

STATE OF MINNESOTA
IN COURT OF APPEALS

FILED

December 3, 2018

**OFFICE OF
APPELLATE COURTS**

*In re Minnesota Department of Natural
Resources Issuance of Dam Safety Permits
2016-1380 and 2016-1383 to Poly Met
Mining, Inc. for the NorthMet Project*

Court of Appeals Case No. _____

**RELATOR'S STATEMENT
OF THE CASE**

1. Court or agency of case origination.

This matter is an appeal from the final Findings of Fact, Conclusions, and Order of the Commissioner of the Minnesota Department of Natural Resources ("DNR") dated November 1, 2018, granting Dam Safety Permits 2016-1380 and 2016-1383 to PolyMet Mining Inc. for the NorthMet Copper-Nickel Mine Project ("Project" or "NorthMet Project") and making a final determination that construction of neither dam requires a public waters work permit.

2. Jurisdictional statement.

a. Statute, rule or authority authorizing certiorari appeal.

Minnesota Statutes § 93.50 authorizes any person aggrieved by any final order, ruling, or decision of the commissioner to obtain judicial review of such order, ruling or decision under Minn. Stat. §§ 14.63-69. Certiorari review of an administrative decision pursuant to chapter 14 is also a matter of right under Minn. Stat. §606.06.

WaterLegacy is a 501(c)(3) non-profit organization founded to protect Minnesota fresh water resources and the communities that rely on them from pollution and destruction. WaterLegacy's members include property owners who live downstream of the proposed Project and other Minnesotans who rely on clean water, fish, wild rice and other natural resources sustained by the Partridge River, Embarrass River and St. Louis River watersheds of the Lake Superior Basin. WaterLegacy's mission and the interests of its members in property, subsistence foods, health, recreation, aesthetics, and use and enjoyment of natural resources would be affected by the effects of the Project and its Dam Safety Permits on water quality and other natural resources.

b. Authority fixing time for obtaining certiorari review.

Minnesota Statutes § 14.63 requires that a petition for a writ of certiorari under sections 14.63-68 must be filed and served within 30 days "after the party receives the final decision and order of the agency." WaterLegacy has not received the Findings of Fact, Conclusions, and Order of the Commissioner or Dam Safety Permits 2016-1380 and 2016-1383 from the DNR. WaterLegacy learned of DNR's permitting decisions through a press release received on November 1, 2018¹ and has viewed the DNR's Findings of Fact, Conclusions and Order and the Dam Safety Permits.

¹ WaterLegacy has proceeded with this appeal to ensure that this Court has jurisdiction over this matter, but does not waive any rights to receive the Dam Safety Permits, Findings of Fact, Conclusions, and Order and all documents referenced or relied upon therein from the DNR.

c. Finality of order or judgment.

The DNR's November 1, 2018 Findings of Fact, Conclusions, and Order granting Dam Safety Permits 2016-1380 and 2016-1383 to Poly Met Mining Inc. for the Project and denying the need for a public waters work permit for either dam are final decisions.

3. State type of litigation and designate any statutes at issue.

This is a certiorari appeal from a final DNR decision and order granting Dam Safety Permits and denying the need for public waters work permits under Minnesota Statutes ch. 103G and Minnesota Rules ch. 6115.

4. Brief description of claims, defenses, issues litigated and result below:

The NorthMet Project is Minnesota's first proposed copper-nickel sulfide mine project. It has an enormous potential for harm to Minnesota's natural resources. Poly Met Mining Inc. and PolyMet Mining Corp. ("PolyMet") are jointly engaged in the NorthMet Project. PolyMet expects to mine approximately 533 million tons of rock over 20 years, generating 308 million tons of waste rock and 225 million tons of flotation tailings waste.

Flotation tailings waste, ground to fine powder, would be spigotted in a liquefied slurry on top of an old iron-mining tailings storage pile, containing peat and tailings slimes. Although PolyMet refers to its tailings storage facility as a flotation tailings "basin" ("FTB"), NorthMet tailings would form a wet mound as much as 250 feet above grade, held back by earthen dams. PolyMet proposes to add bentonite clay to the "beaches" and faces of the tailings dam

and to deposit bentonite through a pond on the top of the tailings pile to reduce water passing over reactive tailings waste. Dam Safety Permit 2016-1380 is a permit for the dam containing Project flotation tailings (“FTB Dam”).

PolyMet would construct the FTB Dam on the perimeter of the existing LTV taconite tailings basin. Approximately 140 acres of wetlands, primarily deep and shallow marsh wetlands, would be directly impacted by construction of the tailings facility and FTB Dam buttress.

PolyMet proposes to begin hydrometallurgical autoclave processing approximately two years after mining starts, generating 313,000 tons of hydrometallurgical residue waste annually or up to 5,634,000 tons over the expected Project mine life. This waste would have markedly elevated sulfate, copper and nickel concentrations and contain up to 2,952 pounds of mercury by the end of mine operations. PolyMet proposes to locate hydrometallurgical waste in a lined facility on an unstable foundation, on top of wetlands and tailings slimes.

Despite concerns about liner deformation and failure as a result of the unstable foundation beneath the hydrometallurgical waste facility, PolyMet has not proposed and the DNR has not required either selection of a site with a more stable foundation or that peat layers and slimes be excavated. Dam Safety Permit 2016-1383 is a permit for the dam for the hydrometallurgical residue facility (“HRF Dam”).

The DNR proposed Draft Dam Safety Permits 2016-1380 and 2016-1383

for the FTB Dam and the HRF Dam, respectively, on September 15, 2017. WaterLegacy submitted detailed comments on these draft permits on October 16, 2017 as well as objecting to conditions in these draft permits in Objections to the Permit to Mine submitted on February 27, 2018. This appeal is based on these comments and objections, along with issues raised in the Findings of Fact, Conclusions, and Order for Project permits.

The FTB Dam would create a permanent wet impoundment on an unstable foundation. The applicant hasn't met its burden of proof that the proposed tailings dam is reasonable or that it will adequately protect public safety and promote the public welfare. Minn. Stat. §103G.315, subp. 6. The FTB Dam does not demonstrate stability under all conditions of construction and operation or compliance with "prudent, current environmental practice throughout its existence." Minn. R. 6115.0410, subp. 8(D),(F).

No showing has been made of a lack of other suitable feasible and practical alternative sites for the HRF Dam, as required by law, despite the small footprint needed for Project hydrometallurgical waste disposal and the availability of proximate brownfield sites. Minn. R. 6115.0410, subp. 8(B). As a result of its location on wetlands and slimes, the HRF Dam poses a readily avoidable risk of liner deformation and release of toxic wastes, and the applicant hasn't met its burden of proof that the proposed hydrometallurgical waste facility is reasonable or that it will adequately protect public safety and promote the public welfare. Minn. Stat. §103G.315, subp. 6. The HRF Dam

cannot demonstrate stability under all conditions of construction and operation or compliance with “prudent, current environmental practice throughout its existence.” Minn. R. 6115.0410, subp. 8(D),(F).

Conditions for both the FTB Dam and the HRF Dam propose that final designs, geotechnical data, and operations plans will be provided after issuance of the permits, in violation of statutes and rules requiring enforceable conditions to protect public waters and final design requirements. *See* Minn. Stat. § 103G.315, subd. 14; Minn. R. 6115.0410, subp. 2, subp. 6, subp. 7; 6115.0430.

In its Findings of Fact for the Dam Safety Permits, the DNR stated that the FTB Dam would not be located on public waters, so no public waters work permit would be required.² This decision is erroneous, since the FTB Dam would directly impact public waters wetlands. Minn. Stat. §§ 103G.005, subd. 15a, subd. 17b; 103G.245, subd. 1.

In its Conclusions for the Permit to Mine, the DNR found that Poly Met Mining Inc. and PolyMet Mining Corp. “are jointly engaged in the NorthMet Project” and jointly possess the capital and provide the financial and operational decision making necessary to conduct the NorthMet Project.³ Dam safety permits 2016-1380 and 2016-1383 that only include Poly Met Mining Inc. are deficient as a matter of law to adequately protect public safety and

² Findings of Fact, Conclusions, and Order, NorthMet Project - Dam Safety Permits, Findings ¶¶ 6, 262, 263.

³ Findings of Fact, Conclusions, and Order, NorthMet Project - Permit to Mine, Conclusions ¶¶ 6, 7.

welfare during dam operations, closure, reclamation and maintenance. *See* Minn. Stat. 103G.315, subd. 3, subd. 6.

5. List specific issues proposed to be raised on appeal

Based on Minnesota Statutes chapter 103G and Minnesota Rules chapter 6115, pertaining to public waters of the state, the issues presented in this appeal are stated below.

1. Whether the DNR's approval of Permit (2016-1380) to create a permanent wet impoundment on an unstable foundation for the Project FTB Dam failed to comply with statutes and rules pertaining to public waters of the state and was arbitrary and capricious.
2. Whether the DNR's approval of Permit (2016-1383) to site and construct the HRF Dam on a site with an unstable foundation failed to comply with statutes and rules pertaining to public waters of the state and was arbitrary and capricious.
3. Whether the DNR's approval of Permits for both the FTB Dam (2016-1380) and the HRF Dam (2016-1383) without final designs, geotechnical data, and operations plans failed to comply with statutes and rules pertaining to public waters of the state, was arbitrary and capricious, and frustrates judicial review.
4. Whether the DNR's decision that no public waters work permit was required for the FTB and FTB Dam failed to comply with statutes pertaining to public waters of the state.
5. Whether the FTB Dam Safety Permit (2016-1380) and the HRF Dam Safety Permit (2016-1383) granted by the DNR are legally deficient in that they fail to include PolyMet Mining Corp., a joint venturer in the NorthMet Project, including the construction, operation, reclamation, closure, and maintenance of the FTB and HRF Dams.

6. Related appeals.

This matter is related to the following appeals:

1. WaterLegacy's appeal, filed concurrently, of the DNR's Findings of

Fact, Conclusions, and Order issuing the Permit to Mine for the Project and denying a Petition for Contested Case Hearing.

2. WaterLegacy's September 17, 2018 appeal from the DNR's denial of a petition for a Supplemental Environmental Impact Statement, consolidated by the Court (Case No. A18-1312, A18-1524, A18-1608).

7. Contents of record.

No hearing has been held, so no transcript is required. The parties have not prepared an agreed statement of the record under Rule 110.04.

8. Oral argument:

Formal oral argument is requested in St. Paul.

9. Identify the type of brief to be filed.

Formal brief will be filed under Rule 128.02.

10. Names, addresses, and telephone numbers of attorney for appellant and respondent.

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