

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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*In re Minnesota Department of Natural  
Resources Issuance of Dam Safety  
Permit 2016-1380 To PolyMet Mining,  
Inc. for the NorthMet Project.*

Court File No. \_\_\_\_\_

**PETITIONER'S STATEMENT  
OF THE CASE**

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Petitioners Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, Duluth for Clean Water, Friends of the Cloquet Valley State Forest, Save Lake Superior Association, Save Our Sky Blue Waters, and Center for Biological Diversity (collectively “Petitioners”) state as follows:

**1. Agency of Case Origination.**

This matter is an appeal from a final decision of the Minnesota Department of Natural Resources (“DNR”), signed by Commissioner Tom Landwehr and dated November 1, 2018, issuing Poly Met Mining, Inc. (“PolyMet”) a Dam Safety Permit for the Flotation Tailings Basin (“Dam Safety Permit”)<sup>1</sup>. PolyMet applied for the Dam Safety Permit in relation to its NorthMet Mine Project (“NorthMet Project”).

**2. Jurisdictional Statement.**

- a. Statute, rule or other authority authorizing certiorari appeal:

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<sup>1</sup> DNR also issued a Dam Safety Permit for the Hydrometallurgical Residue Facility on the same day as part of the same Order. The Hydrometallurgical Residue Facility Dam Safety Permit is not part of this appeal.

Certiorari review is requested from this quasi-judicial administrative action. Certiorari jurisdiction is pursuant to Minnesota Statutes § 480A.06, subdivision 3, Minnesota Statutes § 606.06, and the decision in *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn.1992). Petitioners and their members are aggrieved by DNR's issuance of the Dam Safety Permit for the NorthMet Project because the DNR failed to comply with Minnesota Statutes § 103A.201, § 103G.315 subdivision 3, and § 116D.04, subdivision 6, and Minnesota Administrative Rules Chapter 6115, resulting in a permit for a Class I dam that does not protect public safety, does not promote the general welfare, and does not comply with prudent, current environmental practice. Petitioners and their members rely on natural resources and wildlife that will be affected by the NorthMet Project, including the St. Louis, Partridge, Cloquet, and Embarrass Rivers, and Petitioners' members own and use property that is near the mining site and that could be affected by a failure of the proposed dam and releases to the water from the flotation tailings basin dam, a dam which will remain in place forever.

b. Authority fixing time limit for obtaining certiorari review:

Minn. Stat. § 606.01 provides that “[n]o writ of certiorari shall be issued, to correct any proceeding, unless such writ shall be issued within 60 days after the party applying for such writ shall have received due notice of the proceeding sought to be reviewed

thereby.” The DNR issued its order approving the FTB Permit for the NorthMet project on November 1, 2018.<sup>2</sup>

c. Finality of order or judgment:

The decision to be reviewed disposes of all claims by and against all parties.

**3. State Type of Litigation and Designate any Statutes at Issue.**

This is a certiorari appeal from the DNR’s final decision to issue the Dam Safety Permit to PolyMet for the NorthMet Project. Statutes and Rules at issue are Minnesota Statutes § 103A.201, § 103G.315, subdivision 3, and § 116D.04, subdivision 6, and Minnesota Administrative Rules Chapter 6115.

**4. Brief Description of Claims, Defenses, Issues Litigated and Result Below.**

Petitioners assert that, as a matter of law, the DNR erred in its decision to issue the Dam Safety Permit to PolyMet. Through this appeal, Petitioners seek review of the DNR’s decision and a ruling of the Court of Appeals reversing the DNR’s decision to issue the Dam Safety Permit to PolyMet.

Any person seeking to construct a dam or impoundment in Minnesota must first apply for and obtain a permit from the DNR. Prior to issuing such a permit, the DNR must find that the applicant’s plans are “reasonable, practical, and will adequately protect public safety and promote the public welfare.” Minn. Stat. § 103G.315, subd. 3.

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<sup>2</sup> Despite the statutory requirement for jurisdiction to be triggered by a party’s receipt of a decision, the DNR did not mail or otherwise serve this decision on the Petitioners, but only made the decision available on its website. To ensure that this Court has jurisdiction over this matter, despite the DNR’s failure to provide Petitioners with actual notice, Petitioners have proceeded with this appeal.

In 1978, the DNR adopted Minnesota Rules 6115.0300 to 6115.0520 (“Dam Safety Rules”) to govern the inspection, operation, and construction of dams. Minn. Laws 1978, chapter 779, section 8. Among other things, the Dam Safety Rules set forth the “minimum standards and criteria for ... permits for dam projects.” Minn. R. 6115.0300. “The purpose of [the Dam Safety Rules] is to regulate the construction and enlargement of dams, as well as the repair, alteration, maintenance, operation, transfer of ownership, and abandonment, in such a manner as to best provide for public health, safety, and welfare.” *Id.* For new dams, the DNR approval must be based on “the potential hazards to the health, safety, and welfare of the public and the environment....” Minn. R. 6115.0410, subp. 8. All dams must comply with “prudent, current environmental practice throughout [their] existence.” *Id.* In addition, prior to approval of any new Class I dam, the DNR must make a determination that the permit applicant has demonstrated “a lack of other suitable feasible and practical alternative sites, and economic hardship which would have a major adverse effect on population and socioeconomic base of the area affected.” *Id.* Finally, every dam used for waste disposal must have a termination plan which describes the final removal and treatment of all “ponded and channeled waters.” Minn. R. 6115.0390, subp. 3.

PolyMet’s NorthMet project is Minnesota’s first copper-nickel mine. The waste rock and tailings from this mine will be “reactive,” meaning the waste will “release substances that adversely impact natural resources.” Minn. R. 6132.0100, subp. 28. PolyMet will dispose of reactive tailings by pumping them in a slurry form to the “flotation tailings basin.” *See* Addendum at 7. The flotation tailings basin will be built on

top of the “slimes” and tailings of a 50-year old iron-mining tailings basin. *See* Addendum at 7, 14, 32-34. As permitted by the Dam Safety Permit, PolyMet will construct a 250-foot high embankment, which will be comprised primarily of coarse mine tailings from the preexisting iron mine, to impound the tailings and associated water. *See* Addendum at 14. The Dam Safety Permit allows PolyMet to construct this dam using the less-safe “upstream” construction method. *See* Addendum at 14. During construction, PolyMet plans to amend the exterior dam face with a bentonite layer to reduce water seepage and oxidation of the tailings. *See id.* Finally, after the mining operation is done, the DNR will not require PolyMet to decommission this dam, but instead will permit PolyMet to use this dam to maintain a 900-acre “pond” (the equivalent in area to approximately 900 football fields) to contain the reactive mine tailings in perpetuity. *See* Addendum at 42.

On September 15, 2017, the DNR published a draft Dam Safety Permit. On October 16, 2017, Petitioners commented extensively on this draft permit and requested a contested case hearing. Petitioners supported their comments and contested case hearing request with expert reports. Specifically, Petitioners documented that the proposed dam was not consistent with the requirement that it be compliant with “prudent, current environmental practice throughout its existence,” as required by Minnesota Administrative Rule 6115.0410, subpart 8. Petitioners submitted evidence that the dam will not be built using the safest techniques and will be located on unstable materials, and thus will be geomorphically unstable and prone to failure. Petitioners noted that, to reduce reactivity in the tailings deposits under the dam, the DNR proposed to allow

PolyMet to add a clay layer to the dam face, but this is a novel construction technique that may also lead to instability and failure.

Petitioners also commented that the draft permit precluded full public review as it relied on plans to be submitted after permit issuance, in violation of Minnesota Administrative Rule 6115.0410, subpart 6, which requires the submission of *final* design reports, *prior* to permit issuance. Finally, Petitioners argued that under Minnesota Statutes § 116D.04, subdivision 6, the DNR could not permit PolyMet’s permanent wet pond proposal when there were feasible and prudent alternatives—including “dry closure” by removing water after the basin is no longer in active use, or managing the tailings in a dried form to begin with—with lesser environmental impacts.

On November 1, 2018, without prior notice to Petitioners or the public, the DNR issued the Dam Safety Permit to PolyMet. *See* Addendum at 67. The DNR also denied Petitioners’ request for a contested case hearing.<sup>3</sup> Although the DNR made some minor changes to the permit in response to Petitioners’ concerns, the DNR did not address Petitioners’ major concerns with either the project or the permit itself.

Petitioners ask this Court to reverse the DNR’s decision to issue the Dam Safety Permit to PolyMet because the DNR failed to ensure that the permit complied with applicable law, including Minnesota Statutes § 103A.201, § 103G.315 subdivision 3, and with Minnesota Administrative Rule Chapter 6115, and because its decision was

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<sup>3</sup> While it does not appear that, under statute, a contested case hearing is required in response to a public request, nothing prevents the commissioner from conducting a contested case hearing where it would be helpful to do so. Minn. Stat. § 103G.311, subd. 4. Petitioners have sought appellate review of the commissioner’s decision not to conduct a contested case hearing on the permit to mine, which involves similar issues.

arbitrary, unreasonable, unsupported by substantial evidence, and was otherwise contrary to law. *See Dietz v. Dodge Cty.*, 487 N.W.2d 237, 239 (Minn. 1992) (construing the standard of review under Minn. Stat. ch. 606). The DNR also failed to comply with Minnesota Statutes § 116D.04, subdivision 6, under which the DNR cannot approve a permit if there is a feasible and prudent alternative with lesser environmental impacts.

## **5. Specific Issues Proposed to Be Raised on Appeal.**

1. Whether the DNR erred as a matter of law when it issued a dam safety permit to PolyMet including:
  - (a) whether the DNR failed to comply with the statutory requirement that the DNR only approve applications for dam safety permits that promote the public health, safety, and welfare. *See Minn. Stat. § 103A.201.*
  - (b) whether the DNR violated the dam safety rules when it approved a dam that will not comply with prudent, current environmental practice throughout its existence. *See Minn. R. 6115.0410, subp. 8.*
  - (c) whether the DNR failed to comply with the dam safety rules when it issued a permit that allows PolyMet to submit key plans describing how it will comply with the rules or permit terms after the permit is issued, frustrating public and judicial review. *See Minn. R. 6115.0410, subp. 6.*
  - (d) whether the DNR issued a permit in violation of the dam safety rules on the basis that “economic hardship” had been established, when alternatives exist, such as the dry stack tailings/filtered tailings storage method, or dry closure. *See Minn. R. 6115.0410, subp. 8.*
  - (e) whether the DNR failed to comply with the regulatory requirement that each application for a dam safety permit include a termination plan which describes the final removal and treatment of all impounded water. *See Minn. R. 6115.0390, subp. 3.*
2. Whether the DNR violated the requirements of the Minnesota Environmental Policy Act when it approved perpetual maintenance of a dam necessary to maintain a wet tailings storage facility instead of

requiring that PolyMet implement a feasible and prudent alternative, i.e., dry closure or dry stack tailings/filtered tailings. *See* Minn. Stat. § 116D.04, subd. 6.

## **6. Related Appeals.**

This appeal is related to the following appeals:

1. Petitioners' appeal, filed concurrently, of the DNR's decision to issue PolyMet a Permit to Mine;
2. Petitioners' declaratory judgment action, filed concurrently, challenging the rule under which the DNR issued the permit to mine as provided in Minn. Stat. §§ 14.44-5;
3. Petitioners' August 10, 2018 appeal of the DNR's denial of a petition for a supplemental Environmental Impact Statement (Case Nos. A18-1312, A18-1524, and A18-1608). Briefing in this matter will be completed in January 2019.

Petitioners seek to stay this case until this Court has resolved the supplemental EIS petition appeal and the declaratory judgment action on the rules.

## **7. Contents of Record.**

There was no hearing or trial preceding the DNR's final decision, so no transcript is required. The parties have not agreed to prepare a statement of the record pursuant to Rule 110.04.

## **8. Formal Oral Argument is Requested in St. Paul.**

## **9. Petitioner will File a Formal Brief under Minn. R. Civ. App. P. 128.02.**

## **10. Names, Addresses, Zip Codes and Telephone Numbers of Attorney for Petitioner and Respondents.**

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