

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
Case Type: Civil Other/Misc.

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis County Hoyt Lakes and Babbitt Minnesota

Case No. 62-CV-19-4626

The Honorable John H. Guthmann

**POLY MET MINING, INC.'S
OBJECTION TO VIDEO/AUDIO
REQUEST**

INTRODUCTION

The Star Tribune and MinnPost recently noticed requests to cover the evidentiary hearing by visual and audio recordings.¹ In accordance with Minnesota Rule of General Practice 4.03(b) and the procedure for objections provided by the Court at the January 10, 2020 telephonic conference, Poly Met Mining, Inc. (“PolyMet”) hereby objects to the noticed visual and audio recordings.

ARGUMENT

Minnesota Rule of General Practice 4.01 provides that “[e]xcept as set forth in this rule, no visual or audio recordings, except the recording made as the official court record, shall be taken in any courtroom . . . during a trial or hearing of any case or special

¹ Star Tribune Notice of Visual or Audio Coverage (Jan. 6, 2020) (photo coverage only); MinnPost Notice of Visual or Audio Coverage (Jan. 9, 2020) (audio recording and still photography).

proceeding incident to a trial or hearing.”² Rule 4.02 enumerates five exceptions to this general ban on visual and audio recordings, only two of which are potentially relevant here.³ The first, Rule 4.02(a), states that “[a] judge may authorize the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration.” The second, Rule 4.02(c), states that “[i]n civil proceedings, a judge may authorize, without the consent of all parties, the visual or audio recording and reproduction of appropriate court proceedings” provided that “[t]here shall be no visual or audio coverage of any witness who objects thereto in writing or on the record before testifying.” *See* Minn. R. Gen. P. 4.02(c)(v). Neither exception applies to allow audio and visual recordings of the evidentiary hearing. The audio and visual recordings are not being offered “for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration.” Both the Star Tribune and MinnPost intend to use the audio and visual recordings to supplement their media reports. Even if the exception governing “civil proceedings” applies, this Court should not allow audio and visual recordings or, at minimum, should severely restrict their use.

² “Visual coverage or recording includes film, video, and still photography.” Minn. R. Gen. P. 4.01.

³ The non-relevant exceptions allow visual and audio recordings of “investitive, ceremonial or naturalization proceedings” Minn. R. Gen. P. 4.02(b), and certain criminal proceedings, Minn. R. Gen. P. 4.02(d) and (e).

I. The Court cannot allow audio and visual recordings of Brad Moore and Christie Kearney.

Even if the exception for “civil proceedings” applies, “there shall be no visual or audio coverage of any witness who objects thereto in writing or on the record before testifying.” Minn. R. Gen. P. 4.02(c)(ii). Brad Moore and Christie Kearney—the two PolyMet witnesses named by Relators—object to being recorded.⁴ Therefore, the Court cannot allow audio and visual recordings of Mr. Moore and Ms. Kearney over their objection.

II. The Court should not allow audio and visual recordings of the remainder of the evidentiary hearing.

Even if the exception for “civil proceedings” applies, the Court should prohibit audio and visual recordings of the remainder of the evidentiary hearing. Such media coverage would likely adversely affect the behavior of the lawyers and witnesses, thereby inhibiting the Court’s ability to expeditiously conduct the hearing and focus on the limited issues remanded by the court of appeals. Allowing audio and visual recordings would also increase the chance that the proceedings of the evidentiary hearing will be misconstrued by the media and in front of the court of appeals. In this digital age, snippets of audio recordings can easily be cherry-picked and publicized without context.

Neither Relators nor the public and media will be prejudiced by not having audio and visual recordings of the hearing. The court reporter’s transcript of the evidentiary hearing will provide an accurate, non-biased representation of the proceedings without the danger of biased or prejudicial reporting and will provide adequate transparency into the court proceedings.

⁴ Moore Decl. (Jan. 14, 2020); Kearney Decl. (Jan. 14, 2020).

III. If the Court allows any audio and visual recordings of the evidentiary hearing, such recordings should be limited to coverage of witness testimony.

If the Court is inclined to allow audio and visual recordings of the evidentiary hearing, it should only allow such recordings during witness testimony, not during arguments of attorneys, or during the Court's administration of the hearing or non-dispositive pre-hearing matters. In a regular civil proceeding "preceding or during a jury trial, there shall be no visual or audio coverage of hearings that take place outside the presence of the jury."⁵ In this case, the Court is acting as the jury pursuant to Minnesota Statutes section 14.68 to determine whether there are any irregularities in procedure. Therefore, audio and visual recordings should be allowed only in instances in which the Court is acting as a fact-finder, and not in instances in which the Court is presiding over the proceeding.

Although the provision prohibiting "coverage of hearings that take place outside the presence of the jury does not prohibit visual or audio coverage of appropriate pretrial hearings in civil proceedings, such as hearings on dispositive motions," Minn. R. Gen. P. 4.02(c)(v), there are no such motions that are or will be before the Court. As the Court made clear at the January 10, 2020 telephonic conference, it did not contemplate or provide a process for pre-hearing dispositive motions such as motions for summary judgment.

Given that the parties have agreed to submit pre-hearing memoranda in lieu of opening statements, and that the Court will be acting as a fact-finder only during the

⁵ Minn. R. Gen. P. 4.02(c)(v) ("This provision does not prohibit visual or audio coverage of appropriate pretrial hearings in civil proceedings, such as hearings on dispositive motions.").

presentation of witness testimony, the Court should limit audio and visual recordings to coverage of witness testimony. Limiting the coverage in this manner will decrease the likelihood that any party could be prejudiced by the media coverage of the hearing, and increase the likelihood that the hearing is not derailed by grandstanding and attempts to create viral media moments.

CONCLUSION

For the reasons stated herein, the Court should prohibit visual and audio coverage of the evidentiary hearing.

Dated: January 15, 2020

GREENE ESPEL PLLP

/s/ Monte A. Mills

Monte A. Mills, Reg. No. 030458X

Caitlinrose H. Fisher, Reg. No. 0398358

David S. McGhee, Reg. No. 0400175

222 S. Ninth Street, Suite 2200

Minneapolis, MN 55402

mmills@greeneespel.com

cfisher@greeneespel.com

dwilliams@greeneespel.com

(612) 373-0830

VENABLE LLP

Kathryn A. Kusske Floyd, DC Reg. No. 411027

(admitted pro hac vice)

Jay C. Johnson, VA Reg. No. 47009

(admitted pro hac vice)

Kyle W. Robisch, DC Reg. No. 1046856

(admitted pro hac vice)

600 Massachusetts Avenue, NW

Washington, DC 20001

kkfloyd@venable.com

jcjohnson@venable.com

kwrobisch@venable.com

(202) 344-4000

Attorneys for Poly Met Mining, Inc.