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November 29, 2019

The Honorable John H. Guthmann
Ramsey County District Court
1470 Ramsey County Courthouse
15 Kellogg Boulevard West
St. Paul, MN 55102

Re: Ramsey County Court File No. 62-CV-19-4626
Request for Production of Redacted Documents

Dear Judge Guthmann:

On behalf of Respondent Minnesota Pollution Control Agency (“MPCA”), we write in regard to the Court’s directive at the November 13, 2019 hearing regarding forensic search terms and in response to Relators letter dated November 27, 2019.

A. Forensic Search Terms

MPCA and Relators have been able to reach agreement on search terms. MPCA attaches its proposed list of search terms. MPCA believes that the central issue dividing the parties is whether search terms should include a component that ties the search to Relators’ Discovery requests and the scope of this proceeding. MPCA believes that additional qualifying terms are needed in many instances. With respect to requests that relate to the PolyMet NPDES permitting process, MPCA would propose that a descriptor such as (PolyMet or Poly Met or NorthMet or Northmet) be included. Otherwise, searches such as “John Doe” or “permit” are likely to lead to collection of thousands of irrelevant documents, which then must be reviewed and culled.

Similarly, for document requests that may not be limited to the PolyMet permit (such as those involving MPCA’s custom and practice), searches should be tied to the requests via other refining terms.

Relators’ proposed searches, such as “EPA,” are overly broad and likely to yield unwieldy results that benefit none of the parties and create additional needless disputes.

B. Issues raised by Relators regarding MPCA’s Updated Privilege Log

Prior to the Pre-Hearing Conference, Relators’ raised issues with approximately 350 documents on Relators’ privilege log. The bulk of Relators’ challenges were that the documents were claimed as deliberative privilege or no attorney was indicated. MPCA reviewed all of the

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challenged documents and produced an updated privilege log on November 26, 2019, responding to each of the items flagged by Relators. MPCA produced 165 of the documents flagged by Relators, including documents that upon further review are not privileged for variance reasons, documents to which only the deliberative process privilege applies and redacted copies of the two documents for which Relators claimed a substantial need (including Privilege Log Number 301, and referred to as “Document 301” in the November 13th Hearing Transcript).

For documents not produced, MPCA provided additional information to clarify the basis for withholding the document (e.g., where a document was prepared by a non-attorney but at the request of, and under the direction of counsel), or corrected entry information (e.g., an incorrect date or other descriptive information).

Relators’ November 27, 2019 Letter challenges 30 of the documents it previously challenged and then challenges an additional 33 entries on MPCA’s privilege log for the first time. The challenge to 33 new documents is untimely and should have been previously raised. Moreover, the Court indicated during the Pre-Hearing conference that disputes over prior productions were to have been raised prior to last Friday, November 22.

Of the 30 documents Relators previously challenged, MPCA has agreed to produce MPCA has agreed to produce Privilege Log Number 153.

In regard to Privilege Log Number 301, Relators concede that notes in the document at issue are attorney work-product. *See* Transcript at 83 (“And Relators are not saying this is not work product.”). The Parties further understood that the notes at issue concerned a number of dates extending over a period of years and that events of these dates were not the subject of Relators’ motion. But MPCA nonetheless agreed to produce notes from the two days at issue (September 26, 2018 and April 5, 2018). Building on Relators’ representations, the Court recounted the understanding reached among the parties and the Court: “So it’s my understanding that 301 and 302 would be produced. *The notes for the two days at issue will be provided.* There will be redactions of mental impressions.” Transcript at 91.

MPCA produced *all* of the notes from these two days – without redaction. MPCA did not produce documents related to Mr. Schmidt’s notes of conversations from meetings on other days. The parties agree that this is work-product and Relators made no argument that they were entitled to documents beyond the two days at issue.

The remaining documents that Relators challenge are all either attorney client communications, attorney work product or work product produced by MPCA personnel at request of counsel. Relators now assert, without basis, that these documents are “likely to have segregable, if any, privileged content.” The majority of the challenged documents constitute work product, either prepared at the request of counsel or by counsel, and are privileged in their entirety. Regarding the documents that have been withheld on the basis of attorney client privilege alone, Relators will further review these documents to determine if there are any that may be produced with redactions.



C. Relators Privilege Log

Due to weather and other considerations, Relators' informed counsel for MPCA today that they have been unable to make the production of redacted versions of items from Relators' log as yet but will do so on Monday. Because MPCA has not received the produced documents or redactions, MPCA cannot agree to accept the new production as resolving all issues. The Parties therefore respectfully request that they be allowed to meet and confer further after Monday, December 2, 2019, when Relators expect to produce those documents.

Sincerely,

/s/ John C. Martin
John C. Martin
Holland & Hart LLP

/s/ Richard E. Schwartz
Richard E. Schwartz
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MPCA Proposed List of Search Terms for Forensic Data Files: 11-29-19

1. "Poly Met" or Polymet
2. Northmet
3. LTV or LTVSMC
4. Mining and copper
5. MOA or MOU
6. "Memorandum of Agreement"
7. Babbit
8. "Kurt Thiede" or Thiede
9. John Cherry
10. "John Stine" and (Polymet, Poly Met or EPA)
11. "Michelle Beeman"
12. "Richard Clark" or "Rich Clark"
13. "Jeff Udd" or "Jeffrey Udd" or Udd
14. "Cathy Stepp" or Stepp
15. "Rebecca Flood"
16. "Shannon Lotthammer" and (Polymet, Poly Met or EPA)
17. "Ann Foss" and (Polymet, Poly Met or EPA)
18. EPA and permit
19. EPA and comment
20. EPA and Poly Met or Polymet
21. "Adonis Neblett"
22. "Mike Schmidt" or "Michael Schmidt"
23. "John Martin"
24. "Data Practices" and (Poly! or Poly Met or NorthMet)