

# PolyMet Financial Assurances Hearing

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My name is Steve Timmer; I am a resident of Edina, Minnesota, and I have been a practicing business lawyer and litigator in the state for 39 years.

I am not an environmental lawyer. However, the considerations of financial assurances<sup>1</sup> and liability insurance<sup>2</sup> required of PolyMet Mining before permitting it to put a shovel in the ground is similar to considerations in complex business transactions. The state is being asked by PolyMet to permit an activity that has inherent and substantial environmental and financial risks of a very long term nature.

The Minnesota Department of Natural Resources is charged by the Legislature to determine the amount of liability insurance and the amount and types of financial assurances to the state itself for the operation and reclamation of the mine. As I read the statutes and the DNR's rules, determining these amounts is not tempered by economic policy considerations. In other words, environmental degradation cannot be traded for hoped for economic development.

Regarding the financial assurances to the state, the first task is figure out who the real parties in interest are, and what their financial strength is.

PolyMet Mining Corp. is a British Columbia corporation; its only material business is that of its only and wholly-owned subsidiary, PolyMet Mining, Inc., a Minnesota corporation. The mining leases and the former LTV Erie plant are held by the subsidiary. *Corp.* and *Inc.* are [consolidated for financial reporting purposes](#)<sup>3</sup>, and it is unclear whether *Inc.*, the Minnesota subsidiary, has any other material assets; it almost certainly does not.

*Inc.* acquired the Erie plant in a cash and stock transaction from Cleveland

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<sup>1</sup> <https://www.revisor.mn.gov/statutes/?id=93.49>

<sup>2</sup> <https://www.revisor.mn.gov/statutes/?id=93.481>

<sup>3</sup> <http://www.polymetmining.com/wp-content/uploads/2013/02/FORM-20-F-FYE-1-2013.pdf>

Cliffs, Inc., which, along with Minnesota Power, had purchased it out of bankruptcy from another mining company, LTV. [Edison Investment Research – PolyMet is a client -- reports that PolyMet’s comparative economic advantage is the Erie plant that it bought cheap.](#)<sup>4</sup>

According to a news report that I read, the [LTV bankrupt estate received \\$25 million](#)<sup>5</sup> in cash, and the assumption of “certain environmental liabilities” for the property, while the price PolyMet paid was, according to PolyMet financial statements, about \$22 million, roughly \$6 million in PolyMet stock, \$14 million, in promissory notes, and \$1 million in cash, along with the environmental liability assumption.

There were, as the Committee knows, some epiphanies about environmental conditions at the Erie site between the purchase by Cleveland Cliffs and the later purchase by PolyMet. The tailings basin at the Erie site already leaks into the groundwater.

Since *Corp.* and *Inc.* consider themselves one, we must consider them as joint applicants as well.

PolyMet calls itself miners, but it has never operated a mine. It has never earned any money from mining; in fact, it has accumulated about \$88 million as an operating deficit. [That’s from financials about a year old; that figure is obviously higher now.](#)<sup>6</sup>

Nor does PolyMet have any material unencumbered assets. All of its property is encumbered by a first lien mortgage or security interest to repay approximately \$45 million in debt to Glencore/Xstrata, or perhaps twice what an optimistic estimate of the plant and associated property is worth.

With no means of payment, and insufficient cash to even open a mine, PolyMet cannot offer any material financial assurance to the State of

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<sup>4</sup> <http://www.scribd.com/doc/187067954/Edison-Investment-Research-PolyMet-report>

<sup>5</sup> Ibid.

<sup>6</sup> <http://www.polymetmining.com/wp-content/uploads/2013/02/FORM-20-F-FYE-1-2013.pdf>

Minnesota on its own credit. As PolyMet cautions in its investor materials, there is no assurance – there’s that word again – that PolyMet will ever raise any more money.

Any financial assurance here can only be made by a surety or guaranty. And given the unknown and open-ended and centuries-long nature of PolyMet’s potential liability, there are no third-party sureties who will have any interest in this. At least now that AIG is no longer around.

Glencore/Xstrata, just mentioned, PolyMet’s largest shareholder, is only indirectly at the table, but it is the only party with any financial capacity. Glencore has invested \$140 million in the previously-referenced debt capital and equity in PolyMet, [according to Edison Investment](#).<sup>7</sup> This is about half of the current market capitalization of PolyMet.

The stock equity was acquired by Glencore in a series of private stock transactions, off of any exchange. Glencore also backed the most recent “rights offering” of PolyMet, that is, offering to buy any stock that didn’t sell in the public transaction.

PolyMet would [prefer you to think that Glencore is entirely hands-off](#)<sup>8</sup> in PolyMet’s operations. However, Glencore has a seat on the board of PolyMet, with a mechanism to get more, and a seat on an important technical committee as well. Although not public, the loan agreements between these parties undoubtedly also contain extensive positive and negative covenants – what PolyMet must do and what it must not do – that give Glencore practical control over PolyMet.

Glencore has the right to buy PolyMet’s production for at least five years, and warrants to lever up its ownership in PolyMet.

PolyMet is Glencore’s *alter ego*. Edison Investment candidly calls PolyMet a “junior mining company.” PolyMet is the hands and feet of Glencore, and

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<sup>7</sup> <http://www.scribd.com/doc/187067954/Edison-Investment-Research-PolyMet-report>

<sup>8</sup> <http://www.scribd.com/doc/186439134/KARE-11-TV-Airs-Two-part-Series-on-PolyMet-Press-Release>

it will be Glencore's shovel, too, if we permit the mine. PolyMet is entirely dependent on the beneficence of Glencore for its existence.

Edison Investment rolled the term "junior mining company" out in its report as though it was a term of art. Well, it is. A junior mining company is capitalized, with both debt and equity, only enough to permit it to explore and perhaps operate, while protecting the real party in interest from the full range of the consequences of the mining activity. In its most recent annual report, PolyMet candidly admits it doesn't have the money to open, much less operate, a mine.

It is only fair, therefore, that Glencore/Xstrata be a full partner in the environmental liability exposure of PolyMet, not merely as an indemnifier, but as an applicant and principal on the obligations. This is in addition to whatever other cash or surety is required of PolyMet.

Such a requirement would mitigate the bankruptcy or inadequate capitalization risk of a mining endeavor, at least to the State of Minnesota. ([Minn.R. 6132.1200, Subpart 5 \(2008\)](#)<sup>9</sup> requires that financial assurances not be dischargeable in bankruptcy, but even sureties are heir to the risks of bankruptcy and insolvency, as we recently learned.)

But it still wouldn't do a thing for the interests of riparian owners in a watershed in the case, for example, of a catastrophic tailings dam failure, like the recent coal ash impoundment failure in North Carolina, or poisoned surface and ground water, like the Berkeley Pit<sup>10</sup> or the failed gold mine at Barite Hill<sup>11</sup>, South Carolina.

Those interests could still be affected significantly and perhaps irretrievably, and the mine operator could still disappear in the mist of bankruptcy, as the aptly named Freedom Industries did recently in West Virginia.

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<sup>9</sup> <https://www.revisor.mn.gov/rules/?id=6132.1200>

<sup>10</sup> <http://www.losapos.com/openpitmines>

<sup>11</sup> <http://left.mn/2013/07/from-a-gleam-in-a-miners-eye/>

Although not discussed as much, there is another condition precedent to the issuance of a mining permit by the Commissioner of the DNR, and it is addressed to this issue. [Minn. Stat. sec. 93.481 subd. 1\(2\) \(2013\)](#)<sup>12</sup> states, *inter alia*, that a permit applicant must provide:

[A] certificate issued by an insurance company authorized to do business in the United States that the applicant has a public liability insurance policy in force for the mining operation for which the permit is sought, or evidence that the applicant has satisfied other state or federal self-insurance requirements, to provide personal injury and *property damage protection in an amount adequate to compensate any persons* [emphasis added] who might be damaged as a result of the mining operation or any reclamation or restoration operations connected with the mining operation[.]

Insurance policies are issued, ordinarily, for a year at most, and certainly not for the duration of the environmental hazard presented by a PolyMet mine, or the permit period including the 200 – 500 year environmental hazard tail.

When the mine closes, and there is no more mining revenue from it, it will be increasingly difficult for the DNR to require that liability insurance protecting the public be kept in place. (Or to keep funding sureties for the financial assurances.) From experience around the country and the world, we know with certainty that a closed sulfide mine is a dangerous mine.

I offer no opinion as to amounts of assurance and insurance adequate to protect the state and the public, but they are obviously quite large. While the amounts of each will be reconsidered periodically<sup>13</sup>, consideration of them are matters that ought to be addressed now, in public, and not as some “closing detail” in private discussions between DNR and PolyMet and Glencore/Xstrata.

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<sup>12</sup> <https://www.revisor.mn.gov/statutes/?id=93.481>

<sup>13</sup> Although I am less certain of that in the case of liability insurance, or that liability insurance need be maintained on a continuing basis at all.

At all events, it is clear to me that financial assurances to the state and public liability insurance can only mitigate loss once it has occurred, and are no substitute for the prevention of environmental damage in the first place.

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February 11, 2014