

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the NorthMet Project
Permit to Mine Application

NOTICE AND ORDER FOR PREHEARING CONFERENCE AND HEARING

TO: The following parties through their respective counsel of record:

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Petitioners Minnesota Center for Environmental Advocacy, the Center for Biological Diversity, Friends of the Boundary Waters Wilderness, and WaterLegacy (collectively, Petitioners), the Fond du Lac Band of Lake Superior Chippewa, and Applicant Poly Met Mining, Inc. (PolyMet), are **HEREBY NOTIFIED** that the Minnesota Department of Natural Resources (DNR) has initiated this action to resolve disputed issues of material fact related to whether the use of bentonite will be effective at reducing oxygen and water infiltration into the Flotation Tailings Basin as set forth in the Permit to Mine (Permit) for the NorthMet Mining Project. The statutory and regulatory authority for this hearing includes: Minn. Stat. § 93.483; Minn. Stat. §§ 14.57-14.62; Minn. R. 1400.5010-1400.8500.

IT IS HEREBY ORDERED that a telephonic prehearing conference will be held on November 1, 2021, at 10:00 A.M. Central Time, by the Office of Administrative Hearings. At the time the prehearing conference is scheduled to begin, the parties shall dial the following:

1-(888) 742-5095

Conference Code: 454-161-2416#

All mail sent to the Administrative Law Judge should be directed to PO Box 64620, St. Paul, Minnesota, 55164-0620.

This matter has been assigned to Judge James LaFave, Administrative Law Judge, Office of Administrative Hearings, PO Box 64620, St. Paul, Minnesota, 55164-0620. The phone number for Judge LaFave's chambers is (651) 361-7874.

A contested case hearing will be held at a place and time to be determined by the Administrative Law Judge. The hearing will be conducted pursuant to the contested case procedures set out in Chapter 14 of Minnesota Statutes, Minn. Stat. § 93.483, and Minn. R. 1400.5100 to 1400.8500. These materials may be purchased from the Minnesota Book Store, telephone (651) 297-3000, or are available for free at <http://www.revisor.mn.gov>.

The attorneys and associated contact information for the DNR are listed below. These attorneys may be contacted to discuss discovery or informal disposition of this matter.

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FINDINGS

Project and Procedural Background

1. PolyMet proposes to develop the NorthMet copper-nickel-platinum group elements mine and associated processing facilities near Hoyt Lakes (the NorthMet Project). As proposed, construction will last for approximately 18 to 24 months and will include land clearing, tailings basin improvements, building renovation and construction, stockpile preparation, and utility upgrades. Mining will involve open-pit surface mining methods for approximately 20 years, resulting in average production of approximately 32,000 tons per day of ore and 42,000 tons per day of waste rock.

2. Mining of ore is proposed at a previously undisturbed site approximately six miles south of Babbitt. Processing of ore is proposed at a previously developed taconite processing site, which will be refurbished for the NorthMet Project. Ore will be transported from the mine site by an upgraded existing railway to the refurbished taconite facility for processing (Plant Site). Tailings and hydrometallurgical residues will then be deposited in an upgraded existing tailings basin (the Flotation Tailings Basin) and new hydrometallurgical residue facility, respectively.

3. The Flotation Tailings Basin, where reactive tailings will be stored, will be constructed on top of Cells 1E and 2E of the existing LTV Steel Mining Company tailings basin. A dam will be constructed on the perimeter of the Flotation Tailings Basin.

4. Flotation tailings produced at the Plant Site will be piped in slurry form and deposited within the Flotation Tailings Basin. The tailings will settle out in the basin, and the decanted water will be pumped back to the plant for reuse in the plant process. The Flotation Tailings Basin will have capacity to store tailings over the 20-year life of operations. As proposed, by the end of that period of operations, the top of the dam will be 250 feet high and will have a storage capacity of approximately 145,000 acre-feet. The basin will cover over two square miles in area. Management of these tailings is a key component of the Permit to Mine (Permit).

5. During operations and reclamation, PolyMet proposes to add a bentonite layer to the Flotation Tailings Basin's side slopes, pond bottom and beaches. The bentonite amendment is a layer of soil that will be "amended" to incorporate a small percentage of bentonite, which will limit oxygen and water from reacting with the flotation tailings by creating a layer of saturated soil between the atmosphere and the flotation tailings. The bentonite layer is one of several proposed features of the Flotation Tailings Basin designed to control and limit the potential environmental impacts of reactive mine waste.

6. After an extensive (12 year) environmental review, in 2016 PolyMet applied for a permit to mine for the NorthMet Project.¹

7. During the environmental review, and in the permitting process, the Petitioners submitted extensive comments.

8. In conjunction with DNR's analysis of the Permit application, the Petitioners submitted timely requests for a contested case hearing pursuant to Minn. Stat. § 93.483. The petitions requested a contested case hearing on many issues, including the use of bentonite as a mitigation measure in the Flotation Tailings Basin.

9. On November 1, 2018, the DNR commissioner denied the Petitioners' requests for a contested case hearing, finding that the matters raised in the petitions, including the attached technical information, had been fully analyzed during the environmental review and permit analysis process. The commissioner further held that a contested case hearing to rehash materials that had already been fully analyzed, including the use of bentonite, would not aid the commissioner "in resolving the disputed facts in order to make a final decision on the completed [permit] application." Minn. Stat. § 93.483, subd. 2(b)(3). A permit to mine for the NorthMet Project, together with associated conditions, was issued on November 1, 2018.

10. The Petitioners appealed the commissioner's order denying the petitions for a contested case hearing and the issuance of the Permit.

11. The issue of whether the Petitioners were entitled to a contested case hearing was ultimately decided by the Minnesota Supreme Court on April 28, 2021. *In the Matter of the NorthMet Project Permit to Mine*, No. A18-1952, 2021 WL 1652768 (Minn. Apr. 28, 2021).

12. In its decision, the Court upheld the commissioner's decision to deny a contested case hearing on a number of issues, including the design of the Flotation Tailings Basin dam, the use of wet closure, whether bentonite is an available technology, and the impact of the use of bentonite on dam stability. The court found that the commissioner's findings on these issues were supported by substantial evidence in the record.

13. The Court, however, ordered the DNR to hold a contested case hearing on a single issue: whether the bentonite amendment "is a practical and workable reclamation technique that will satisfy the DNR's reactive waste rule, Minn. R. 6132.2200, subp. 2(B)." *Id.* at *15.

14. Other issues raised by the Petitioners are specifically excluded from this contested case hearing. Such issues include, but are not limited to, the design of the Flotation Tailings Basin dam, the impact of the use of bentonite on the dam's stability, wet closure, financial assurance, whether Glencore should be added to the permit, permit term, and whether bentonite is an available technology.

¹ Minnesota Statute § 93.481, subd. 1, provides: "no person shall engage in or carry out a mining operation for metallic minerals within the state unless the person has first obtained a permit to mine from the commissioner."

15. As directed by the Court, the DNR will be making a separate determination regarding the permit term. The DNR will also be making a separate determination as to whether Glencore should be named as a permittee on the permit.

16. When holding a contested case hearing, the commissioner is required 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.

17. This hearing will focus exclusively on whether the use of bentonite, as one of several mitigation measures in the Flotation Tailings Basin, is a practical and workable reclamation technique that will satisfy the DNR’s reactive waste rule.

Relevant Legal Requirements for Proposed Compliance Mechanism

18. Chapter 6132 sets forth an outcome-based regulatory framework rather than detailing specific performance standards for mining operations. *See MCEA v. MDNR*, No. A18-1956 (Minn. Ct. App. 2019). The text of the rules, and the rule-making record, show that the intent of the rules was to allow for a case-by-case, site-specific review of applications for non-ferrous metallic mineral permits to mine. *Id.* The general purpose and policy of this framework is detailed in Minn. R. 6132.0200. This Rule provides, in relevant part, that:

[I]t is the policy of the Department of Natural Resources that mining be conducted in a manner that will reduce impacts to the extent practicable, mitigate unavoidable impacts, and ensure that the mining area is left in a condition that protects natural resources and minimizes to the extent practicable the need for maintenance. This shall be accomplished according to parts 6132.0100 to 6132.5300 through the use of mining, mine waste management, and passive reclamation methods that maximize physical, chemical, and biological stabilization of areas disturbed by mining, as opposed to the use of ongoing active treatment technologies. The department recognizes that in some cases passive treatment alone will not entirely meet all reclamation goals. In these cases, active treatment technologies may be necessary and provisions for continued maintenance of the treatments will be required.

Id. The Rule further recognizes that “[b]ecause of the unique character of each mining operation and the extreme diversity of the possible types and sizes of operations, specific permit requirements shall be established within the framework established” by Chapter 6132. *Id.*

19. Like the Rules themselves, the Statement of Need and Reasonableness (SONAR) emphasized the flexibility of this regulatory approach:

[T]he rules are designed to act as a framework within which specific permit requirements are to be developed to address the unique problems anticipated to exist at each individual mine site. The actual reclamation, conducted at a given mine, will have to be custom designed to account for each site and operation’s uniquely specific characteristics. In order to make the proposed rules workable, it

is necessary and reasonable to build in enough flexibility, while still providing basic direction on how reclamation can be achieved.

SONAR at 8.

20. During the rulemaking hearing, a DNR witness explained the flexibility of the framework in discussing the various reclamation standards within Chapter 6132:

[E]ach section starts off with a section called goals. And these goals are targets that we want the mining companies, the operators, permittees to be aiming at when they do the reclamation. And we have established these targets and use them in the development of the specific requirements under each of these various different sections.

We think the targets are important because they sort of establish a policy for each section. We recognize the fact that these goals may not be attainable, but we feel that they are at least targets that one should shoot for. One will not be considered to be out of compliance if the goal is not met, but the specific requirements that have been developed will be the things that we will be looking at to determine compliance.

Hearing Tr., Dec. 7, 1992, Paul Pojar Test. at 124:9-125:2. The flexibility of this regulatory framework was repeatedly highlighted in the SONAR, supported by witnesses at the rule-making hearing, and accepted by the ALJ in her final report. *Id.* at K. Lappako Test. at 63:21-24. (“An iterative approach, it’s not just one cookbook recipe that can be gone through in order to determine the drainage quality that would be generated by the waste and if the water resources of the state are adequately protected.”); ALJ Report at 10 (“DNR has demonstrated that, overall, its performance criteria are needed and reasonable to minimize the adverse environmental impact arising from mining operations by arriving at specific standards which will vary from site to site.”).

21. The contested case hearing implicates two primary legal authorities: Minn. Stat. § 93.481, subd. 2, and Minn. R. 6132.2200, subp. 2(B).

22. Minn. Stat. § 93.481, subd. 2, provides in relevant part:

The commissioner in granting a permit with or without modifications shall determine that the reclamation or restoration planned for the operation complies with lawful requirements and can be accomplished under available technology and that a proposed reclamation or restoration technique is practical and workable under available technology.

23. Minn. R. 6132.0100 provides separate definitions for “mine waste” and “reactive mine waste.” Under this Rule, “mine waste” is defined as “a material, such as surface overburden, rock, lean ore, leached ore, or tailings that in the process of mining and beneficiation has been exposed or removed from the earth.” *Id.*, subp. 16; *see also* Minn. Stat. § 93.46, subd. 3 (setting forth substantially the same definition). “Reactive mine waste” is separately defined as “waste that is shown through characterization studies to release substances that adversely impact

natural resources.” *Id.*, subp. 28. There is no statutory definition for “reactive mine waste.” In the SONAR accompanying Rule 6132, the DNR explained that:

“Reactive mine waste” is defined because nonferrous metallic mining often generates mine wastes with characteristics that can cause water that might contact such waste to assume an unacceptable quality due to contamination. Since such waste will have to [be] reclaimed in a manner different from that without such characteristics it is reasonable to require its identification.

SONAR at 7. The characterization-study process is governed by Minn. R. 6132.1000.

24. Minn. R. 6132.2200 specifically governs “reactive mine waste” under chapter 6132. Subpart 1 of this Rule provides as its goal: “[r]eactive mine waste shall be mined, disposed of, and reclaimed to prevent the release of substances that result in the adverse impacts on natural resources.” Under subpart 2.A, “[c]hemical and physical characterization of mine waste must be conducted before the submission of an application for a permit to mine and continuously after that during the process of mining” in accordance with Minn. R. 6132.1000. Subp. 2.B. of the Rule requires reactive mine waste storage facilities to either:

(1) modify the physical or chemical characteristics of the mine waste, or store it in an environment, such that the waste is no longer reactive; or

(2) during construction to the extent practicable, and at closure, permanently prevent substantially all water from moving through or over the mine waste and provide for the collection and disposal of any remaining residual waters that drain from the mine waste in compliance with federal and state standards.

Id.

25. During the rule-making hearing, DNR witnesses specifically recognized the potential for long-term treatment of reactive mine waste in conjunction with non-ferrous metallic mining under Rule 6132. At no point did any of these witnesses testify that such long-term treatment was barred under the Rules. These witnesses noted that Chapter 6132 was designed to require characterization of reactive mine waste at the outset of permitting and throughout mining operations with the aim of designing a containment system to prevent adverse impacts to water quality, without specifically detailing the requirements of such a system. The aim of the design requirements of Minn. R. 6132.2200 is to keep water away from reactive mine waste, and, if that is not possible, then such water “must be collected and treated.” Hearing Tr., Dec. 7, 1992, P. Eger Test. at 74:1-3; *see also* SONAR at 13 (“The location of drainage patterns of waters contacting reactive mine wastes is necessary because such waters have the potential of adversely impacting natural resources and therefore may need to be collected and treated.”).

ORDER AND ISSUE TO BE DETERMINED

26. In light of the Minnesota Supreme Court's decision, the DNR **HEREBY ORDERS** a contested case hearing on the following issue:

Is the proposed bentonite amendment a "practical and workable" reclamation technique pursuant to Minn. Stat. § 93.481, subd. 2, that will, in conjunction with other engineering controls, collection and treatment, monitoring, and inspection requirements set forth in the Permit to Mine issued November 1, 2018, reduce oxygen and water infiltration and satisfy the reactive mine waste rule, Minn. R. 6132.2200, subp. 2(B)?

ADDITIONAL NOTICE

27. A party's failure to appear at the hearing or prehearing conference may result in a finding that that party is in default, that the DNR's findings contained in this Notice and Order may be accepted as true, and that the proposed action may be upheld.

28. If any party has good cause for requesting a delay of the prehearing conference, the request must be made in writing to the Administrative Law Judge at least five days prior to the prehearing conference. A copy of the request must be served on the other parties.

29. Any party intending to appear at the prehearing conference must file a Notice of Appearance form and return it to the Administrative Law Judge within 20 days of the date of service of this Notice and Order. A copy must be served on the DNR's attorneys. A Notice of Appearance form is enclosed.

30. All parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. The parties are entitled to the issuance of subpoenas to compel witnesses to attend the hearing. The parties will have the opportunity to be heard orally, present evidence, cross-examine witnesses, and submit evidence and argument. Ordinarily the hearing is tape-recorded. The parties may request that a court reporter record the testimony at their expense.

31. Persons attending the hearing should bring all evidence bearing on the case, including any records or other documents. State agencies are required by law to keep some data not public, and parties are required to advise the Administrative Law Judge if not public data is offered into the record. Be advised that if data that is not public is admitted into the record, it may become public data unless an objection is made and relief is requested under Minn. Stat. § 14.60, subd. 2.

32. Requests for subpoenas for the attendance of witnesses or the production of documents at the hearing shall be made in writing to the Administrative Law Judge pursuant to Minn. R. 1400.7000. A copy of the subpoena shall be served on the other parties. A subpoena request form is available at <http://mn.gov/oah/> or by calling (651) 361-7900.

