

American Iron & Steel Company
Great Western Recycling Industries, Inc.
Phillips Recycling Systems, LLC
Metals Reduction Company, LLC
Toy's Scrap & Salvage Corp.
RSI Recycling, Inc.



August 7, 2019

VIA EMAIL AND MESSENGER

Brent Rohne
Inspector, Air Compliance & Enforcement Unit
Minnesota Pollution Control Agency
520 Lafayette Road
Saint Paul, MN 55155

Re: Consent Decree – Dispute Resolution Procedures
Northern Metals Submission in Support of Force Majeure Extension Request
*Northern Metals, LLC v. Laura Bishop, Commissioner of the Minnesota Pollution
Control Agency*
Court File No. 62-CV-15-3827

Dear Mr. Rohne:

Northern Metals, LLC (“Northern Metals”) submits this letter to the Minnesota Pollution Control Agency (“MPCA”) to provide additional information regarding its request to extend the Consent Decree’s August 1, 2019 deadline for Northern Metals to terminate its shredding operations in Minneapolis (hereinafter referred to as the “Deadline”). As you know, the Consent Decree provides conditions for Northern Metals’ continued operations in Minneapolis while its new facility is being planned, permitted, and constructed in Becker, Minnesota (the “Becker Facility”). The Consent Decree provides Northern Metals with the ability to request an extension of the Deadline at issue for good cause. Good cause unquestionably exists here as further specified below for extreme weather-related delays and for the City of Becker’s delays in placement and connection of sewer, water, utilities, and transportation infrastructure associated with the Becker Business Park. Good cause also exists because the reasons for delays arise from causes beyond Northern Metals’ control that could not be overcome with the reasonable exercise of due diligence.

This letter is accompanied by three attachments: (1) Affidavit of Angie Wanger, Managing Consultant at Trinity Consulting, Inc., which includes a Memorandum she prepared regarding winter weather and the associated delays; (2) Affidavit of Greg Pruszinske from the City of Becker regarding utility delays; and (3) Affidavit of Scott Helberg, Chief Operating Officer of Northern Metals.

1. Notice of Extension and Notice of Dispute

As the MPCA is aware, in May 2019, I, Scott Helberg, Chief Operating Officer of Northern Metals, reached out to Jeff Smith at the MPCA to discuss the status of Northern Metals' new facility. The parties met in person on June 18, 2019 at the Becker Facility for a tour of the facility and a discussion regarding the ongoing construction. At that point it had become apparent to Northern Metals that the Becker Facility would not be operational by the Deadline due to matters outside of Northern Metals' control.

On June 20, 2019, Northern Metals submitted a written request to the MPCA pursuant to Part IX (Extensions/Force Majeure) of the Consent Decree for an extension of time of the Deadline. This request complied with Part IX of the Consent Decree as it was provided "at least 10 days before the scheduled deadline." The request noted severe weather delays and utility delays as a basis for the requested extension because the Becker Facility would not be fully operational by the Deadline for those reasons.

Approximately one month later, and with no further communications in the interim, the MPCA denied Northern Metals' extension request on July 18, 2019. The next day, Northern Metals submitted a written Notice of Dispute to the MPCA, thereby invoking the Dispute Resolution procedures under Part VIII of the Consent Decree. These procedures provide for a 20-day period for informal negotiations (unless otherwise modified by the parties), which for the current dispute expires tomorrow, August 8, 2019. The MPCA Commissioner then has an unspecified amount of time to issue her final decision regarding Northern Metals' extension request. Thereafter, if Northern Metals disputes the Commissioner's ruling, Northern Metals has 30 days to file and serve a motion with the Court seeking a Court order resolving the dispute. *See* Part VIII, Consent Decree.

After Northern Metals submitted its Notice of Dispute, the parties again met in person on July 24, 2019 to informally negotiate the requested extension. No agreement was arrived upon at that meeting, but the parties discussed meeting again.

Notwithstanding the fact the parties were engaging in informal negotiations as required by the Consent Decree, the MPCA made statements to the public during the week of July 22nd that the MPCA would still require Northern Metals to terminate its shredding operations in Minneapolis on August 1, 2019. At that point it became clear to Northern Metals that the MPCA would not permit Northern Metals to operate past the Deadline despite the fact that date was disputed and the Dispute Resolution process was not yet complete. Northern Metals was thus compelled to file a motion on July 25, 2019 to seek relief from the Court.

Shortly after Northern Metals' filed its motion, the MPCA Commissioner informed me that the MPCA would no longer meet to negotiate the requested extension due to the motion being filed. Helberg Aff. ¶ 6.

2. Court Hearing

The parties appeared in court on July 29, 2019 for Northern Metals' Motion to Extend the Deadline for Good Cause Shown. Chief Judge Guthmann ultimately determined that the August 1, 2019 deadline would be stayed while the parties complete the Dispute Resolution process. Chief Judge Guthmann took particular note of the following sentence from the Consent Decree:

Throughout any dispute resolution, Northern Metals shall comply with all portions of this Consent Decree that are not in dispute.

See Part VIII, Consent Decree. As confirmed by the Court, the obvious implication of this sentence is that Northern Metals does not have to comply with matters that are in dispute (i.e., the Deadline).¹

Chief Judge Guthmann made several additional comments from the bench. He noted that the August 1, 2019 deadline is not immovable as all deadlines can be extended according to the terms of the Consent Decree.² Chief Judge Guthmann also noted that the Consent Decree inescapably contemplates a connection between Northern Metals shuttering its shredding operations at the Minneapolis facility and commencing new operations at the Becker location. When addressing the MPCA's argument that the shutdown deadline for the Minneapolis operations has nothing to do with whether the Becker Facility is operational or not, Chief Judge Guthmann stated:

...[I]t is not a good faith reading of the consent decree to argue that there is no connection between the closure date for the Minneapolis shredder facility and the new facility in Becker. They are connected and they are connected from the very first sentence of the section of the consent decree that discusses the conditions for closure of the Minneapolis shredder facility. And any consideration by the PCA that does not accept that as truth is an unreasonable reading of the consent decree.

See Transcript, P. 61, L:2-11. He also stated:

...[T]o suggest that good cause for extending the August 1 deadline requires [Northern Metals] to produce a reason why they can't shut down the metal shredder facility in Minneapolis is a specious argument.

See Transcript, P.46, L. 12-15. Accordingly, "good cause" for an extension inevitably involves matters that may have arisen with respect to the construction of the Becker Facility.

¹ Transcript, P. 36, L:15-20. "I mean, it says right in there that throughout any dispute resolution, Northern Metals shall comply with all portions of this consent decree that are not in dispute. That's an implicit statement at a minimum that they don't have to comply with provisions that are in dispute."

² Transcript, P. 26, L:1-6. "...because all deadlines can be extended according to the consent decree, correct?"

In his comments at the end of the hearing, Chief Judge Guthmann summarized the issues and remaining procedures for the present dispute:

The consent decree contemplates a hard shutdown date of August 1, 2019, but the consent decree also makes it quite clear that any deadline may be extended. Northern Metals satisfied the notice requirement by requesting an extension more than ten days before the deadline. An extension cannot be denied unreasonably, and the consent decree indicates good cause must be due to circumstances beyond the control of Northern Metals that could not be overcome with the exercise of due diligence. And that good cause does not include unanticipated costs.

The extension request did not seek an extension for any cost reasons. The sole reasons were utility connections that were the responsibility of the City of Becker, a third-party entity, and the weather, the ultimate third-party entity. The dispute resolution process of Section VIII was triggered by the July 19 letter sent by Northern Metals. The 20 days runs on August 8, after which time the PCA must issue a written ruling if an agreement cannot be reached. Thereafter, Northern Metals has 30 days to file a motion with this Court if it disagrees with the ruling.

Transcript, P. 61, L. 14 – P. 62, L.10.

Thus, the main issue to resolve regarding Northern Metals' extension request is whether Northern Metals has provided sufficient good cause to extend the August 1, 2019 Deadline. As stated previously by Northern Metals and recognized by the Court, Northern Metals' good cause basis for requesting the extension includes: (1) extreme weather delays; and (2) water, utility, sewer, and transportation infrastructure delays during the ongoing construction of the Becker Facility.

3. Extreme Winter Weather

The winter months of January through March 2019 were particularly harsh due to extreme cold temperatures, record snowfall, and significant frost depth. Indeed, according to the Minnesota DNR, the arctic outbreak from January 27–31, 2019 had some of the lowest air temperatures to visit Minnesota since 1996, and the lowest wind chills since the 1980s.³

As further detailed in the Memorandum attached to Ms. Wanger's Affidavit, record snowfall occurred in February 2019. Snow cover acts as an insulating layer, minimizing frost depth. The lack of significant snow cover in December and January combined with extreme cold temperatures in January resulted in a deeper layer of frost. Construction personnel at the Becker

³ *Cold Outbreak: January 27-31, 2019*, Minnesota Department of Natural Resources Climate Journal, (January 2019). Accessed here: <https://www.dnr.state.mn.us/climate/journal/cold-outbreak-january-27-31-2019.html>

Facility indicated that frost depths were a minimum of five feet throughout the site and seven or more feet in heavy traffic areas, which were confirmed either directly through excavation or through a contractor using a cord drill to drill into the soil. Although Minnesota winters can vary, construction companies typically anticipate frost depths to about three to four feet. Helberg Aff. ¶ 11. Thus, seven or more feet of frozen ground is a significant increase over what is deemed "typical," significantly impacting the conditions of the construction site at the Becker Facility.

The dangerously cold temperatures not only caused risk to the workers, but also delayed the pouring of concrete slabs as concrete cannot be poured over frozen ground. The Ferrous and MRP Buildings could not continue to be constructed until the concrete slabs were poured. Accordingly, ground thawers needed to be utilized to raise the temperature of the ground before work could proceed. Temperatures in excess of 30°F were required by contractors to pour floor slabs. Northern Metals originally prepared for four ground thawing machines to be on site so that construction could keep moving forward during the winter, as four is a reasonable number for ordinary winter conditions. However, due to the fact the ground froze up to seven feet in many locations, Northern Metals needed to find and secure an additional ten ground thawing machines in order to ensure that progress was actually being made on thawing the ground in spite of the weather conditions. *Id.*

Indeed, even the ground thawing units had trouble continuously functioning due to extremely cold temperatures in late January. If a ground thawer malfunctioned, the ground would refreeze, requiring the ground thawers to run for a longer period of time after being repaired. Not surprisingly, the time and effort required to thaw deeply frozen ground down caused delays down the line with other critical steps in the construction process. As noted previously, the largest impact of the freezing cold was a significant delay on when the concrete slabs could be poured for the Ferrous and MRP Buildings. Based on the records provided by all contractors regarding the delays experienced due to extreme cold, over 69 days were lost due as a result of extreme temperatures and the associated work needed to thaw the ground, which was clearly outside of Northern Metals' control.

The record snowfall was also a contributor to construction delays. When snowfall occurred at the site, snow filled the trenches that were built for concrete foundations. After each snowfall, snow had to be removed by the construction crews prior to work commencing. Due to both the number of instances of snowfall and overall quantity of snow, a significant amount of time was lost due to shoveling and transporting snow, which slowed overall construction progress.

Although Northern Metals could not control the extreme temperatures and record snowfall, Northern Metals took prompt action to ensure the construction for the Becker Facility could continue moving forward. Daily meetings were held at the construction site's office building among the foreman, including during days where extreme weather was taking a toll on the construction schedule. Contractors also worked overtime and on weekends to accommodate for weather delays. Temporary structures with tarps and heaters were also built to create environments suitable for pouring concrete and to protect the poured concrete from the weather

conditions. Creating and subsequently removing these structures obviously required additional time and effort, thus adding to the overall construction timeline.

In sum, the extremely cold temperatures and significant snowfall during the winter of 2019 greatly impacted the construction schedule for the Northern Metals' facility. The most significant impact was the inability to pour concrete due to these conditions. The initial foundations for the Ferrous Building and MRP Buildings were completed January 17, 2019 and March 25, 2019 respectively, but low temperatures restricted the pouring of concrete for both buildings' floor slabs. Concrete could ultimately be poured March 18, 2019 for the Ferrous Building, sixty (60) days after its foundations were complete, and April 3, 2019 for the MRP building, nine (9) days after its foundations were complete. The inability to pour these floor slabs resulted in a total of sixty-nine (69) days of delay related to extreme weather conditions. Northern Metals exercised due diligence during this process to ensure the ground could be thawed as soon as reasonably and practicably possible so that concrete could be poured and the construction of the buildings could move forward.

4. City of Becker Utility Delays

Becker has been working diligently to ensure that the water, sewer, utilities, and transportation connections are completed as soon as possible. The City of Becker is excited to be the new home for Northern Metals and is eager for the new facility to be up and running. Nevertheless, Becker has incurred significant hurdles and setbacks in bringing the needed utilities to the site.

As further detailed in the Affidavit of Greg Pruszinske, the area being developed by Northern Metals has not been served previously by city water, sewer, or transportation infrastructure. Accordingly, extensive planning was required at the outset to design the utilities for the project and to evaluate and implement the logistics for bring these critical features onto the site. These planning efforts were further complicated by anticipated business growth and increased traffic in the Becker Business Park, which requires the city to develop and improve the transportation system that will serve the area. Sewer and water utility placement dovetails closely in placement and timing with approval and completion of transportation infrastructure improvements, and the utilities need to be placed in the transportation corridor right-of-way. Becker's business attraction efforts required an Industrial Park Expansion Utility Feasibility Study & Computer Modeling Study to ensure the city was planning for the adequate water and sewer sizing to accommodate further business growth within the Becker Business Park. This study was completed from January 4, 2019 through April 4, 2019.

Although the new air permit for the Northern Metals project was not issued until June 2018, in January 2018 Becker began working on its application for funding for the project from the Federal Economic Development Administration ("EDA"). Once the permit was finally issued, Becker was able to proceed with the preliminary engineering report and NEPA review, which were completed on August 10, 2018. However, Becker's EDA grant application was ultimately denied on November 8, 2018. Becker immediately pursued alternative funding sources including the Minnesota Department of Employment and Economic Development's

Innovative Business Development Public Infrastructure Program (“BDPI”) Grant. City staff mailed the application on November 20, 2018, and a BDPI grant in the amount of approximately \$1.8 million was awarded on December 7, 2018.

Because the project served the larger Becker Business Park, Becker was the sole applicant in all funding applications. Northern Metals did not participate in the funding application process. Furthermore, Northern Metals worked under an extremely tight time frame and was exclusively engaged in developing their property and constructing their buildings and operations. It was not apparent to the City of Becker until spring 2019 that it would not be able to meet the initial August 1 startup date and the water and sewer utility placement and connections to the Northern Metals facility would be delayed into the fall of 2019.

Complete operations at the Becker facility cannot commence without water, sewer, utilities, and roads for ingress and egress. Once these connections are made, additional testing is required to ensure the water and sewer utilities are adequate before the Becker facility will be fully operational. Helberg Aff. ¶ 16.

The construction contract for sewer and water utility installation at the Becker Facility was not awarded by the City until July 30, 2019 (the day after the Court hearing). Construction is estimated to begin in the middle of August 2019. The construction contract includes a November 15, 2019 milestone for permanent buried municipal utilities to the project. The City has indicated there are still certain unknown factors regarding the timeline needed to complete utility construction, including the supply of pipe and other materials required, which may further delay projected project completion dates. Pruszinske Aff. ¶ 17.

Becker has represented that the delays related to sewer and water utility connections and transportation related improvements encountered on the project were not the fault of Northern Metals or the City, but rather arose out of a number of unanticipated issues in dealing with a large and complex project. There is nothing Northern Metals could have done to put utilities and roads in the ground as that was solely in control of Becker and its municipal process. There was no action Northern Metals could have taken to expedite the utility installation schedule.

5. Requested Extension and Ongoing Compliance

For the reasons addressed above and in the attachments, Northern Metals unquestionably encountered delays during the construction of the Becker Facility due to extreme winter weather conditions and delays in utility, water, sewer and transportation connections. Neither of these delays were within the control of Northern Metals. Extreme weather is an act of God and one that Northern Metals could not control. When the extreme weather occurred, Northern Metals and its contractors took meaningful action to remedy and control the situation as best they could by installing additional ground thawers, temporary heating shelters, and working overtime and on weekends. The City of Becker has been solely in control of the utility connections. Northern Metals is preparing the site so that utilities can be installed as soon as they are ready, but cannot control when that installation will ultimately occur.

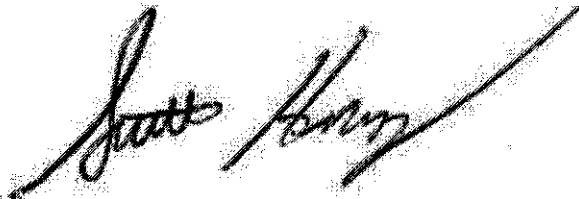
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Thus, given the delays associated with extreme winter weather, as well as the ongoing delays regarding utilities, Northern Metals has established good cause for an extension of the deadline to cease shredding operations in Minneapolis. Materials submitted previously by the City of Becker suggested that the targeted completion date for the water and utility connections as well as transportation infrastructure construction was October 1, 2019 completion date. Now that the City's final contract has a completion date of November 15, 2019, Northern Metals is seeking an extension of the deadline to November 15, 2019. As always, Northern Metals is willing to continue negotiating this date with the MPCA to see if a reasonable solution can be entered into.

As a final matter, except for the August 1, 2019 deadline which is being disputed in good faith under the terms of the Consent Decree, Northern Metals has complied with all requirements of the Consent decree and met every other deadline noted therein. Northern Metals has at all times exercised due diligence in meeting its obligations under the Consent Decree and moving the construction process for the Becker Facility forward despite encountering multiple circumstances beyond Northern Metals' control. The emission standards applicable to Northern Metals' current and future operations under are far more stringent than the standards that apply to other shredding operations in Minnesota, and Northern Metals has been and will continue to meet such standards at both the Minneapolis Facility during its remaining days, and the new Becker Facility.

Northern Metals appreciated the opportunity to meet with Commissioner Bishop this morning to discuss each of these issues and we remain open to continued discussions with MPCA to find a path forward to cooperatively resolve this ongoing dispute.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Helberg", written in a cursive style.

Scott Helberg
Chief Operating Officer
Northern Metals, LLC

cc: MPCA Commissioner Laura Bishop
Assistant MPCA Commissioner Craig McDonnell
Jeff Smith, MPCA Industrial Division
Daniel Huff, City of Minneapolis