

**FILED**

Nos. A18-1952, A18-1953, A18-1958, A18-1959, A18-1960 and A18-1961

February 12, 2020

**STATE OF MINNESOTA  
IN SUPREME COURT**

**OFFICE OF  
APPELLATE COURTS**

*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)*

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**MINNESOTA DEPARTMENT OF NATURAL RESOURCES'  
PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEALS**

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## **INTRODUCTION**

After fourteen years of exhaustive environmental review and permitting that resulted in a 700,000-page administrative record, the Department of Natural Resources (“DNR”) issued Poly Met Mining, Inc. a permit to mine and dam safety permits for the NorthMet project. The court of appeals remanded the permits for still more proceedings. The breadth of the court’s holding merits review under Minn. R. Civ. App. P. 117 because it eliminates DNR’s legislatively granted discretion, devises a novel standard of review, and disregards statutory provisions. The court also weakened a key tool DNR uses to ensure that mines meet their reclamation obligations, holding that DNR must set a fixed end date for any permit to mine. The impacts will be wide ranging, affecting not just the permits at issue here, but the State’s entire regulatory scheme for ferrous and non-ferrous mines – whether existing or proposed. The significance of the legal issues involved, and their novelty, warrant this Court’s additional review.

## **STATEMEMENT OF LEGAL ISSUES**

1. Is a petitioner under Minn. Stat. § 93.483 entitled to a contested case hearing if any material fact is in dispute, even if the agency has issued well-reasoned findings explaining why additional evidence would not “aid the commissioner in resolving disputed facts”?
2. Does a petitioner satisfy the requirements to file a petition under Minn. Stat. § 93.483 by alleging minimal or unsubstantiated impacts to its property?
3. Did the court of appeals err in ordering a contested case hearing under Minn. Stat. § 93.483 to address matters outside the record on appeal or outside the scope of the statute?
4. Does Minn. Stat. § 93.481 require that a permit to mine have a numerical term rather than a performance-based term?

## STATEMENT OF CRITERIA SUPPORTING PETITION

Review is appropriate under Minn. R. Civ. App. P. 117, subd. 2(a), (c), and (d).

The court of appeals' decision misconstrues statutory provisions, abrogates agency authority, and erodes long established separation of powers principles. This case, therefore, presents important questions of administrative law and statutory interpretation. This Court should also exercise its supervisory powers to clarify and harmonize the applicable statutory law. Additionally, review is necessary to correct the court's failure to follow this Court's precedent.

## STATEMENT OF THE CASE

DNR subjected the NorthMet project to intense scrutiny during the environmental review process. DNR Permit to Mine (PTM) Findings at ¶¶ 8-40, 72-112.

After DNR issued a record of decision for the environmental review, PolyMet submitted its permit to mine and dam safety permit applications for the NorthMet project. Relators submitted extensive comments during permitting and filed petitions for a contested case hearing for the permit to mine application. *See* DNR PTM Findings at ¶¶121-166, 792, Dam Safety Findings. Contrary to the court's findings (Decision at 20, 23), DNR engaged in a rigorous analysis of these concerns and modified the permits based, in part, on Relators' comments. *See, e.g.*, DNR PTM Findings at ¶¶121-166, 170, 466-829. But DNR ultimately rejected Relators' request for a contested case hearing because the commissioner found that a hearing would not aid DNR in making its decision. *See id.* DNR meaningfully considered and addressed every issue raised by

Relators, including those for which the court of appeals directed DNR to hold a contested case hearing. *See id.* at ¶¶ 497-532, 565-610, 796-805 (wet closure); *id.* at ¶¶ 533-564, 801-805 (bentonite amendment); *id.* at ¶¶ 467-496, 611-637, 796-805, 806-811 (dam safety); *id.* at ¶¶ 698-701, 703-726, 824-829 (financial assurance).

The court, however, never examined DNR’s rationale for why it had rejected the petitions. Instead, the court concluded that a contested case hearing is required merely because there are factual disputes supported by credible evidence.

## **ARGUMENT**

### **A. The Court of Appeals Erred in its Holding that a Contested Case Hearing Is Required Irrespective of Whether the Hearing Would Aid the Commissioner, and a Ruling from this Court Would Harmonize the Law on this Issue of Statewide Importance.**

The court of appeals’ central holding is that DNR must conduct a contested case hearing in any situation in which there is “probative, competent, and conflicting evidence on a material fact.” Decision at 21. This holding disregards the plain text of Minn. Stat. § 93.483, which requires more than a simple showing of conflicting evidence.

The relevant provision requires a hearing only “if the commissioner finds that” a petitioner has demonstrated that there is (i) a material issue of fact in dispute and (ii) 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 dispute and making a final decision on the application. Minn. Stat. § 93.483, subd. 3.

The court reduced these statutory provisions to a single criterion -- the existence of disputed facts supported by credible evidence. In essence, the court misconstrued the statute and determined that, as a matter of law, the commissioner will always be aided by a contested case procedure whenever there is conflicting evidence. Decision at 33-34.

Contrary to the court's holding, even when experts disagree, there are many circumstances where a contested case hearing will not aid a commissioner in making a decision on a permit application.<sup>1</sup> As set forth in the commissioner's findings, this is one such situation. DNR PTM Findings at ¶¶ 792-829. In particular, the commissioner found that a contested case hearing is unnecessary because (i) the Relators raised policy disputes, (ii) DNR made changes to the permit based on concerns raised in the petitions, (iii) the record is fully developed and extensive, and (iv) the evidence the Relators wish to present has already been fully reviewed and considered by the agency. Courts have endorsed the foregoing rationales for denying a contested case petition even when petitioners supply expert testimony raising disputed issues.<sup>2</sup>

Indeed, the court's decision, and analysis, conflicts with longstanding precedent.<sup>3</sup>

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<sup>1</sup> See, e.g., *Matter of Amendment No. 4*, 454 N.W.2d 427, 430 (Minn. 1990); *North American Water Office v. LTV Steel Minn. Co.*, 481 N.W.2d 401, 404-05 (Minn. App. 1992); *In re Dairy Dozen-Thief River Falls*, 2010 WL 2161781 at \*16 - 19 (Minn. App. June 1, 2010); *In re Heron Lake BioEnergy*, 2006 WL 1806160 at \*3 - 8 (Min. App. July 3, 2006); *Dead Lake Ass'n. v MPCA*, 2005 WL 2877490 (Minn. App. 2005); *Walser Auto Sales, Inc. v. Best Buy Co., Inc.*, 2002 WL 172025 at \*3 (Minn. App. Feb. 5, 2002).

<sup>2</sup> See *id.*

<sup>3</sup> The factors set out in Minn. Stat. § 93.483, subd. 3, providing authority for DNR to initiate contested case hearings are analogous to the MPCA's contested case hearing rule, which has been interpreted on numerous occasions by this Court and the court of appeals. Minn. R. 7000.1900, subp. 1. Consequently, the parties and the court relied on case law interpreting the MPCA rule. See Decision at 20-24.

For example, the court rejected DNR's finding that a contested case hearing can be denied if issues raised in a petition were thoroughly considered during environmental review and permitting. Decision at 22-23. This Court has, however, reversed a court of appeals decision directing MPCA to hold a contested case hearing even though the issues were thoroughly examined during the permitting process. *See N. States Power v. Wilmarth Indust. Solid Waste*, 459 N.W.2d 922, 923 (Minn. 1990).

The court's failure to address DNR's reasons for rejecting the petitions also conflicts with bedrock administrative law principles. Review of an agency's denial of a contested case petition is governed by Minn. Stat. §14.69. *See, e.g., In re Solid Waste Permit for NSP Red Wing*, 421 N.W.2d 398, 403 (Minn. App. 1988). But here, the court never addressed, much less deferred to, DNR's findings, reasoned analysis, and judgment for why a contested case hearing was not required by the statute.<sup>4</sup>

Because it announces new rules related to when a contested case proceeding is required and applies a standard of review that conflicts with established case law, this Decision will have profound statewide ramifications for how Minnesota agencies review permit applications.

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<sup>4</sup> It is unclear if the court was even aware of DNR's findings related to the denial of the petitions because the court erroneously ruled that DNR made no findings during permitting related to whether the petitions satisfied the statutory criteria. Decision at 19-20, 23. This is simply wrong. *See* DNR PTM Findings at ¶¶121-166, 466-829.

**B. A Decision from This Court Will Clarify New Legislative Standards Governing Who May Petition for a Contested Case Hearing.**

The legislature modified DNR's contested case hearing statute in 2017 to significantly restrict who may file a petition for a contested case hearing on a permit to mine. Decision at 13-14. Under the new statute, a petitioner only meets the requirements if it can show that it owns property that "will be affected" by the mining operation. Minn. Stat. 93.483, subd. 1.

Here, the commissioner made extensive findings supported by the record explaining why Relators did not demonstrate that property they own will be affected by the mine. *See* DNR PTM Findings at ¶¶ 128-135, 149-154, 773-791.

The court refused to give DNR's findings any deference and rejected DNR's reading of the statute. Instead, the court suggested that a property "will be affected" if it may be influenced in some way by the mine's operation. For example, living in the watershed and merely alleging impacts to surface waters would be sufficient to show a petitioner's property "will be affected." Decision at 17. This interpretation conflicts with the plain text of the statute by either converting "will be affected" into "may be affected" or, alternatively, equating "will be affected" with any *de minimis* effect on water. It also defies the purpose of the 2017 legislative change, because under the court's interpretation, virtually anyone who lives within the thousands of square miles that make up the mine's watershed now has standing.

A decision from this Court is therefore needed to clarify whether a party who is without an interest distinct from the general public is entitled to demand a contested case



hearing when substantial evidence supports the commissioner's findings that he or she will not be affected by the mine.

**C. A Decision from this Court Will Correct the Court of Appeals' Error in Granting a Contested Case Hearing on Matters Outside the Record on Appeal.**

The court departed from the usual course of justice in granting a contested case hearing on two issues outside of the administrative record that are currently pending before the agency: the Brazil dam failures and Glencore's acquisition of PolyMet stock. Decision at 32-34.<sup>5</sup> The court did not have jurisdiction over these issues. The only decisions that were properly before the court were identified in the six writs of certiorari issued on December 3 and December 4, 2018. Nothing in these writs provides that the court had jurisdiction to address issues that arose *after* the permitting decisions were made and that are currently pending before the agency.

**D. A Decision from this Court on Whether a Numeric Term, Rather than a Performance-Based Term, is Required in a Permit to Mine Would Clarify the Law on an Issue of Statewide Impact.**

The court held that Minn. Stat. § 93.481, subd. 3, requires the commissioner to set a numeric term for the permit to mine. There is nothing in the statute suggesting that a term must be numeric, and this conclusion conflicts with DNR's long-standing practice of using performance-based terms for ferrous and peat mines, which are likewise governed by Minn. Stat. § 93.481, subd. 3.

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<sup>5</sup> The court also effectively granted a hearing on the dam safety permits though those permits are only appealable under Minn. Stat. ch. 103G, which was not invoked by Relators.

DNR's practice of using a performance-based term ensures that a permittee is not released from permit obligations prior to completion of reclamation and closure. The court's ruling will put Minnesota's environment at risk by substantially hampering DNR's ability to ensure all mines are safely decommissioned in accordance with the goals set forth in Minn. Stat. § 93.44.

Dated: February 12, 2020

Respectfully submitted,

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## **CERTIFICATE OF DOCUMENT LENGTH**

This petition complies with the word limitations of Minn. R. Civ. App. P. 117, subd. 3. The petition was prepared using Microsoft Word 2016, which reports that the petition contains 1,999 words.

/s/ Jon W. Katchen  
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