

**STATE OF MINNESOTA
IN COURT OF APPEALS**

*In re Minnesota Department of Natural
Resources Issuance of a Permit To Mine
To PolyMet Mining, Inc. and
PolyMet Mining Corp. for the NorthMet Project.*

Court File No. _____

**PETITIONERS' STATEMENT
OF THE CASE**

Petitioners Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, Duluth for Clean Water, Save Lake Superior Association, Center for Biological Diversity, Friends of the Cloquet Valley State Forest, and Save Our Sky Blue Waters (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 a permit to mine to PolyMet Mining, Inc. and PolyMet Mining Corp. (“PolyMet”) for the NorthMet Mine Project (“NorthMet Project”).

2. Jurisdictional Statement.

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

Minnesota Statute § 93.50 provides “[a]ny person aggrieved by any final order, ruling, or decision of the commissioner may obtain judicial review of such order, ruling, or decision under sections 14.63 to 14.69.” Accordingly, this appeal is brought pursuant to Minn. Stat. §§ 14.63-.69 or, alternatively, Minn. Stat. § 606.01, and Minn. R. Civ.

App. P. 115. Petitioners¹ and their members are particularly aggrieved by the DNR's denial of their petition for a Contested Case Hearing and the DNR's issuance of a permit to mine for the NorthMet Project because the DNR failed to comply with Minn. Stat. §§ 93.47, 93.481, 116D.04, subd. 6, and Minn. R. ch. 6132, resulting in a permit that does not protect the natural resources of the state. Petitioners and their members rely on, use and enjoy the 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 property could be affected by releases to the water and air from the mining site. The DNR's failure to follow Minnesota law in issuance of the permit to mine means that the resources on which Petitioners and their members depend, and which are highly valued by Petitioners and their members, will be subjected to contamination or greater risk of contamination.

b. Authority fixing time limit for obtaining certiorari review:

Minnesota Statute § 93.50 provides for review under the procedures governing appeals from contested cases under Minn. Stat. §§ 14.63-.69. Minnesota Statute § 14.63 provides that “[a] petition for a writ of certiorari by an aggrieved person for judicial review under sections 14.63 to 14.68 must be filed with the court of appeals and served on all parties to the contested case not more than 30 days after the party receives the final

¹ With regard to issues related to the petition for the contested case hearing, Petitioners consist of the Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, and Center for Biological Diversity.

decision and order of the agency.” The DNR issued its order approving the permit to mine for the NorthMet Project on November 1, 2018.²

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 deny Petitioners’ petition for a contested case hearing and to issue a permit to mine to PolyMet for the NorthMet Project.

The following statutes are at issue:

Minnesota Constitution, Art. I.

Minn. Stat. ch. 93 and rules adopted thereunder.

Minn. Stat. ch. 116D.

Minn. Stat. ch. 14.

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

Petitioners seek a ruling reversing the DNR’s decision to deny Petitioners’ petition for a contested case hearing on the DNR’s decision to issue a permit to mine for PolyMet’s NorthMet Project, and if this relief is not granted, a ruling reversing the DNR’s decision to issue a permit to mine to PolyMet for its NorthMet Project.

The Minnesota Legislature imposes few statutory limits on the DNR’s approval of mining permits and reclamation plans, but requires such approval to be based on

² Despite the statutory requirement for jurisdiction to be triggered by a party’s receipt of a decision, 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 DNR’s failure to provide Petitioners with actual notice, Petitioners have proceeded with this appeal, but reserve their right to receipt of the DNR’s decision.

reclamation plans (Minn. Stat. § 93.481), and repeatedly requires that the Commissioner “determine that the reclamation or restoration planned for the operation complies with *lawful requirements* and *can be accomplished under available technology* and that a proposed reclamation or restoration technique *is practical and workable under available technology*.” Minn. Stat. § 93.481, subd. 2 (emphasis added). For mining of metals other than iron (“nonferrous” metals), the Commissioner must “develop procedures that will identify areas or types of areas which, if mined, *cannot be reclaimed with existing techniques to satisfy the rules* promulgated under this subdivision” and the commissioner cannot issue permits to mine “until the commissioner determines *technology is available to satisfy the rules so promulgated*.” Minn. Stat. § 93.47, subd. 3 (emphasis added). The Legislature also requires that “[a] permit issued by the commissioner pursuant to this section [] be granted for the term determined necessary by the commissioner for the completion of the proposed mining operation, including reclamation or restoration.” Minn. Stat. § 93.481, subd. 3(a).

In 1993, the DNR adopted Minnesota Rules Chapter 6132 to govern mine-waste disposal, mining areas and permits to mine for nonferrous metals. 17 *State Register* 2207 (March 15, 1993) (“Chapter 6132”). “The purpose of [Chapter 6132] is to implement Minnesota Statutes, sections 93.44 to 93.51, to control possible adverse environmental effects of nonferrous metallic mineral mining, to preserve natural resources, and to encourage planning of future land utilization, while at the same time promoting orderly development of nonferrous metallic mineral mining...” Minn. R. 6132.0200. The DNR included “goals” in each section of Chapter 6132 governing reclamation. “Goals” means

“reclamation targets of achievement toward which the specific requirements of parts 6132.02100 to 6132.5300 are directed.” Minn. R. 6132.0100, subp. 8. But the “requirements” are also general statements, and rarely establish directly enforceable standards or limits. *See* Minn. R. ch. 6132. Instead, the DNR specified that “*specific permit requirements* shall be established within the framework established by parts 6132.0100 to 6132.5300. Permit terms and conditions shall be directed toward attaining the goals while fulfilling the requirements described in parts 6132.0100 to 6132.5300.” Minn. R. 6132.0200.

In 2005, PolyMet proposed to develop a copper-nickel mine, the first Minnesota mine to be regulated under the laws applicable to nonferrous metal mining. *See* Addendum (“Add.”) 1-6 (general description). The waste rock and tailings³ from this mine will be “reactive,” meaning the waste will “release substances that adversely impact natural resources.” Minn. R. 6132.0100, subd. 28. *See* Add. 49-51. PolyMet proposes to dispose of reactive waste rock under water in the mine pits and in a covered pile, and to slurry wet tailings to a new tailings basin to be constructed on top of an old iron-mining tailings basin. *See* Add. At 53. PolyMet will attempt to capture contaminated water released from these permanent waste disposal sites and treat it before discharging it to waters of the state. At closure, PolyMet will store the slurried tailings in a 900-acre “pond” and in 435 acres of “beaches,” all held in place with a new earthen dam built partially on the remains of the old dam and partially on top of the reactive tailings. *See*

³ The finely-ground rock waste remaining after valuable metals are extracted from the ore.

Add. 76. How PolyMet will comply with the closure standards in Chapter 6132 is not known. PolyMet has proposed to reduce reactivity and reduce water moving through the mine waste with an untested scheme to “amend” the surface of the beaches, the faces of the dam, and the bottom of the pond, with clay (“bentonite”). *See* Add. 107.

On January 5, 2018, the DNR published a draft permit allowing PolyMet to construct and operate its proposed mine. The draft permit did not include a term, firm plans, or other specific permit conditions, but instead broadly approved “the application” which consisted of 60,000 pages of documents, including the Final Environmental Impact Statement on the NorthMet Project. In the “special conditions,” the proposed permit required PolyMet to develop and submit various plans for the DNR to review (and sometimes approve), but lacked any standards for such review and/or approval. Despite relying on PolyMet’s bentonite scheme to find that the mine would meet standards applicable to reactive mine waste, the DNR admitted that it is unknown whether this scheme will be effective (and, if effective, to what degree) by including requirements for PolyMet to conduct “bench,” “pilot scale” and “field” testing. This testing will not occur until after the tailings basin is in operation or once it is closed, and the draft permit did not establish any standards against which DNR can assess the results of the testing.

In February and March, 2018, Petitioners commented extensively on this draft permit, and petitioned for a contested case hearing under Minn. Stat. § 93.483 and Minn. R. 6132.400, subp. 2. Petitioners supported their petition with declarations from members who own property near the mine and who would be affected by the proposed operation, and with expert reports and other information supporting the material issues of

fact that Petitioners sought to have resolved in a contested case hearing. In particular, Petitioners documented that the proposed mine closure did not meet the goals and standards in the DNR's nonferrous mining rules, and that the DNR's approval of PolyMet's attempt to comply with those rules by novel techniques—such as using bentonite to limit infiltration and oxygen intrusion—violated the statutory requirement for reclamation to be based on “existing” or “available” technology under Minnesota Statutes sections 93.481, subd. 2 and 93.47, subd. 3. Petitioners also commented that the permit lacked the “term” mandated by Minnesota Statutes section 93.481, subd. 3(a) and specific enforceable conditions under Minn. R. 6132.2000, and that it relied on plans to be submitted after the permit was effective, thereby frustrating public review. Finally, Petitioner pointed out that under Minnesota Statutes section 116D.04, subd. 6, the DNR could not permit PolyMet's proposed reactive mine waste closure proposal when there were feasible and prudent alternatives—dry stack (or “filtered tailings”) or dry closure—with lesser environmental impacts.

On November 1, 2018, without prior notice to Petitioners or the public, the DNR denied Petitioners' request for a contested case hearing and issued PolyMet a permit authorizing it to construct and operate its mine. *See generally* Addendum. Although the DNR made some minor changes to the permit in response to Petitioners' concerns, the DNR did not change the permit to address Petitioners' major concerns with either the NorthMet Project or the permit itself. The DNR denied Petitioners' petition for a contested case hearing because the DNR found that Petitioners' members do not live close enough to the proposed mine to be affected by it, Petitioners' concerns about the

environmental impacts of the mine on their members' property were "speculative," and because the DNR had already made up its mind about the issues Petitioners were raising. *See Add.* at 156-180.

Petitioners ask this Court to reverse the DNR's decision to deny Petitioners' contested case hearing petition. If the Court reverses the DNR's decision on the contested case hearing petition, this Court need not reach the question of whether the permit is valid. If the Court affirms the DNR's decision to deny the contested case hearing petition, the Court should nevertheless reverse the DNR's decision to issue a permit to PolyMet because the DNR failed to ensure that the permit complied with applicable law, including Minnesota Statutes sections 93.47 and 93.481 and Minnesota Rules chapter 6132, and because its decision was unsupported by substantial evidence, and was otherwise arbitrary, and capricious. *See Minn. Stat. § 14.69.* The Court should also reverse the DNR's decision because the DNR failed to comply with Minnesota Statute section 116D.04, subd. 6, under which the DNR cannot approve a permit significantly affecting the quality of the environment which is likely to cause "pollution, impairment, or destruction" of natural resources, if there is a feasible and prudent alternative.

5. Specific Issues Proposed to Be Raised on Appeal.

1. Whether the DNR erred as a matter of law when it denied Petitioners' contested case hearing petition including:
 - (a) whether Minn. Stat. § 93.483 unconstitutionally restricts the right of the public to seek a contested case hearing based on property ownership status, which is an irrational classification;

- (b) whether, if the DNR may constitutionally apply Minn. Stat. § 93.483 to restrict Petitioners' right to a contested case hearing based on property owner status, the DNR correctly applied that statute when it determined that Petitioners did not meet the qualifications established by Minn. Stat. § 93.483; and
 - (c) whether the DNR violated Minn. Stat. § 93.483 and Minn. R. 6132.4000 or otherwise acted in an arbitrary and capricious manner when it denied Petitioners' contested case hearing petition because it had already made up its mind on the issues Petitioners raised.
- 2. Whether the DNR erred as a matter of law when it issued a permit to mine for the NorthMet Project including:
 - (a) whether the DNR failed to comply with statutes that require the DNR to approve mining that uses "available technology" when it approved PolyMet's experimental plan to comply with the "reactive mine waste" rule based on unknown test results and without establishing standards for compliance. *See* Minn. Stat. §§ 93.47 and 97.481; Minn. R. 6132.2200, subp. 2.
 - (b) whether the DNR acted contrary to its "reactive mine waste" and "closure and postclosure" rules when it approved PolyMet's plan to store its waste under ponded water in perpetuity. *See* Minn. R. 6132.2200 and 6132.3200.
 - (c) whether the DNR violated the statutory requirement to issue a permit to mine with a "term" when the commissioner issued a permit to mine for the NorthMet Project that allows construction, operation, reclamation and post-closure to continue in perpetuity. *See* Minn. Stat. § 93.481, subd. 3(a).
 - (d) whether the DNR violated the law, or otherwise acted in an arbitrary and capricious manner by frustrating public and judicial review, when it issued a permit to mine for the NorthMet Project that failed to establish enforceable terms and conditions and that allowed key plans to be submitted after the permit is issued. *See* Minn. Stat. § 93.481, subd. 1; Minn. R. 6132.0200.

- (e) whether the DNR failed to comply with rules that require financial assurance to be available and payable when needed, when the uncontroverted record establishes that the profitability of the mine is predicted to be marginal. *See* Minn. Rule 6132.1200, subpart 5.
- 3. Whether the DNR violated the requirements of the Minnesota Environmental Policy Act when it failed to require PolyMet to implement a feasible and prudent alternative, i.e., dry closure or dry stack tailings/filtered tailings, and instead approved perpetual maintenance of a permanent wet tailings storage facility that will cause pollution, impairment, or destruction of the air, water, land, and other natural resources. *See* Minn. Stat. § 116D.04, subd. 6.

6. Related Appeals.

This appeal is related to the following appeals:

1. Petitioner's appeal, filed concurrently, of the DNR's decision to issue PolyMet Mining, Inc. a dam safety permit for the perpetual operation of a Class I dam holding tailings and water;
2. Petitioner's declaratory judgment action, filed concurrently, challenging the rule (Minn. R. ch. 6132) under which DNR issued this permit, as provided in Minn. Stat. §§ 14.44-5;
3. Petitioner's 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 plan to 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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