

STATE OF MINNESOTA

DISTRICT COURT-CIVIL DIVISION

COUNTY OF ST. LOUIS

SIXTH JUDICIAL DISTRICT

Court File No. 69DU-CV-06-3233

Wetlands Action Group, et al.,

Plaintiffs

**ORDER FOR SUMMARY
JUDGMENT AND
MEMORANDUM**

vs.

St. Louis County, et al.,

Defendants.



The above-entitled matter came before the Honorable Heather L.

Sweetland on Plaintiff's motion for a temporary injunction on March 26, 2007.

Plaintiff, Wetlands Action Group, et al., appeared through their attorney, James P. Peters; Defendants, St. Louis County, et al., appeared through their attorney, Russell H. Conrow.

Based on the files and records herein, the Court now makes the following:

ORDER

1. Plaintiffs' motion for summary judgment is granted. The Wetland Restoration Agreement between St. Louis County and PolyMet, Inc. is void. No additional physical alteration shall be undertaken on the Floodwood wetland restoration site until the Environmental Impact Statement has been completed and approved.
2. Defendant's motion for summary judgment is denied.
3. Plaintiffs are entitled to reasonable costs and disbursements related to litigating these proceedings. Plaintiff shall submit an Affidavit of Costs and Disbursements within thirty (30) days of this Order.
4. The attached Memorandum is incorporated by reference.

Dated: April 16, 2007.

BY ORDER OF THE COURT:

Heather L. Sweetland

Heather L. Sweetland
Judge of the District Court

JUDGMENT

I hereby certify that the foregoing constitutes the judgment of the Court. Witness
the Honorable Heather L. Sweetland, Judge of the District Court, at Duluth,
Minnesota, this 17 day of April, 2007.



Cindy Stratiotti / dr
Court Administrator

By: Deb Rintala, deputy
Deb Rintala, Deputy

MEMORANDUM

FACTS

PolyMet Mining Corporation (PolyMet) proposed an open pit mine for the extraction of nickel, copper, cobalt, and various other precious metals at a location approximately six (6) miles from Babbitt, Minnesota. Ore extracted from the mine would be transported to the former LTV Steel taconite processing facility, located approximately five (5) miles from Hoyt Lakes, Minnesota, for processing (the mine and processing proposal shall be referred to as the Project).¹

The United States Army Corps of Engineers (USACE) and the Minnesota Department of Natural Resources (DNR) agreed to execute a joint Environmental Impact Statement (EIS) for environmental review of the Project. Notice of the initiation of the environmental review process was provided on the Minnesota Environmental Quality Board and Environmental Protection Agency websites in June and July of 2005, respectively. Notice of the intent to draft an EIS was published in the Federal Register on July 1, 2005.

A Draft Scoping Decision regarding the EIS was issued simultaneously with the notice of initiation of the environmental review process. A Final Scoping Decision for the EIS was drafted on October 25, 2005. Environmental review continues to this date toward completion of a final EIS. Both the Draft and Final Scoping Decision documents stated that all mitigation measures related to the

¹ The official name for the whole project is the NorthMet Mine and Ore Processing Facilities Project.

project will be considered within the EIS.² Both documents also stated that there were no related or connected actions associated with the Project.

On February 7, 2006, the St. Louis County Board (the County) passed a resolution to approve a wetland restoration plan with PolyMet as part of the environmental impact mitigation required for the Project.³ The wetland restoration efforts would take place on tax-forfeited land near the St. Louis River in the Floodwood area (wetland restoration site). PolyMet agreed to pay St. Louis County \$105.00 per wetland credit acre annually for the life of the mine.⁴ Citizens and counsel for PolyMet addressed the County Board at the meeting. Alan Mitchell, the St. Louis County Attorney at the time, advised the County Board to pass the resolution.

Prior to the February 7, 2006 County Board meeting, but with knowledge of discussions between St. Louis County and PolyMet, the Minnesota Center for Environmental Advocacy (MCEA) warned the County Board that their approval of a wetland restoration plan may violate state and federal law restricting government action or approval prior to completion of the environmental review process.⁵

² "The EIS will also discuss the suitability and feasibility of various wetland mitigation strategies." NorthMet Mine and Ore Processing Facilities Project Draft Scoping Decision, 3.3.1. "The EIS will also describe and discuss the suitability and feasibility of various wetland mitigation strategies." NorthMet Mine and Ore Processing Facilities Project, October 25, 2005, 3.3.1.

³ The Wetlands Restoration Agreement Between St. Louis County and PolyMet Mining, Inc. was signed on April 6, 2006. The wetland restoration plan permitted immediate access to the wetland restoration site by PolyMet to conduct planning, design, and other restoration work within the agreement for wetland restoration efforts.

⁴ According to the wetland restoration agreement, PolyMet would pay an estimated \$5,400.00 per wetland credit acre over the life of the mine. PolyMet's operations would require wetland credits each year, which would be sold under the agreement between St. Louis County and PolyMet. PolyMet's payment to St. Louis County for the wetland acres over the life of the mine is expected to be approximately \$1.1 million.

⁵ The MCEA sent a letter to the St. Louis County Board on February 3, 2006.

Upon receipt of information that the County planned to harvest timber from the wetland restoration site, the Minnesota Environmental Quality Board (EQB) issued a similar warning message to the County Board regarding their approval and participation in an agreement with PolyMet for wetland restoration and timber harvest. EQB noted the actions of the County may violate state and federal law providing for environmental review prior to the initiation of any project requiring such review.⁶

On February 17, 2006, the County Land Department sold the timber harvest from the wetland restoration site by way of auction. Timber was harvested from the land over the 2006-2007 winter season, finishing in February of 2007.

Plaintiffs in this action include the Wetlands Action Group, citizens concerned with damage or alteration of the St. Louis River riverbed, and property owners near the wetland restoration site.⁷ Property owners near the site are concerned with flooding and other changes to the water table in the area. Plaintiffs filed a motion for summary judgment seeking a declaratory judgment that the County violated state and federal law, an order voiding the wetland restoration agreement, enjoinder of any efforts to physically alter the wetland restoration site until the final EIS is completed, and an award of legal costs and fees.

⁶ The EQB noted their concerns that St. Louis County was violating state and federal law by their actions in a letter sent to the St. Louis County Board on February 16, 2006.

⁷ The Wetlands Action Group is a citizen organization concerned with sustainable economic development and environmental protection.

The County filed a counter motion for summary judgment and requested Plaintiffs' request for relief be denied. According to the County, the timber harvest on tax-forfeited land was action they are free to take at any time, regardless of whether the land is within the scope of an EIS as a mitigation sight.. The County argues the "project" was not begun by the logging because the "project" includes only the mining and processing sites in Babbitt and Hoyt Lakes. The County describes the Wetland Restoration Agreement as contingent upon approval of the whole Project by the environmental review process.

ANALYSIS

Summary Judgment Standard

Summary judgment is proper when the evidence, viewed in the light most favorable to the non-moving party, reveals no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Dep't of Natural Res., 693 N.W.2d 181, 186 (Minn. 2005); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Summary judgment shall be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and either party is entitled to summary judgment as a matter of law. Minn. R. Civ. P. 56.03; Northland Ins. Co. v. Bennett, 533 N.W.2d 867, 870-71 (Minn. Ct. App. 1995).

"The moving party bears the burden of showing the absence of genuine issues of material fact." Independent Sch. Dist. No. 197 v. Accident and Cas. Ins. of Winterhur, 525 N.W.2d 600, 605 (Minn. Ct. App. 1995) (citing Celotex, 477

U.S. 317, 323 (1986)). When faced with a supported motion for summary judgment, the nonmoving party must “present specific facts showing that there is a genuine issue for trial.” DHL, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997) (quoting Minn. R. Civ. P. 56.05). “A fact is material if its resolution will affect the outcome of a case.” O’Malley v. Ulland Bros., 549 N.W.2d 889, 892 (Minn. 1996) (citing Zappa v. Fahey, 245 N.W.2d 258, 259-60 (1976)).

All doubts and factual inferences must be resolved in favor of the non-moving party. Wagner v. Schnegmann’s So. Town Liquor, 485 N.W.2d 730, 733 (Minn. Ct. App. 1992).

**Wetland Restoration Agreement and Timber Contract Between
St. Louis County and PolyMet Mining Co.**

When the parties or applicable body agree or determine that an EIS is required under the statutes, “a project may not be started and a final government decision may not be made to grant a permit, approve a project, or begin a project, until ... the [EIS] has been determined adequate ... or a variance has been granted from making an [EIS] by the [EQB].” Minn. Stat. 116D.04, subdiv. 2b; Minn. R. 4410.3100, subpt. 1; see e.g., Dead Lake Assoc., Inc. v. Commissioner of Minnesota Pollution Control Agency, 2005 WL 287490 (Minn. Ct. App. 2005) (unpublished opinion) (a permit granted by the MPCA prior to adequate environmental review was inappropriate).⁸

No government unit shall take any action that “will prejudice the ultimate decision on the project” until environmental review has been fully conducted.

⁸ The definition of a “permit” includes a “commitment to issue or the issuance of a discretionary contract, grant, subsidy, loan ... by a governmental unit.” Minn. R. 4410.0200, subpt. 58.

Minn. R. 4410.3100, subpt. 2.⁹ “Government action” is defined as meaning “activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of government.” Minn. Stat. § 116D.04, subdiv. 1a(d). “An action prejudices the ultimate decision on a project if it tends to determine subsequent development or to limit alternatives or mitigative measures.” Minn. R. 4410.3100, subpt. 2.

Minnesota Regulations define a “project” as including its “connected actions and phased actions.” Minn. R. 4410.1700, subpt. 9. In Pope County Mothers, et al. v. MPCA, 594 N.W.2d 233 (Minn. Ct. App. 1999), a multi-site operation was planned for the purpose of raising and harvesting pigs. Sites, regardless of the specific activity done upon them, were included in the single project for the purposes of environmental review. Id. at 237.

The Minnesota Rules require an EIS to describe potential mitigation measures related to the proposed project. Minn. R. 4410.2300(I). Mitigation is defined, in pertinent part, as “rectifying impacts by repairing, rehabilitating, or restoring the affected environment; ... [and] compensating for impacts by replacing or providing substitute resources or environments.” Minn. R. 4410.0200, Subpt. 51(C, E). Determining whether “environmental effects are subject to mitigation is an important consideration” during the environmental assessment and review processes. Pope County Mothers, 594 N.W.2d at 238.

The purpose of conducting environmental review “is to determine the potential for significant environmental effects *before* they occur.” Trout Unlimited,

⁹ An EIS is required for any “metallic mineral mining and processing” project. Minn. R. 4410.2000, subpt. 2 (referencing Minn. R. 4410.4400, subpt. 8). The parties do not dispute that an EIS is required for the Project.

Inc., et al. v. The Minnesota Department of Agriculture, 528 N.W.2d 903, 905 (Minn. Ct. App. 1995) (holding that future monitoring or restrictive permitting was insufficient when criteria are met for requiring an EIS); see also Minn. R. 4410.2000 (purpose of EIS is to inform involved participants and any interested person of the potential environmental risks, alternatives to the project (or facets of the project), and options to minimize environmental effects).

A county has significant freedom in relation to their management and use of tax-forfeited land. A county auditor may sell the land, sell timber, lease the land for purposes of topsoil or gravel removal, grant permits for the deposit of tailings and other mining waste products, and allow the demolition of structures upon the land. Minn. Stat. § 282.04, subdiv. 1-2.

By virtue of the competing motions for summary judgment, the parties agree that there are no genuine issues of material fact. The parties dispute, however, which party is entitled to summary judgment as a matter of law.

The completion of the timber harvest reduces the relief sought by Plaintiffs. In lieu of the completion and sale of the timber harvest, the relief sought by Plaintiffs includes vacating the wetland restoration agreement between the County and PolyMet, continued enjoinder of any efforts or related physical alteration of the wetland restoration site pursuant to the wetland restoration agreement, and an award of costs and disbursements.

The County has great statutory discretion with regard to the use or sale of tax-forfeited lands within its boundary. The tax-forfeited land involved in this dispute would be no exception without regard to its planned involvement in a

complex project requiring environmental review. The tax-forfeited land at issue is included as a possible mitigation site for the project. That classification and the statutorily required inclusion in the environmental review alter the status of the property. If the land is tax-forfeited *and* included within the scope of environmental review, the County must comply with the state and federal rules regarding environmental review. It is likely the County encouraged consideration of the tax-forfeited property as a source of wetland replacement credits for financial reasons. The County sacrifices their discretionary use of the property if that use has potential environmental effects or is related, in any way, to a project's progress or approval.

The actions by the County amounted to governmental approval for the initiation of mitigation efforts within the project. Mitigation, as well as the sites it takes place on, is clearly within the scope of the unfinished EIS. The wetland restoration site is part of the project as a potential mitigation site, the resolution passed by the County Board was a "permit" as defined by Minn. R. 4410.0200, subpt. 58, the timber harvest was the beginning of wetland restoration and mitigation work for the project, the EIS has not been completed or approved, and no variance was sought by the County.

The acts of the County are prejudicial to the final approval of the project. The County Board's approval of an agreement between the County and PolyMet was a discretionary contract and, thus, a permit under the Rules. The County is not the responsible governmental unit (RGU) with the tasks of conducting environmental review and providing final approval or disapproval of the project.

As evidenced by the necessity of a building permit from the County and the consideration of the tax-forfeited land as a mitigation site, however, the County is certainly involved in the project.

In a news release, PolyMet framed the County's action as "support" for the project, and that appearance of support is precisely the type of prejudice toward final approval that the Rules aim to eliminate. The County's wetland restoration agreement and subsequent action in pursuit of that agreement gives the impression of governmental approval for the project. The County's conduct does not give *actual* approval for the project, but the agreement and related actions may affect discourse surrounding the project and within development of the EIS, either of which could ultimately affect final approval. If governmental units could approve or initiate work on multiple facets of a complex project, the RGU might feel obligated to approve the project due to existing investment.

The stated purpose of environmental review, including the Environmental Assessment Worksheet (EAW) and EIS processes within state and federal law, is for regulatory bodies to assess the potential environmental impacts, consider alternatives to projects and mitigation processes, and provide this information to the project parties and the public to make a reasonable and informed decision on the facts available. There is no doubt that environmental review may slow project completion, but the legislature and regulatory authorities have determined that costs (economic and social) associated with reasonable delay in a project's completion are outweighed by thorough consideration of potential environmental impacts.

The purpose of environmental review requires cooperation between national, state, and local governmental units. The purpose of environmental review is diminished by piecemeal approval of a project by a local governmental unit (here, St. Louis County) prior to the completion of the requisite environmental review process by the "responsible governmental unit" (in this case, the Minnesota DNR) undertaking such review. Partial approval, endorsement, or complete approval of a local government unit prior to the completion of environmental review may give the public and the parties involved in the project a false perception of authorization. Transparency, diligence, cooperation, and fair dealing are all critical components in the environmental review process. Compromising these components inhibits the purpose of environmental review from coming to fruition. Public policy concerns favor granting temporary relief.

CONCLUSION

Plaintiffs' motion for summary judgment is granted. The Wetland Restoration Agreement between St. Louis County and PolyMet, Inc. is void. No additional physical alteration shall be undertaken on the Floodwood wetland restoration site until the Environmental Impact Statement has been completed and approved.

Plaintiffs are entitled to reasonable costs and disbursements related to litigating these proceedings. Plaintiff shall submit an Affidavit of Costs and Disbursements within thirty (30) days of this Order.

Defendant's motion for summary judgment is denied.