

STATE OF MINNESOTA
IN COURT OF APPEALS

FILED

December 3, 2018

**OFFICE OF
APPELLATE COURTS**

In re Minnesota Department of Natural Resources Issuance of a Permit to Mine to Poly Met Mining Corp. and PolyMet 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 Findings of Fact, Conclusions, and Order of the Commissioner of the Minnesota Department of Natural Resources ("DNR") dated November 1, 2018, granting a Permit to Mine to the PolyMet Mining Corp. and to Poly Met Mining, Inc. ("PolyMet") for the NorthMet Copper-Nickel Mine Project ("Project" or "NorthMet Project") and denying WaterLegacy's February 27, 2018 Petition for Contested Case Hearing filed with Objections to the draft Permit to Mine for the Project.

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 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 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 Permit to Mine online. Some of the documents referenced in the Permit and Findings, including eight "Approval Attachments" apparently incorporated in the Permit to Mine, are still not available to WaterLegacy or to members of the public.

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 Permit to Mine, 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 PolyMet a Permit to Mine for the Project and denying WaterLegacy's Petition for Contested Case Hearing 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 a permit to mine and denying a contested case hearing. Minn. Stat. ch. 93; Minn. R. ch. 6132.

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

The PolyMet NorthMet Project is Minnesota's first proposed copper-nickel sulfide mine project. It has an enormous potential for harm to Minnesota's natural resources. 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. PolyMet plans to dispose of reactive waste rock in a mine pit and in an unlined 526-acre permanent waste rock stockpile.

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," 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.

PolyMet has proposed to collect and dispose of what it claims will be nearly all contaminated wastewater from the unlined tailings mound and the unlined permanent waste rock stockpile. It has offered a conceptual plan to dig a trench and construct a slurry wall to capture contaminated seepage at the waste rock stockpile and around portions of the tailings facility. On the south side of the tailings facility, PolyMet has yet to develop a design for its asserted seepage capture.

PolyMet proposes to begin hydrometallurgical autoclave processing two years after mining starts, generating 313,000 tons of waste annually. 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 the hydrometallurgical waste in a lined facility on an unstable foundation, on top of wetlands and tailings slimes, creating a risk of liner deformation and failure.

The NorthMet sulfide mine is a highly controversial project: more than 90,000 comments were submitted during environmental review, and another 14,000 comments were made in response to the DNR's draft Permit to Mine. Despite this level of controversy and serious concerns raised by scientific and engineering experts, the Permit to Mine is based on untested assumptions, rejection of alternatives without full analysis, and reliance on technologies that

are neither proven nor effective. Both general conditions incorporated in the Permit to Mine and special conditions enumerated by the DNR lack specific enforceable standards, performance requirements, final designs, or specifications on critical issues.

On January 5, 2018, the DNR released Draft Special Conditions for the PolyMet Permit to Mine. WaterLegacy submitted Objections and a Petition for Contested Case Hearing to the DNR on February 27, 2018. These Objections requested that the DNR deny the PolyMet Permit to Mine due to its failure to comply with requirements of Minnesota Statutes chapter 93 and Minnesota Rules chapter 6132 and on the grounds that the Permit to Mine was vague, indefinite, and would lack enforceable conditions.

On behalf of its members, including property owners living as close as eight miles downstream, WaterLegacy petitioned for a contested case to allow evidence, cross-examination, and independent recommendations of an administrative law judge to assist in the determination of disputed material issues of fact, particularly those related to storage of reactive mine waste and collection of contaminated wastewater during operations, reclamation, closure, and long-term maintenance. *See* Minn. Stat. § 14.57(a) and §93.483; Minn. R. 6132.4000; 6132.5000.

In addition, on April 5, 2018, WaterLegacy submitted Comments on Petitions for Contested Case raising concerns about new information on Project mine plan acceleration and expansion plans and an unexamined tailings

disposal alternative disclosed in a new Technical Report posted by PolyMet in March 2018.

WaterLegacy's Objections and Comments raised the issues which are the subject of this appeal, as summarized below. The draft Permit to Mine failed to comply with applicable law and was indefinite, vague and not reasonably enforceable in many respects, including its unlimited term; its lack of specific conditions, designs, requirements and enforceable limits for mine construction, processing, operations, closure and maintenance; and its use of future plans and future approvals for which no standards were specified. *See* Minn. Stat. §93.481, subd. 1, subd. 3, subd. 4(c) and (d); Minn. R. 6132.0300, subp. 1; 6132.3100; 6132.2200, subp. 2 (C); 6132.4000, subp. 5.

The use of wet slurry tailings deposition and wet closure for the Project tailings facility failed to control adverse environmental effects, preserve natural resources, mitigate unavoidable impacts, ensure that the mining area is left in a condition that protects natural resources, minimize the need for maintenance, or maximize the physical and chemical stabilization of areas disturbed by mining. *See* Minn. Stat. §93.44; Minn. R. 6132.0200. The Project tailings facility would not prevent substantially all water from moving through or over mine waste and was not designed, constructed, and operated to be structurally sound, minimize hydrologic impacts, and prevent the release of substances that result in adverse impacts on natural resources. *See* Minn. R. 6132.2200, subp. 1, subp. 2(B); 6132.2500, subp. 1; subp. 2(B).

In closure, the Project tailings facility would fail to permanently prevent substantially all water from moving over reactive mine waste, would allow indefinite wet closure, would rely on techniques for bentonite use that are neither practical or workable under available technology, and would allow the release of substances adversely impacting natural resources. *See* Minn. Stat. § 93.481, subd. 2; Minn. R. 6132.2200, subp. 1, subp. 2(B); 6132.2500, subp. 1, subp. 2(B), (C); 6132.3200, subp. 2 (E)(5).

As a result of its location and construction on an unstable foundation, the hydrometallurgical waste storage facility would create a completely avoidable risk of liner deformation and failure, and would not be designed or constructed to control adverse environmental effects, preserve natural resources, minimize potential damage to property and to natural resources, or prevent the release of highly concentrated and toxic wastes that result in adverse impacts on surface water and groundwater. *See* Minn. Stat. §93.44; Minn. R. 6132.0200; 6132.2000, subp. 1, subp. 5(C), (E); 6132.2200, subp. 1, subp. 2 (C), (E).

The wastewater seepage collection methods proposed for the unlined tailings facility and unlined permanent waste rock stockpile are unspecified and conceptual designs that are neither practical nor workable under available technology, would release pollutants that adversely impact natural resources, and would fail to provide for the collection and disposal of waters moving through and draining from reactive mine waste. *See* Minn. Stat. §§ 93.44, 93.481, subd. 2; Minn. R. 6132.2200, subp. 1, subp. 2(B), (C).

In addition, the financial assurance proposed for the Project is legally insufficient. The DNR failed to require that PolyMet provide an amount equal to the reclamation cost estimate for the first year of mining operations before permit issuance. Minn. R. 6132.1200, subp. 2, subp. 4(B).

The DNR's issuance of its Findings of Fact Conclusions and Order and the final Permit to Mine for the PolyMet Project on November 1, 2018 provided final disposition on each of the above issues.

5. List specific issues proposed to be raised on appeal

Based on Minnesota Statutes §14.47 and chapter 93 and Minnesota Rules chapter 6132 pertaining to non-ferrous mining and constitutional rights to due process, the issues presented in this appeal are stated below. If the court finds for Relator on the first issue, some or all of the additional issues raised in this appeal may be premature.

1. Whether the DNR's denial of a contested case hearing was erroneous under applicable statutes and rules, arbitrary and capricious, and deprived affected persons of due process of law.
2. Whether the Permit to Mine granted to PolyMet by the DNR, in both its General and Specific Conditions, exceeded the DNR's statutory authority, failed to contain definite conditions required by statutes and rules, and was vague, uncertain, and not reasonably enforceable.
3. Whether the DNR's approval of wet slurry tailings deposition, wet tailings closure and proposed application of bentonite to the tailings dam beaches, exterior and pond failed to comply with statutes and rules applicable to non-ferrous mining and was arbitrary and capricious.
4. Whether the DNR's approval of the location of the Project's hydrometallurgical waste disposal facility on an unstable foundation failed to comply with statutes and rules applicable to non-ferrous mining

and was arbitrary and capricious.

5. Whether the DNR's approval of conceptual and unproven designs for collection of wastewater moving through reactive wastes at the Project tailing facility and permanent waste rock stockpile failed to comply with statutes and rules applicable to non-ferrous mining and was arbitrary and capricious.
6. Whether the financial assurance approved by the DNR before issuance of the Permit to Mine was legally deficient under non-ferrous mining rules.

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 Dam Safety Permits for the Project flotation tailings facility and hydrometallurgical waste facility.
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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