



◀ **CAPITOL RETORT:** SCOTUS, retirees, protests and the Pope. [Page 2](#)

RECALLING SCALIA: Minneapolis attorney was a clerk for the late justice. [Page 3](#)

05105766997

Saint Paul Legal Ledger

Capitol Report

\$2.00 ■ Vol. 89 No. 79

For additional political coverage go to

POLITICS
IN MINNESOTA
[politicsinmn.com](#)

Monday, February 22, 2016

Minnesota demographer: 'The big story is aging'

BY CHRIS STELLER

Staff Writer

Susan Brower became state demographer in 2012 after Tom Gillaspy left following more than three decades in the position. With the 2016 session approaching, Capitol Report checked in with her about how the job is going. This interview is edited for length and clarity.

Q: Does your job change during session?

A: I'm still learning the rhythm of bonding years versus other years. It

varies depending what's on the agenda and how I can help. When legislators were looking at wages and jobs, they pulled me in for a presentation. Typically, I'm

brought in toward the beginning to give a big-picture view of whatever they're looking at. Toward the end of session, when they're working on the details of legislation, I'm less involved.

Q: Are you pulled in on specific bills?

A: Sometimes, if they think I can provide data that will help them estimate the number of people that the bill will impact or the cost of the bill, or if they have a specific situation they want to know how that will play out in the state. I'm thinking of a legislator looking for some changes in long-term care who was wondering about the family situations of elderly in long-term care. We can look to census data to see how many are married or living alone. Sometimes the data can help contextualize whatever bill they're working on.

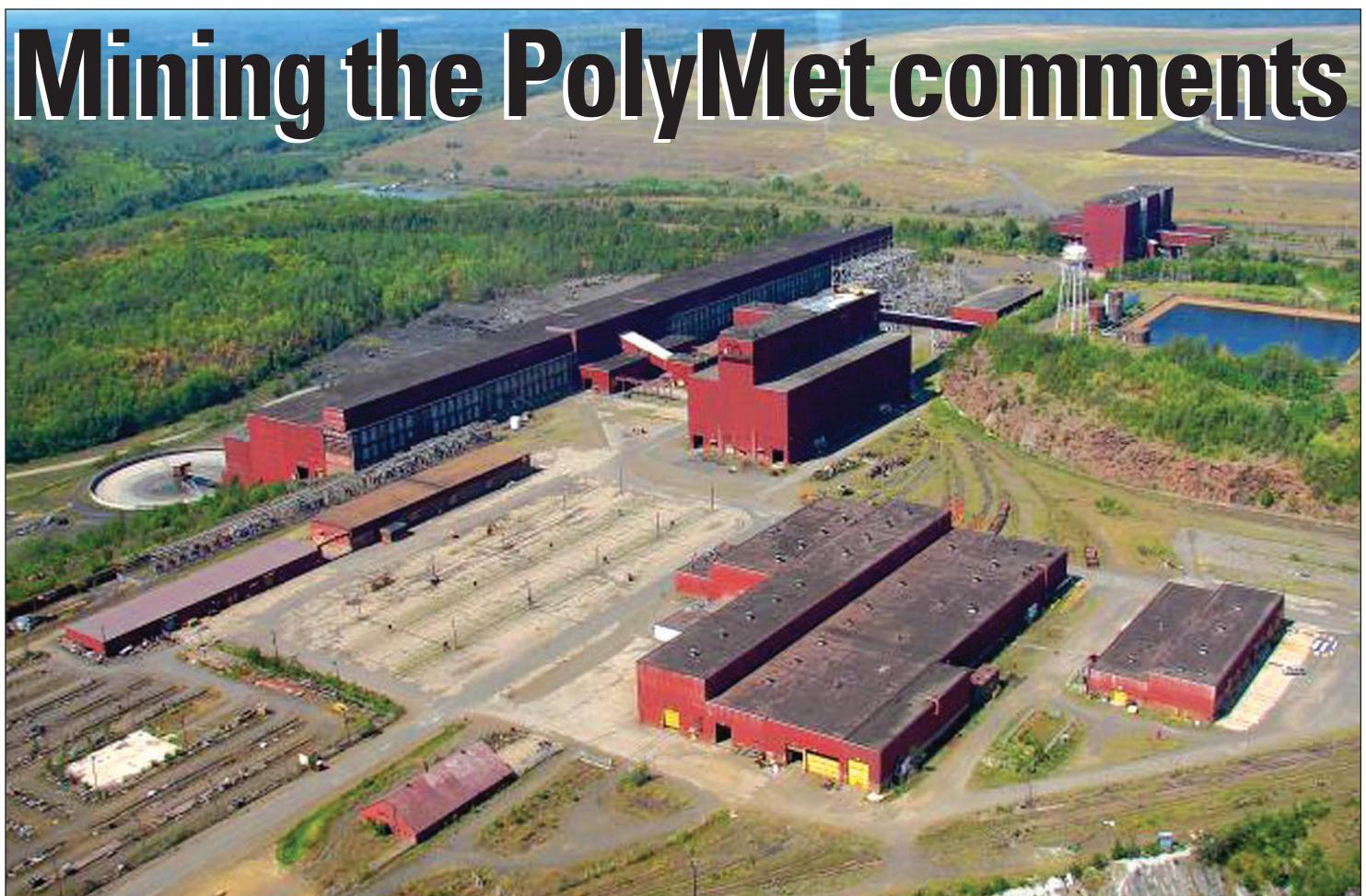
Q: There are fractures between metro, suburban and rural areas. With your data, do you help describe those differences or smooth them over?

Demographer | pg 24



Susan Brower

Mining the PolyMet comments



AP PHOTO

The PolyMet copper-nickel mining project would cover about 16,700 acres of the Mesabi Iron Range in northeastern Minnesota.

How agencies decide facts in environmental review

BY ZAC FARBER

Staff Writer

When record numbers of Minnesotans share their thoughts on an environmental impact statement, who sifts through their comments and how do they decide which ones are valid?

The supplemental draft of the EIS for the proposed PolyMet copper-nickel mine drew 58,000 comments. Environmental groups say their input was ignored. The Minnesota Department of Natural Resources says the review was conducted in scrupulous adherence to the law. PolyMet, which paid \$95 million for the review, says it's not a popularity contest – it's about science.

The DNR is expected to make a final adequacy determination this month, concluding the environmental review and likely moving the project to the permitting phase.

The 3,576-page final version of the EIS is dry, technical and repetitious to read. But since its first draft was published in 2009, the document has been a battlefield for adversarial interests with starkly different views of how the proposed mine will affect northern Minnesota's wetlands, air and water quality, wildlife and cultural resources.

The comment-and-response process is the most visible engagement to date in this ongoing battle, and it sets the stage for future conflicts as PolyMet prepares to acquire state and federal permits while



AP PHOTO: STEVE KARNOWSKI

Aaron Klemz, spokesman for the Friends of the Boundary Waters Wilderness, discusses environmentalists' objections to the final environmental impact statement for the proposed PolyMet copper-nickel mine in northeastern Minnesota, at a news conference, Nov. 13, 2015, in St. Paul.

its opponents prepare to fight it in the courts.

'Rigor' or 'puffery'

More people weighed in on PolyMet than they did during any other environmental commenting period in the history

PolyMet EIS: By the numbers

58,000: Comments on supplemental draft environmental impact statement

3,576: Pages in final EIS

774: Pages in comments appendix for final EIS

\$95 million: PolyMet's cost for environmental review process

90: Percent of comments that were form letters

of the state. Dozens of hydrologists, geochemists, mining engineers and other citizen experts submitted detailed reports questioning the accuracy of the EIS' statistical models and pollution mitigation proposals.

DNR staff, assisted by the U.S. Forest Service and the U.S. Army Corps of Engineers, sliced apart individual comments and sorted them into 23 "themes," such as "hazardous materials," "aquatic species," "socioeconomics" and "human health."

Next, the co-lead agencies wrote hundreds of short, paraphrased summaries, which they described as capturing "the

PolyMet | pg 4

PolyMet

Continued from page 1

intent of each group of similar comments."

Then, finally, they responded to their synopses of the comments using a rubric of point-by-point mini-essays published in a 774-page appendix to the final EIS.

A press release issued by the DNR in November said the review was conducted with "the highest level of rigor and objectivity."

"Our responsibility is to conduct a neutral evaluation based on information from the company, our own analysis, and the comments we receive," DNR Commissioner Tom Landwehr said in the press release. "The process has been thoughtful, independent and thorough."

But many environmentalists and attorneys who have watched and participated in the PolyMet environmental review process dispute Landwehr's characterization. They describe the process as broken and say the DNR and other co-lead agencies are ignoring scientifically valid criticisms both large and small, and have failed to seriously consider analyses conflicting with PolyMet's business interests.

Paula Maccabee, St. Paul-based WaterLegacy's advocacy director and legal counsel, described the way the DNR incorporated comments into the final EIS as "puffery" that "just adds a bunch of verbiage and self-justification."

"It doesn't use good science, it doesn't evaluate the risk — in some ways it seems to conceal the risk," she said. "In many cases, it looks like the environmental review documents basically adopted what PolyMet or their environmental consultants said nearly verbatim."

Bruce Richardson, a PolyMet spokesman working out of St. Paul, said it is "foolishness" to think that "because we pay the bill, it somehow taints the process."

"We benefit from the process because it's an independent review, so the public and the taxpayers can be assured the information that's been collected and reviewed and decided upon has all been done independently," he said.

Aaron Klemz, advocacy director of Friends of the Boundary Waters Wilderness, said the lengthy bureaucratese in which the EIS is written can be construed as an "attempt to confuse people."

"Where we feel the process has been a bit corrupted is there's so much information in a project like this, huge amounts of data underlying the assertions made in the document," he said. "No member of the public can possibly apprehend all the information at once."

Thousands of form letters

Of the tens of thousands of comments submitted on the EIS, the vast majority — more than 90 percent — are form letters submitted through the websites of groups like the Sierra Club, Mining Truth and WaterLegacy, said Barb Naramore, the DNR assistant commissioner overseeing the review process.

"Sorting out duplicates" of these form letters is the first step in processing comments, she said.

"We read them and understand that they're there and we track them and we're very clear in our records that these are comments we received," she said. "But they're not comments we need to respond to."

"In many instances, comments prompted us to review and reconfirm our approach. In other instances, they led us to make modifications."

—Tom Landwehr, DNR commissioner

This approach to form letters irks the environmental groups that solicit them.

"It should matter if people who could otherwise be watching TV or calling their best friend took the time out to say, 'We don't want this,'" Maccabee said. "It's far too easy for bureaucrats to dismiss the importance of the public, and I think they're making a huge mistake."

The motivation behind the form letters is essentially grandstanding: Environmental groups hope to impress Gov. Mark Dayton and other politicians with the public's overwhelming disapproval of the project covering about 16,700 acres of the Mesabi Iron Range in northeastern Minnesota.

Mining Truth, a coalition of environmental groups, crunched the numbers in 2014 to show 98 percent of commenters were opposed to the mine.

Kathryn Hoffman, legal director of the St. Paul-based Minnesota Center for Environmental Advocacy, claims the DNR was "dismissive" toward members of the public who submitted comments, but she still believes participating in the process is worthwhile.

"People comment because they are opposed to the project, and they want to tell somebody, and this is the place to do it," Hoffman said. "I don't know if it's the best place."

The 'art' of comment reading

Ultimately, while form letters constitute nine-tenths of comments, they are not the main weapon anti-PolyMet groups deploy against the EIS.

The bulk of the groups' effort involves compiling hundreds of pages of analysis questioning assumptions about mercury contamination, pollution seepage and other potential hazards posed by a mine that regulators acknowledge in the EIS could taint the water for up to 500 years and, in a worst-case scenario, incur up to billions of dollars in long-term cleanup costs.

Far more troubling than regulatory agencies' treatment of form letters, environmental groups say, is how the agencies have responded to the detailed criticisms and rebuttals of independent scientists.

Hoffman said by slicing apart all comments and sorting them into buckets, the agencies lumped together technical and expert analysis with civilians' amateur opinions.

"There's a difference," she said, "between a member of the public who writes in and says, 'I'm concerned about the base flow [how water seeps from rivers into riverbeds] in the Partridge River,' and a hydrologist who builds a model fixing their inaccurate assumptions about the base flow — who cites literature and has an area of expertise."

Anthony Erba, director of the U.S. Forest Service's Eastern Region, defended the process used to sort comments.

"The art associated with reading through a lot of these letters is sifting through the personal values and getting to more substantive issues that we need to address through environmental anal-

ysis or the decision-making process," he said.

But environmental groups say the regulatory agencies responsible for making corrections to the EIS have declined to fix simple mistakes pointed out in comments.

A toxic transposition?

Daniel Pauly, a Harvard-educated chemist working with Friends of the Boundary Waters, found data in the supplemental draft version of the EIS that confused two units, "ng/L" and "ug/L," which are used in very small measurements of volume. A ug/L, or microgram per liter, is 1,000 times greater than an ng/L, or nanogram/liter.

The mistake, he wrote in a comment, was not minor. The transposition of a "u" for an "n" led to the erroneous conclusion that mercury discharges in the Tailings Basin would be below the maximum levels spelled out in the Great Lakes Initiative standard.

"People comment because they are opposed to the project, and they want to tell somebody, and this is the place to do it. I don't know if it's the best place."

—Kathryn Hoffman, legal director, Minnesota Center for Environmental Advocacy

The DNR's "thematic response" that appears to address this error is phrased in general terms; neither Pauly's name nor the transposition of units is specifically mentioned anywhere in this newspaper's search of the 774-page appendix. The mercury-themed response (labeled "MERC 04") acknowledges "inconsistencies in the way the results were reported" and claims that "text, tables, and/or figures have been revised to include the addition of data."

But the response does not elaborate on the details of the "inconsistencies" and revisions. And when Pauly read the final EIS, he found the transposition error had not been corrected.

In his second set of comments, Pauly re-explained the mistake and spelled out potential consequences, including the "long-term damage to the St. Louis River watershed and enormous unseen future costs."

Then he added this sentence, which he colored a bright red: "I pointed out this error in my SDEIS comments, but it is clear that the drafters of the FEIS did not consider this issue, and clearly did not correct it."

The DNR's Naramore declined to comment on why the final EIS was not changed in light of Pauly's dis-



Saint Paul Legal Ledger Capitol Report

Published twice a week by

FINNCE AND COMMERCE, INC.

Publication Office

332 Minnesota St., Suite W-1293

St. Paul, MN 55101-1309

Phone: 651-222-0059

Office Fax: 651-222-2640

News Releases: edit@politicsimnminnesota.com

MICHAEL RIFANBURG

Publisher

612-584-1537

CASEY SELIX

Editor

612-584-1556

JEFF SJERVEN

Associate Editor

612-584-1575

CHRIS STELLER

Staff Writer

651-222-1837

DAVID BOHLANDER

Copy Editor

612-584-1527

ZAC FARBER

Web Coordinator

612-584-1549

MARK BERRIMAN

Advertising Director

612-584-1539

SHEILA BENNETT

Advertising Account Representative

612-584-1544

DAVID SEAWELL

Advertising Account Representative

612-584-1545

AMANDA DORN

Event Manager

612-584-1534

DISA McCLELLAN

Audience Development Manager

612-659-7392

PUBLIC NOTICES

Publicnotices@legal-ledger.com

SUBSCRIPTION SERVICES:

800-451-9998 • Fax 800-329-8478

Subscriptions@dolanmedia.com

Subscription Rates (Twice a week)

1 Year.....\$169.00

2 Year.....\$305.00

SAINT PAUL LEGAL LEDGER CAPITOL REPORT (USPS 476-980)

Periodicals Postage Paid at St. Paul, Minnesota.

POSTMASTER: Electronic Address Change Service Requested, "Capitol Report" Subscription Services 10 Milk St Ste 1000, Boston MA 02108.

Commentary Policy

SAINT PAUL LEGAL LEDGER CAPITOL REPORT welcomes guest commentaries and letters on public policy and politics, whether federal, state or local in nature.

Guest commentaries typically run 700 to 1,000 words. Authors should provide photographs if possible. Except in extremely rare circumstances, and only when prior arrangements are made, all published letters must include the author's name. Authors must also include an address and a daytime phone number for verification, though these will not be published.

To make arrangements or submit a letter or commentary, contact:

Saint Paul Legal Ledger Capitol Report
332 Minnesota St., Suite W-1293
St. Paul, MN 55101

Phone: 651-222-1981
Fax: 651-222-2640

edit@politicsimnminnesota.com

SAINT PAUL LEGAL LEDGER CAPITOL REPORT reserves the right to edit all materials for reasons of space, factual accuracy and good taste. Letters and commentaries that are submitted exclusively, or at least first, to Capitol Report are much more likely to be published.

SAINT PAUL LEGAL LEDGER CAPITOL REPORT is an affiliate of The Dolan Company, 222 Ninth Street South suite 2300, Minneapolis, MN 55402.

Entire contents copyrighted (c) 2016 by Saint Paul Legal Ledger Capitol Report. All rights reserved. Reproduction in whole or in part without express written permission of the publisher is strictly forbidden.

PolyMet

Continued from page 4

covery. "We are carefully considering Mr. Pauly's comment as we develop our adequacy determination," she said.

Klemz claims the handling of Pauly's comment is not just a one-off case of an overlooked typo but evidence that the co-lead agencies ignored the facts.

"There were a ton of substantive comments on the SDEIS that were not addressed in any substantive form in the final EIS," Klemz said.

DNR Commissioner Landwehr said in the press release that the agency has never been anything but impartial.

"In many instances, comments prompted us to review and reconfirm our approach," he said. "In other instances, they led us to make modifications."

'Not a popularity contest'

Mining advocates emphasize the jobs and tax revenue the PolyMet project would bring to northern Minnesota, and the minority of commenters supporting the project expressed confidence in the co-lead agencies' ability to fairly evaluate risks and keep people safe.

The mining companies "will utilize advanced technology ... to ensure protection of human and environmental health," the Duluth Area Chamber of Commerce wrote in a comment on the SDEIS. "These agencies rely on years of scientific research to set these standards that safeguard our air, water and land."

Richardson, PolyMet's spokesman, noted that the Minnesota Chamber of Commerce and a number of local chambers submitted comments in support of the mine – as did companies such as General Electric and Caterpillar that use copper and nickel in their operations. But he said he was untroubled by the thousands of commenters opposing the mine.

"Environmental review is not a popularity contest," he said. "It's really about the science and making sure that proper scientific and research protocols are followed."

'Recipe for a Superfund site'

Maccabee said the comment review process was heavy on "justifications" and the language of "listening," but absent meaningful action or considered revisions.

"That's a recipe for a Superfund site; it is not a recipe for modern compliance with the law and modern technology."

— Paula Maccabee, advocacy director, WaterLegacy

"Even when problems are identified, whether by tribal scientists or citizen scientists, what we get back is, 'Don't worry,' or, 'We'll just see what happens and monitor and maybe if we find a problem we'll deal with it after the fact,'" she said. "That's a recipe for a Superfund site; it is not a recipe for modern compliance with the law and modern technology."

Erica Morrell, a University of Michigan Ph.D. candidate with a research



FILE PHOTO

About 2,000 people packed the ballroom at St. Paul's RiverCentre on Jan. 28, 2014, for a public hearing on the planned PolyMet open-pit copper mine.

"There is no legal mandate for those comments to influence final decisions in any way."

— Erica Morrell, Ph.D. candidate, University of Michigan

interest in public comment periods and environmental impact statements, wrote in a 2013 paper that comment periods are designed simply to "offer citizens the opportunity to react to plans, decisions, and technologies already in the making, rather than preventing them in the first place."

"There is no legal mandate for those comments to influence final decisions in any way," Morrell said in an interview. "Since tribal leaders, local citizens, social scientists, consumer advocates, etc., tend not to be the ones

appointed to read comments, these perspectives are often the least valued and acknowledged, since reviewers just do not know how to measure or consider it against what they are more trained and familiar to deal with."

Naramore, the assistant DNR commissioner, said the comment review process is not intended as "a referendum on a project" but, instead, is "designed to hear anybody's perspective about the identification and disclosure of the potential environmental effects."

"It's not how many yeas and nays it gets from public opinion," she said. "But it still serves a public purpose where people have a place to come, where they have an opportunity to express an opinion on the process."

Naramore said many significant



AP PHOTO

"Environmental review is not a popularity contest. It's really about the science and making sure that proper scientific and research protocols are followed."

— Bruce Richardson, spokesman, PolyMet

changes were made to the final EIS based on comments submitted on the draft and supplemental draft versions of the document.

Specifically, she pointed to a comment showing how data had been used incorrectly in modeling water quality at the Tailings Basin.

"An additional containment feature was added because we realized that the underlying soil was more permeable than had been originally modeled," Naramore said.

But Maccabee said it was a "misnomer" to claim a containment feature had been added to the project.

"The '[containment] system' is a gravel-filled trench and a clay cut-off wall segment in the soil, which cannot create a seal with bedrock due

to the local geology, including huge boulders, and will deteriorate over time," she said. "WaterLegacy considers the FEIS response to concerns raised by geologists about seepage on the south and east sides of the Tailings facility to be a band-aid on a broken leg."

While environmental groups seem to expect little from the review process, they say their primary motivation for submitting comments is to get on the record scientific evidence omitted from the EIS. Comments can be used as evidence during permitting and in court.

"In order to bring a lawsuit on environmental review, we would need to have submitted our concerns in the comments," Hoffman said.



Paula Maccabee

Naramore, the assistant DNR commissioner, said the comment review process is not intended as "a referendum on a project" but, instead, is "designed to hear anybody's perspective about the identification and disclosure of the potential environmental effects."

Naramore said many significant