FILED
September 18, 2019
OFFICE OF
APPELLATE COURTS

**STATE OF MINNESOTA**

**IN COURT OF APPEALS**

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| 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). | **O R D E R**<br>**A18-1952**<br>**A18-1953**<br>**A18-1958**<br>**A18-1959**<br>**A18-1960**<br>**A18-1961** |

Considered and decided by Cleary, Chief Judge; Worke, Judge; and Schellhas, Judge.

**BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:**

These consolidated appeals are taken from November 1, 2018 decisions by respondent Minnesota Department of Natural Resources (DNR) denying petitions for a contested-case hearing and issuing a permit to mine (PTM) and dam-safety permits (together, the DNR permits) to respondent Poly Met Mining Inc. (PolyMet) in relation to its NorthMet project. Relators move for leave to present additional evidence pursuant to Minn. Stat. § 14.67 (2018) and for a stay of the DNR permits pending this court's disposition of the appeals.

There are currently 11 appeals pending before this court arising out of PolyMet's NorthMet project. Three additional appeals and an administrative rules challenge were resolved in unpublished opinions issued on May 28, 2019 and August 5, 2019. *See Minn. Center for Envtl. Advocacy v. Minn. Dep't of Nat. Res.*, No. A18-1956, 2019 WL 3545839 (Minn. App. Aug. 5, 2019); *In re Applications for a Supplemental Envtl. Impact Statement for Proposed NorthMet Project*, Nos. A18-1312 A18-1524, A18-1608, 2019 WL 2262780 (Minn. App. May 28, 2019).

Of the 11 pending appeals, three are taken from a decision by the Minnesota Pollution Control Agency (MPCA) issuing a National Pollutant Discharge Elimination Permit/State Disposal System (NPDES/SDS) permit for the project. On June 25, 2019, this court granted a motion for transfer to district court, under Minn. Stat. § 14.68 (2018), for hearing and determination of alleged procedural irregularities not shown in the record. *See In re Denial of Contested Case Hearing Requests and Issuance of NPDES/SDS Permit for the Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 25, 2019) (order). In the order granting the transfer to district court, the court stayed the NPDES/SDS permit appeals pending the district court proceedings. *See id.* Subsequently, on August 6, 2019, this court granted a motion to stay the NPDES/SDS permit itself. *See In re Denial of Contested Case Hearing Requests and Issuance of NPDES/SDS Permit for the Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. Aug. 6, 2019) (order).

Two appeals (A19-0115, A19-0134) are taken from the MPCA's decision to grant an air emissions permit; briefing is underway in those appeals.

The remaining six, above-captioned appeals are taken from the DNR's November 1, 2018 decisions to issue the DNR permits, and are scheduled for oral argument on October 23, 2019. Relators filed these appeals in December 2018, and submitted a request to the DNR to stay the DNR permits pending appeal. On January 30, 2019, the DNR issued a decision denying the stay request. On January 31 and February 28, 2019, relators requested reconsideration of the issuance of the DNR permits based on the January 25, 2019 failure of the Córrego do Feijão tailings dam in Brumadinho, Brazil. Relators also requested that the DNR reconsider the denial of their request to stay the permits. On August 7, 2019, the DNR issued an order denying the reconsideration requests.

Meanwhile, on July 26, 2019, relators filed a motion in this court for leave to present additional evidence and to stay the DNR permits. The DNR and PolyMet filed responses to the motion on August 12, 2019, and relators filed a reply on August 23, 2019.

**I.**

Relators first seek relief under Minn. Stat. § 14.67, a part of the Minnesota Administrative Procedure Act (MAPA) provisions governing judicial review of agency decisions. *See* Minn. Stat. §§ 14.63-.69 (2018). Section 14.67 provides, in full:

> If, before the date set for hearing, application is made to the court of appeals for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional

> evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

Thus, section 14.67 allows this court discretion to remand to the agency for presentation of additional evidence if materiality and good-cause showings are met.

Relators' motion for leave to present additional evidence under Minn. Stat. § 14.67 is based on two circumstances that developed after the DNR permits were issued on November 1, 2018: (1) the January 25, 2019 failure of the Brumadinho tailings dam, and (2) a June 28, 2019 disclosure that Switzerland-based mining company Glencore had obtained 71.6 percent majority ownership of PolyMet. Relators assert that they have met the requirements of Minn. Stat. § 14.67 because the evidence they seek to present is "highly material" and was not available to them until after the DNR issued its decisions. The DNR counters that evidence of circumstances that indisputably did not exist at the time of the DNR's permitting decisions is not material to the issues in the case.

Relators raise serious, justifiable concerns about the ongoing regulation of the NorthMet project, and we agree that the post-permit circumstances that relators have identified require close attention, review, and appropriate action by the DNR and other permitting authorities. Pursuant to its statutory obligations, the DNR could reasonably be expected to undertake a full-scale review of the Brumadinho dam failure and its impact on the analysis underlying the decision to issue the NorthMet dam-safety permits. It is also reasonable to expect that the DNR would fully review the impact on the permits of

Glencore's majority stake in PolyMet. The DNR states that its technical staff has reviewed the Brumadinho dam failure, but provides little detail about that review. Similarly, counsel for the DNR states that it is considering whether to add Glencore as a co-permittee, but provides no additional detail. Relators reasonably seek to ensure that the DNR complies with its statutory obligations.

Notwithstanding the reasonable bases for relators' concerns, we decline to remand the appeals to the agency for presentation of additional evidence because such a remand would be inconsistent with the limited nature of certiorari review.

It is well established that "[c]ertiorari is, by its nature, a review based solely upon the record." *Amdahl v. Fillmore County*, 258 N.W.2d 869, 874 (Minn. 1977); *see also Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) ("Review by certiorari is limited to an inspection of the record of the inferior tribunal . . . ."); *State ex rel. Peterson v. City of Alexandria*, 297 N.W. 723, 724 (Minn. 1941) ("Since the proceeding in certiorari is in the nature of an appeal, the record to be considered is that made and certified by the tribunal whose proceedings are under review."). Applying this principle, this court has granted motions to strike documents not considered by the decision-maker, particularly when those documents postdate the decision itself and thus could not have been considered by the decision-maker in reaching that decision. *See, e.g., In re Block*, 727 N.W.2d 166, 177 (Minn. App. 2007); *Stephens v. Bd. of Regents of Univ. of Minn.*, 614 N.W.2d 764, 769 (Minn. App. 2000); *accord White v. Minn. Dep't of Nat. Res.*, 567 N.W.2d 724, 735

(Minn. App. 1997) (recognizing limited circumstances in which district court could consider extra-record evidence in administrative appeal).

Consistent with the general nature of certiorari review, the judicial-review provisions of MAPA, which are applicable in this case, provide that "review shall be confined to the record" provided by the agency. Minn. Stat. § 14.68. Two exceptions apply. First, in cases where there are "procedural irregularities not shown in the record," this court may transfer the matter to district court for hearing and determination of the irregularities. Minn. Stat. § 14.68. Second, in cases where a party seeks to present "additional evidence on the issues in the case" and meets materiality and good-cause requirements, this court may "order that the additional evidence be taken before the agency on such conditions as the court deems proper." Minn. Stat. § 14.67.

Mindful of the nature of certiorari review and the structure of MAPA's judicial-review provisions, we conclude that relators have not demonstrated that evidence of events postdating the DNR's permitting decisions is material to the issues in this case. Those issues are whether the decisions to issue the DNR permits on November 1, 2018 were based on an error of law, unsupported by substantial evidence, or were arbitrary and capricious. *See* Minn. Stat. § 14.69. Evidence of subsequent developments is not material to determining the propriety of the DNR's decisions on November 1, 2018.

**II.**

Relators next seek a stay of the DNR permits pending resolution of these appeals. Filing a certiorari appeal from an agency decision does not stay that decision. *See* Minn.

Stat. § 14.65 (providing that filing of writ of certiorari does not stay agency decision, but that agency or court of appeals may do so). A party seeking to stay in a certiorari appeal must first request the stay from the agency. *See* Minn. R. Civ. App. P. 115.03, subd. 2(b); 108.02, subd. 2; *see also DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 143 (Minn. App. 2007). This court reviews an agency's stay decision for abuse of discretion. *DRJ*, 741 N.W.2d at 144. When considering a motion to stay, relevant factors may include "whether the appeal raises substantial issues; injury to one or more parties absent a stay; and the public interest, which includes the effective administration of justice." *Webster v. Hennepin County*, 891 N.W.2d 290, 293 (Minn. 2017). Substantial issues may favor the grant of a stay "where important questions of law are raised, which, if decided in favor of appellant, . . . will require a reversal." *State v. N. Pac. Ry. Co.*, 22 N.W.2d 569, 574 (Minn. 1946). "Effective administration [of justice] includes protecting appellate jurisdiction, avoiding multiple lawsuits, and preventing the defeat of 'the objects of the appeal or the writ of error.'" *Webster*, 891 N.W.2d at 293 (quoting *N. Pac. Ry.*, 22 N.W.2d at 574-75). A stay motion requires an individualized inquiry into the factors most relevant to the particular case. *Id.*

Relators assert that a stay is warranted because they have raised substantial issues on appeal; because construction of the NorthMet project, which they assert is imminent, will cause them irreparable harm; and because staying the DNR permits would protect the public interest as well as this court's jurisdiction. They also assert that a stay is warranted given post-permit developments including the district court proceedings and stay of the

NPDES/SDS permit, the Brumadinho dam failure, and Glencore's acquisition of a majority interest in PolyMet. The DNR considered some of these arguments in its January 30, 2019 order denying a stay and August 7, 2019 order denying reconsideration, and maintains before this court its position that a stay is not warranted.

As we note above, relators have raised serious concerns about post-permit developments. Although the parties disagree about the import of the developments, there is no dispute that the developments warrant the DNR's consideration. The DNR states that it has considered, or is considering, the post-permit developments. The time that may be required to fully evaluate the post-permit developments is a circumstance that may justify staying the permit.

The panel assigned to hear this appeal on the merits will be in the best position to determine whether a stay of the DNR permits is warranted. And the panel's consideration of the issue will benefit from oral argument. Accordingly, this court will grant a temporary stay, as ordered below.

**IT IS HEREBY ORDERED:**

1. Relators' motion is granted in part and denied in part.

2. The request for leave to present additional evidence is denied.

3. The request for a stay of the DNR permits is granted pending further consideration and an order by the panel assigned to decide this case on the merits.

4. The NorthMet permit to mine and dam safety permits 2016-1380 and 2016-1383 are stayed pending further order of this court.

5. All parties shall be prepared to address at oral argument on October 23, 2019, the propriety of continuing the stay. The DNR shall be prepared to advise the court on the status of post-permit developments, including its evaluation of the Brumadinho dam failure and its consideration of whether Glencore will be added as a co-permittee.

**Dated:** September 18, 2019

**BY THE COURT**

Edward J. Cleary
Chief Judge