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Air Permit/Clean Air Act: Minnesota Appellate Court Addresses Challenge to Use of Synthetic Minor

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The Minnesota Court of Appeals (“Court”) addressed in a March 23rd Order the Minnesota Pollution Control Agency’s (“MPCA”) grant of an air emissions permit to PolyMet Mining, Inc. (“PolyMet”). See *In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining, Inc.*, 2020 WL 1330209 (Minn. Ct. App. Mar. 23, 2020).

PolyMet planned to build the first copper-nickel-PGE (platinum group elements) mine in Minnesota—the so-called “NorthMet project.”

The construction of the mine triggered the need to obtain certain air permits. PolyMet applied to the MPCA for an air emissions permit in August 2016, and submitted a revised application in January 2018.

PolyMet applied for what is known as a “synthetic minor permit.” A synthetic minor permit limits throughput volumes. This potentially allows the permittee to avoid the more stringent requirements for “major source” permitting under the Clean Air Act. In its application, PolyMet proposed that it would limit ore throughput to 32,000 tons per day (tpd).

After the application was submitted and a public comment period was held, PolyMet filed a Technical Report with Canadian securities regulators in which it provided economic scenarios with higher ore throughputs. These higher throughput volumes in the Canadian report led the Minnesota Center for Environment Advocacy (“MCEA”) and the Fond du Lac Band of Lake Superior Chippewa (“the band”) to argue that PolyMet intended to build a larger project than that for which it was seeking permits.

The MCEA submitted a letter to the MPCA detailing its concerns. The MPCA responded by asserting that “[n]either the Technical Report, nor PolyMet’s submissions in support of the Air Permit, indicated any intent by PolyMet to circumvent major source permitting.” Thus, the MPCA issued the permit.

MCEA and the band (collectively “relators”) filed separate cert. appeals which the Court consolidated. The parties then filed motions related to the appropriate scope of the record. The Court addressed two issues:

1. Should the motions related to the record be granted?
2. Have the relators established a basis for relief under Minn. Stat. § 14.69?

With respect to the first issue, the Court explained that in a cert. appeal the agency decision-maker (MPCA here) is required to submit the record at the Court’s request. After the MPCA submitted the record, the relators moved to supplement it with documents that were submitted outside the public-

comment period. MPCA opposed the motion and filed its own motion to strike portions of the relators' brief and addendum, arguing that they referenced documents that are not part of the record.

Relying on two cases—one from the Minnesota Supreme Court and one from the Minnesota Court of Appeals—the Court sided with the relators and supplemented the record. In *Crystal Beach Bay Ass'n v. County of Koochiching*, 243 N.W.2d 40 (Minn. 1976), the court explained that “[a]lthough an appellate court is ordinarily limited to a consideration of matters contained in the record before it, we think it has inherent power to look beyond the record, where the orderly administration of justice commends it.” Further, in *White v. Minn. Dep't of Nat. Res.*, 567 N.W.2d 724 (Minn. App. 1997), the court held that evidence outside the administrative record can be considered when “the agency failed to consider information relevant to making its decision.” Those two cases together allowed the Court here to consider the disputed documents.

Addressing the second issue, the Court explained that it would apply a “hard look” analysis. It asked if MPCA took a hard look at the salient problems when making the decision. However, judicial review of a decision is appropriate only when the “agency states with clarity and completeness the facts and conclusions essential to its decision.”

The MPCA decision on the PolyMet permit was conclusory and failed to make findings adequate for this Court to review. Accordingly, the Court remanded to the MPCA for additional findings.

A copy of the order can be downloaded [here](#).