

**STATE OF MINNESOTA
IN COURT OF APPEALS**

*In re Minnesota Pollution Control Agency
Denial of Contested Case Hearing and
Issuance of NPDES/SDS Permit
MN0071013 for the NorthMet Project.*

Court of Appeals Case No. _____

**RELATOR’S STATEMENT
OF THE CASE**

1. Court or agency of case origination.

WaterLegacy takes this appeal from the Minnesota Pollution Control Agency (“MPCA”) Findings of Fact, Conclusions of Law, and Order dated December 20, 2018 (“Order”), denying a contested case hearing and granting National Pollutant Discharge Elimination System/State Disposal System (“NPDES/SDS”) permit MN0071013 (“NPDES/SDS Permit” or “Permit”) for the proposed NorthMet copper-nickel mine project (“NorthMet Project”) to Poly Met Mining, Inc. (“PolyMet”).

2. Jurisdictional statement.

a. Statute, rule or authority authorizing certiorari appeal.

Minnesota Statutes § 115.05, subdivision 11 authorizes any person aggrieved by any final decision of the agency of the commissioner, including decisions on denial of a contested case hearing and issuance of a permit, to obtain judicial review of such order, ruling or decision under Minn. Stat. §§ 14.63-69.

WaterLegacy is a Minnesota non-profit organization founded to protect Minnesota’s water resources, wetlands, ecosystems, and the communities that rely

on them. WaterLegacy's members include Minnesotans who live within a few miles downstream of the proposed NorthMet Project, and members who drink water, fish, canoe, gather wild rice, sustain themselves and their families on wild-caught fish and wild rice, conduct scientific inquiries, enjoy recreation and aesthetics, and observe wildlife on nearby Superior National Forest lands and in receiving and downstream waters for the NorthMet Project, including Second Creek, the Partridge River, Colby Lake, Whitewater Reservoir, the Embarrass River, the Embarrass River chain of lakes (Sabin, Wynne and Embarrass Lake), and the St. Louis River.

WaterLegacy is an aggrieved person because its core mission and the interests of its members in protecting their health and the health of their families and communities, as well as in engaging in fishing, canoeing, gathering wild rice, sustaining themselves and their families on wild and local natural foods, conducting scientific research, enjoying recreation and aesthetics, and observing wildlife are adversely affected by the MPCA's December 20, 2018 Order denying a contested case hearing and issuing an NPDES/SDS Permit that will allow NorthMet Project pollution in receiving and downstream waters. WaterLegacy commented on the MPCA's Draft NPDES/SDS Permit for the NorthMet Project and petitioned the MPCA for a contested case hearing on this Permit on March 16, 2018.

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 received MPCA's Order on December 20, 2018.

c. Finality of order or judgment.

The MPCA's December 20, 2018 Findings of Fact, Conclusions of Law and Order denying a contested case hearing and issuing NPDES/SDS Permit MN0071013 for the NorthMet Project is a final decision.

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

This is a certiorari appeal from a final MPCA decision granting an NPDES/SDS Permit and denying a contested case hearing. Pertinent authorities include the Clean Water Act ("CWA"), 33 U.S.C. §§1251 *et seq.*; 40 C.F.R. parts 122, 123, 124, 131, and 132; Minn. Stat. ch. 115 and 116; and Minn. R., ch. 7000, 7001, 7050 and 7052.

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

The PolyMet NorthMet project is Minnesota's first copper-nickel sulfide ore mine project to reach the permitting stage. The MPCA released its Draft NPDES/SDS Permit for the NorthMet Project on January 31, 2018. On March 16, 2018, during the public notice period, WaterLegacy filed comments objecting to the Draft NPDES/SDS Permit as a violation of federal and state law and filed a petition for contested case hearing. On December 20, 2018, the MPCA released its Order denying contested case hearing requests and issuing NPDES/SDS Permit MN0071013 for the NorthMet Project. WaterLegacy takes its appeal from these final

decisions.

Minnesota's authority to allow release of pollutants to surface waters of the United States derives from and is constrained by the CWA. *See* 33 U.S.C. §§ 1313, 1314, 1342; 40 C.F.R. ch. 123. It is not disputed that all wetlands and other surface waters potentially impacted by the NorthMet project pollutant discharge are waters of the United States. *See* 40 C.F.R. § 122.2.

Any addition of pollutants from a point source to waters of the United States is prohibited, except in compliance with the CWA and its regulations. *See* 33 U.S.C. § 1311; 40 C.F.R. §§ 122.1, 122.21. No State may issue an NPDES permit when its conditions do not provide for compliance with the CWA, federal regulations promulgated, and State water quality standards approved under the Act. *See* 33 U.S.C. §§ 1311, 1313, 1342; 40 C.F.R. §§ 122.4, 122.41, 122.43, 122.44, 123.25.

Minnesota enacts water quality standards subject to EPA approval, and once standards are approved by the EPA, states are bound to enforce their water quality standards under the CWA. *See* 33 U.S.C. § 1313(c), 40 C.F.R. ch. 131. State NPDES permits must include water quality based effluent limits and conditions, and must control all pollutants that are or may be discharged from point sources that have a reasonable potential to cause or contribute to a violation of State water quality standards. *See* 33 U.S.C. §§ 1311, 1342, 1362; 40 C.F.R. §§ 122.1, 122.4, 122.43, 122.44, 123.25. Surface waters potentially impacted by NorthMet Project water pollution are also subject to the standards and procedures of the federal Great Lakes Initiative ("GLI"). *See* 40 C.F.R. Part 132; Minn. R. ch. 7052.

Under the CWA, when pollutants have been channelized and collected in a discernable conveyance they constitute a “point source,” and their addition to surface waters of the United States is a point source discharge that must be controlled under the CWA. *See* 33 U.S.C. §1362; 40 C.F.R. §122.2; *see also* Minn. Stat. § 115.01; Minn. R. 7001.1020.

The CWA sets federal standards for state monitoring of pollutants, and NPDES permits must provide monitoring to assure compliance with all applicable requirements of the CWA and federal regulations. *See* 33 U.S.C. §§ 1314(i), 1342; 40 C.F.R. §§ 122.43(a), 122.48, 123.25. The CWA establishes the procedures for NPDES permitting, including requirements for responses to comments. *See* 33 U.S.C. § 1342; 40 C.F.R. §§ 124.17, 123.25. The CWA also provides that any citizen has the authority to enforce violations of effluent standards and limitations and the federal district courts have the jurisdiction to hear such claims, issue orders and impose civil penalties for violations, unless compliance with a permit has vitiated such authority. *See* 33 U.S.C. §§ 1342(k), 1365; 40 C.F.R. §§ 122.5, 122.64(b), 123.25.

Minnesota statutes require the MPCA to impose permit conditions for the NPDES program consistent with and, not less stringent than those of the CWA, Minn. Stat. §§ 115.03, subd. 5, 116.03, subd. 2b(j). No NPDES/SDS permit can be issued that fails to contain conditions necessary to achieve compliance with all applicable Minnesota and federal statutes and rules. *See* Minn. R. 7001.0140, 7001.0150, 7001.1000, 7001.1080. Monitoring must also be sufficient to achieve

compliance with both State and federal requirements. Minn. R. 7001.0150, subp. 2. Prior to final action on a permit, the MPCA must respond to comments received during the public comment period and make those comments available to the public. Minn. R. 7001.0660(E).

In addition, Minnesota law requires that the commissioner of the MPCA must grant a petition for contested case hearing when there is a dispute of a material issue of fact concerning a pending matter and a reasonable basis underlying the dispute that would allow introduction of information that would aid in reasoned decision-making. *See* Minn. Stat. § 14.57(a); Minn. R. 7000.1900; *In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance*, 672 N.W. 2d 921 (Minn. Ct. App. 2004).

The NorthMet project will directly discharge up to 5.7 million gallons per day of effluent from 10 surface discharge outfalls (SD002-SD011) at the processing plant to wetlands flowing into the Embarrass River headwaters of the St. Louis River, the largest U.S. tributary to Lake Superior. Neither the NPDES/SDS Permit, its Fact Sheet, nor the Order disclose the quantity of other NorthMet discharge of pollutants to waters in the Partridge River or Embarrass River watersheds from Mine Site or Plant Site features.

The NPDES/SDS Permit for the NorthMet Project sets no water quality based effluent limitations (WQBELs) for any parameter directly discharged through outfalls SD002-SD011. The Permit further fails to require monitoring for chemical parameters at these 10 outfalls. The Permit also fails to set WQBELs at SD001, which is a proposed wastewater treatment system collection point prior to actual

surface discharge outfalls SD002-SD011, or at SW020 (PM7/SD026), where untreated discharge from the NorthMet project Flotation Tailings Basin (“Tailings Basin”) will reach Second Creek, a headwaters stream to the Partridge River.

The Permit sets technology based effluent limits (TBELs) at SD001 that fail to comply with Minnesota or GLI water quality standards. The Permit also sets operating limits on a NorthMet wastewater system internal waste stream (WS074).

The NorthMet project will discharge pollutants to surface waters of the United States via hydrologically connected groundwater at point sources, including the huge unlined Tailings Basin at the Plant Site, the unlined 526-acre Category 1 waste rock stockpile at the Mine Site, and, eventually, when it has been mined and backfilled with reactive wastes, the 155-acre East Pit at the Mine Site. Pollutants may also be discharged to surface water via hydrologically connected groundwater at lined point sources, including the 300-acre Hydrometallurgical Residue Facility at the Plant Site; and the Ore Surge Pile, Category 4 waste rock stockpile (57 acres), Category 2/3 waste rock stockpile (180 acres), and various Mine Site basins, ponds and sumps containing reactive mine processing wastewater.

The NPDES/SDS Permit prohibits direct discharge to surface water, overflows, spills and releases from both lined and unlined project Mine Site features and prohibits direct discharge to surface water from the Tailings Basin pond and from the seepage collection features proposed for the Category 1 waste rock stockpile and the Tailings Basin. However, the Permit contains no prohibition on discharge to surface water from the Tailings Basin *per se*, and no prohibition on discharge to

surface water via hydrologically connected groundwater from any of the numerous lined and unlined Mine Site and Plant Site NorthMet point sources.

The NPDES/SDS Permit fails to require surface water monitoring in locations where direct discharge to surface water could be detected and fails to require adequate surface water monitoring to detect where discharge via hydrologically connected groundwater first reaches surface waters. Permit monitoring, thus, fails to assure compliance with surface water quality standards as required under federal and state law.

The MPCA denied a contested case hearing on the NorthMet Permit, despite WaterLegacy's petition setting forth material issues of disputed fact based on record evidence and expert opinion including, but not limited to the following issues: the failure to demonstrate that seepage capture from the unlined Tailings Basin and Category 1 waste rock stockpile would prevent discharge of pollutants; the reasonable potential of pollutants discharged from the NorthMet project to cause or contribute to violations of water quality standards; the insufficiency of proposed monitoring to detect violations or protect surface water quality; and the likelihood that the NorthMet Project will degrade and increase impairments of receiving and downstream waters with respect to mercury.

WaterLegacy's comments stated that the NPDES/SDS Permit violated the CWA, federal implementing regulations, the GLI, and state statutes and rules. These claims included, but were not limited to the following: 1) the Permit failed to set water quality based effluent limits for discharge of pollutants to surface water with

the reasonable potential to cause or contribute to exceedance of water quality standards; 2) the Permit failed to set limits, standards or conditions to prevent discharge of NorthMet point sources to surface waters via hydrologically connected groundwater from violating water quality standards; and 3) the Permit failed to provide adequate monitoring to detect, prevent or allow enforcement of violations of the CWA and water quality standards due to NorthMet direct discharge to surface waters and discharge to surface waters via hydrologically connected groundwater.

In issuing the NorthMet NPDES/SDS Permit and denying contested case hearings, the MPCA has erred, exceeded its statutory authority, arbitrarily and capriciously deferred to the project proponent, misapplied the applicable burden of proof, acted with improper procedure, and violated the Clean Water Act, the Great Lakes Initiative, federal implementing regulations, state statutes, and rules requiring control of water pollution and requiring a contested case hearing so that an independent trier of fact can resolve disputed factual matters.

5. List specific issues proposed to be raised on appeal

This appeal is brought under the federal CWA and its implementing regulations, the GLI, and Minnesota statutes and rules requiring compliance with applicable federal and state pollution control statutes and rules. 33 U.S.C. §§ 1251, *et seq.*, including but not limited to §§ 1311, 1313, 1314, 1342, 1362; and 1365; 40 C.F.R. parts 122, 123, 124, 131 and 132; Minnesota Statutes ch. 115 and ch. 116; Minnesota Rules, ch. 7000, 7001, 7050, 7052. On the basis of these authorities, the issues listed below are raised on appeal. 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 MPCA erred as a matter of law and arbitrarily and capriciously denied a contested case hearing despite material factual disputes pertaining to the NorthMet NPDES/SDS Permit.
2. Whether the MPCA erred and exceeded its statutory authority by issuing an NPDES/SDS Permit for the NorthMet Project without water quality based effluent limits (WQBELs) for direct surface discharge.
3. Whether the MPCA erred and arbitrarily and capriciously concluded that there was no reasonable potential that direct surface discharge from the proposed NorthMet Project would cause or contribute to exceedance of water quality standards.
4. Whether the MPCA erred and exceeded its statutory authority by issuing an NPDES/SDS Permit that failed to prohibit NorthMet Project discharge of pollutants from point sources through seepage and via hydrologically connected groundwater from causing or contributing to violations of surface water quality standards.
5. Whether the MPCA erred and exceeded its statutory authority by issuing an NPDES/SDS Permit for the NorthMet Project without setting limitations and standards to prevent untreated point source seepage and discharge via hydrologically connected groundwater from causing or contributing to violations of surface water quality standards.
6. Whether the MPCA erred, exceeded its authority, and arbitrarily and capriciously issued an NPDES/SDS Permit that failed to require adequate monitoring where the NorthMet Project will directly discharge pollutants into surface waters.
7. Whether the MPCA erred, exceeded its authority, and arbitrarily and capriciously issued an NPDES/SDS Permit that failed to require adequate monitoring where the NorthMet Project will discharge pollutants into surface water via hydrologically connected groundwater.
8. Whether the MPCA erred and exceeded its authority in issuing an NPDES/SDS Permit for the NorthMet Project that would shield PolyMet from liability and preclude citizen enforcement of violations of water quality standards under the CWA.

9. Whether the MPCA's issuance of an NPDES/SDS Permit for the NorthMet Project was procedurally unlawful due to failure to provide responses to certain comments as required under the CWA and state law.

6. Related appeals.

Minnesota Court of Appeals File No. A19-0112, *In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/ State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project*, filed January 18, 2019.

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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