Case Nos. A18-1952, A18-1953, A18-1958, A18-1959, A18-1960, A18-1961

STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the NorthMet Project Permit to Mine Application Dated December 2017 (A18-1952, A18-1958, A18-1959), and
In the Matter of the Applications for Dam Safety Permits 2016-1380 and 2016-1383 for the NorthMet Mining Project (A18-1953, A18-1960, A18-1961)

PETITION FOR REVIEW AND ADDENDUM OF PETITIONER POLY MET MINING, INC.

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Petitioner Poly Met Mining, Inc. respectfully submits this Petition for Review:

I. Legal issues and their disposition by the court of appeals

Does Minnesota Statutes section 93.483 mandate a contested case hearing whenever an agency faces conflicting evidence, regardless of whether substantial evidence supports its factual findings?

The court of appeals' published opinion interpreted the relevant statute to require a contested case hearing whenever "there is probative, competent, and conflicting evidence on a material fact issue." (A.21.) That reading disregards the statute's operative language, this Court's application of virtually identical language, and the Minnesota Administrative Procedure Act's deferential standard of review.

II. Criteria relied on to support the petition

Review is appropriate under Rule of Civil Appellate Procedure 117, subdivision 2(a), (c), and (d).

This case presents important questions that transcend the interests of the parties. The statute at issue uses the same contested case hearing criteria as the Minnesota Pollution Control Agency, which permits thousands of projects every year without holding contested case hearings. So if the decision below stands, permitting and environmental review throughout the state will become less predictable and more burdensome as agency findings supported by substantial evidence are relitigated before administrative law judges.

III. Statement of the case

To obtain its permit to mine and dam safety permits, PolyMet navigated the most comprehensive environmental review and permitting process in Minnesota history. As the court of appeals recognized, that process began in 2004, when the Department of Natural Resources and U.S. Army Corps of Engineers began scoping a joint Environmental Impact Statement. More than ten years later, having published both draft and supplemental draft statements, the agencies released their Final Environmental Impact Statement. When DNR found the Final EIS adequate in March 2016, no one challenged its determination.

Later that year, PolyMet submitted both a 4,000-page permit to mine application that covered every aspect of PolyMet's mine plan and two comparably thorough dam safety permit applications. DNR and its outside consultants then spent over a year with PolyMet gathering more information and improving the applications. That led PolyMet to file the revised applications that were ultimately incorporated into DNR's draft permits.

DNR noticed a 60-day public comment period on its draft permit to mine. During that time, it received thousands of comments and two contested case hearing petitions.[1] The agency spent the next eight months evaluating the materials it had received. In November 2018, it issued PolyMet a permit to mine, together with a 177-page document titled "Findings of Fact, Conclusions, and Order of Commissioner." Relying on the Final EIS and extensive factual findings, including 14 pages devoted specifically to the contested case hearing petitions, DNR concluded that "there was not a reasonable basis underlying a disputed material

[1] DNR followed a similar process for the dam safety permits, but it did not receive any petitions for a contested case hearing.

issue of fact" and that a contested case hearing would not introduce information that would "aid the commissioner in resolving any disputed facts."[2] On those grounds, it denied the petitions.

Relators filed certiorari petitions challenging DNR's permitting decisions on numerous grounds. The court of appeals held that DNR had misinterpreted the relevant statute, reversed DNR's permitting decisions, and instructed DNR to hold a contested case hearing. (A.36)

IV. Brief argument in support of the petition

The court of appeals' holding in this case reshapes the place of contested case hearings in project permitting, raising questions of statewide importance that are bound to recur regularly.

A. As an initial matter, the court of appeals' interpretation of the contested case criteria departs from the relevant statute's plain language and this Court's decisions. Far from of "[s]ynthesizing" precedent, as it claimed, the court of appeals subordinated this Court's most relevant decisions in a way that should not be applied statewide without this Court's consideration.

Under section 93.483, subdivision 3, a contested case hearing "must" be held "if the commissioner finds that":

> (1) there is a material issue of fact in dispute concerning the completed application before the commissioner;
>
> (2) the commissioner has jurisdiction to make a determination on the disputed material issue of fact; and

[2] *See* A.38, A.40, A.42, A.49, A.50, A.51, A.52, A.53.

> (3) there is a reasonable basis underlying a disputed material issue of fact so that a contested case hearing would allow the introduction of information that would aid the commissioner in resolving the disputed facts in order to make a final decision on the completed application.

As a matter of statutory interpretation, the court of appeals reasoned that the phrase "so that" in the third contested case criterion reflected a "legislative judgment that a contested-case hearing will be helpful in cases where there are genuine, material disputes of fact." (A.21–22.) That reading is wrong for at least two reasons.

1. The first contested case criterion requires "a material issue of fact in dispute." Minn. Stat. § 93.483, subd. 3(a)(1). The third criterion—the one the court of appeals was interpreting—requires more. It requires "a reasonable basis *underlying* a disputed material issue of fact." *Id*., subd. 3(a)(3) (emphasis added). By holding that "a contested-case hearing will be helpful in cases where there are genuine, material disputes of fact," the court of appeals' decision renders the third criterion superfluous. In Minnesota, "[a] statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (citation and internal quotation marks omitted).

2. The court of appeals' reading of the statute ignores the operative phrase that applies to all three contested case criteria: "if the commissioner finds that." The decision below essentially nullified that limiting language, substituting the court of appeals' judgment for the commissioner's. Under the Minnesota Administrative Procedure Act, courts uphold agency factual findings unless they are "unsupported by substantial evidence" or "arbitrary or capricious." Minn. Stat. § 14.69. Here, DNR made extensive factual findings, supported by substantial evidence, related to the

contested case hearing criteria. By instead focusing solely on whether disappointed participants had presented a conflicting case, the court of appeals committed an error of both statutory interpretation and administrative law.

What is more, the court of appeals' new rule requiring contested case hearings any time project opponents offer "probative, competent, and conflicting evidence on a material fact issue" contradicts this Court's precedent. Indeed, this Court in *Northern States Power Co.*, 459 N.W.2d 922 (Minn. 1990), reversed a decision much like the one in this case. There, the court below had ordered a contested case hearing based on the existence of "genuine issues of material fact" supported by proffered experts, proposed findings, and alleged new facts. *Request for Permit Regarding the Proposed N. States Power Co. Indus. Wasted Incinerator*, 1990 WL 52610, at *3 (Minn. Ct. App. 1990). This Court held that was not enough. After "review of the extensive record," the Court explained that "the agency decision was supported by the requisite substantial evidence" and that relators were not "entitle[d] to a contested case hearing." *N. States Power*, 459 N.W.2d at 923. Similarly, the Court in *Amendment No. 4 to Air Emission Facility Permit No. 2021-85-OT-1*, 454 N.W.2d 427, 429-30 (Minn. 1990), reversed a court of appeals decision that had ordered a contested case because "evidence . . . exist[ed] on material questions raised." The court below effectively rejected *Northern States Power* and *Amendment No. 4*, instead adopting the reasoning of the decisions they overturned.

B. The court of appeals' new contested case hearing requirement will alter the environmental review and permitting process at DNR and PCA. In principle, the Minnesota Environmental Policy Act frontloads environmental review, ensuring that decisionmakers and the public "understand[] the impact which a proposed

project will have on the environment" before that project is permitted. Minn. R. 4410.0300, subp. 3. To that end, the approval process for many projects—including any project with "the potential for significant environmental effects"—begins with an Environmental Impact Statement. Minn. R. 4410.2000, subp. 3(A). PolyMet's project spent approximately 10 years in that process, which included multiple rounds of public review and comment.

When opponents of PolyMet's project petitioned for a contested case hearing, DNR relied in large part on findings from its decade of unchallenged environmental review to conclude that the petitioners' factual claims lacked a "reasonable basis" so that a contested case hearing would not "aid the commissioner" in making a final decision. The court of appeals disagreed, but not because DNR's findings were unsupported by substantial evidence. It held, as a matter of law, that petitioners are entitled to a contested case hearing any time they present "probative, competent, and conflicting evidence on a material fact issue." (A.21.) This Court has purposely stopped well short of that approach, choosing instead to place appropriate weight on findings made by specialized agencies based on substantial evidence gathered during environmental review. *N. States Power*, 459 N.W.2d at 923; *Amendment No. 4*, 454 N.W.2d at 430.

The court of appeals' contrary holding upsets the balance of Minnesota's environmental review and permitting process. Instead of encouraging agencies to rely on independent studies conducted over the course of many months or years—an EIS—the court of appeals' decision allows essentially any factual dispute to be carried into a contested case hearing at the end of the permitting process.

This change hurts PolyMet, which acquired its permits after the most elaborate environmental review and permitting process in Minnesota history, only to have the court of appeals decide that a contested case hearing was required all along. And because the statute at issue in this case applies to all permits to mine, every future mining project faces the same conundrum: Years of environmental review can now be disputed in a contested case hearing based simply on "probative, competent, and conflicting evidence." Such hearings add time and legal uncertainty that did not exist before the court of appeals' decision.

The court of appeals' decision similarly affects projects permitted by PCA, which uses nearly identical contested case hearing criteria. *See* Minn. R. 7000.1900, subp. 1. As documented in its annual permitting efficiency report, PCA receives dozens of individualized permit applications each year for projects that require new construction.[3] It almost never holds a contested case hearing, possibly because the Legislature has set a goal that even the most complex permits should be issued or denied within 150 days. Minn. Stat. § 116.03, subd. 2b(a). Absent this Court's review, all of these projects will now be susceptible to a contested case hearing based on "probative, competent, and conflicting evidence." That includes more than just the industries that must comply with PCA's strict air and water quality requirements. PCA permits everything from family-owned businesses to municipal wastewater treatment facilities. If the court of appeals' decision stands, everyone regulated by PCA faces a longer, more uncertain permitting and contested case hearing process.

[3] In fiscal 2019, PCA received 75 applications for individualized "Tier 2" air, land, and water permits that required construction. (A.65.) It received thousands more applications for "Tier 1" general permits requiring construction. (A.64.)

V. Conclusion

Ignoring this Court's decisions, the court of appeals announced a new rule of administrative law that applies both to mining projects like PolyMet's and to any permit issued by the PCA. That rule flouts the Administrative Procedure Act by not deferring to agency findings, effectively overrides pre-permit environmental review, and increases the burden of acquiring permits. This Court's review is needed to decide whether the court of appeals correctly interpreted the contested case hearing criteria.

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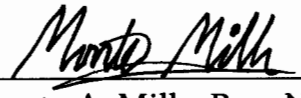

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