

Environment

State court reverses PolyMet water permit, but sides with company on other issues

Dan Kraker Duluth January 24, 2022 1:46 PM



A former iron ore processing plant near Hoyt Lakes, Minn., would become part of the proposed PolyMet copper-nickel mine. Jim Mone | AP 2016

The state appeals court has issued a mixed opinion in a complicated case contesting one of the key permits PolyMet Mining needs to build what would be the state's first copper-nickel mine in northeastern Minnesota.

The decision Monday from the Minnesota Court of Appeals reverses the project's water quality permit and sends it back to the Minnesota Pollution Control Agency to determine whether any pollution discharges from the mine into groundwater would violate the federal Clean Water Act. That's a victory for the environmental groups and the Fond du Lac Band of Lake Superior Chippewa who sued to overturn the permit.

But the three-judge panel rejected several other arguments from PolyMet's opponents, including a demand for more stringent limits on the treated wastewater that's discharged from the mine, and a call for a "contested case hearing" to gather more evidence and testimony on certain aspects of the permit before a neutral judge.

So while the decision means an additional delay for the contentious project, it does not put a stop to the \$1

billion open-pit mine that PolyMet has proposed near the towns of Babbitt and Hoyt Lakes.

"We conclude that the PCA erred by not properly considering whether the federal Clean Water Act applies to any future discharges from PolyMet's facility to groundwater. But we conclude that there is no reversible error with respect to all other issues that have been raised by the parties," the judges wrote in the [39-page opinion](#).

The ruling is just the latest step in a long legal battle that opponents to the PolyMet project have waged since the state first approved it more than three years ago. Several other key permits that PolyMet needs to begin construction also remain tied up in litigation or have been remanded to state agencies for additional work.

Groundwater impacts

PolyMet's proposed mine for copper, nickel and precious metals poses potentially more severe environmental risks than the state's long-established iron ore mining industry, because the process used to extract the minerals from the ore can result in the contamination of nearby waterways with heavy metals and other pollutants.

That's why the project's water quality permit, which sets limits on the pollutants that can be released into those waterways, has been so heavily scrutinized by state regulators and the project's opponents.

A key issue in Monday's decision is whether any contaminated water from the mine could seep through the soil and rock into groundwater — and eventually into nearby lakes and streams — in violation of the federal Clean Water Act.

The landmark federal law applies to surface waters like lakes and streams.

But in a 2020 decision known as the "Maui case" — issued nearly two years after the MPCA approved the

PolyMet permit — the U.S. Supreme Court held that the Clean Water Act also applies to discharges of pollutants into groundwater, if the discharge “is the functional equivalent of a direct discharge” to surface waters.

In Monday’s ruling, the appeals court agreed with the environmental groups and the Fond du Lac Band that the PCA erred by not analyzing whether any contaminated seepage from the mine could make its way into lakes and streams in violation of federal law.

“This is a huge victory,” said Paula Maccabee, advocacy director and counsel for WaterLegacy, one of the groups that challenged the permit.

“PolyMet’s water pollution permit has been thrown out ... If the MPCA wants to start over and create a new permit, they need to do the analysis of whether untreated pollution from the PolyMet mine project would violate surface water quality standards,” Maccabee said.

The MPCA agreed that the groundwater analysis needed to be done, but argued that the court should have conducted it, rather than sending it back to the agency.

The agency and PolyMet said the company’s planned facility, which includes engineering controls, monitoring and other requirements, is designed to prevent seepage into groundwater — and even if seepage occurs, that it would take years to reach nearby surface waters, by which time the pollutants would be diluted.

PolyMet CEO Jon Cherry said he’s optimistic the MPCA will reach the same conclusions after it completes the additional analysis required by the court.

“This will mean a little more process, but it gives us a clear roadmap to the reactivation of this permit,” Cherry said.

MPCA spokesperson Darin Broton estimated the additional analysis will “take a few months” to complete, adding that it’s not the first time the agency has been told by the court to apply the Maui precedent to a mining permit. A decision last year also reversed a permit for the MinnTac iron ore mine and remanded it to the MPCA.

PolyMet prevails on several issues

On several other issues, the appeals court sided with PolyMet and the MPCA.

The judges upheld [a lower court’s decision last year that largely cleared the MPCA](#) of accusations of illegally suppressing comments from the federal Environmental Protection Agency that were critical of the water quality permit.

In that case, [internal documents revealed that MPCA staff](#) had asked the EPA to not submit written comments during the public comment period for the permit. The agency subsequently destroyed records of its requests to the EPA.

While the appeals court ruling acknowledged that “the procedures employed by the PCA in this matter are contrary...to public accountability of administrative agencies...and public access to governmental information,” the judges wrote that they may not reverse the permit on the grounds that the decision “was made upon an irregular procedure that is not unlawful.”

“For a second time, a Minnesota court has firmly decided that the MPCA’s permitting processes for the PolyMet project were rigorous and prudent,” the agency said in a statement.

Environmental groups and the Fond du Lac Band also argued that the water pollution permit approved by the MPCA does not sufficiently protect state and tribal water quality standards because it failed to include the most stringent level of pollution limits known as “water-quality-based effluent limits,” or WQBELs.

Those are limits that are applied where the pollution is discharged from the facility. The PolyMet permit, by contrast, includes operating limits that are applied within the facility, before it’s discharged into the environment.

The MPCA concluded that the PolyMet project doesn’t have “reasonable potential” to violate state water quality standards, and therefore the permit didn’t require the most stringent effluent limits.

In its ruling, the court wrote that the agency’s analysis “is based on its scientific expertise and policy judgments, which, as in prior cases, are entitled to our deference.”

The court also dismissed PolyMet's opponents' request for a contested case hearing, in which an administrative court judge would hold a trial-like proceeding to gather more information and testimony about disputed aspects of the permit.

PolyMet, in its statement, said it's pleased the company has prevailed "on the majority of the issues" and that the court has narrowed the case to the single issue of whether the project's groundwater discharges meet Clean Water Act standards.

But opponents point out that several key permits PolyMet needs to begin construction remain tied up in litigation, or have now been remanded back to state agencies for additional proceedings.

"Once again the courts have rejected a PolyMet permit," said Kathryn Hoffman, CEO of the Minnesota Center for Environmental Advocacy, another of the groups challenging the permit.

"The agency obviously has more work to do to protect Minnesota's waters and communities from the serious risks of sulfide mining," she added.

Chris Knopf, executive director of Friends of the Boundary Waters Wilderness, said the groups are strongly considering appealing much of the decision to the Minnesota Supreme Court.

Meanwhile, the groups plan to convene on the steps of the State Capitol Tuesday afternoon to deliver a petition to Gov. Tim Walz, asking him to move on from PolyMet.

Your support matters.

You make MPR News possible. Individual donations are behind the clarity in coverage from our reporters across the state, stories that connect us, and conversations that provide perspectives. Help ensure MPR remains a resource that brings Minnesotans together.

[Donate today. A gift of \\$17 makes a difference.](#)

Support MPR News

- [Trailcam captures busy life on Voyageurs 'wolf and bear highway'](#)
- [A Minnesota kindergarten program takes learning outside](#)
- [A year after breach, Enbridge says it's stopped Line 3 groundwater aquifer leak](#)