DNR's decision to issue the permits. This does not, of course, preclude respondents from renewing their challenges to the DNR's permitting decisions after the conclusion of the contested case hearing. *Id.*

open-pit mine site is a previously undisturbed area; the plant site is a former taconite-processing facility owned by LTV Steel Mining Company (LTV Mining). Over the estimated 20-year life of the mine, approximately 533 million tons of ore and waste rock would be removed from the open-pit mines and processed at a rate of up to 32,000 tons per day.

Tailings, the waste by-product from ore processing, would be mixed with water and pumped as a slurry into an existing, but upgraded, flotation tailings basin maintained at the LTV Mining plant site.[5] To contain these tailings, PolyMet plans to build a new dam atop the existing LTV Mining tailings dam, using an upstream construction method.[6] To keep water and oxygen from reaching the tailings, the exterior side of the dam, along with the tailings basin beaches and basin bottom, would incorporate a bentonite-amended oxygen-barrier layer (the bentonite amendment). Bentonite is a natural clay sealant. The project would also use a containment system to collect water seepage from the tailings basin to prevent surface water and ground water pollution.

After mining operations cease, the project calls for placing the tailings under a "wet cover" (i.e., a man-made pond) to minimize the reactivity of tailings to oxygen. Reclamation and closure following the expected 20-year mine life would include periodic

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[5] Tailings are produced when the economic mineral portion of the ore, the "concentrate," is separated from the non-economic mineral portion, the "tailings." The basin holds the tailings, which are deposited there post-processing.

[6] The upstream construction method involves adding materials to the dam in successive "lifts" in a stairstep fashion toward the inside of the tailings basin. This is opposed to a downstream construction method, which involves adding material to the exterior of the dam.

monitoring and maintenance of water quality until conditions are deemed environmentally acceptable. *See* Minn. Stat. § 93.44 (2020) (declaring the State's policy to provide for reclamation of land subject to mining). According to PolyMet's modeling, post-closure maintenance is likely necessary for at least 200 years.

The Mine Permitting Application Process. Mining in Minnesota is regulated by statute and administrative rules. The permitting process allows the State to balance its interests in limiting the "possible adverse environmental effects of mining" and preserving natural resources, against its interests in encouraging "the orderly development of mining," "good mining practices," and the beneficial aspects of mining. Minn. Stat. § 93.44; Minn. R. 6132.0200 (2019); *see also* Minn. Stat. § 93.001 (2020) ("It is the policy of the state to provide for the diversification of the state's mineral economy . . . ."). Mining must be "conducted on sites that minimize adverse impacts on natural resources and the public," Minn. R. 6132.2000 subp. 1 (2019), and the mining operation must be "designed, constructed, and maintained so that it is compatible with surrounding nonmining uses." Minn. R. 6132.2100, subp. 1 (2019).

There are two types of permits at issue in this appeal. The first, the permit to mine, concerns the NorthMet project. *See* Minn. Stat. § 93.481, subd. 1 (2020) (requiring "a permit to mine" from the DNR to "carry out a mining operation" in the state). The second, the dam-safety permits, govern PolyMet's proposed tailings basin dam and the facility (referred to as a hydrometallurgical residue facility) that receives residue, mostly gypsum,

from ore processing activities.[7] *See* Minn. Stat. § 103G.297, subd. 1 (2020) (authorizing the commissioner to "issue water-use permits for the diversion, draining, control, or use of waters of the state for mining"). The DNR granted the permit to mine and the dam-safety permits on November 1, 2018.

The application for a permit to mine is a multi-phase process that begins after the environmental review by federal and state regulators is complete. *See* Minn. R. 6132.4000, subp. 1 (2019). The permitting process begins with a preapplication conference and site visit by the DNR commissioner to review the proposed mining operation. Minn. R. 6132.1100, subp. 1 (2019). A preapplication meeting is also required to "outline chemical and mineralogical analyses and laboratory tests to be conducted for mine waste characterization." Minn. R. 6132.1000, subd. 1 (2019).

A permit to mine application must include "a proposed plan for the reclamation or restoration" of the affected mining area, a certificate of a "public liability insurance policy" or "evidence that the applicant has satisfied . . . state or federal self-insurance requirements." Minn. Stat. § 93.481, subd. 1. The application must also demonstrate that public notice has been given in the locality of the proposed mining operations. *Id*. The applicant must also submit "such information as the [DNR] may require." *Id*.; *see also*

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[7] A "dam" is an "artificial barrier" that "does or may impound water and/or waste materials containing water." Minn. R. 6115.0320, subp. 5 (2019). According to the Commissioner's decision on the dam-safety permits, PolyMet's proposed dams "will not change or diminish the course, current or cross section of a public water" nor involve the "construction, reconstruction, modification or removal of a dam on public water."

Minn. R. 6132.1100–.1300 (2019) (requiring the applicant to address other relevant matters).

The DNR reviews a permit to mine application to determine if it is "complete." Minn. R. 6132.4000, subp. 1. Once the DNR declares the application complete, it publishes notice in the State Register that "an application for a permit to mine" has been received, and the applicant publishes notice for four weeks in a newspaper that circulates in the locality of the proposed mine, with details regarding the proposed operations. *Id.*; Minn. R. 6132.4900, subp. 1 (2019). After the applicant's publication has run for four weeks and the applicant submits verification of publication, the application is "considered filed." Minn. R. 6132.4000, subp. 1.

Within 120 days after the permit to mine application is "deemed complete and filed," the DNR must "grant the permit applied for, with or without modifications or conditions, or deny the application unless a contested case hearing is requested or ordered." Minn. Stat. § 93.481, subd. 2.

Dam-safety permits are authorized by Minnesota Statutes chapter 103G (2020). The permit application must include the information required by the DNR, *see* Minn. Stat. § 103G.301, subd. 1, and the applicant must serve the application on municipal bodies or conservation districts if the proposed use is within or affects one of those bodies. *Id.*, subd. 6. The permit application must also include a "preliminary report" with geological conditions, preliminary design assumptions, and engineering details, prepared by or reviewed with an engineer who is "proficient in dam engineering." Minn. R. 6115.0410, subps. 3, 5 (2019). Once the DNR accepts the preliminary report, the applicant must submit

a final design report that includes additional details on the project, such as geological considerations, studies and analyses of seepage and stability issues, and "analytical and design details," among other requirements. *Id*., subp. 6.

The commissioner must notify the applicant within 30 days whether the application is deemed complete and must "act on" the application within 150 days after it is deemed complete, by either holding a hearing or by granting or denying the permit. Minn. Stat. § 103G.305, subd. 1.[8] The permit decision is final 30 days after the decision is made and "an appeal may not be taken" if no demand for a hearing is made. Minn. Stat. § 103G.311, subd. 5(c)(1). A dam-safety permit may be issued, subject to conditions deemed necessary to protect public interests, if the commissioner determines that (1) the proposed use is necessary for the mining operation; (2) the proposed use will not "substantially impair" the public interests in the State's water resources or the "substantial beneficial" public use of those resources, or endanger public health; and, (3) the proposed mining operation is in the public interest. Minn. Stat. § 103G.297, subds. 3, 7. The permit term is for the period that the commissioner deems "reasonable and necessary for the completion of the proposed mining operations." *Id*., subd. 6; *see also* Minn. R. 6115.0390, subp. 1 (2019) ("Unless the dam is removed, the owner shall perpetually maintain the dam . . . to ensure the integrity of the structure.").

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[8] The commissioner can waive the hearing provided for under section 103G.311, which allows certain entities to demand a hearing, *id*., subds. 4, 5(a). If a hearing is held, the DNR's findings of fact must be based on "substantial evidence." Minn. Stat. § 103G.315, subd. 2.

PolyMet's Permit Applications. The review process that culminated in the DNR's issuance of PolyMet's permit to mine and dam-safety permits began in 2004, with a joint federal-state environmental review. *See In re Applications for Supplemental Envtl. Impact Statement for Proposed NorthMet Project*, No. A18-1312, 2019 WL 2262780, at *1 (Minn. App. May 28, 2019) (summarizing the environmental review process), *rev. denied* (Minn. Aug. 20, 2019). PolyMet has received the major state and federal permits needed for the NorthMet project, including pollutant discharge and air-emissions permits.[9] In addition, the Final Environmental Impact Statement (FEIS), which was deemed adequate in March 2016 under the National Environmental Policy Act, 42 U.S.C. §§ 4321–47, and the Minnesota Environmental Policy Act, Minn. Stat. ch. 116D (2020), was not appealed. Because no appeal was taken from that adequacy determination, it is a final agency decision that is no longer subject to judicial review. *See* Minn. Stat. § 116D.04, subd. 10 (authorizing an appeal).[10]

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[9] Challenges to the permits issued by the Minnesota Pollution Control Agency (MPCA) are the subject of an appeal pending before the court of appeals, *In re Denial of Contested Case Hearing Requests & Issuance of NPDES/SDS Permit No. MN0071013*, No. A19-0112. In a separate appeal, we rejected claims that the permitting agency was required to investigate whether PolyMet engaged in sham permitting when receiving air-emissions permits for the NorthMet project. *See In re Issuance of Air Emissions Permit No. 13700345-101 for Polymet Mining, Inc.*, 955 N.W.2d 258 (Minn. 2021).

[10] MCEA and WaterLegacy appealed the denial of their petitions for a supplemental environmental impact statement (SEIS), through which they sought to address PolyMet's proposed change in the treatment of wastewater, disclosure under Canadian securities law of information "about the financial viability of the NorthMet project," potential expansion of the project, and unconsidered alternatives for tailings disposal. The court of appeals affirmed, concluding that the DNR properly applied the law in denying those petitions, and its decision was supported by substantial evidence. *In re Applications for a [SEIS] for the Proposed NorthMet Project*, 2019 WL 2262780, at *5.

The environmental review process precedes the permit application process because it is intended to inform the subsequent permitting and approval processes and, thus, the DNR uses that process and the FEIS as "guides" during the permitting process. *See* Minn. R. 4410.0300, subp. 3 (2019) (stating that environmental reviews are "used as guides in issuing, amending, and denying permits"). After the NorthMet FEIS was deemed adequate and was not challenged, PolyMet submitted its application for the dam-safety permits on July 11, 2016, and submitted its permit to mine application on November 3, 2016.

Over the next year, the DNR and PolyMet identified and resolved issues and concerns raised by the agency and various public comments, with PolyMet submitting at least three revised versions of its permit to mine application. By early 2018, the DNR had developed 90 special conditions for the permit to mine to address operations, reclamation, mitigation of wetland impacts, and financial assurances, among other issues.

The draft dam-safety permit applications were circulated to local and county governments and tribal entities, and a 30-day public comment period was opened in September 2017. The DNR issued notice of the draft permit to mine application and opened a public comment period on January 5, 2018. The DNR received more than 5,000 public comments on the dam-safety permit applications and more than 14,000 public comments on the permit to mine application. The permit to mine application was deemed complete and filed on January 29, 2018. Respondents MCEA and WaterLegacy each submitted a timely petition for a contested case hearing on the permit to mine.[11]

[11] Respondent WaterLegacy identified eight issues on which it requested a contested case hearing, including the "tailings waste storage facility," the hydrometallurgical residue

On November 1, 2018, the DNR issued three decisions: the first denied respondents' petitions for a contested case hearing and granted the permit to mine subject to the special conditions; the second granted the dam-safety permits; and the third transferred the existing permit for the LTV Mining tailings basin to PolyMet.[12] The DNR supported its decision on the permit to mine with a 177-page document containing over 800 findings of fact, in addition to the commissioner's conclusions. The decision granting the dam-safety permits was similarly supported by extensive factual findings and conclusions. Based on its review of the entire record, the DNR concluded that PolyMet's proposed dams and mining operations are reasonable, practical, and will adequately protect natural resources, ensure public safety, and promote the public welfare. Thus, the DNR concluded that it was required to grant the applications subject to the terms and conditions in the permits. The DNR also denied the petitions for a contested case hearing, concluding that respondents lacked standing to seek such a hearing because they did not own property that would be affected by the proposed mining operations. But assuming that they had standing, the

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facility, waste storage and seepage containment technologies, elimination of the wastewater treatment facility, the environmental liability insurance coverage, and the lack of "information and specificity" concerning the permit. Respondent MCEA also listed eight issues for a contested case hearing, including the "adequacy of the permit," the tailings basin, "waste rock characterization," the reactive qualities of that material, the requirements for "waste rock storage piles," the adequacy of the proposed monitoring wells at the site, and financial assurances.

[12] At the court of appeals, the Band challenged this third decision, to transfer the existing LTV Mining permit for the tailings basin to PolyMet, claiming that the DNR's decision was arbitrary and capricious. *In re NorthMet*, 940 N.W.2d at 238. The court of appeals disagreed and affirmed the DNR's decision to transfer that permit. *Id.* The Band did not seek review of this issue and, thus, it is not before us.

commissioner nonetheless concluded that petitioners had not met their burden of demonstrating that a contested case hearing was necessary on the factual issues presented in their petitions.

Judicial Proceedings. Respondents sought review of the DNR's permit decisions by filing six separate certiorari appeals in the court of appeals: three from the DNR's decision to deny a contested case hearing and to issue the permit to mine (A18-1952, A18-1958, A18-1959) and three from the DNR's decision to issue the dam-safety permits (A18-1953, A18-1960, A18-1961). The court of appeals consolidated the six appeals, and while briefing was on-going, temporarily stayed the permits pending a final decision on the merits. *In re NorthMet*, No. A18-1952, Order at 7–9 (Minn. App. filed Sept. 18, 2019).

On January 13, 2020, the court of appeals reversed the DNR's decisions granting the permit to mine and the dam-safety permits. *In re NorthMet*, 940 N.W.2d at 237–38. Interpreting Minn. Stat. § 93.483, the court of appeals held that the DNR is required to hold a contested case hearing when a petition presents "probative, competent, and conflicting evidence on a material fact issue." *Id.* at 231. The court then identified five issues where it found that respondents had produced such evidence: (1) upstream construction method of the tailings basin dam; (2) bentonite amendment to the tailings basin; (3) alternatives to wet closure of the tailings basin; (4) financial assurances; and (5) PolyMet's relationship to its largest shareholder, Glencore. *Id.* at 232–37. Thus, the court of appeals concluded that the DNR erred by issuing the permits and remanded to the DNR to hold a contested case hearing. *Id.* at 237–38. After concluding that a contested case hearing was required on issues raised in the respondents' petitions, the court of appeals declined to reach the

other arguments presented except for one. In the interests of administrative and judicial efficiency, the court of appeals considered whether the DNR erred by issuing the permit to mine without a definite term. *Id.* The court concluded that the plain language of Minn. Stat. § 93.481, subd. 3(a), required the DNR to set a fixed term for the permit to mine and "direct[ed] that, for any permit issued following remand, the DNR shall determine and impose an appropriate, definite term." *Id.* at 238.

We granted the petitions for review filed by the DNR and PolyMet.

ANALYSIS

This appeal primarily concerns the contested case requirements in Minn. Stat. § 93.483 as applied to the issues raised by respondents in their petitions for a contested case hearing on PolyMet's permit to mine application. Because the court of appeals reversed the decision to grant the permits after concluding that the DNR is required to hold a contested case hearing on the issues respondents raised in their petitions, we focus only on those issues addressed by the court of appeals.

I.

We begin with the question of who can file a petition for a contested case hearing. "Any person owning property that will be affected by the proposed [mining] operation . . . may file a petition" for a contested case hearing. Minn. Stat. § 93.483, subd. 1. In denying respondents' contested case hearing petitions, the DNR determined that the "vague and speculative assertions" made by MCEA and WaterLegacy, and their members, were "premised on the occurrence of adverse impacts" that were "not likely to occur." Thus, the DNR concluded that the organizations and their members lacked standing to file a petition for

a contested case hearing because no one owned property that *will be* affected by PolyMet's proposed mining operations.

The court of appeals rejected this interpretation of Minn. Stat. § 93.483, subd. 1, concluding that the DNR's interpretation suggested that only individuals owning property "directly adjacent" to a proposed project would have a right to petition for a contested case hearing. *In re NorthMet*, 940 N.W.2d at 228. The court concluded that the DNR applied an "overly narrow interpretation" of the statute and that the member declarations established that members' properties will be affected—"that is, [a]cted upon, influenced, or changed"—by the possible release of pollutants from the tailings basin or by the risk of dam failure. *Id.* at 229 (alteration in original).

This issue presents a question of statutory interpretation, which we review de novo. *See In re Restorff*, 932 N.W.2d 12, 18 (Minn. 2019). We begin with the language of the statute, giving words and phrases their plain and ordinary meaning. *Id*. at 19; *see also* Minn. Stat. § 645.08 (1) (2020). We do not defer to agency interpretations of unambiguous language in rules and regulations. *In re Reichmann Land & Cattle, LLP*, 867 N.W.2d 502, 506 (Minn. 2015).

The court of appeals concluded that the term "affected," in the statutory clause, "property that will be affected," Minn. Stat. § 93.483, subd. 1, is broad; it means to be acted upon, influenced, or changed in some way. *In re NorthMet*, 940 N.W.2d at 229. We agree. The court of appeals' interpretation is consistent with the plain meaning of the word "affected," and consistent with the language describing the timing of that impact, "will be"

affected, either now or in the future. *See The American Heritage Dictionary of the English Language* 28 (5th ed. 2011).

The DNR argues that the court of appeals erred, asserting that the Legislature intended to extend the right to petition for a contested case hearing only to a narrow class of persons based on the statutory requirement that property *will be* affected. The DNR's position hinges on the likelihood that a member's property will actually be affected if any of the potential adverse consequences actually come to pass, or that any effect, if it occurs, will be substantial. This interpretation, however, asks us to add terms to the statute that the Legislature did not include, which we do not do. *General Mills, Inc. v. Comm'r of Revenue*, 931 N.W.2d 791, 800 (Minn. 2019) ("We do not, however, add words to the plain language of a statute to fit with an identifiable policy.").

Instead, we consider whether respondents have alleged potential impacts from the proposed mining operations that will affect their property. The declarations filed with respondents' petitions for a contested case hearing included numerous allegations about the potential impact of the mining operations on state-wide natural resources—waters, fish and wildlife populations—used by their members who own property in northeastern Minnesota. These allegations, by themselves, do not satisfy the statutory standard to file a petition for a contested case hearing because the members do not *own* the natural resources that they allege will be affected by the NorthMet project.

On the other hand, at least one declaration filed by each petitioning organization contained specific allegations about potential impacts to property actually owned by the declarant. For example, one declarant, who uses a well to supply his home with water for

drinking, washing, and bathing, began testing his well water for bacteria and chemicals to establish a baseline for monitoring potential future groundwater pollution. Another declarant explained that the real estate market in northeastern Minnesota, where her family owns property, has been "destabilized" in the wake of PolyMet's proposed mining operations. And yet another property owner described intermittent streams that cross his property, which he contends, in part, enhance the value of his property, and which he fears will be affected by the proposed mine. Each of these declarants allege that property they own will be influenced or impacted in some way by the NorthMet project. Therefore, we agree with the court of appeals: respondents have standing to file a petition for a contested case hearing under Minn. Stat. § 93.483, subd. 1.

II.

Next, we consider the legal standard that governs the DNR's decision on a petition for a contested case hearing, including the standard that applies to judicial review of that agency's decision. The DNR "must grant" a contested case petition if the commissioner finds that:

> (1) there is a material issue of fact in dispute concerning the completed application before the commissioner;
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> (2) the commissioner has jurisdiction to make a determination on the disputed material issue of fact; and
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> (3) there is a reasonable basis underlying a disputed material issue of fact so that a contested case hearing would allow the introduction of information that would aid the commissioner in resolving the disputed facts in order to make a final decision on the completed application.

Minn. Stat. § 93.483, subd. 3(a). The petitioner bears the burden of showing entitlement to the requested hearing. *In re N. States Power Co. (NSP) Wilmarth Indus. Solid Waste*

Incinerator Ash Storage Facility, 459 N.W.2d 922, 923 (Minn. 1990). If the petitioner's showing fails on any one of the three criteria in subdivision 3(a), the petition can be denied. *See Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 662 N.W.2d 125, 130 (Minn. 2003) (noting that the use of the term "and" typically denotes a conjunctive rule).

The court of appeals concluded that paragraph (3) of subdivision 3(a) requires the DNR to grant a contested case hearing "when there is probative, competent, and conflicting evidence on a material fact issue." *In re NorthMet*, 940 N.W.2d at 231; *see also id.* (explaining that court's conclusion that the phrase "so that" in paragraph (3) reflects a "legislative judgment that a contested-case hearing *will be* helpful in cases where there are genuine, material disputes of fact" (emphasis added)). In reaching this conclusion, the court of appeals rejected the DNR's argument that the commissioner has the discretion to decide whether to hold a contested case hearing as "inconsistent with the language of the statute and the caselaw." *Id.*; *see also id.* ("Nothing in the statutory language grants the DNR the unfettered discretion it seeks to employ."). The court of appeals acknowledged that the DNR had already evaluated the issues presented in the petitions, including the construction method for the tailings basin dam, the use of bentonite, the closure method and other storage alternatives, PolyMet's financial assurances, and the ownership interests in PolyMet. *Id.* at 232–37. Nonetheless, the court concluded that nothing in subdivision 3(a) "limits contested case hearings to 'new' evidence," and the issue is "not whether there is substantial evidence to support the DNR's decision," but whether the petitions presented material fact issues, "such that a contested-case hearing was required *before* the DNR made its decision." *Id*. at 232, 237.

The DNR asserts that the court of appeals erred as a matter of law in requiring a contested case hearing based solely on a showing of factual disputes. The DNR contends that section 93.483 gives the commissioner the discretion to decide whether a contested case hearing is needed in light of the issues presented in the petition and the application before the agency. Thus, the DNR argues, the commissioner has the discretion to deny a petition for a contested case hearing if the commissioner finds that such a hearing would not aid the DNR in making a final decision on the completed application. PolyMet agrees, asserting that the plain language of subdivision 3(a) allows the commissioner to decide whether a contested case hearing would help to resolve factual disputes in making a final decision on the completed application. Then, PolyMet contends that the decision to grant or deny a contested-case petition is, as with other agency decisions, subject to judicial review under Minn. Stat. § 14.69 (2020). Respondents disagree. They assert that the plain language of section 93.483 requires the commissioner to hold a contested case hearing when a petition presents disputed material facts because such disputes make the information provided at a contested case hearing necessarily helpful to the commissioner in making a decision on the permit to mine application.

We have not had occasion to address the requirements for a contested case petition outlined in subdivision 3(a). Thus, we begin with the plain language of the statute. Subdivision 3 governs the commissioner's decision to hold a contested case hearing. Paragraph (a) lays out three distinct criteria: there must be material facts in dispute; the commissioner must have jurisdiction to make a decision on that factual dispute; and, there must be a reasonable basis for those factual disputes such that new information introduced at

a hearing would aid the commissioner in making a final decision on the completed application. Minn. Stat. § 93.483, subd. 3(a)(1)–(3). The commissioner must find that each of these criteria are met. *Id*., subd. 3(a) (stating that a petition must be granted "if the commissioner finds that" the criteria in the next three paragraphs are met).

The plain language of subdivision 3(a) requires more than the mere existence of material factual disputes to merit a contested case hearing. Subdivision 3(a) contains two statutory requirements in addition to showing there are material facts in dispute. *See* Minn. Stat. § 93.483, subd. 3(a)(2)–(3). The commissioner must find, in light of all three criteria, that the information provided at the hearing "would aid" in resolving factual disputes and making a final decision on the application. *Id.*, subd. 3(a)(3). We have said that it is "not enough to raise questions," "pose alternatives," or identify evidence of "beneficial alternatives" to merit a contested case hearing. *In re Amendment No. 4 to Air Emission Facility Permit No. 2021-85-OT-1*, 454 N.W.2d 427, 430 (Minn. 1990). Thus, we do not agree that simply identifying factual disputes in a petition leads to the conclusion that a contested case hearing *necessarily* will help the commissioner make a decision on a permit to mine application.

Moreover, by focusing solely on the existence of material factual disputes without regard for the Legislature's decision to give the commissioner authority to find that a hearing will be helpful, the court of appeals effectively collapsed paragraphs (1) and (3) into a single, determinative inquiry: does the petition present disputed material issues of fact. This interpretation cannot be correct because it renders the entirety of paragraph (3), which directs the Commissioner to find a "reasonable basis" underlying the identified factual disputes,

superfluous. *See* Minn. Stat. § 645.16 (2020) ("Every law shall be construed, if possible, to give effect to all its provisions."); *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999); *see, e.g.*, *In re Reichmann Land & Cattle*, 867 N.W.2d at 511 (adopting an interpretation of a statute for a pollution discharge permit that gave effect to all its provisions). There would be no reason for the Commissioner to find that a contested case hearing will "aid" in resolving fact disputes and making a final decision if the existence of fact disputes alone compels the commissioner to hold such a hearing.

Finally, our conclusion that the Commissioner must find, based on the three criteria in subdivision 3(a), that a hearing will aid in making a final decision on the permit application, preserves a discretionary agency decision that is evaluated deferentially by the judiciary under a substantial-evidence standard. *See Minn. Ctr. Envt'l Advoc. v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 463–64 (Minn. 2002) (applying a substantial-evidence standard to an agency's decision to deny a request to prepare an environmental impact statement, noting that a decision on environmental effects of the proposed project "is primarily factual" and requires the agency's "technical knowledge and expertise"); *see also* Minn. Stat. § 14.69(e) (2020) (stating that agency decisions subject to judicial review must be supported "by substantial evidence in view of the entire record as submitted"); *In re Heron Lake BioEnergy, LLC*, No. A05-1162, 2006 WL 1806160, at *3 (Minn. App. July 3, 2006) (stating that an agency "has wide discretion to determine whether the permit challenger has met its burden to show that a contested-case hearing is warranted"), *rev. granted* (Minn. Sept. 19, 2006), *appeal dismissed* (Minn. Jan. 31, 2007); *Walser Auto Sales, Inc. v. Best Buy Co.*, No. C6-01-888, 2002 WL 172025, at *3 (Minn. App. Feb. 2, 2002) ("[R]eview of an agency's refusal to hold

a contested case hearing on a permit application requires us to give the agency wide discretion to determine whether the permit challenger has met its burden to show that a contested case hearing is warranted."). We will defer to the legislative judgment to allow the commissioner to decide, based on the commissioner's findings, whether to hold a contested case hearing. *See, e.g.*, *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 666 (Minn. 1984) (concluding that the initiation of a contested case hearing is within the agency's discretion when a rule allowed the agency to hold such a hearing if an "application is substantially contested").

Such deference is consistent with the authority the commissioner holds under subdivision 5. *See Anderson v. Comm'r of Tax'n*, 93 N.W.2d 523, 528 (Minn. 1958) (explaining that statutes are "construed as a whole so as to harmonize and give effect to all its parts"). Under this provision the commissioner identifies "the issues to be resolved and limit[s] the scope and conduct of the hearing." Minn. Stat. § 93.483, subd. 5. If the commissioner has the discretion to identify issues and limit the scope of a contested case hearing, the commissioner must also have the discretion to determine whether a contested case hearing will be helpful in reaching a decision on the completed permit to mine application.

The court of appeals' decision *In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance*, 672 N.W.2d. 921 (Minn. App. 2004), on which respondents rely, does not support a different conclusion. There, the Minnesota Pollution Control Agency (MPCA) reissued permits to two municipalities whose wastewater treatment facilities discharged into streams flowing into Lake Byllesby, and also denied the MCEA's petition for a contested

case hearing. *Id.* at 923, 925. The court of appeals reversed, deciding first that the agency erred in reissuing the permits because it could not "conclude that the MPCA's decision not to apply the phosphorus rule was supported by substantial evidence." *Id.* at 928; *see also id.* at 927–28 (relying on the questions raised "concerning whether the MPCA engaged in reasoned decision-making" and whether factors other than the agency's rule were relied on). But, because the court was "not prepared . . . to re-write the permits" to address the merits of MCEA's challenges to the permits, the court considered whether the agency erred by denying MCEA's petition for a contested case hearing. *Id.* at 928. Noting that the MCEA had identified experts who challenged the agency's methodology and interpretations, the court concluded that when a "relator has raised a genuine question concerning whether the MPCA adequately addressed the disputed fact issues . . . a presentation of these issues to a neutral administrative law judge in a contested case hearing 'will aid the agency in resolving the disputed facts and making a final decision on the matter.' " *Id.* at 930 (quoting Minn. R. 7000.1900, subp. 1 (2001)).

But the concerns presented by the record in *In re Owatonna* are not present here. *See id*. at 927–28 (questioning the agency's modeling on phosphorus limits, noting the agency announced its intent to reissue the permits before modeling was done, and stating that the MCEA's concerns were rejected in a "conclusory manner"). The record in this case is replete with examples of the DNR soliciting input from the public and considering such input in a deliberative manner, as evidenced by its 177-page findings of fact and conclusions of law released alongside the permit to mine. We also question whether the court's discussion of the need for a contested case hearing in *In re Owatonna* was dicta because the court ultimately

concluded that the MPCA's permitting decision lacked substantial evidence. *See id*. at 928 (concluding "that the MPCA's decision not to apply the phosphorus rule" was not "supported by substantial evidence"). Had the court of appeals concluded that the MPCA did not err in denying MCEA's petition for a contested case hearing, the outcome would not have changed—the MPCA's decision to reissue the permits would have been overturned based on a lack of substantial evidence. *See State v. Atwood*, 925 N.W.2d 626, 631 (Minn. 2019) (noting that the "paradigmatic example of nonessential dicta" is an alternative conclusion that would not change the outcome of a case).

Finally, we are unpersuaded by the respondents' policy arguments for requiring the DNR to hold a contested case hearing whenever a petitioner presents probative evidence of material fact disputes. Although evidence that is not probative in nature is unlikely to aid the agency, the converse is not necessarily true: the presence of probative evidence may, but also may not, aid an agency in making a final decision on the completed permit application. Every petition for a contested case hearing must be considered in light of the evidence presented as well as the record developed to that point. We disagree with the MCEA's suggestion that a contested case hearing is necessary to "build a robust record" for appellate review whenever probative evidence of a disputed material issue of fact is presented. The record for appellate review depends on the agency decision at issue—here, the decision to deny the petitions for a contested case hearing. And at the time the DNR denies a petition for a contested case hearing, a reviewing court has all the evidence it needs to determine whether such a decision is supported by substantial evidence in the record. *See, e.g.*, *In re NSP Wilmarth*, 459 N.W.2d at 923 ("Our review of the extensive record developed . . . prior to issuance of the permit leads

to the conclusion that the agency decision [to deny a petition for a contested case hearing] was supported by the requisite substantial evidence.").

In sum, we hold that the DNR has the discretion to determine whether a hearing on the factual disputes in a petition for a contested case hearing will "aid" the agency in making a final decision on the completed application.

III.

We now turn to the merits of the DNR's decision to deny the petitions for a contested case hearing and whether that decision was based on substantial evidence in the record. *See id.* (applying a substantial-evidence standard to a decision to deny a petition for a contested case hearing).

Under Minn. Stat. § 14.69, we may affirm, remand, or reverse an agency decision if the agency's findings of fact are unsupported by substantial evidence, arbitrary or capricious, or affected by an error of law. *See In re Application Of Minn. Power for Auth. To Increase Rates for Elec. Serv. In Minn.*, 838 N.W.2d 747, 753 (Minn. 2013) (discussing the standard of review); *In re Dairy Dozen-Thief River Falls, LLP*, No. A09-936, 2010 WL 2161781, at *16 (Minn. App. June 1, 2010) ("Denials of contested case hearing requests are also reviewed under Minn. Stat. § 14.69.").

We have said that substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion," and more than a "scintilla," "some," or "any" evidence. *Cable Commc'ns Bd.*, 356 N.W.2d at 668 (citing *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)). Although we have used different formulations, this standard reflects a singular legal principle: a substantial-evidence

analysis requires us to "determine whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record." *Minn. Power & Light Co. v. Minn. Pub. Utils. Comm'n*, 342 N.W.2d 324, 330 (Minn. 1983). This principle is rooted in the deference we show to matters that are properly within an agency's particular expertise. *See Reserve Mining Co.*, 256 N.W.2d at 824 (explaining that "deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience"). "Our guiding principle is that if the ruling by the agency decision-maker is supported by substantial evidence, it must be affirmed." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 279 (Minn. 2001).

With this standard in mind, we now turn to the specific material issues of fact addressed by the court of appeals[13] to determine whether the DNR's decision to deny respondents' petitions for a contested case hearing was supported by substantial evidence in the record.

[13] The court of appeals noted that "numerous factual issues" were raised in the contested case hearing petitions, "*including*" the five issues specifically addressed in the opinion. *In re NorthMet*, 940 N.W.2d at 232–36 (emphasis added). Consistent with that decision and with the parties' arguments to our court, we address these same five specific issues. Further, given the substantial overlap in the petitions, the issues, and the themes pursued by respondents—the tailings basin dam construction, the tailings basin itself, and the bentonite amendment—we see no need to address other issues that, even though not specifically raised in the briefs, might fall within these petitions.

The tailings basin dam

PolyMet proposes to build a new tailings basin dam using an upstream construction method.[14] Under Minnesota's nonferrous mining rules, a tailings basin must, among other requirements, be "structurally sound" and "minimize hydrologic impacts." Minn. R. 6132.2500, subp. 1 (2019). The Commissioner must also base the approval or denial of a dam on "the potential hazards to the health, safety, and welfare of the public and the environment," and determine whether the proposed dam will be in "[c]ompliance with prudent, current environmental practice throughout its existence." Minn. R. 6115.0410, subp. 8 (2019).

In denying the petitions for a contested case hearing, the DNR determined that PolyMet's proposed tailings basin dam will be structurally sound and satisfies the applicable requirements, including safety factors. MCEA and WaterLegacy contend that these findings are erroneous because using an upstream construction method for the tailings basin dam poses an unreasonable risk of dam failure. They provided expert opinions critical of the upstream construction method and highlighted at least two recent incidents where upstream tailings dams catastrophically failed, resulting in widespread pollution and significant loss of life.[15]

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[14] The upstream construction method adds the building blocks of a dam over time, in a stair-step fashion towards the center of the basin. In contrast, the downstream construction method adds new dam sections to the exterior of the tailings basin dam. A third type of construction, a centerline construction method, is a hybrid of the upstream and downstream methods.

[15] The court of appeals took judicial notice of another dam failure that occurred at the Córrego do Feijão tailings dam in Brumadinho, Brazil on January 25, 2019, approximately

After a careful review of the DNR's findings and the underlying record, we conclude that substantial evidence supports the DNR's decision to deny the contested case hearing petitions on the proposed upstream construction design. The DNR's findings explain that selecting a construction approach is not a one-size-fits-all determination and that the proper construction method should be based on the specific circumstances of the proposed dam. To that end, the DNR's findings noted that one advantage of the upstream construction method is that it creates a smaller footprint for the tailings basin dam, thereby minimizing the impact on nearby wetlands. The findings also explained that PolyMet's proposed dam is to be constructed using the existing LTV Mining coarse tailings as building material, which, due to its limited availability, weighs against the downstream or centerline construction methods. Finally, the DNR's findings included multiple references to PolyMet's Flotation Tailings Management Plan, which provided the engineering and

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3 months after DNR issued the permits here. *In re NorthMet*, 940 N.W.2d at 233 n.22. Based on this fact, the court of appeals directed the DNR to address "up-to-date information on upstream construction and dam failures" on remand. *Id.* We question whether an appellate court can require the DNR to address updated information at a contested case hearing, given that the Legislature conferred on the commissioner the authority to "identify the issues to be resolved and limit the scope and conduct of the hearing in accordance with applicable law, due process, and fundamental fairness." Minn. Stat. § 93.483, subd. 5. In addition, the commissioner has ample authority to investigate safety issues as they arise in the context of permitted activities. *See, e.g.*, Minn. Stat. § 93.47, subd. 4(1)–(2) (2020) (authorizing the commissioner, in enforcing mining regulations, to investigate and inspect "as the commissioner deems necessary," including by "enter[ing] upon any parts of the mining areas"); Minn. Stat. § 93.481, subd. 4(2)–(3) (2020) (allowing the commissioner to modify a permit "to protect the public health or safety" or certain public interests, and to "suspend operations" if necessary to "protect the public health or safety or to protect public interests in lands or water"). Because we conclude that respondents are not entitled to a contested case hearing on the upstream construction method or stability of the tailings basin dam, we need not decide whether the court of appeals erred in directing the DNR to address updated, post-permit factual matters regarding other dams.

technical data showing that the tailings basin dam will be structurally sound. In these findings, the DNR "adequately explained how it derived its conclusion" and "that [its] conclusion [was] reasonable on the basis of the record," satisfying the substantial-evidence standard. *Minn. Power & Light Co.*, 342 N.W.2d at 330.

Alternatives to wet closure of the tailings basin

Upon completion of mining activities, PolyMet proposes using wet closure to achieve reclamation as required by Minnesota's nonferrous mining rules. *See* Minn. R. 6132.3200, subp. 1 (2019) ("The mining area shall be closed so that it is stable, free of hazards, minimizes hydrological impacts, minimizes the release of substances that adversely impact other natural resources, and is maintenance free."). The proper closure option is determined after "an examination of alternative practices," such that the proposed design presents "the most effective and workable means of achieving reclamation, including being technologically, economically, and practically applicable." Minn. R. 6132.0100, subp. 17 (2019).

As a reclamation method, "wet closure" entails covering the tailings in the basin with water to create a 900-acre pond to prevent oxygen from reaching the stored tailings. In contrast, "dry closure" involves draining the basin and placing the tailings under a dry cover with bentonite amended over the entire surface of the tailings basin. Another tailings-management method is "dry stacking" or "filtered tailings," which involves dewatering and stacking the dried tailings on an exposed liner. MCEA and WaterLegacy contend that dry closure or dry stacking are preferable to wet closure and that a contested

case hearing is necessary to consider whether PolyMet's wet closure plan will adequately protect natural resources or if there is a feasible or prudent alternative closure method.

In its findings, the DNR concluded that using wet closure has advantages over dry closure or dry stacking, acknowledged the trade-offs associated with wet closure, and noted that there is no ideal solution that completely eliminates all environmental risks and impacts. The DNR's findings explained that, although dry stacking tailings conserves water and does not require a dam, dry tailings are prone to wind erosion and can release pollutants that become saturated in humid climates like Minnesota. As a result, the DNR concluded that dry closure or dry stacking would not present significant benefits over PolyMet's proposed wet closure method. The DNR fully evaluated the various methods of mine closure, including dry closure and dry stacking, and had access to a report by outside experts who presented the DNR with six alternatives for covering the tailings basin at closure. The report included a discussion of the benefits and risks associated with each closure option, and provided support for the conclusion that wet closure would best serve to protect nearby natural resources while also providing an acceptable factor of safety.

After a careful review of these findings and the underlying record, we conclude that substantial evidence supports the DNR's decision to deny the petitions for a contested case hearing on the wet closure method. The record shows that the DNR was aware of, and considered, the trade-offs associated with the alternative closure options. Specifically, the DNR noted that "[w]hile dry closure has advantages, it also must be stressed that it has downsides, including the deleterious impacts to water quality based on the predictive water modeling and more impacts to wetlands, sensitive habitats, and wildlife." The findings

and the record demonstrate that the DNR's explanation was adequately explained and its conclusion was reasonable.[16] *Minn. Power & Light Co.*, 342 N.W.2d at 330.

Bentonite amendment to the tailings basin

For its proposed plan for the "reclamation or restoration" of the mining area, Minn. Stat. § 93.481, subd. 1(1), PolyMet proposes applying a bentonite-soil mixture to the face of the tailings basin dam, during construction; to the exposed beach areas on the interior of the basin, at closure; and to the tailings basin pond bottom, at closure (collectively, the "bentonite amendment"). PolyMet's proposed bentonite amendment is designed to satisfy the DNR's reactive waste rule. *See* Minn. R. 6132.2200, subp. 2(B)(2) (2019) (requiring a facility to either modify the waste "such that the waste is no longer reactive," or "permanently prevent substantially all water from moving through or over the mine waste and provide for collection and disposal of any remaining residual waters that drain from the mine waste"). The commissioner may only approve mine reclamation techniques that are "practical and workable under available technology." Minn. Stat. § 93.481, subd. 2.

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[16] WaterLegacy also argues that a contested case hearing is necessary to consider whether a better alternative site exists for tailings storage than the existing LTV Mining tailings basin. The DNR contends that alternative sites for the tailings basin were considered and that "dry stacking at a different site was not a preferable alternative because it would require the conversion of additional green space and would not address the existing tailings basin legacy issues that are addressed by the Application." The DNR's findings contain multiple references to the FEIS, explaining that "reusing existing infrastructure would minimize impacts . . . to wetlands, habitat, . . . wildlife" and "has significant economic advantages." These findings and references to the unchallenged FEIS provide substantial evidence supporting the DNR's finding that there is no better alternative site for tailings storage.

MCEA and WaterLegacy assert that a contested case hearing is required to address three of the DNR's findings related to the bentonite amendment.

First, MCEA and WaterLegacy challenge the DNR's finding that bentonite is an "available technology" under Minn. Stat. § 93.481, subd. 2.[17] Respondents contend that, because PolyMet's proposed methods of applying bentonite are "untested and unproven," bentonite cannot be considered an "available technology." We disagree. PolyMet's Adaptive Water Management Plan, included in its permit application, explains that "bentonite has been used for many years in a wide variety of applications," including mine tailings facilities. PolyMet also identified at least two companies that provide bentonite-based products for hydraulic barriers and other applications. MCEA and WaterLegacy argue that the methods of application and usage are "untested and unproven"; but bentonite, as a technology, exists and is commonly used as a barrier for reducing oxygen and water infiltration. Thus, we conclude that substantial evidence in the record supports the DNR's decision to deny a contested case hearing on whether bentonite is an "available technology."

Second, MCEA and WaterLegacy challenge the DNR's finding that the bentonite amendment is a "practical and workable" reclamation technique. *See* Minn. Stat. § 93.481,

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[17] The term "available technology" is not defined in the statute. When a term is not defined in the statute, we determine its common meaning by looking to dictionary definitions and applying them in the context of the statute. *State v. Prigge*, 907 N.W.2d 635, 638 (Minn. 2018). The word "available" commonly means "[p]resent and ready for use." *The American Heritage Dictionary of the English Language* 123 (5th ed. 2011). Therefore, we conclude that, for Minn. Stat. § 93.481, a technology is considered "available" if it exists and is ready for use at the time of permit issuance.

subd. 2. They contend that there is no evidence in the record that the bentonite amendment proposed by PolyMet has been tested nor is there any evidence that the methods for applying bentonite will be effective at reducing oxygen and water infiltration into the stored tailings. We agree.

The DNR supported its findings that bentonite "has been tested" and "will be effective" with various citations to the FEIS. But the references to bentonite in the FEIS consist of descriptions and objectives of the bentonite amendment and conclusory statements about its effectiveness; there is no analysis of the scientific basis for the DNR's assumptions. Further, the single study on which nearly all the DNR's findings of effectiveness rely is not in the record.[18]

The contested case petitions, in contrast, presented a bevy of evidence, including statements made by the DNR's own experts and external consultants that contradicted the DNR's finding on effectiveness. For example, one of the DNR's external consultants opined that "[t]he methods and assumptions used to place the bentonite and to control the infiltration and tailings saturation are unsubstantiated, and wishful thinking. We do not

[18] At oral argument, we inquired about the location of this bentonite study and other evidence in the record on which the DNR relied for its finding regarding bentonite's effectiveness. Afterwards, the DNR moved for leave to supplement the record with the study in question and two additional documents concerning the effectiveness of bentonite. We denied the motion. *In re NorthMet*, No. A18-1952, Order at 3(Minn. filed Nov. 16, 2020). As explained in our order denying the motion, we generally do not base our decision on matters outside the record on appeal. *Id.* at 2. In addition, up to the point of our inquiry at oral argument, the DNR had represented that the record was complete and contained all documents considered in its review of PolyMet's permit applications. *See In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999) (denying a motion to supplement based in part on the agency's representation that the record on appeal was complete).

believe it will function as intended, because of the unproved application methods." In addition, respondents submitted new evidence with their petitions that the proposed sodium bentonite could react with multivalent cation species in the pond water, resulting in a cation exchange that could reduce the effectiveness of the bentonite by up to seventy percent. The DNR wholly failed to address respondents' concerns about cation exchange in its findings, the FEIS, or any other documentation in the record.

Nor can we conclude that the special conditions of the permit to mine, which require PolyMet to prove the effectiveness of the bentonite amendment before construction may begin on the tailings basin dam, are an effective substitute for the substantial evidence required to support the DNR's decision. The special conditions only require PolyMet to demonstrate the effectiveness of the bentonite amendment in reducing oxygen infiltration into the tailings basin beaches and dam face before construction begins; notably, those conditions do not address how PolyMet will subaqueously apply bentonite to the pond bottom in a uniform manner or that the bentonite layer, even if uniformly applied, will be effective at permanently maintaining a positive water balance of the pond. Even PolyMet's proposed pilot/field testing plan (included as Attachment I of Appendix 11.5 of the permit to mine application) requires at least 2 years of deposited tailings to accumulate *after* mining operations have begun before experimental testing on the effectiveness of the bentonite pond bottom cover could occur.

The effectiveness of the bentonite amendment is critical in preventing oxygen and water from reaching the stored tailings and ensuring the NorthMet project's compliance with the DNR's reactive waste rule. *See* Minn. R. 6132.2200, subp. 2(B)(2). The DNR's

findings about the effectiveness of the bentonite amendment on the beaches and dam face rest on a study that is not part of the record. Further, the record is entirely devoid of any evidence to support the DNR's finding that the pond-bottom bentonite cover will be effective in reducing water infiltration and maintaining a permanent pond. Given this void, we cannot conclude that substantial evidence supports the DNR's decision to deny the petitions for a contested case hearing on bentonite's effectiveness. Instead, we conclude 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).

Third, MCEA and WaterLegacy challenge the DNR's finding that the bentonite amendment will not negatively impact the stability of the tailings basin dam. They contend that the bentonite amendment will exacerbate erosion on the tailings basin dam face, making the dam "geomorphically unstable" and increasing the likelihood of a catastrophic dam failure. However, the DNR's findings about bentonite's effect on the stability of the tailings basin dam are supported by a technical analysis conducted by third-party experts that is summarized in the Geotechnical Data Package, included with the permit application. That study included an analysis with equations, modeling, and review of scientific literature, all of which found that the proposed bentonite-amended dam would meet state and federal safety factors. Thus, the DNR adequately explained its conclusion and based on the record, that conclusion is reasonable. *Minn. Power & Light Co.*, 342 N.W.2d at 330.

Financial Assurances

Minnesota's nonferrous mining rules require permittees to submit evidence of financial assurances that a source of funds is available to the DNR if the permittee (1) fails to meet its closure and reclamation obligations or (2) is required to take corrective action by the commissioner for noncompliance with design and operation criteria. *See* Minn. R. 6132.1200, subp. 1 (2019); *see also* Minn. Stat. § 93.481, subd. 1 (requiring the applicant to submit any other information "the commissioner may require"). The court of appeals concluded that a contested case hearing is required to address whether PolyMet's financial assurances will be sufficient to cover reclamation and other long-term costs associated with the project. *See In re NorthMet*, 940 N.W.2d at 235–36. In doing so, the court of appeals dismissed PolyMet's argument that respondents had forfeited this argument by not raising it in their briefs. *Id.* at 236 n.26. The court concluded that "the issues were raised to the DNR by MCEA, relate to matters of significant public concern, and are well briefed by amici on appeal." *Id.* The DNR maintains that the issue of a contested case hearing on financial assurances was raised solely by one group of amici, the Carlson amici, and that the court of appeals erred by considering it.

We agree with the DNR. Under the principle of party presentation, we generally do "not consider arguments raised for the first time on appeal" nor do we "decide issues raised solely by an amicus." *Hegseth v. Am. Fam. Mut. Ins. Grp.*, 877 N.W.2d 191, 196 n.4 (Minn. 2016). Amicus must accept the case before the court as it is and "ordinarily cannot inject new issues into a case that have not been presented by the parties." *Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12, 23 n.9 (Minn. 2004). Although we have the authority to

"consider any issue if the interests of justice so require," *Hegseth*, 877 N.W.2d at 196 n.4, and we have occasionally considered issues raised solely by an amicus, we only do so if the issue is one that we could raise sua sponte. *See, e.g.*, *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 645 n.7 (Minn. 2012). The circumstances of this case, an appeal on certiorari review of an agency decision that is subject to a deferential standard of review, is not one of those rare instances where we need to or should reach an issue raised only by an amicus party.

MCEA may have raised issues related to PolyMet's financial assurances in its contested case petition. But MCEA, WaterLegacy, and the Band did not raise or address this specific issue in their briefs to the court of appeals.[19] Indeed, the only party who argued for a contested case hearing on the issue of financial assurances before the court of appeals was the Carlson amici.[20] Therefore, we conclude that because the question of whether a contested case hearing on financial assurances was raised and argued solely by an amicus before the court of appeals, that issue is not properly before us. *See Hegseth*, 877 N.W.2d at 196 n.4 ("[W]e generally will not decide issues raised solely by an amicus.").

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[19] The phrase "financial assurance" appears only once, in passing, in the briefs filed by MCEA and the Band. And while WaterLegacy's brief at the court of appeals included a section related to financial assurances, that argument was made to challenge the *legal* sufficiency of the DNR's decision to issue the permit to mine in light of the financial assurances proposed by PolyMet, not as a reason why the DNR erred in denying the contested case petitions.

[20] We also note that the Commissioner has the authority to annually review a permittee's financial assurances, Minn. Stat. § 93.49 (2020), and may suspend, revoke, or modify a permit if the financial assurance requirements are not met. Minn. R. 6132.1200, subp. 7.

Glencore

Minnesota's nonferrous mining 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, and the permit to mine shall be issued jointly." *See* Minn. R. 6132.0300, subp. 2. Respondents argue that a contested case hearing is required to determine whether Glencore, a Swiss-based company that owns a substantial interest in PolyMet's stock and has provided much of the funding for the NorthMet project, should be considered "engaged in a mining operation" with PolyMet and listed as a co-permittee on the permit to mine. The DNR argues that the court of appeals lacked jurisdiction to order a contested case hearing related to Glencore because the issue was not raised in respondents' timely filed petitions. Moreover, PolyMet argues that judicial review is confined to the record, and the court of appeals should not have considered post-permit factual developments related to Glencore's increased ownership interest.[21]

We agree with the DNR and PolyMet. Neither of respondents' timely filed petitions requested a contested case hearing on Glencore's ownership interest in PolyMet. Because PolyMet's permit to mine application was deemed completed and filed on January 29, 2018, any petition for a contested case hearing was required to be submitted by

[21] When addressing the issues related to Glencore, the court of appeals took judicial notice that Glencore's interest in PolyMet's total issued outstanding common shares increased from 40.3 percent to 71.6 percent on June 28, 2019, approximately 7 months after DNR issued the permit to mine. *In re NorthMet*, 940 N.W.2d at 237 n.29. The court of appeals then determined that "the contested case hearing held on remand should encompass up-to-date information on Glencore's interest in PolyMet and involvement with the NorthMet project." *Id.* For the same reasons outlined above regarding the Brazil dam collapse, we reject the court of appeals' reasoning here. *See supra* note 15.

February 28, 2018. *See* Minn. Stat. § 93.483, subd. 1 (requiring that a petition for a contested case hearing be filed "within 30 days after the application is deemed complete and filed" in order to be considered by the commissioner). The issue of Glencore's ownership interest in PolyMet was raised for the first time in a supplemental petition filed by WaterLegacy on April 5, 2018, over 1 month after the deadline to file a contested case petition had passed. Thus, because the supplemental petition was untimely filed, the DNR properly denied respondents' request for a contested case hearing on issues related to Glencore.

Nor can we agree with the court of appeals that "the DNR had an independent obligation to determine whether a contested case hearing is required." *In re NorthMet*, 940 N.W.2d at 236 n.28. The criteria in Minn. Stat. § 93.483, subd. 1, for a contested case hearing, including a timely petition, must be met. *See id*., subd. 1 (requiring a petition to be filed within "30 days after the application is deemed complete and filed"). Requiring the commissioner to "independently evaluate" every factual issue related to a completed permit application and determine "whether the statutory criteria for a contested-case hearing were met," *In re NorthMet*, 940 N.W.2d at 230, would relieve petitioners of the statutory requirement to identify specific disputed issues of material fact in a *timely* petition. *See* Minn. Stat. § 93.483, subd. 1 (outlining procedure for filing a petition for a contested case hearing); *Amaral*, 598 N.W.2d at 384 ("Whenever it is possible, no word, phrase, or sentence should be deemed superfluous, void, or significant.") Thus, because the supplemental petition raising issues related to Glencore was not timely filed in

accordance with Minn. Stat. § 93.483, subd. 1, the court of appeals lacked jurisdiction to decide those issues.

IV.

Next, we must decide whether the DNR erred by issuing a permit to mine without a definite, fixed term. The DNR must include in the permit "the term determined necessary by the commissioner for the completion of the proposed mining operation, including reclamation or restoration." Minn. Stat § 93.481, subd. 3(a). The DNR's rules provide that the permit term "shall be the period determined necessary by the commissioner for the completion of the proposed mining operation including postclosure maintenance, based on information provided under part 6132.1100." Minn. R. 6132.0300, subp. 3.

The permit to mine issued to PolyMet states that the NorthMet project, including mining and reclamation activities, would "be completed in approximately the year 2072." Maintenance and "active water treatment" would continue at the site "until such time that continued compliance with the Minnesota Rules 6132.2000 to 6123.3200 has been established and the necessity for postclosure maintenance has ceased." Reviewing this language, the court of appeals concluded that "the DNR erred by issuing a permit without a fixed term, and direct[ed] that, for any permit issued following remand, the DNR shall determine and impose an appropriate, definite term." *In re NorthMet*, 940 N.W.2d at 238.

We review de novo an agency decision that "turns on the meaning of words in a statute or regulation." *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 39–40 (Minn. 1989). "In considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise." *Id.* Thus, we "may

substitute [our] own judgment" for that of the agency when the language at issue "is clear and capable of understanding." *Id.* at 40.

The DNR argues that the plain meaning of the word "term" does not require a permit term to be for a fixed, calendar-based duration. Instead, the DNR asserts that an indefinite, performance-based term is appropriate because Minnesota's mining rules contemplate that reclamation and post-closure activities may last for an indefinite period. In the alternative, the DNR argues the word "term" in the statute is ambiguous and, therefore, its own interpretation is entitled to deference.

We disagree with the DNR on both counts. In interpreting a statute, we construe words "according to their common and approved usage." Minn. Stat. § 645.08(1). Because the Legislature did not define the word "term," we may determine its common meaning by looking to dictionary definitions. *State v. Prigge*, 907 N.W.2d 635, 638 (Minn. 2018). The court of appeals relied on the definition of "term" as "[a] limited or established period of time that something is supposed to last." *In re NorthMet*, 940 N.W.2d at 238 (quoting *The American Heritage Dictionary of the English Language*, 1796 (5th ed. 2011)). The notion that a "term" is a fixed period of time is uniform across various dictionaries. *See, e.g.*, *Webster's Third New International Dictionary* 2358 (1968) (defining "term" as "a limited or definite extent of time;" "the time for which something lasts"); *The New Oxford American Dictionary* 1750 (2001) (defining "term" as "a fixed period or limited period of time for which something . . . lasts or is intended to last"); *Term*, *Black's Law Dictionary* (11th ed. 2019) (defining "term" as "[a] fixed period of time"). Consistent with these

definitions, we conclude that the word "term," as used in section 93.481, means a fixed, definite period of time.

The DNR and supporting amici contend that a permit term may be fixed by an increment other than years. For example, amicus Iron Mining Association of Minnesota contends that a "life term" is a term that is fixed to an indefinite length (i.e., the life of the individual). But, in that phrase, the word "life" modifies and limits the meaning of the word "term." We are not convinced that the phrase "determined necessary . . . for the completion of the proposed mining operation, including reclamation" modifies and limits the meaning of "term" in section 93.481 in a similar way. We interpret that language as simply describing what will happen during the permit term, not as setting the length of that term.

The DNR also argues that the definition of "term" is susceptible to multiple reasonable interpretations and, therefore, its interpretation is entitled to deference. As a threshold matter, we only defer to an agency's interpretation of an ambiguous statute if we determine the agency's interpretation is reasonable. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 516 (Minn. 2007). Even if ambiguous, we only defer to the agency's expertise if the "language is so technical in nature that the agency's field of technical training, education, and experience is necessary to understand the [statute]." *Id.*

We do not find the DNR's indefinite, performance-based term to be a reasonable interpretation of the word "term" as used in the context of the statute. But even if we did, the word "term" is not the type of language that is so technical in nature that we need to

rely on the DNR's expertise to discern its meaning. In *Annandale*, for example, we determined that the phrase "cause or contribute to the violation of water quality standards" merited deference to the interpretation supplied by the MPCA. *Id.* at 517; *see also Minn. Ctr. Env't Advoc.*, 644 N.W.2d at 464 (holding that the phrase "significant environmental effects" required application of MPCA's technical knowledge and expertise). The same reasoning does not apply to the word "term," which has a consistent, plain meaning across multiple references.

Finally, the DNR argues that, as a matter of public policy, setting a fixed permit term at the time of issuance would upend its ability to ensure reclamation because a permittee could simply complete its mining activities, wait for the permit to expire, and walk away from its reclamation responsibilities. This argument presumes that the DNR is powerless to enforce reclamation requirements beyond a permit's term. That presumption is simply incorrect. The Legislature gave the DNR broad enforcement powers to correct violations of mining statutes and rules by assessing civil penalties and seeking criminal penalties or injunctive relief. *See* Minn. Stat. § 93.51, subds. 1–2 (2020). In addition, the DNR retains the power to amend the permit if a permittee fails to achieve reclamation within the proposed term. *See* Minn. R. 6132.4200-.4300 (2019).

In sum, we conclude that the meaning of "term" in Minn. Stat. § 93.481 refers to a fixed period of time covering a precise number of years. And we agree with the court of appeals that the DNR erred in issuing a permit that did not include a fixed term.

V.

Finally, we must determine whether the court of appeals erred by reversing the DNR's decision to issue the two dam-safety permits for the NorthMet project. The DNR's decision to waive a contested case hearing on the dam-safety permits went unchallenged. *Cf.* Minn. Stat. § 103G.311, subd. 5(a) (allowing only the permit applicant and certain government entities to petition for a contested case hearing on factual issues related to a dam-safety permit). On appeal, MCEA and WaterLegacy challenged the DNR's decision to issue these permits, asserting that the dam-safety permits do not meet the standards set forth in Minn. Stat. § 103G.315, subd. 3.

The court of appeals did not separately evaluate whether the DNR's decision to issue the dam-safety permits was based on substantial evidence nor did it find any legal deficiencies with the dam-safety permits. Instead, the court reversed the DNR's decision to issue to the dam-safety permits, relying on the DNR's explanation that there was "substantial overlap between the permit-to-mine and the dam-safety permits as each permit was issued to the same permittee for the same project and is based on the same underlying factual analysis." *In re NorthMet*, 940 N.W.2d at 237 n.31. The DNR asserts that the court of appeals erred by reversing the dam-safety permits without making any finding that those permits were factually or legally deficient.

We agree with the DNR. The court of appeals' decision to reverse the dam-safety permits, without considering the record on which the DNR relied for those permits, was an error of law. In reversing the dam-safety permits based on the decision that a contested case hearing on the permit to mine is necessary, the court of appeals acted prematurely—

it presumed that a contested case hearing on factual issues related to the permit to mine would inevitably affect the validity of the dam-safety permits. But the two types of permits are governed by different statutory standards. *Compare* Minn. Stat. § 93.44 (allowing mining where possible adverse environmental effects are controlled), Minn. Stat. § 93.481, subd. 2 (requiring the DNR to "determine that the reclamation or restoration planned for the operations complies with lawful requirements"), *and* Minn. R. 6132.0300, subp. 1 (requiring the permittee to show it has the capital and financial resources to conduct the mining), *with* Minn. Stat. § 103G.315, subd. 3 (authorizing the commissioner to issue dam-safety permits if the applicant's plans are "reasonable, practical, and will adequately protect public safety and promote the public welfare"). The court of appeals did not explain why, in light of these different standards, the DNR would be required to reconsider the dam-safety permits based on the outcome of a contested case hearing on the permit to mine.[22]

Thus, we conclude that the court of appeals erred in reversing the dam-safety permits to allow for reconsideration after a contested case hearing on the permit to mine. If reconsideration of the dam-safety permits is necessary after the DNR holds a contested case hearing on the permit to mine, the DNR may, in its discretion, modify the dam-safety

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[22] In addition, it is not clear that the DNR would be required to reconsider the dam-safety permits simply because a contested case hearing is held on the permit to mine. A contested case hearing results in recommendations that the DNR may, but is not obligated to, accept. *See* Minn. Stat. § 14.62, subd. 2a (2020) (stating that an administrative law judge's decision is final unless the agency modifies or rejects it); *In re Excess Surplus*, 624 N.W.2d at 278 (stating that an agency "owes no deference to any party in an administrative proceeding, nor to the findings, conclusions, or recommendations of the [administrative law judge]"). Thus, it is not clear why the DNR would be required to reconsider the dam-safety permits; the decision to require additional proceedings on one permit does not necessarily force additional proceedings on the other.

permits as allowed by the mining statutes and regulations. *See* Minn. R. 6115.0500(B) (2019) (stating that the DNR can "modify a [dam-safety] permit at any time if the commissioner deems it necessary for any cause for the protection of the public interests").

CONCLUSION

For the foregoing reasons, we affirm in part, reverse in part, and remand to the Department of Natural Resources to conduct the contested case hearing required by this decision and, thereafter, to determine and fix the appropriate definite term for the permit to mine as necessary.

Affirmed in part, reversed in part, and remanded.

THISSEN, J., took no part in the consideration or decision of this case.