



Court Remands Mine's 'Synthetic Minor' Air Permit for Findings on Whether Mine Intends to Comply With Operational Limits

The Minnesota Court of Appeals ruled this week that a mine's "synthetic minor" air emissions permit failed to address contentions attributed to its parent company's public securities filing that some said suggested the mine might not comply with the permit's output restrictions. The court ruled the Minnesota Pollution Control Agency ("MPCA") must make additional factual findings to address those contentions and issue a revised decision to support its conclusion that PolyMet Mining Inc. ("PolyMet") is anticipated to comply with the terms of its synthetic minor source permit.

The case also illustrates the challenges to permittees in meeting the "substantial evidence" test administrative laws often require to support permit decisions, when facing highly charged factual contentions that are outside the permitting authority's administrative record. It demonstrates how courts can react in reviewing administrative decisions when the courts believe the agency failed to consider all available information in making its decision.

PolyMet plans to build the first copper-nickel-platinum mine in Minnesota and had applied for an air-emissions permit. If PolyMet has the potential to emit more than 250 tons of air pollution each year, it would be deemed a "major stationary source" and required to undergo an exacting major source permitting process. Instead, PolyMet applied for an air permit in which PolyMet agreed to limit its ore-processing rate (or throughput) to 32,000 tons per day thereby limiting air pollution, qualifying the mine for a minor source permit (often referred to as a "synthetic minor" permit), and not requiring it to meet the exacting requirements for a major stationary source.

Ten days after the public comment period closed on PolyMet's permit, PolyMet's Canadian parent corporation filed a report with Canadian securities regulators ("Canadian Report"). The Canadian Report evaluated the economics of the mine with the synthetic minor permit limitations and the feasibility of increasing the throughput to levels that would require a major source permit. One of the relator environmental groups notified the MPCA of the Canadian Report on three occasions, and provided additional related documents, before the MPCA made its final decision to issue the synthetic minor air emissions permit. The Court faulted the MPCA's permitting decision and supporting documents for failing to address the Canadian Report or the potential, based on documents provided, that PolyMet would expand its operations after being issued the synthetic minor source permit.

The Court's decision came after the Minnesota Supreme Court had remanded the matter back to the Court to determine whether: 1) the Canadian Report and other evidence undermined the MPCA's conclusion that PolyMet would comply with all conditions of the permit; and 2) whether the MPCA should have denied the permit because PolyMet "failed to disclose fully all facts relevant" to the permit and "knowingly submitted false or misleading information" to the MPCA.

The Court applied the "substantial-evidence" test to determine whether the MPCA "adequately explained how it derived its conclusion" and "whether that conclusion is reasonable on the basis of the record." The Court had previously held that the administrative record was to be supplemented with the Canadian Report and related documents. The Court found that while the MPCA concluded that PolyMet was anticipated to comply with the terms of its synthetic minor source permit, it did not explain why it found this conclusion to be correct. The MPCA had a copy of the Canadian Report and other documents that called into question whether PolyMet could be expected to comply as the information indicated profitability would be limited with the lower throughput and that PolyMet was evaluating profitability with a higher throughput. The Court further relied on the Canadian Report when the Court determined that the MPCA failed to make any reflective findings on whether PolyMet had failed to disclose relevant facts.

The Court remanded the matter back to the MPCA for additional findings and a revised decision, rather than reverse the agency's decision as lacking the support of substantial evidence. The Court expressly stated that it has "not concluded that the

record could not support a reasoned decision” by the MPCA to issue the permit, but only that the MPCA “did not make such a reasoned decision.”

This blog post was drafted by [Karen Olson](#), an attorney in the Minneapolis, Minnesota, office of Spencer Fane. For more information, visit www.spencerfane.com.