

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

**[POLYMET'S PROPOSED]  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ORDER**

On January 21 to January 29, 2020, the Court, the Honorable John H. Guthmann, Chief Judge of the Second Judicial District, presiding, held an evidentiary hearing in this matter. Based on the testimony and exhibits received into evidence at the hearing, and all the files, records, and proceedings herein, the Court makes the following Findings of Fact:

**FINDINGS OF FACT**

**I. Clean Water Act National Pollutant Discharge Elimination System Permitting**

1. The National Pollutant Discharge Elimination System ("NPDES") permit program is part of the Clean Water Act ("CWA"). (Tr. 496:24–497:1, 519:24–520:1.) Under 40 C.F.R. Part 123, the Environmental Protection Agency ("EPA") can delegate its authority to issue NPDES permits to a state. (Tr. 100:5–9.) A state that seeks authority to issue NPDES permits must execute a memorandum of agreement with EPA. 40 C.F.R. § 123.24(a).

2. A memorandum of agreement must contain, among other things, “[p]rovisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the [EPA] Regional Administrator for review, comment and, where applicable, objection.” 40 C.F.R. § 123.24(b)(2). Minnesota has delegated authority to issue NPDES permits. (Tr. 668:17–19.) “Certain procedural requirements set forth in part 124 must be adopted by States in order to gain EPA approval to operate RCRA, UIC, NPDES, and 404 permit programs.” 40 C.F.R. § 124.1(e).

3. The Minnesota Pollution Control Agency (“MPCA”) has met the requirements for EPA approval to operate its NPDES permitting program. Under 40 C.F.R. § 123.24(a), “[a]ny State that seeks to administer a program under this part shall submit a Memorandum of Agreement.”

**A. The MPCA-EPA Memorandum of Agreement**

4. MPCA and EPA executed a Memorandum of Agreement (“MOA”) authorizing MPCA to administer the NPDES program in Minnesota. The MOA that EPA Region 5 and MPCA signed in 1974, as amended, governs the process for issuance of the NPDES permit in this case. (Ex. 328; Tr. 499:11–13.)<sup>1</sup>

5. The purpose of the MOA is “to provide the terms and conditions for approval by the EPA” of Minnesota’s NPDES program under the Clean Water Act and

---

<sup>1</sup> When EPA and MPCA signed the MOA in 1974, the regulations governing state program requirements were found in 40 C.F.R. Part 124. (Ex. 328.) The MOA’s headings reflect that.

“EPA’s guidelines for ‘State Program Elements Necessary for Participation in [NPDES].’” EPA and MPCA agreed on the “procedures” in the MOA “[t]o satisfy the requirements of the [EPA] guidelines.” (Ex. 328.)

6. As part of its delegated authority, MPCA receives NPDES permit applications. The MOA states that when MPCA “determines that an application is complete, [it] shall transmit two copies of the completed application and a cover letter indicating that the application has been determined to be complete to the Regional Administrator.” (Ex. 328 at 3; Tr. 406:2–17.) The MOA also states that “[t]he Regional Administrator shall provide written comment on an application for a NPDES permit no later than 20 days from the date of receipt of application from [MPCA].” (Ex. 328 at 4.) If MPCA receives neither a comment nor a request for an extension from EPA within 20 days, it “may assume . . . that no comment is forthcoming.” (Ex. 328 at 4.) The MOA further provides that “[n]o NPDES application shall be processed by [MPCA] until all deficiencies identified by the EPA are corrected and the Director [of MPCA] receives a letter from the EPA concurring with the Director that the application is complete.” (Ex. 328 at 4.)

7. The MOA also addresses MPCA’s responsibility to transmit proposed NPDES permits to the EPA Regional Administrator. More specifically, the MOA provides that “[a]t the time a public notice . . . is issued, the Director [of MPCA] shall transmit one copy of the NPDES public notice, fact sheets, proposed NPDES permit and a list of all persons receiving the public notice” to the Regional Administrator. (Ex. 328 at 9.)

8. The MOA is consistent with regulations adopted by EPA under the CWA. *See* 40 C.F.R. §§ 123, 124. For instance, part 124.10(c)(1)(ii), provides that public notice of a draft permit should be mailed to “EPA when the draft permit is prepared by the State.” Part 124.10(d)(1)(v) also requires that the notice include a description of the comment procedures. Part 124.10(e) provides that EPA (and others) should receive a copy of the fact sheet, permit application, and draft permit with the public notice. Part 124.11 states that “[d]uring the public comment period provided under § 124.10, any interested person may submit written comments on the draft permit . . . and may request a public hearing, if no hearing has already been scheduled.” Part 124.17 requires States “to issue a response to comments when a final permit is issued,” 40 C.F.R. § 124.17(a), and make the response “available to the public,” 40 C.F.R. § 124.17(c).

9. The MOA states that MPCA must “consider all comments received as a result of the public notice and may modify the proposed NPDES permit as it considers appropriate.” (Ex. 328 at 9.) The MOA neither explicitly requires nor explicitly prohibits EPA comments during the public notice period. (Tr. 108:4–7, 125:13–15, 321:2–6.) The MOA explicitly allows, but does not require, MPCA to hold public hearings during the public notice period. (Ex. 328 at 9; Tr. 1332:15–18.)

10. If MPCA modifies a proposed NPDES permit “as a result of the public notice or public hearing,” the MOA requires MPCA to transmit “a revised copy of the proposed NPDES permit” to the EPA Regional Administrator, “with a request for approval to issue the NPDES permit.” (Ex. 328 at 10.)

11. When EPA receives a request for approval to issue an NPDES permit, the MOA specifies that “[t]he Regional Administrator shall respond within 15 days” and “may comment upon, object to or make recommendations with respect to the proposed NPDES permit. If no written comment is received by [MPCA] within the 15 days, the Director [of MPCA] may assume, after verification of receipt of the proposed permit, that the EPA has no objection to the issuance of the [proposed] permit.” (Ex. 328 at 10–11; Tr. 258:12–15.) If EPA objects in writing within the 15-day period, MPCA may not issue the proposed NPDES permit. (Ex. 328 at 11.)

12. EPA’s authority to comment on or object to an NPDES permit is not limited by the MOA. *See* 33 U.S.C. § 1342(d). EPA’s oversight authority provides it with the necessary power to accomplish such tasks even after the public comment period concludes. *See, e.g., id.* § 1342(d)(1) & 4 (allowing EPA to assume exclusive authority to issue the permit if the state refuses to modify the permit to comply with EPA objections); *S. California All. of Publicly Owned Treatment Works v. U.S. Env’tl. Prot. Agency*, 853 F.3d 1076, 1078 (9th Cir. 2017) (“Even when a state assumes primary responsibility for issuing NPDES permits, EPA retains supervisory authority over state permitting programs under 33 U.S.C. § 1342(d).”).

13. The MOA “may be modified by the Agency and the Regional Administrator,” and any such revisions “of the Agreement . . . shall be finalized, reduced to writing, approved by the Agency, and signed by the Director, and Chairman of the Agency, and the Regional Administrator prior to forwarding of the recommendations of

the Regional Administrator to the Administrator of EPA for review and approval.” (Ex. 328 at 16.) MPCA and EPA did not formally revise the MOA. (Tr. 408:2–8, 13–17.)

**B. MPCA Staff**

14. Three MPCA staff were primarily devoted to the NorthMet project’s NPDES permit—Richard Clark, Stephanie Handeland, and Jim Robin. (Tr. 850:8–12.) Richard Clark was a supervisor in the mining group. (Tr. 927:15–19; 1259:2–3.) Stephanie Handeland was the lead permit writer for the NorthMet project’s NPDES permit. (Tr. 927:20.) And Jim Robin was a project manager in the mining group. (Tr. 927:21.) Handeland and Robin reported to Clark, who reported to Jeffrey Udd. (Tr. 850:17–24.)

15. Starting in January 2018, Udd supervised MPCA’s staff team working on the NorthMet project. (Tr. 849:8–15.) Udd worked with MPCA starting in 2002. (Tr. 847:23–24.) In January 2018, he assumed Ann Foss’s role as manager of MPCA’s mining sector. (Tr. 848:12–14, 861:18–19.) Before that time, he had “very limited” involvement with PolyMet’s application for an NPDES permit. (Tr. 848:15–18.)

16. Michael Schmidt, MPCA’s legal counsel, began working on mining issues, including the NorthMet Project in 2015. (Tr. 927:22, 1122:6–7.) Schmidt usually attended calls and meetings between MPCA and EPA on the PolyMet permit and offered legal advice regarding the permit process. (Tr. 898:24–899:13, 985:7–18, 1124:16–23, 1223:23–1224:5.)

17. Shannon Lotthammer was the Assistant Commissioner for Water Policy from February 2018 to February 2019. (Tr. 542:3–7.) Shannon was responsible for the federal-state relationship for water permitting. (Tr. 417:6–9.)

18. John Linc Stine served as Commissioner of MPCA from May 2012 to January 2019. (Tr. 379:10–17.) The Commissioner’s Office had little involvement in the permit process. (Tr. 927:23–25.) Stine reported to the Governor’s chief of staff and to the Governor. (Tr. 443:13–14.)

19. Laura Bishop is the current Commissioner of MPCA and has served in that role since January 2019. (Tr. 736:1–6.)

### **C. EPA Staff**

20. During the permitting process, Kevin Pierard was the chief of the NPDES programs branch in EPA Region 5.<sup>2</sup> (Tr. 97:8–13, 98:17–21.)

21. Chris Korleski was the Water Division Director of EPA Region 5 and the highest staff person in the Water Division of EPA Region 5. (Tr. 157:10–16.) Korleski

---

<sup>2</sup> Pierard spoke with Relators’ counsel about the substance of his testimony, exhibits, and the scope of counsel’s examination at least four times after being sworn in. (Tr. 345:18–349:3.) Relators’ counsel in fact suggested one break after Pierard provided an answer, and then returned to clarify and expand on the substance of that answer after the break. (Tr. 165:4–166:3). Despite these frequent contacts, Pierard testified that he could not remember the substance of the conversations—even when he was asked about one of them about an hour after it occurred. (Tr. 348:3–349:3.) Further, in response to one objection that was sustained, counsel for Relators inferred that she knew Pierard’s anticipated answer, and stated “Actually, your Honor, that’s not what this witness would have testified.” (Tr. 202:4–5.) Pierard’s close relationship with Relators’ counsel and contact with Relators’ counsel during his testimony undermines his credibility in this case.

had worked at EPA for years. (Tr. 672:17–673:3.) Pierard reported directly to Korleski. (Tr. 157:10–13.)

22. Linda Holst became the Acting Water Division Director of EPA Region 5 when Korleski moved out of the EPA Region 5 Water Division Director position. (Tr. 316:19–22; 688:17–22.) Holst was Acting Water Division Director of EPA Region 5 by June 2018. (Tr. 316:19–22, 688:17–22; Ex. 2010.) Pierard then reported directly to Holst. (Tr. 316:19–22.)

23. Cathy Stepp became the Regional Administrator of EPA Region 5 in or around January 2018. (Tr. 409:7–17.)

24. Kurt Thiede became Chief of Staff to the Regional Administrator in or around February 2018. (Tr. 412:7–8, 16–18.)

**D. PolyMet’s NPDES permit application**

25. PolyMet submitted an application for an NPDES permit on July 11, 2016. (Court Ex. B at 1; Tr. 151:2224.)

26. On August 5, 2016, more than 20 days after PolyMet submitted the initial application, EPA acknowledged receipt of the application, informed MPCA that it would be reviewing the permit, and stated that the MOA would guide EPA’s oversight of the permit. (Ex. 290; Tr. 150:17–20, 1275:15–22.) EPA did not comment on PolyMet’s application within 20 days of receiving the July 2016 permit application.<sup>3</sup> (Tr. 1341:5–9.)

---

<sup>3</sup> EPA also did not submit written comments within 60 days of receiving the July 2016 permit application. (Tr. 1341:10–14.)

MPCA assumed, under the MOA, that no comment from EPA was forthcoming and proceeded to process PolyMet's application. (*See* Exs. 328, 306 at 1; Tr. 152:6–7.)

27. MPCA started interacting regularly with EPA in mid-2016, after PolyMet submitted its initial NPDES permit application. (Tr. 961:10–20.) MPCA asked EPA to be involved early in the permit review process, to streamline the review process. (Tr. 135:7–10.)

28. Initially, MPCA and EPA had conference calls once or twice a month. (Tr. 961:21–962:1, 1041:8–19; *see also* Ex. 708; Tr. 147:5–6, 461:21–462:1, 504:25–505:5, 664:19–22; 1041:24–1042:4.) As permit writer Handeland explained: “It was just a very complex project, proposed project, and we wanted – there were a number of issues that we had talked with EPA prior to the application coming in that we wanted to work with them on and get their opinions on, get their feedback on.” (Tr. 962:18–22; *see also* Tr. 1041:14–19.)

29. The bi-monthly calls allowed for more contact between EPA and the state agency than usual. (Tr. 147:21–148:7; 1041:8–14.) MPCA did not make efforts to hide the bi-monthly calls from the public. (Tr. 1228:3–5.) MPCA never suggested, and EPA never understood, that the calls would take the place of EPA's formal review or stop EPA from submitting written comments on the permit. (Tr. 149:11–23.) MPCA communicated to EPA that it “look[ed] forward to any comments [EPA] may wish to provide.” (Tr. 158:10–18; Ex. 815.)

30. On November 3, 2016, EPA sent MPCA an untimely letter identifying “deficiencies EPA has found regarding the application materials.” (Ex. 306.)

31. MPCA did not ask EPA for a letter stating that the application was complete and EPA never sent one. (Tr. 153:9–17.) MPCA did not advise EPA that its deficiency letter regarding the 2016 application was sent too late under the MOA. (Tr. 1360:15–19.)

32. PolyMet submitted a revised permit application in October 2017. (Tr. 153:19–154:8, 1280:8–9; *see also* Exs. 32, 349 at 3.) EPA never sent a letter stating the revised application was complete. (Tr. 153:9–12.) Nor did EPA, at any point, state that PolyMet’s revised application remained incomplete and should not be processed. EPA did not comment within 20 days of receiving the October 2017 revised permit application or at any point thereafter.<sup>4</sup> (Tr. 1341:15–18.) MPCA assumed, under the MOA, that no comment from EPA was forthcoming and continued to process PolyMet’s revised application. (Ex. 328; Tr. 1346:3–9, 1358:20–1359:6; *see also* Ex. 37.)

33. EPA never sent a letter identifying deficiencies in the revised permit application. EPA also continued to participate in calls and meetings to discuss the NPDES permit. (*See, e.g.*, Tr. 911:10–24, 968:17–24, 972:6–973:2, 1358:20–1359:6; Exs. 37, 307, 307A, 324, 324A, 325, 325A, 374, 708, 774, 775, 2039.)

#### **E. The Public Notice Draft Permit**

34. MPCA and EPA did not speak as regularly during the period in 2017 in which MPCA worked on the permit and fact sheet. (Tr. 961:10–962:10; *see also*

---

<sup>4</sup> EPA also did not submit written comments within 60 days of receiving the October 2017 revised permit application. (Tr. 1341:19–22.)

Ex. 708.) Two of the conference calls regarding the NorthMet Project<sup>5</sup> occurred during that period on November 1, 2017, and on November 9, 2017. (Court Ex. B at 1.)

35. Sometimes, EPA provides comments on an early-stage draft NPDES permit<sup>6</sup> before the public notice period, particularly when “states were interested in knowing from EPA if there were any big ticket issues that they should address in advance of public noticing the permit.” (Tr. 111:24–112:12.) States and EPA were interested in getting big ticket issues out of the way even before the public notice. (Tr. 112:12–14.) The MOA is silent on this procedure. (Tr. 470:7–11.)

36. MPCA asked EPA to be involved in the early stages of the permitting process. (Tr. 135:5–10, 147:10–14; Ex. 685.) MPCA never asked EPA to refrain from putting its comments or concerns in writing. (Tr. 703:19–704:6.) And EPA never agreed to refrain from putting its comments or concerns in writing. (Tr. 147:2–9.)

37. Because MPCA was interested in EPA’s feedback on the proposed permit, MPCA provided EPA (and certain tribes) with the draft proposed permit and fact sheet two weeks before the public notice date—i.e., before MPCA was required to do so under the MOA.<sup>7</sup> (Tr. 157:21–158:23, 1327:3–10; Exs. 34–36, 815; Court Ex. B at 2.) Pierard suggested that EPA’s review of an early-stage draft permit could result in EPA not submitting formal written comments. (Ex. 837 at 17.)

---

<sup>5</sup> Relators refer to the NorthMet Project as the “PolyMet Project.” See Court Ex. B.

<sup>6</sup> Relators refer to this as a pre-public notice draft of a permit. (Tr. 112:15–17.)

<sup>7</sup> EPA received the draft permit on January 17, 2018. (Tr. 159:15–17.; Ex. 34.) The public comment period began on January 31, 2018. (Tr. 928:7–8.)

38. EPA Region 5 does not submit written comments on every proposed permit. (Tr. 111:2–21, 129:19–130:1.) EPA comments on some, but not all, NPDES permits. (Tr. 111:2–21.) One reason EPA may submit comments in writing is to make clear that EPA is not being “lackadaisical” if it takes a long time for the state to issue the permit. (Tr. 131:1–15.) From 1974 to the present, EPA submitted written comments on some, but not all, of the hundreds of proposed permits submitted by MPCA. (Ex. 706.)

39. Although MPCA believed that EPA might provide written comments on the draft proposed permit (Tr. 158:14–23; Ex. 815 (“We look forward to any comments you may wish to provide”), and although EPA was not “excluded from the invitation to comment” on the draft proposed permit (Tr. 452:2–17, 1240:14–19; Ex. 35 at 4), EPA did not submit a written comment on the PolyMet NPDES draft proposed permit.

40. MPCA provided EPA and the tribes with a copy of the draft proposed permit on January 17, 2018, two weeks before the draft proposed permit was provided for public notice. (Court Ex. B at 2.) After EPA received the draft proposed permit, Pierard emailed Udd and Clark to set up a conference call because discussing things “seemed like a much more efficient way to go.” (Tr. 160:17–161:10; Ex. 37.)

41. The public comment period began January 31, 2018, and ended March 16, 2018. (Tr. 667:13–15, 928:7–8; Ex. 326.) MPCA extended the public notice period from the mandatory 30 days to 45 days, due to the permit’s complexity. (Tr. 1332:10–12.)

42. MPCA and DNR co-hosted two public hearings and open houses during the public notice period, in early February. (Tr. 928:21–929:2, 929:8–10; Ex. 326.) One occurred in Aurora and was attended by four hundred people. (Tr. 929:5–6.) The second

occurred in Duluth and was attended by roughly one thousand people. (Tr. 929:6–7.) It was unusual for MPCA to hold two such events for a permit. (Tr. 1332:15–18.) MPCA is not required to, and does not usually, hold public hearings for NPDES permits. (Tr. 1332:17–18.)

43. Udd, Clark, Handeland, Robin, and Schmidt all attended the public hearings and open houses. (Tr. 929:21–930:1.)

44. In anticipation of a large number of comments, MPCA set up a web portal through which people could submit written comments electronically. (Tr. 1332:20–24.) Clark was unaware of having a web link to receive written comments for any other NPDES permit. (Tr. 1335:2–4.)

45. MPCA had a meeting with a number of tribes during the public comment period in early March, including Relator Fond du Lac. (Tr. 930:2–15.)

46. MPCA and EPA continued to have conversations during the public comment period, at Pierard's request. (Tr. 160:18–161:16.) EPA and MPCA participated in conference calls regarding the NorthMet Project on January 31, 2018, February 13, 2018, and March 5, 2018. (Court Ex. B at 2; *see also* Tr. 972:6–973:2; Exs. 324, 324A, 708.) Schmidt did not understand EPA to be providing official comments during these calls. (Tr. 1162:23–1163:7, 1164:13–17, 1165:12–16, 1166:9–13.) MPCA never suggested, and EPA never understood, that the calls would stop EPA from submitting written comments or objections on the permit. (Tr. 161:13–162:2, 341:24–342:2.)

47. Handeland took handwritten notes during these three conference calls. (Tr. 972:6–17, Ex. 324.) Clark would take handwritten notes only for memory retention

purposes and then discard the notes after meetings. (Tr. 1307:4–10.) Clark did not intend to refer to the notes or use the notes again at a later time. (Tr. 1307:16–23.) Clark understood that a member of the permit team, Handeland, was already taking notes. (Tr. 1308:15–1309:8.)

48. During the February 13, 2018 conference call, MPCA and EPA discussed the public meetings on the NorthMet NPDES permit, including how many people attended. (Tr. 863:1–7, 863:22–864:3.)

49. During the March 5, 2018 conference call, Pierard said that some EPA staff had concerns and that EPA staff were recommending submitting written comments. (Tr. 162:14–163:5, 872:7–873:1, 977:23–978:3, 1175:3–8; Ex. 837; *see also* Exs. 641, 324A at 10.) Pierard also said that EPA staff would have to “run” any decision regarding providing official comments “up the line.” (Ex. 837.) Udd believed that the Commissioner’s office would be interested in Pierard’s update and said that he would discuss EPA staff’s concerns with that office. (Tr. 873:5–18.) Pierard also raised concerns about the MOA’s 15-day review period for final proposed permits, suggesting that EPA would like additional review time. (Tr. 882:8–14.)

50. The same day, Pierard told his boss, Korleski, that he had a draft letter prepared for Korleski’s review. (Tr. 164:6–9; Ex. 641.)

#### **F. Public Notice Period Comments**

51. After the March 5, 2018 call, Udd spoke to Lotthammer, explaining that EPA was considering sending written comments. Udd “expressed some concerns about that because of the amount of comments that were being received during the public

comment period.” (Tr. 556:23–557:3, 899:22–900:17.) Although Lotthammer did not work directly with the permit writers (Tr. 570:12–571:23, 927:3–25), Udd reached out to Lotthammer because she was designated as the lead for the project in the Commissioner’s office (Tr. 933:8–20).

52. Udd anticipated a high volume of written comments. Udd based this expectation on the large attendance at the February public hearings; the detailed nature of the questions and concerns raised at both the public meetings in February and the March 1 meeting with tribes; the tens of thousands of comments received during the environmental review process; the complexity of the project; and the general “high profile” nature of the project, as Minnesota’s “first copper nickel mine to go through the permitting process.” (Tr. 928:15–929:17, 930:2–932:13.)

53. Udd was concerned that EPA’s comments “would have added to the burden for the staff.” (Tr. 902:12–16; *see also* Tr. 556:22–7, 666:7–16, 710:5–6, 865:24–866:12.) Clark, Handeland, and Schmidt had an “an extremely high work load.” (Tr. 932:14–21.) Udd was concerned about the staff being overwhelmed with the high number of expected comments. (Tr. 900:15–17, 901:16–25, 928:15–19, 1332:20–21.)

54. The permit writers expressed their concerns about workload and efficiency. The lead permit writer, Handeland, was handling responses to comments along with Clark and Schmidt. (Tr. 935:1–4, 1334:19–25, 1335:22–1336:2.) Handeland had concerns and felt overwhelmed at times with respect to the actual permit drafting and response to comments. (Tr. 1336:14–17.)

55. Stine also expressed similar concerns. When Stine spoke to EPA about the timing of EPAs comments, he was concerned about the demands on the staff and their workload because they were “really deluged by the response requirements.” (Tr. 505:13–506:8, 511:12–14; *see also* Tr. 507:12–508:13.) Stine was also concerned about whether MPCA had the resources to handle the additional workload. (Tr. 509:15–25, 510:17–511:8.) Stine shared his concerns with Jeff Smith of the Industrial Division and Todd Biewen, director of Environmental Analysis and Outcomes, to determine if staff from other MPCA divisions could assist the permit writers. (Tr. 510:17–511:8.)

56. In light of the demands on MPCA staff, Stine and Lotthammer believed it would be more efficient to have EPA review and comment on a revised version of the permit. (Tr. 418:1–17, 419:14–8, 419:22–420:3, 511:12–21, 557:10–13, 666:19–667:10, 710:7–18, 713:19–714:8.)

57. Udd also knew that MPCA was planning on making changes to the permit to reflect feedback from the public and feedback conveyed by EPA to MPCA during the EPA-MPCA conference calls. (Tr. 556:18–557:9, 665:14–24, 716:25–717:3, 870:24–871:10, 932:22–933:1.)

58. Udd told Lotthammer that he thought EPA was going to follow the MOA. (Tr. 873:19–874:20, 900:12–15, 900:21–23.) Like Pierard, Udd understood that the EPA could comment at any time but was meant to “comment towards the end of the process when we have the final package ready for them to review.” (Tr. 875:10–15.)

59. While Udd hoped that EPA would be willing to delay its comments until later in the process (Ex. 575 ¶ 6), he never asked Lotthammer to ask EPA to completely

forgo commenting on the permit. (Tr. 709:25–710:8; 902:5–7.) Lotthammer also never suggested that she would ask EPA to completely withhold its comments. (Tr. 561:3–10; 902:8–11.)

60. Instead, Lotthammer and Udd discussed the idea of seeing if EPA would be willing to hold off providing written comments until after MPCA updated the permit. Lotthammer and Udd did not discuss what the specific proposal might look like. (Tr. 561:3–10, 904:8–904:25, 908:21–909:1, 909:10–20.)

61. Lotthammer shared Udd’s efficiency concerns. (Tr. 557:10–15.) She wanted “to get the best work product in front of EPA for their formal review and comment.” (Tr. 578:15–16.) Lotthammer was “very interested in actually getting EPA feedback on that improved work product as opposed to the version that we knew we were going to be changing based on the public comments.” (Tr. 667:6–10.)

62. Later in the week of March 5 or the week of March 12, Lotthammer asked Udd if he was okay with giving EPA more time at the end of the process than what is outlined in the MOA. (903:18–25.) Udd did not object to extending the time because MPCA had already been receiving feedback from EPA during its conversations related to the public notice draft permit and the delay would alleviate staffing concerns. (Tr. 680:9–16, 908:21–909:1; Exs. 324, 324A.) Neither Udd nor Lotthammer made notes of the conversation. (Tr. 550:10–14, 904:6–7.)

63. In early March, Lotthammer spoke by phone with Pierard about the timing of EPA’s comments. (Tr. 558:11–14, 559:10–13, 667:18–668:5.)

64. Lotthammer requested that EPA consider postponing providing written comments on the draft permit, since MPCA knew it would be making changes. (Tr. 559:10–13, 667:18–668:2, 669:15–18, 932:22–933:1, *see also* Tr. 310:8–9, 460:10–18, 675:21–676:1, 713:19–714:8.)

65. When Pierard expressed concerns about transparency, Lotthammer explained that MPCA was not “trying to suggest not to . . . get comments or be transparent.” (Tr. 559:13–23.) Rather, MPCA was “simply requesting that EPA consider allowing [MPCA] to provide the updated work product before they weighed in with their formal written comments.” (Tr. 559:13–23, 668:22–669:5; *see also* Tr. 669:5–18.) MPCA knew at that time that the agency would “be making changes” to the permit, so “it didn’t make sense . . . that EPA would be sending written comments on a version that we already were going to be changing.” (Tr. 669:15–18; *see also* Tr. 310:12–15, 460:10–18, 511:14–21, 932:22–933:1; Ex. 333.)

66. Lotthammer never questioned EPA’s authority to submit written comments. (Tr. 308:24–309:2.) Lotthammer never suggested that EPA lacked authority to submit written comments. (Tr. 309:16–17.) Lotthammer never demanded that EPA not send written comments. (Tr. 668:6–9, 676:4–6.) Lotthammer recognized that MPCA “didn’t have the authority to make a demand on EPA” with respect to submitting comments, nor would it have “been appropriate to make a demand or an instruction.” (Tr. 668:6–14.) Lotthammer never suggested that EPA was violating or would violate the MOA by submitting or intending to submit written comments. (Tr. 309:21–23; *see also*

Tr. 681:10–18.) Lotthammer also never suggested that the conversation be kept confidential. (Tr. 671:10–16; *see also* Tr. 681:19–24.)

67. Pierard understood Lotthammer was making a request, not a demand. Each time Pierard described the conversation with Lotthammer, Pierard described Lotthammer as making a “request” and a “suggestion.” (Tr. 186:22–187:2, 309:24–310:11.)

68. Lotthammer subsequently spoke with Chris Korleski. (Tr. 562:9–13, 672:9–14.) Lotthammer requested that EPA consider delaying written comments until after MPCA had an opportunity to make the changes that MPCA staff were already anticipating making to the draft permit. (Tr. 562:15–18, 673:4–11.) Again, Lotthammer did not demand or direct EPA not to provide written comments. (Tr. 626:13–18, 676:4–9.) Nor did Lotthammer ask that the conversation be held in confidence. (Tr. 677:1–3.) Korleski mentioned EPA staff’s concern that there be adequate time to review and provide comments on any revised permit. (Tr. 563:25–564:8, 673:12–25.) Lotthammer did not make notes of her conversations with Pierard and Korleski, or a memo summarizing her conversations because it was not her normal practice to do so. (Tr. 550:5–14, 562:1–5, 563:20–23, 590:1–8.)

69. On or around March 9, 2018, Pierard spoke with Stepp and indicated an intention to send written comments. (Tr. 177:18–178:6.) Stepp indicated that she would be speaking with Commissioner Stine within the week. (Tr. 180:3–7.)

70. On March 12, 2018, Commissioner Stine spoke with Stepp and Kurt Thiede by phone. (Tr.411:22–25; Ex. 58.) During that conversation, Stine did not discuss the substantive aspects of the permit standard. (Tr. 415:1–22.) Stine and Stepp discussed

MPCA's "agreement" with the tribal governments to provide them with early copies of draft NPDES permits. (Tr. 413:6–13, 420:11–19.) Stine also asked Stepp to consider providing comments at a later time, on a revised proposed permit. (Tr. 417:18–418:10.)

71. Stine did not complain about what he understood to be EPA staff's plan to submit written comments. (Tr. 422:8–11, 422:23–423:7.) Nor did Stine attempt to cover up or prevent criticisms from EPA. (Tr. 512:17–20.)

72. Stine did share with Stepp and Thiede a concern about efficiency. MPCA staff were working to prepare the revised draft permit. (Tr. 417:24–418:17, 459:10–14.) Staff were burdened by responding to comments. (Tr. 419:22–420:3.) MPCA received almost 700 comments during the public comment period, which broke down to about 1600 individual comments. (934:9–15; Exs. 350 ¶ 23.) Responding to the comments was a "very extensive amount of workload for the staff." (Tr. 507:23–508:13.)

73. The final response to comments prepared by staff was over 300 pages long. (Tr. 507:3–11, 664:8–9; Ex. 1133.) Preparing that document strained MPCA's resources by creating a "dramatic amount of work." (Tr. 507:25–508:3–13.)

74. Stine wanted EPA's comments to address the most up-to-date information, to maximize permitting efficiency and preserve MPCA's resources. (Tr. 418:4–10.) Revisions were also being made to address EPA staff's concerns, which had been expressed in numerous phone calls both before and during the public notice and comment period. (Tr. 460:10–18, 461:20–462:2, 667:18–668:2, 673:6–11, 971:5–13, 972:6–973:7, 1228:23–6, 1299:8–24, 1303:14–1304:5; Exs. 324A, 325A, 333.) In light of the comments that MPCA had already received (Tr. 928:21–929:17, 1230:2–7), Stine was

aware that the staff were already in the midst of revisions. (Tr. 511:14–21.) It was important to Stine “to make sure that [EPA] knew what [MPCA] were expecting to change and how that would directly impact their interest in comments.” (Tr. 512:7–10.)

75. Stine asked Lotthammer to follow up with Stepp or Thiede, and to connect with Thiede. He explained to Lotthammer why he “was concerned about the workload and efficiency and asked her to look into the matter.” Stine did not suggest to Lotthammer that EPA comments should be suppressed or prevented. (Tr. 513:8–514:2.) He considered it her delegated authority to communicate whatever she deemed appropriate. (Tr. 453:18–22.)

76. Stine connected Lotthammer with Thiede by email. (Tr. 677:5–6; Ex. 58.) Stine did not discuss or review the contents of Lotthammer’s subsequent emails to Thiede because he considered it Lotthammer’s “delegated authority to communicate whatever she deemed appropriate.” (Tr. 453:8–22.) Stine and Lotthammer did, however, discuss that MPCA and EPA were in direct communication and having numerous conference calls about the permit conditions and details. (Tr. 461:19–462:1.)

77. Lotthammer then sent Thiede an email on March 13, 2018. (Ex. 333.) She did not seek legal advice before sending the email, receive help in drafting the email, or ask anybody to review the email. (Tr. 572:11–19, 573:1–3.) Still, Lotthammer had an interest in ensuring that everything was consistent with the MOA. (Tr. 573:15–23.)

78. In the March 13 email, Lotthammer wrote:

The concern we have expressed to Region 5 staff/mgrs. is the *timing* of EPA comments, not the ability for EPA to comment. The draft permit that is the subject of this discussion is on public notice until March 16. We know that we will be making some changes to the draft permit in response to public comments, and also questions raised by EPA. We have asked that EPA Region 5 not send a written comment letter during the public comment period and instead follow the steps outlined in the MOA and wait until we have reviewed and responded to public comments and made associated changes before sending comments from EPA.

(Ex. 333.) It was important to Lotthammer to make clear that MPCA was not “questioning EPA’s authority” and was not “trying to suggest at all that EPA couldn’t or shouldn’t comment.” (Tr. 679:2–9.)

79. Lotthammer believed that this proposed approach was consistent with the MOA. Like Udd, Lotthammer believed that the MOA contemplated EPA comments at the end of the process, so that the permit could be on public notice for comments, the permit could be improved afterwards, and then the EPA would review work product that had been improved by public comments. (Tr. 577:25–578:21, 680:17–681:3, 874:19–20, 875:10–15, 900:21–23; Ex. 333.)

80. Later that day, on March 13, 2018, Lotthammer and Thiede spoke by phone. Lotthammer confirmed that MPCA was not suggesting that EPA could not comment during the public comment period. (Tr. 586:1–587:1, 692:13–21; *see also* Exs. 60–61.) Lotthammer understood that EPA could comment at any time. (Tr. 692:18–21.) Lotthammer did not make notes of her conversation with Thiede, or a memo summarizing her conversation because it was not her normal practice to do so. (Tr. 550:5–14, 562:1–5, 563:20–23, 590:1–8.)

81. Thiede did not inform Lotthammer that EPA had already prepared a written comment letter. (Tr.589:13–19.) Thiede did not suggest that the MOA prevented MPCA’s proposal that EPA postpone providing written comments. (Tr. 692:22–25.)

**G. EPA Does Not Comment During the Public Notice Period**

82. It was impossible for MPCA to prevent EPA from providing written comments on an NPDES permit. (Tr. 497:17–20.) Relatedly, it “would not be within the state’s authority” to direct EPA not to object to a permit. (Tr. 498:11–14.)

83. Lotthammer spoke with Thiede again on March 15, 2018. (Exs. 61, 62; Tr. 590:9–16.) At that time, they agreed that MPCA would develop a pre-proposed permit in response to the public comments and provide that pre-proposed permit to EPA. EPA would then have 45 days to review and provide written comments on that pre-proposed permit. (Tr. 311:20–313:6, 515:22–516:9, 591:9–593:6; Exs. 64, 64A, 674, 2009, 2010, 2014.) In other words, MPCA would revise the draft permit to incorporate its response to comments and then provide that revised draft—which EPA called a pre-proposed permit—to EPA for its review. (Tr. 515:22–516:3.) During the conversation, Thiede did not discuss reopening the comment period or formally amending the MOA. (Tr. 593:11–21.)

84. MPCA further agreed that it would submit the final proposed permit to EPA under the MOA, triggering EPA’s 15-day period to comment upon or object to the proposed permit. (Tr. 313:7–13, 516:19–24, 518:3–13; Exs. 64, 64A, 307, 307A, 2014.) In other words, EPA would have more time—60 days in total—to comment. (Tr. 313:3–13, 313:17–19, 471:24–472:5.)

85. Lotthammer recognized that it was EPA's authority and ultimate decision whether to send written comments during the public notice period. (Tr. 597:14–598:2, 681:10–18, 695:15–25.) Lotthammer also recognized that it was still EPA's authority and ultimate decision to raise objections within 90 days after MPCA sent the final proposed permit. (Tr. 518:15–22.)

86. EPA proposed the idea to have MPCA submit a pre-proposed permit to allow EPA an additional review period, and EPA came up with the term. (Tr. 533:25–534:4, 592:1–8, 698:18–699:1.) EPA suggested the term “pre-proposed permit” to distinguish the next draft permit from the final proposed permit that must be provided for a 15-day review under the MOA. (Tr. 592:2–8; 533:25–534:4.) Thiede suggested the term for the first time on the March 15 call. (Tr. 592:14–17.) The MOA neither requires nor prohibits additional EPA review of a pre-proposed permit. (Tr. 470:7–11.)

87. By the morning of March 16, 2018, Pierard had been told by his superiors that EPA would not be sending written comments. (Tr. 191:17–192:7.)

88. The same day, Thiede emailed Lotthammer, memorializing EPA's “understanding of what EPA and MPCA have agreed to.” (Ex. 307A; *see also* Ex. 64A.)

89. Lotthammer agreed with EPA's “characterization . . . of what we have agreed to for the PolyMet draft permit next steps.” (Ex. 307A; *see also* Ex. 64A; Tr. 313:20–23.) Udd, who was copied on Lotthammer's response, forwarded the email to Richard Clark and Stephanie Handeland, with the statement “Here's the plan.” (Ex. 307A.)

90. EPA understood that the arrangement was an alternative that did not require modification of the MOA. (Tr. 313:13–16, 470:19–20, 472:10–22; 517:8–11, 517:19–518:2.) EPA did not express a concern to Stine or Lotthammer that the arrangement was not in compliance with the MOA. (517:24–518:2; 593:17–21; 670:4–8; 692:22–25.)

91. Pierard then spoke with Udd and told Udd that EPA would not be submitting written comments. (Tr. 193:2–3.)

92. Udd sent a follow-up email to Clark and Handeland, indicating that Pierard would like to continue “with the routine check-in meetings every few weeks” and “would like to have one the first week of April to walk through what the comment letter would have said if it were sent.” (Ex. 307A; Tr. 911:10–912:1.) The words Udd used in his email were Pierard’s. (Tr. 912:14–17.)

93. Stine expected that EPA would still comment on the NorthMet project, just at a later date. (Tr. 520:21–521:6; *see also* Tr. 516:5–24; Ex. 64A.) Lotthammer similarly “wanted to get EPA’s review and feedback,” just “on the improved version of the permit based on the changes that we were already going to be making.” (Tr. 603:1–3.)

94. MPCA’s primary concern was efficiently preparing a revised draft permit. (Tr. 417:24–418:7.) MPCA did not ask EPA to defer providing written comments in an attempt to manipulate the administrative record. (Tr. 419:1–6.) MPCA did not ask EPA to defer providing written comments as part of an overall litigation strategy. (Tr. 419:9–13.) And MPCA did not ask EPA to defer providing written comments due to political pressure from the Governor or the Chief of Staff. (Tr. 447:2–6.)

95. Witnesses were unaware of any instance in which someone from MPCA ever directed EPA not to comment on a permit. (Tr. 498:19–22, 704:3–6, 1063:12–15, 1343:9–12.) Witnesses were unaware of any instance in which anyone had made efforts to hide EPA staff’s concerns from the public. (Tr. 522:3–8, 684:24–658:2, 939:22–24, 1063:16–19, 1343:13–16.) Witnesses were unaware of any instance in which someone from MPCA ever directed EPA not to object to a permit. (Tr. 498:23–25, 704:3–6.)

96. If any MPCA employee had attempted to cover up EPA staff’s concerns, Commissioner Stine would have responded with an investigation and potentially disciplinary action. (Tr. 522:12–20.)

97. The public comment period for the draft NPDES permit ended on March 16, 2018. (Court Ex. B at 2.)

98. The public comment period resulted in approximately 700 written comments, hundreds of which were deemed to be “substantial” and required a written response. (Tr. 496:2–6, 934:9–15; Exs. 350 ¶ 23 and 1133.)

99. EPA did not send written comments during the public comment period, or at any point thereafter. (Exs. 674, 575 ¶ 8; Tr. 317:25–319:4, 351:17–352:18, 938:7–939:9.)

#### **H. MPCA and EPA Continue to Communicate**

100. MPCA and EPA remained in contact while MPCA responded to comments and revised the permit. (*See* Ex. 708.)

101. In the usual permitting process, it would only take MPCA about a month to respond to comments. (Tr. 1061:24–1062:5.) During the PolyMet permitting process,

MPCA took seven months to prepare responses to all the written comments and prepare a revised permit. (Tr. 934:16–25.)

102. At Pierard’s request (Tr. 192:18–193:10, 911:10–24; Ex. 307A), EPA and MPCA participated in a conference call on April 5, 2018 so that Pierard could walk through what the draft comment letter he had prepared would have said if it were sent. (Court Ex. B at 2; Tr. 193:2–10, 911:15–912:17; Exs. 307A, 2039.) Pierard “felt so strongly” about reading the letter to MPCA, but he was never instructed to do so. (Tr. 235:5–9.)

103. Handeland, Clark, Udd, and Schmidt also participated in the call. (Tr. 978:22–979:3, 1324:7–1325:1.)

104. Pierard read from the underlined portions of the draft comment letter, a document which was never shared physically with MPCA or PolyMet before the permit issued. (Tr. 194:7–13.)<sup>8</sup> Although Pierard indicated that he wanted MPCA to “be aware of the specific comments [EPA was] going to make so that they could consider them as they looked at other comments,” Pierard did not tell MPCA that he would be directly reading from a document. (Tr. 193:2–10, 980:23–981:1, 1342:10–15; *see also* Tr. 924:9–17, 1194:17–1195:1.)

---

<sup>8</sup> Before the issuance of the permit, neither MPCA nor PolyMet received from EPA a copy of the draft comment letter. Both MPCA and PolyMet saw the unsent draft comment letter for the first time through an internet publication. (Ex. 248; Tr. 746:14–18, 917:15–918:8.)

105. Sometimes Handeland took handwritten notes during calls with EPA for her personal use. (Exs. 324, 324A, 325, 325A; Tr. 971:5–9, 971:15–20.) Handeland started taking handwritten notes during the April 5, 2018 call, but quickly stopped because she could not keep up. (Tr. 979:17–980:4, 980:11–16.) She recycled the paper that same day because “there was nothing on there worth keeping.” (Tr. 982:16–983:2.) No one told or suggested to Handeland that she was required to take notes at the meeting. Likewise, no one told or suggested to Handeland that she recycle her notes, stop taking notes, not take notes, save her notes, discard her notes, or conceal her notes of the call. (Tr. 983:16–24, 1044:2–1044:24.) Handeland did not consider the concerns expressed by Pierard over the phone to be formal EPA comments. (Tr. 986:24–7:4–10.) Handeland could see that Schmidt was also taking notes. (Tr. 984:8–10.)

106. Schmidt took notes during the April 5, 2018 call according to his general practice, in which he would take notes in handwriting, type them after the meeting, and put the handwritten notes in a file designated for shredding. (Tr. 1127:19–1128:1, 1147:14–22, 1191:13–20; 1225:8–12.) No one suggested that Schmidt should take notes or instructed him to take notes. (Tr. 1128:10–13, 1224:19–21.) Schmidt labeled his notes privileged because he believed his notes contained his mental impressions and were privileged. (Tr. 1129:4–18, 1130:1–8.) Schmidt was never advised to take notes or label his notes as privileged in order to protect them from disclosure. (Tr. 1130:9–22.)

107. Neither Handeland, Clark, nor Udd reviewed Schmidt’s notes after the call or while preparing the permit. (Tr. 926:1–3, 943:16–944:5, 984:18–24, 1148:19–22, 1199:9–17, 1324:12–1325:1, 1325:6–1326:7, 1342:25–1343:3.) Generally, Schmidt did

not share his notes with other members of the permit team, and his notes were not accessible electronically to members of the permit team because they were saved in a restricted access folder. (Tr. 1197:16–17, 1200:6–9, 1216:13–14.) Schmidt similarly did not recall consulting his notes from the April 5 call when working on portions of the permit, although it was possible that he had done so. (Tr. 1219:16–21.)

108. Clark, Handeland, and Schmidt met shortly after the call to review the issues EPA raised, and Udd may have participated in the meeting by phone. (Tr. 1324:24–1325:1.)

109. Although MPCA staff could not definitely say whether the statements made in the draft unsubmitted comment letter matched or were exactly the same as comments received and identified in the response to comments, (Tr. 1038:20–24), they believed that “[a] lot of the comments [received and identified in the response to comments] were similar to EPA’s letter that they read over the phone,” (Tr. 1039:10–23) and that Pierard was not raising any major new points. (Tr. 986:21–23, 995:3–8; 1039:8–1039:23, 1197:18–1198:10, 1231:2–25, 1324:16–1325:13, 1342:16–24.)

110. At the time, Lotthammer was not aware that Pierard had suggested the April 5, 2018 call. (Tr. 605:12–606:4.) Lotthammer also was not aware that the April 5, 2018 call occurred. (Tr. 606:5–25, 608:10–15.)

111. Although Pierard read from a draft letter, what he communicated to MPCA on the April 5, 2018 call were not EPA “comments,” because Pierard’s superiors had decided that EPA would not comment on the permit by sending the letter. (Tr. 191:17–

19, 192:5–7, 193:21–194:13.) Pierard’s personal desire to share the contents of an unsent letter did not turn his communications into an official EPA “comment.”

112. The April 5, 2018 call was not recorded or transcribed. (Tr. 1367:3–12.)

113. EPA and MPCA participated in a conference call regarding permitting the NorthMet Project on April 30, 2018. (Court Ex. B at 2; Ex. 708.)

114. EPA and MPCA participated in a conference call regarding permitting the NorthMet Project on June 11, 2018. (Court Ex. B at 3; Ex. 708.)

115. EPA and MPCA participated in a two-day meeting regarding the NorthMet Project on September 25 and 26, 2018. (Tr. 962:25–963:7; Court Ex. B at 4; Ex. 708.) EPA never raised the completeness of the October 2017 revised application as a topic of discussion at those meetings. (Tr. 1358:23–1359:6.)

116. EPA and MPCA participated in a conference call regarding permitting the NorthMet Project on October 22, 2018. (Court Ex. B at 4; Ex. 708.)

### **I. The Pre-Proposed Permit and Final Proposed Permit**

117. MPCA spent months revising the PolyMet NPDES draft proposed permit after the public notice period, before submitting the revised version of the draft proposed permit—called the pre-proposed permit—to EPA. (Tr. 317:25–318:2, 701:1–7, 938:7–10.)

118. MPCA submitted the pre-proposed permit to EPA for review on October 25, 2018. (Court Ex. B at 4; Tr. 317:25–318:2, 701:1–7, 938:7–10.) EPA then had 45-days to review the pre-proposed permit and provide comments. MPCA did not receive written comments from EPA during that time period, which ended on

December 9, 2018. (Tr. 701:8–14, 317:25–318:5; Ex. 64A.) It was EPA’s decision whether to comment on the pre-proposed permit. (Tr. 703:19–21.)

119. On or about December 3, 2018, Pierard called Udd. Pierard did not express any reservations or objections to the terms of the pre-proposed permit on that call. (Tr. 318:6–11, 318:15–18, 938:20–24.) Instead Pierard “told [Udd] to proceed to the proposed permit stage.” (Tr. 318:12–14.) In short, EPA asked MPCA to send the final proposed permit and trigger EPA’s 15-day review under the MOA. (Tr. 318:19–319:1, 938:11–21.)

120. On December 4, 2018, MPCA sent the final proposed permit to EPA, triggering the 15-day comment period under the MOA. (Tr. 318:19–319:1, 351:17–25, 352:8–15; Exs. 2020, 2021.)

121. EPA did not submit to MPCA a written comment on the PolyMet NPDES permit at any point, including on the final proposed permit. Nor did EPA object in writing to the PolyMet NPDES permit at any point. Accordingly, as provided in the MOA, MPCA concluded that EPA had no objection to the issuance of the permit. EPA’s decision not to comment in writing or object “has the legal force and effect of allowing that permit to be final.” (Tr. 458:16–19, 260:7–10.)

122. On December 18, 2018, Pierard called Udd and informed him that EPA had finished its review of the NorthMet project’s NPDES permit and would not be objecting. (Tr. 938:25–939:9.) Udd did not make notes of the call. (Tr. 946:8–12.)

123. MPCA issued PolyMet a final NPDES Permit for the NorthMet Project on December 20, 2018. (Court Ex. B at 4, Exs. 348–49.) Commissioner Stine made the

decision to issue the permit—he was not told to do so by Governor Dayton.<sup>9</sup> (Tr. 493:25–494:4.)

124. In January 2019, MPCA prepared talking points regarding Relators’ claims about the NPDES permit. (*See* Ex. 154; Tr. 622:14–623:3.) Although the talking points did not use the term pre-proposed permit, the talking points correctly stated that “EPA did not send a comment letter during the comment period, but rather chose to let the public notice process conclude and review any changes made to the permit.” (Ex. 154; Tr. 624:1–22.) The talking points also correctly stated that “MPCA provided additional time to EPA to review the final draft permit prior to any final decision on the permit issuance” and that “[t]here is no information in what [MPCA] provided that suggests that EPA was directed to suppress comment (by MPCA or anyone else).” (Ex. 154.) They further correctly stated that “MPCA met with EPA staff to talk through the changes made to the permit based on public comments, and made additional refinements to the permit based on suggestions made by EPA during the discussion.” (Ex. 154.) MPCA did not, nor was it required to, affirmatively disclose in its media release the agreement MPCA reached with EPA. (Tr. 626:11–25.)

---

<sup>9</sup> Between July 2016 and the issuance of the NPDES permit, Stine spoke with the Governor and his chiefs of staff about the NPDES permit. (Tr. 444:1–6, 445:21–446:10.) Neither the Governor nor his chiefs of staff commented or expressed an opinion on the timing of the NPDES permit. (Tr. 446:4–447:2.) Neither the Governor nor his chiefs of staff commented or expressed an opinion on EPA’s decision not to submit written comments. (Tr. 447:2–6.) It was not Stine’s practice or “habit to make memoranda of conversations [he] had with the Governor or chiefs of staff.” (Tr. 445:2–5.)

**J. The PolyMet permit is not a typical permit**

125. The NorthMet Project will be the first of its kind in Minnesota: a copper, nickel, and platinum-group-elements mine located within Minnesota's Mesabi Iron Range. (Ex. 350.) The Project consists of the Mine Site, Plant Site, and the Transportation and Utility Corridors that connect them. (Exs. 349, 350.) The Mine Site is located approximately six miles south of the City of Babbitt and two miles south of the Northshore Mining Complaint's active, open pit taconite mine. (Ex. 349.) The Plant Site is located at the former LTV Steel Mining Company / Cliffs Erie taconite processing facility located approximately six miles north of the City of Hoyt Lakes. (Ex. 349.)

126. Because of the scope of the Project, the NorthMet permit was not the typical, run-of-the-mill permit. It "was much more extensive in many ways compared to the typical discharge permit." (Tr. 660:11-13; *see also* Tr. 496:11-20.) As Udd put it, "there's not really anything to compare it to for prior projects." (Tr. 945:17-18.)

127. There was extensive public involvement in the permitting of the NorthMet project, following an environmental review process that took over ten years to complete. (Tr. 495:9-24; *see also* Ex. 350 ¶ 2.)

128. MPCA anticipated receiving a lot of comments on the draft proposed PolyMet NPDES permit, and therefore set up a variety of means by which comments could be submitted. (Tr. 901:16-25, 1332:20-1333:2.) MPCA created for the first time a web portal to accept public comments. (Tr. 1058:20-24, 1060:12-13, 1060:22-25, 1332:22-24, 1335:2-4.) There were open houses and public meetings as part of that public comment period, attended by hundreds. (Tr. 662:11-663:10, 928:21-929:10,

1059:2–7; Ex. 326.) The mere fact of the public meetings was unusual because “the majority of permits do not have public meetings” and public meetings are “not mandatory.” (Tr. 1332:15–18, 1333:12–14.) MPCA accepted written and oral comments at the public meetings and received a transcription of the oral comments. (Tr. 1332:24–1333:2, 1362:1–10; Ex.326.) There was an extended public comment period of 45 days, rather than the normal 30 days. (Tr. 661:19–662:2, 1332:9–12.)

129. MPCA received “significantly more written comments than it had for any other NPDES permit—1600 individual comments about aspects of the draft permit (Tr. 663:11–23, 988:3–4; Ex. 350 ¶ 23), whereas the usual amount of comments was less than 20. (Tr. 1061:10–15; *see also* Tr. 1333:4–10.)

130. Because MPCA expected to receive so many comments, it retained an independent contractor to compile the comments for MPCA staff. (Tr. 988:3–13, 1335:13–16; *see also* Tr. 865:2–16, 901:19–25.) The contractor helped to extract, sort, and catalog comments. (Tr. 1335:13–16.) The comments were identified by major stakeholders and individual citizen comments and grouped into similar topics. (Tr. 988:9–13, 992:5–15; Exs. 699, 1133.) If EPA had submitted written comments on either an early stage draft permit or public notice draft permit, the comments would have been included in the administrative record and identified in the response to comments document. (Tr. 1003:9–17, 1040:9–1041:1, 1267:19–23, 1269:1–13.) Because EPA did not submit written comments, however, there was no EPA comment letter in the administrative record, and EPA was not identified in the response to comments. (Tr. 1003:9–17, 1366:12–20.)

131. There was also “far more extensive” interaction between EPA and MPCA for the NorthMet project permit than occurred on other NPDES permits. (Tr. 503:3–504:1, 660:19–23.) EPA and MPCA had dozens of meetings and calls during the permitting process. (Ex. 708; Tr. 1042:11–1043:14.) EPA and MPCA staff also “had been in regular conversation . . . which wasn’t something that was always typical with permits.” (Tr. 562:19–22.) Lotthammer could not “think of a[nother] permit where [EPA’s and MPCA’s] staffs had basically bi-weekly meetings at the time to talk about the details” of the permit. (Tr. 660:21–23.)

132. Stine had not previously asked EPA to defer making written comments until after the public notice period. (Tr. 418:18–25.) The approach was specific to the NorthMet permit, “for the sake of efficiently communicating between EPA and PCA.” (Tr. 474:13–22.)

133. Clark described the level of interaction between MPCA and EPA as “far exceed[ing]” past interactions because of the high level of public interest and the complicated regulatory and policy issues that needed to be addressed. (Tr. 1329:25–1330:11.)

134. Another extraordinary aspect related to PolyMet’s NorthMet Project was the State’s retention of outside counsel for legal advice and representation. On September 24, 2015, MPCA Commissioner John Linc Stine, together with DNR Commissioner Tom Landwehr, requested that the Attorney General appoint outside counsel “to provide sound, timely legal advice as well as effective representation in the likely event of a legal challenge to the DNR and PCA’s decision making during both the Final Environmental

Impact Statement (FEIS) and potentially the permitting process, should the FEIS be determined adequate.” (Ex. 382.) At that time, Stine understood that there could be multiple legal challenges to the NorthMet project, in various jurisdictions. (Tr. 384:18–24.)

135. MPCA identified “at least six points where the agencies could reasonably expect a legal challenge concerning the NorthMet Project”: “the joint federal/state environmental impact statement, the MPCA water quality permit decision under the Federal Clean Water Act and the DNR’s water appropriation permit decision, the MPCA’s air emissions permit decision under the Clean Air Act and State law, the DNR’s dam safety permit decision, and the DNR’s permit to mine decision which includes associated wetland mitigation requirements and financial assurance requirements.” Ex. 382. MPCA’s “litigation strategy” did not include trying “to persuade EPA not to put written comments in the [administrative] record that would be available to the court of appeals for review.” (Tr. 419:9–13.)

## **II. The Administrative Record**

### **A. Applicable Law**

136. The “record in a certiorari appeal comprises the papers, exhibits, and transcripts of any testimony considered” by the agency when reaching its final decision. *Stephens v. Bd. of Regents of Univ. of Minn.*, 614 N.W.2d 764, 769 (Minn. Ct. App. 2000) (citing Minn. R. Civ. App. P. 110.01, 115.04).

137. Minnesota Rules 7000.0755, subpart 4 specifically governs “[t]he record upon which the commissioner [of PCA] shall make a final decision other than rulemaking and contested case hearings.”

138. Under Rule 7000.0755, subpart 4, the record consists of: “(A) relevant written materials submitted to the commissioner or agency staff within an established comment period, including requests for an informational meeting and petitions for contested case hearings; (B) written materials submitted to the commissioner or agency staff within a time period established by the commissioner; and (C) written documents containing relevant information, data, or materials referenced and relied upon by agency staff in recommending a proposed action or decision.”

139. The governing statutes and regulations do not require MPCA to “consider or include in the administrative record documents never submitted to or received by it.” *Nat’l Audubon Soc. v. Minn. Pollution Ctrl. Agency*, 569 N.W.2d 211, 216 (Minn. Ct. App. 1997). They also do not require MPCA to consider EPA’s “internal debate[s]” when making permitting decisions. *Id.* Instead, MPCA is required to consider only EPA’s “official comment[s],” if any. *Id.*

#### **B. The Administrative Record for the PolyMet NPDES Permit**

140. Handeland, who had helped develop hundreds of administrative records, compiled the administrative record for the PolyMet NPDES permit by managing the file, keeping track of the permit and fact sheet, and filing the documents appropriately. (Tr. 955:11–957:20, 1003:1–1004:4.) Lotthammer had no role in compiling the administrative record. (Tr. 553:10–15.)

141. Handeland began compiling the record in January 2019, after the permit was issued. (Tr. 1004:5–9.)

142. Handeland asked Clark, her supervisor, for documents related to the administrative record. (Tr. 1004:14–17.) Udd also provided documents for the administrative record. (Tr. 925:19–25.)

143. Handeland did not ask Commissioner Stine or Lotthammer for documents because she had never spoken to them about the PolyMet NPDES permit. (Tr. 1004:25–1005:3, 1062:13–23.)

144. Handeland never asked Schmidt for documents when compiling administrative records. (Tr. 1004:18–19.) Handeland did not ask Schmidt for documents because “[i]f he had anything, it would be privileged.” (Tr. 1004:21–24.)

145. It was not Handeland’s usual practice to include handwritten notes in the administrative record, beyond notes used to develop the permit and respond to comments. (Tr. 1003:9–17, 1071:24–1072:3.)

146. MPCA staff had access to EPA’s NPDES Permit Writer’s Manual. (Ex. 679 at RELATORS\_0064476.) The Permit Writer’s Manual does not “contain legally binding requirements.” (*See* Ex. 679 at RELATORS\_0064476; *see also* Tr. 223:20–224:2 (conceding that manual does not have “the force of law), 334:15–335:1.) As “the permitting authority,” MPCA “may consider other approaches consistent with the CWA and EPA regulations.” (Ex. 679 at RELATORS 0064476.) EPA provided training on the manual in 2010 in St. Paul, before the PolyMet NPDES permitting process began. (Tr. 224:6–15.)

147. The Permit Writer's Manual indicates that the "[e]lements of the administrative records for a draft permit" should include "[c]orrespondence with the applicant and regulatory personnel" and "all meeting reports and correspondence with the applicant and other regulatory agency personnel... and records of telephone conversations." (Ex. 679 at 11-8.) The Manual further states that "[b]ecause correspondence is subject to public scrutiny, references or comments that do not serve an objective purpose should be avoided." (Ex. 679 at 11-8.)

148. The Permit Writer's Manual indicates that the "[e]lements of the administrative records for a final permit" should include "[a]ll elements for the draft permit administrative record" and "[a]ll comments received during the comment period" and "[r]esponses to comments." (Ex. 679 at 11-16.) The Manual also states that the agency response to comments should include a "[d]escription and response to all significant comments... raised during the public comment period or during any hearing." (Ex. 679 at 11-13.)

149. MPCA is not required to create records or documents that do not exist. (Tr. 1233:14-18.) In other words, MPCA was not obligated to document EPA's oral comments for inclusion in the administrative record. (Tr. 1331:6-10.) No one at MPCA ever instructed anyone to take notes during phone calls or meetings, document phone calls for the administrative record, save notes taken during phone calls or meetings, discard notes taken during phone calls or meetings, or withhold from production public notes regarding phone calls. (Tr. 1331:11-1332:5.)

150. The administrative record contains 321,837 pages. (Ex. 568.) It includes all documents used to develop the permit, all written comments received, responses to comments, and some emails and notes used to document or inform the permitting process or decision. (*See* 1003:9–1004:9; *see also* 1307:6–10.) It also includes the March 16 email between Lotthammer and Thiede. (Ex. 64A). The record does not include Lotthammer’s deleted emails (*see* Feb. 7, 2020 Stipulation, Exs. 58, 60–62, 333). Relators and MPCA obtained those deleted emails through Freedom of Information (FOIA) requests to EPA. (Tr. 77:3–8); *see also* Relators’ Letter to Judge Guthmann requesting leave to file motion for reconsideration at 1 (Oct. 28, 2019); Pre-Hearing Conference Tr. at 31:21–32:19, 34:16–19 (Nov. 13, 2019); Relators’ Motion in Limine for Spoliation Sanctions at 5 (Dec. 27, 2019.)

151. Documents received into evidence during the evidentiary hearing include the following documents that are in the administrative record:

| Exhibit            | Description  |
|--------------------|--|
| 32                 | 10/26/17 Email from Richard Clark                                    |
| 34                 | 1/17/18 Email  |
| 37                 | Email chain dated 1/17/18  |
| 64A                | Email chain dated 3/16/18  |
| 107                | Email chain dated 11/3/16  |
| 303A <sup>10</sup> | Email dated 11/3/16 from Kevin Pierard                               |
| 304                | 10/23/17 email from Ms. Kearney                                      |
| 306                | Letter dated 11/3/16 from EPA  |
| 307A               | Email dated 3/16/18 from Mr. Udd                                     |
| 324                | Stephanie Handeland handwritten notes dated 1/31/18, 2/13/18, 3/5/18 |

---

<sup>10</sup> *See* Stipulation, n.3 (Feb. 7, 2020).

| Exhibit | Description   |
|---------|---|
| 324A    | Stephanie Handeland handwritten notes dated 1/31/18, 2/13/18, 3/5/18 (WATER Bates number) |
| 325     | Stephanie Handeland handwritten Notes dated 11/1/17, 11/9/17                              |
| 325A    | Stephanie Handeland handwritten Notes dated 11/1/17, 11/9/17 (WATER Bates number)         |
| 326     | 1/30/18 Email from MPCA containing news release   |
| 334     | 3/26/18 WaterLegacy DPA Request   |
| 348     | NPDES/SDS Permit Program Fact Sheet   |
| 349     | Final Permit  |
| 350     | Findings of Fact, Conclusions of Law, and Order   |
| 1055    | Comments and Joint Petition for a Contested Case Hearing                                  |
| 1069    | October 2017 Updated NPDES/SDS Permit Application, Volume I                               |
| 1097    | 3/16/18 Fond du Lac Band's comment letter   |
| 1098    | 3/16/18 WaterLegacy's Comments and Petition for CCH                                       |
| 1118    | Binder containing permit and attendant documents  |
| 1133    | MPCA Response to Comments   |
| 2039    | 2018-03-19 Appointment for 2018-04-05 meeting   |

(Feb. 7, 2020 Stipulation.)

### III. Official Records Act and Data Practices Act

#### A. Applicable Law

152. The Official Records Act governs records that need to be maintained by state agencies. Under the Act, agencies must “make and preserve all records necessary to a full and accurate knowledge of their official activities.” Minn. Stat. § 15.17, subd. 1. Agencies are required to maintain a record of “information pertaining to an official decision, and not information relating to the process by which such a decision was reached.” *Kottschade v. Lundberg*, 160 N.W.2d 135, 138 (Minn. 1968).

153. The Minnesota Government Data Practices Act, Minn. Stat. § 13.01 *et seq.*, governs the storage of and public access to government records and data. *Webster v. Hennepin Cty.*, 910 N.W.2d 420, 427 (Minn. 2018); Minn. Stat. § 15.17, subd. 4

(providing that “[a]ccess to records containing government data is governed by sections 13.03 and 138.17”). “It establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.” Minn. Stat. § 13.01, subd. 3.

154. The Data Practices Act’s requirements are contained in Minnesota Statutes chapter 13. At its core, the Act provides that, upon request, persons “shall be permitted to inspect and copy public government data,” or be “provide[d] copies of public data” upon payment of the cost to do so. Minn. Stat. § 13.03, subd. 3. Responsible authorities under the Data Practices Act must “prepare a written data access policy and update it no later than August 1 of each year.” Minn. Stat. § 13.025, subd. 2. Responsible authorities must also “keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use,” and “insure that requests for government data are received and complied with in an appropriate and prompt manner.” Minn. Stat. § 13.03, subds. 1, 2.

155. The Data Practices Act provides for civil remedies, including an action for damages and injunction, whenever a government entity violates the Act. *See* Minn. Stat. § 13.08. The Act also contains an administrative remedy to compel compliance by filing a complaint with the Office of Administrative Hearings. *See* Minn. Stat. § 13.085.

156. Nothing in the Data Practices Act authorizes a sanction against the agency or a permittee under the Minnesota Administrative Procedure Act.

## **B. Data Management in This Case**

157. Relators introduced various exhibits related to MPCA's compliance with the Data Practices Act, including: MPCA's Records and Data Management Manual (Ex. 77); an intranet page regarding "Records Management" (Ex. 76); an intranet page regarding "Guide for members of the public requesting information" (Ex. 79); and an MPCA Records Retention Schedule (Ex. 71.)

158. Schmidt advised Udd, Clark, Handeland, and Foss on records retention policies. (Tr. 1134:21–1135:5.) Schmidt did not refer staff to the records retention schedule or the guide for members of the public. (Tr. 1136:12–17; Ex. 71.) He generally referred staff to the MPCA Records and Data Management Manual. (Tr. 1137:11–16; Ex. 77.)

159. "[A]ll [MPCA] employees are responsible for following the agency's Records and Data Management Policy" outlined in the Records and Data Management Manual. (Ex. 77 at 4.)

160. The Records and Data Management Manual required Commissioner Stine to "creat[e] and preserv[e] records that adequately and properly document the organization, functions, policies, decisions, procedures and essential transactions of the MPCA" and to "delegate[]" that responsibility "to the Data Services Section Manager." (Ex. 77 at 4; Tr. 386:22–387:3.)

161. Under the Records and Data Management Manual, "records" and "official records" are "broadly defined by statutes and regulation to include all recorded information, regardless of medium or format, made or received by the agency or its

agents under law in connection with the transaction of public business and either preserved or appropriate for preservation because of their administrative, evidential, fiscal, historical, informational or legal value.” (Ex. 77 at 7-8; Tr. 388:4–14, 389:17–390:3.) “Records are considered to be ‘created’ when they are written by or received at the agency.” (Ex. 77 at 24; Tr. 391:24–392:8, 488:11–24.)

162. In contrast, “nonrecords” are “[d]evelopment materials such as approaches to issues, drafts, notes, outlines, [and] preliminary calculations . . . used when preparing documents for official agency action that have been incorporated or summarized in a final product.” (Ex. 77 at 11.) “Nonrecords” do not need to be retained. (Ex. 77 at 11; Tr. 489:25–490:14; *see also* Ex. 76 at 3.)

163. MPCA staff understood that written comments received from the public or EPA could constitute official records. (Tr. 390:14–391:12.)

164. MPCA staff also understood that written communications, including emails, between EPA and MPCA could constitute official records. (Ex. 77 at 13; Tr. 390:10–13, 391:20–23.) “An e-mail is a record if it documents the agency mission or provides evidence of a business transaction or staff would need to retrieve the message to find out what had been done or to use it in other official actions.” (Ex. 77 at 21; Tr. 395:10–24.)

165. The Records and Data Management Manual required Lotthammer, as Assistant Commissioner, to “ensur[e] records and other types of required documentary materials are not unlawfully removed from the agency by current or departing officials. Employees or agents.” (Ex. 77 at 5; Tr. 387:4–24.)

166. The Records and Data Management Manual permitted the deletion of notes that do not qualify as personal papers:

Unless otherwise specified, notes that do not qualify as personal papers can be destroyed/deleted once they are incorporated into a final product. Examples include notes used to prepare meeting minutes, records of telephone conversations, decision memoranda or other documents when the gist of the discussion, conversation, direction or other activity is embodied in a document that states the official agency decision, position or outcome.

(Tr. 487:14–488:10; Ex. 77 at 11; *see also* Tr. 726:18–727:15.)

167. The Records and Data Management Manual also permitted the deletion of nonrecords, including materials used when preparing documents for official agency action that have been incorporated or summarized in a final product. (Tr. 488:25–490:14; Ex. 77.)

168. The Records and Data Management Manual states that “[r]ecords may be disposed of only as governed by the agency’s retention schedule and applicable laws regarding records disposition.” (Ex. 77 at 25; Tr. 396:20–397:3.)

169. MPCA maintained an intranet page devoted to “records management.” That page specifically addressed how to handle emails and advised MPCA employees to “[d]elete messages that are not records when no longer needed.” (Ex. 76 at 1; Tr. 398:3–6.) The intranet page stated that an email may constitute a record if it “[p]rovides key substantive comments on a draft action memorandum”; “[p]rovides documentation of significant MPCA decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) and not otherwise documented in MPCA files”; or “[c]onveys information of value on important MPCA activities.” (Ex. 76 at 2.)

170. MPCA's guide for members of the public requesting information under the Data Practices Act provides that "MPCA is not required to create data that do not already exist at the entity." (Ex. 79.) It also provides that "[b]efore requested data can be accessed by a requester, they may need to be reviewed by agency staff to ensure they do not contain any data that are classified by federal law, Minnesota statute, or temporary classification as not public." (Ex. 79.)

171. MPCA provided staff with a list of "Data Practices Dos and Don'ts." (Ex. 1003.) The very first "Do" on the list is to "Keep your files neat and discard any drafts and notes when you are through using them." (Ex. 1003; Tr. 492:7–17.)

172. It is MPCA's general practice when responding to data practices requests to exclude from the response documents after the date of the request. (Tr. 1338:20–1339:4.)

173. On March 26, 2018, Paula Maccabee, counsel for WaterLegacy, filed a data practice request on behalf of WaterLegacy, requesting "all records since January 2015 pertaining to," among other things:

[c]omments, letters, emails, memos, meeting notes, phone conversation notes or any other records a) from the U.S. EPA; or b) pertaining to written or oral communications or phone or in-person meetings with the U.S. EPA regarding any proposed or draft NPDES/SDS permit for the PolyMet NorthMet Project . . . .

(Ex. 334; Tr. 773:12–777:4.)

174. Lenny Richards, a senior office administrative specialist with MPCA involved in processing data practice requests, forwarded Maccabee's request to MPCA's mining sector. (Ex. 335; Tr. 752:15–18.) This was his practice with respect to all data

requests that identified the NorthMet Project as the site/facility of concern. (*See, e.g.*, Tr. 761:3–11, 778:11–779:2.)

175. On April 5, 2018, Maccabee again filed a data practice request on behalf of WaterLegacy, requesting “all Comments received by MPCA pertaining to the draft NPDES/SDS permit and/or draft Section 401 certification for the PolyMet NorthMet Project.” (Ex. 336; Ex. 437 (duplicate of Ex. 336); Ex. 389 (email transmission); Tr. 779:11–21.)

176. On April 16, 2018, Richards informed Maccabee that the March 26, 2018 requested information was available via an ftp link. (Ex. 391.)

177. On September 20, 2018, Maccabee again filed a data practice request on behalf of WaterLegacy, requesting, among other things, records since January 2018 pertaining to “[a]ny proposed or draft NPDES/SDS permit for the PolyMet NorthMet Project.” (Ex. 340.)

178. On October 14, 2018, Maccabee again filed a data practice request on behalf of WaterLegacy, requesting, among other things, records since January 2018 pertaining to “[a]ny proposed or draft NPDES/SDS permit for the PolyMet NorthMet Project.” (Ex. 341.) The request also stated that “WaterLegacy specifically requests that all documents not provided in response to our 9-20-2018 request be provided for inspection as soon as possible.” (Ex. 341; Tr. 787:1–16.)

179. On December 12, 2018, Maccabee again filed a data practice request on behalf of WaterLegacy, requesting, among other things, records “since WaterLegacy’s most recent DPA requests this fall” regarding, among other things, “[a]ny proposed or

draft NPDES/SDS permit for the PolyMet NorthMet Project.” (Ex. 346.) The request also stated: “WaterLegacy specifically requests that these documents along with any pertinent documents not provided in response to our 9-20-2018 and 10-14-2018 requests be provided immediately in electronic format or made available for inspection if no electronic copies exist.” (Ex. 346.)

180. On January 1, 2019, Maccabee sent a follow-up email and information request form, reiterating the December 12, 2018 data practice request, and requesting documents through the end of December 2018. (Ex. 414; Ex. 352.)

181. None of Maccabee’s data practices requests specified that they were continuing requests or that the requester wanted a monthly update, as other requesters would occasionally do. (Tr. 785:23–786:18.) It was MPCA’s policy that a records request applied only to documents in existence on or before the date of the request. (Tr. 1144:6–16.)

182. On February 3, 2019, Maccabee emailed Richards, asserting that she had received information “suggesting that there may be some additional data in the possession of the MPCA that would be responsive to my prior requests for information.” (Ex. 419.)

183. That same day, Maccabee filed a data practice request on behalf of WaterLegacy, requesting data not yet provided in response to WaterLegacy’s September, October, December, and January requests, “including data involving MPCA leadership or counsel,” relating to, among other things, “[a]ny comments or feedback provided by the U.S. EPA on the draft or pre-publication NPDES/SDS permit for the PolyMet NorthMet

Project, specifically including but not limited to those read or shown by screen shot to MPCA in April 2018 or in the 45-day pre-publication review period.” (Ex. 419; Ex. 354.)

184. Richards responded to Maccabee’s February 3, 2019 email, by copying and pasting responses from staff. (Ex. 419; Tr. 794:2–795:18.)

185. On March 18, 2019, Richards emailed Maccabee, informing her that “a staff person happened to be going through some of their files and discovered a set of documents that *should* have been provided in response to your 9-20-18 DPA request, but accidentally were not,” and attaching the documents to the email. (Ex. 421.) It was not unusual for staff to provide Richards with responsive documents after he had already responded to the Data Practices Act request, but it was unusual for that to occur months later. (Tr. 782:19–785; Tr. 798:2–5, 12–18.) Richards did not recall which staff person found the documents. (Tr. 798:19–23.)

186. On June 19, 2019, Kevin Reuthers filed a data practice request on behalf of Minnesota Center for Environmental Advocacy, requesting “any and all email communications sent and/or received by former Assistant Commissioner Shannon Lothammer [sic], as well as any and all associated or underlying emails from or to other recipients, during the period from March 1, 2018, to April 6, 2018.” (Ex. 356.) Richards is not sure to whom he forwarded this request. (Tr. 800:1–801:10.)

187. On November 14, 2019, Eric Lindberg filed a data practices request on behalf of Minnesota Center for Environmental Advocacy, requesting “any and all litigation hold notices and subsequent documents . . . related to the PolyMet NorthMet

project.” (Ex. 766.) On December 17, 2019, Richards sent Reuther an email with responsive documents. (Ex. 765.)

188. Richards processed all the above data practices requests related to the NorthMet Project following his standard, general practice, including by providing additional documents found after initially responding to the requests, something that “occasionally happens.” (Tr. 822:6–13; Ex. 400; Tr. 782:19–785.)

189. It is MPCA’s general practice for the records management staff or the staff attorney to send an email to everyone who may have responsive records about preservation requests and create a folder on an MPCA shared drive where everyone could deposit responsive records for compilation. (Court Ex. E (redacted version of Ex. 574) ¶ 23; Tr. 759:9–763:17, 1138:2–19.) The staff attorney would then review the records in the shared drive. (Court Ex. E (redacted version of Ex. 574) ¶ 23; Tr. 1138:20–23.)

190. Schmidt reviewed all of the documents on the shared drive when MPCA responded to WaterLegacy’s data practices requests. (Court Ex. E ¶ 23; Tr. 1139:19–1140:1.) Schmidt’s notes would not have been included in the Data Practices Act responses based on Schmidt’s understanding that they were privileged and constituted an exception to the Data Practices Act. (Tr. 1206:12–1207:9.) MPCA did not provide privilege logs in its responses to Data Practice Act requests. (Tr. 1233:5–12.)

191. Clark testified that he is not personally aware of any failures by MPCA to produce public responsive data in response to data practices requests regarding the NorthMet Project, although in one instance documents had been produced after they were later discovered. (Tr. 1339:5–16.)

### C. Deletion of MPCA files

192. Stine deleted some unnecessary files from his computer when he left office in January 2019. He did not delete anything related to PolyMet. (Tr. 448:21–449:8; 379:15–17.)

193. Before leaving MPCA in February 2019, Lotthammer returned her state-issued laptop and cell phone. (Tr. 544:11–15, 546:1–10.) Lotthammer went through her laptop and deleted emails and files that she “didn’t believe were records that needed to be preserved.” (Tr. 544:11–545:1.) Lotthammer deleted emails that were not records before leaving so that her files were organized and manageable. (Tr. 545:2–8.) She did not delete anything from her phone. (Tr. 546:1–13.)

194. Lotthammer deleted her March 13, 2018 email to Thiede (Ex. 333), along with certain follow-up emails (Exs. 60, 61 and 62; Tr. 371:6–14, 609:24–610:2, 642:8–643:2, 693:1–3.) She does not recall the date she deleted the March 13 email. (Tr. 371:15–23, 610:3–4, 623:19–25.) She believes that she deleted it before the NorthMet NPDES permit issued in December 2018 (Tr. 623:16–18), sometime after Thiede summarized the approach they had agreed to, and before MPCA received Relators’ Data Practices Act requests. (Tr. 623:19–25, 643:11–18.) At some point before Lotthammer left MPCA in February 2019, MPCA put a litigation hold in place for all documents received or sent by Lotthammer. The archived PST of Lotthammer’s email from the litigation hold did not contain these emails, meaning that they were deleted before the litigation hold went into effect. (Ex. 839 at 1; Pre-Hearing Conference Tr. at 95–96 (Nov. 13, 2019).)

195. Lotthammer believed that she could delete the email to Thiede because it was not something that in her “understanding of our data practices and records policies, that [she] needed to keep” (Tr. 610:6–11)—she believed it fell in the category of a “kind of a correspondence nature that isn’t a decision of the agency, it doesn’t document a decision or a practice or a final document of the agency.” (Tr. 611:16–22.) Rather, “it was a conversation.” (Tr. 693:16–19.) Thiede’s responsive email on March 15, 2018 summarized what the agencies “had agreed to” and was, to Lotthammer, “the final action or the decision.” (Tr. 693:20–23.) That email is in the administrative record (Ex. 64A), and it was also produced in response to Relators’ Data Practices Act requests (*see* Feb. 7, 2020 Stipulation).

196. Lotthammer did not consult any specific document before deleting the email to Thiede, but she was generally familiar with the agency’s data practices policies, including the “Dos and Don’ts.” She considered the email to be a “draft or note” that could be discarded. (Tr. 545:9–18, 717:20–21, 719:2–4, 719:12–14.) “Things like works in progress that were superseded or finalized in a decision . . . that is within the context of drafts.” (Tr. 720:8–16.)

197. To the best of Lotthammer’s knowledge, the March 13 email was the only document in writing that reflected MPCA’s request that EPA not send a written comment letter during the public comment period. (Tr. 613:1–9.)

198. Relators filed their motion seeking transfer to the district court on May 17, 2019. (Tr. 66:12–16.) There is no evidence that relevant documents were deleted after the time that Relators filed that motion. (*See, e.g.*, Pre-Hearing Conference Tr. at 982:16–

983:6 (Nov. 13, 2019); Tr. 484:15–17, 544:16–545:1, Tr. 623:16–25, 643:11–18, 848:8–9, 861:18–19, 1127:19–11:28:1, 1304:14–15.)

**D. Litigation hold**

199. MPCA does not usually issue litigation holds when it anticipates judicial review of an NPDES permit on an administrative record. (Tr. 1235:8–12.) Requiring holds for all, or nearly all, permits would be burdensome and expensive. Schmidt testified that in his experience, the prospect of judicial review on an administrative record did not trigger a litigation hold, because that would mean that the agency “would essentially retain every document or every decision it ever made, which is not a feasible approach to document retention” and it “would create a huge burden on the agency.” (Tr. 1235:5–21.) Nor would the prospect of a request for a contested case hearing cause MPCA to issue a litigation hold, in his experience, and he does not know of any occasion when the prospect of a lawsuit under the Minnesota Environmental Rights Act caused MPCA to issue a litigation hold (Tr. 1236:11–25, 1237:1–18.)

200. When Lotthammer left MPCA, there was not a legal hold in place related to the NorthMet NPDES permit, although there were legal holds related to other matters. With respect to those other matters, Lotthammer “made sure to alert the office staff” that she had “data that was subject to a legal hold and that that needed to be preserved.” (Tr. 551:4–17; *see also* Ex. 839 at 1.)

201. The day that the Court of Appeals granted that motion and referred this matter to the district court, June 25, 2019, a litigation hold went into effect. (Tr. 63:4–7.)<sup>11</sup>

202. The next day, MPCA’s head legal counsel sent an email to all MPCA staff stating that “all MPCA employees must immediately preserve all agency data associated with the NPDES permit for PolyMet’s NorthMet Project.” (Ex. 765; Tr. 803:2–11.)

### **E. Forensic Search**

203. The Court ruled on August 7, 2019 (and in the court’s written order that followed dated September 9, 2019), that certain discovery would be allowed to proceed, including up to 25 requests for documents by Relators to MPCA. Relators served document requests on MPCA, including requests for “electronically stored information” defined as “all documents of any kind, without limitations, stored at any time in a computer or other electronic means, including metadata, erased, fragmented or damaged data.” (Pre-hearing Conference Tr. at 97 (Nov. 13, 2019).) MPCA searched for documents but did not hire a third-party to conduct a forensic search. (Pre-hearing Conference Tr. at 97–98 (Nov. 13, 2019).) On November 13 the court granted Relator’s motion to conduct a forensic search of certain MPCA desktop hard drives and servers. (Pre-hearing Conference Tr. at 107–109 (Nov. 13, 2019); Amended Order Setting Evidentiary Hearing at 2 (Nov. 19, 2019).)

---

<sup>11</sup> Relators filed their transfer motion on May 17, 2019, approximately one month earlier. Tr. 66:12–16.

204. In November 2019, MNIT began working with Michael Gutierrez, the director of digital forensics for XACT Data Discovery, who had been retained to perform a forensic search of the computers and devices of Commissioner Stine, Foss, and Lotthammer. (Tr. 838:1–22, 840:2–11, 1082:20–1083:3.)

205. Stine’s computer had been recycled as part of the State’s annual recycling of old computers. (Tr. 841:3–11, 1086:3–7; Ex. 839 at 1.) Usually, when a user leaves the agency, data will be wiped and the machine will be reimaged. (Tr. 842:5–10.)

206. MNIT had a PST file with Lotthammer’s emails from the unrelated litigation hold that was in effect before she left MPCA in February 2019. (Tr. 842:22–24; Ex. 839 at 1.) MNIT received the PST file in August 2019. (Tr. 843:13–18.)

207. MNIT also had Foss’s computer. (Tr. 843:3–9; Ex. 839 at 1.)

208. MNIT gave the files and devices that they had to an XACT representative. (Tr. 843:24–844:10, 845:10–13; Ex. 839.)

209. MNIT used its standard practices for imaging devices—there was nothing unusual about this particular case. (Tr. 845:3–9.)

210. Gutierrez evaluated a forensic copy of the network folders of Lotthammer and Commissioner Stine, a copy of Lotthammer’s emails, Foss’s hard drive, and Lotthammer’s Surface Pro. (Tr. 1086:12–1089:4; Ex. 839.)

211. Gutierrez retrieved and processed approximately 107,500 files for search terms to be applied. (Tr. 1097:20–1098:24; Ex. 839 at 4.)

212. Gutierrez did not uncover any evidence of intentional wiping of data in the forensic search he conducted and was not asked to assess intentional wiping. (Tr. 1100:3–

13.) He also reached no determination as to when certain documents were deleted or by whom, which would have required the parties to identify specific recovered files for Gutierrez to analyze further. (Tr. 1100:16–19.) Relators and MPCA received copies of deleted emails that had been sent between MPCA personnel and EPA personnel through Freedom of Information Act requests to the federal government. (Tr. 77:3–20; *see also* Relators’ Letter to Judge Guthmann requesting leave to file motion for reconsideration at 1 (Oct. 28, 2019); Pre-Hearing Conference Tr. at 31:21–32:19, 34:16–19 (Nov. 13, 2019); Relators’ Motion in Limine for Spoliation Sanctions at 5 (Dec. 27, 2019); Exs. 58, 60–62, 333.)

Based on the foregoing Findings of Fact, and all the files, records, and proceedings, the Court makes the following Conclusions of Law:

### **CONCLUSIONS OF LAW**

#### **No irregularities in procedure occurred.**

1. An “irregularity in procedure” is a violation of statutorily defined procedures or the agency’s own rules and regulations that define the decision-making process. *See Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977) (evaluating irregularities in procedure requires “determin[ing] whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process.”); *see also In re Application of Lecy*, 304 N.W.2d 894, 900 (Minn. 1981) (same); *People for Env’t Enlightenment and Responsibility (PEER), Inc. v. Minn. Env’t Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978) (same); *In re Koochiching County*, No. A09-381, 2010

WL 273919, at \*9 (Minn. Ct. App. Jan. 26, 2010) (distinguishing *Hard Times Cafe* because in case at hand the relator “provided no similar rules governing the [agency] or the commissioner.”); *In re North Metro Harness, Inc.*, 711 N.W.2d 129, 138 (Minn. Ct. App. 2006) (distinguishing *Hard Times Cafe* because in the case at hand relator offered “no similar guidelines that the commission is required to use in making its decisions.”); *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165 (Minn. Ct. App. 2001) (stating that “the city council violated both the procedures set forth in the Manual and the explicit instructions of the city attorney”); *Matter of Dakota Cty. Mixed Mun. Solid Waste Incinerator*, 483 N.W.2d 105, 106 (Minn. Ct. App. 1992) (stating that the inquiry into “irregularities in procedure” under Minn. Stat. § 14.68 before the district court is “limited to information concerning the procedural steps required by law”).

2. In other words, an “irregularity in procedure” must be more than an unusual occurrence—it must be a failure to follow decision-making procedures prescribed by statute, regulation, or rule, or the use of a procedure proscribed by statute, regulation, or rule.

3. An “irregularity in procedure” must relate to the permit under review. (Tr. 51:3–6.) Accordingly, no irregularities in procedure could have occurred before July 11, 2016—the date on which PolyMet filed its permit application. (Tr. 51:8–21.) Likewise, no irregularities in procedure could have occurred after December 20, 2018—the date on which MPCA issued the permit.

4. Relators also do not allege that any irregularities occurred after April 5, 2018, except the failure to properly reference or characterize the events of April 5, 2018.

(Tr. 1050–1055.) “[T]he only events that constitute procedural irregularities are events on April 5, 2018 and earlier, or the failure to properly reference or characterize events April 5, 2018, and earlier in documents produced after that date.” (Tr. 1051:21–25.)

5. An “irregularity in procedure,” in this case, must relate to MPCA’s actions. (Tr. 52:15–18; Relators’ Trial Br. at 3 n.3.) An irregularity in procedure cannot relate to the procedural and substantive actions of the Environmental Protection Agency. (Tr. 52:15–18.) Similarly, EPA’s decision not to comment in writing on the NPDES permit cannot serve as the basis of an irregularity in procedure. (Tr. 256:23–257:1 (“[F]rom the perspective of Relators, what EPA decided and why they decided is, A, impenetrable to us and, B, outside the scope of this proceeding.”).) It is normal and acceptable for EPA to recognize that written comments are “subject to public scrutiny,” and given that, for it to avoid comments that do not serve an objective purpose. (Ex. 679 at 11–8.)

6. It was not an “irregularity in procedure” for MPCA to process PolyMet’s permit application because EPA did not comment within 20 days of receiving PolyMet’s October 2017 revised permit application. Under the MOA, MPCA could assume that the revised permit application was complete.

7. In addition, EPA’s original “deficiency letter,” based on the original June 2016 permit application, was untimely under the MOA. Because EPA sent that letter more than 20 days after it received PolyMet’s original application, MPCA was under no procedural duty to wait for additional correspondence from EPA before continuing to process PolyMet’s applications.

8. Relators failed to meet their burden of proving that MPCA violated statutorily defined procedures or the agency's own rules and regulations that define the decision-making process for approving the NPDES permit.

9. Relators failed to produce testimony identifying any statute, regulation, or provision of the MOA that prohibited MPCA and EPA from agreeing to an arrangement where EPA would not submit written comments on the draft permit during the public notice period. (*See, e.g.*, Tr. 321:13–322:13, 337:14–338:15, 341:7–18, 342:9–343:13, 692:22–25, 1063:12–1064:10, 1232:1–7, 1343:17–1344:2; Exs. 2009, 2010.)

10. Relators failed to produce testimony identifying any statute, regulation, or provision of the MOA that prohibited MPCA from listening to EPA staff read a draft comment letter to MPCA during a conference call to ensure that MPCA fully understood EPA staff's questions and concerns as MPCA developed the pre-proposed permit. (*See, e.g.*, 338:21–339:1, 339:13–21, 939:18–940:9, 1044:2–4, 1331:2–14; Ex. 2010.)

11. Relators failed to produce testimony identifying any statute, regulation, or provision of the MOA that required MPCA to document what Pierard read to MPCA or address it in the response to comments. The contents of the draft comment letter Pierard read to MPCA are not "comments" as defined by federal law. Under federal law, "comments on [a] draft permit[], other than those made orally at a public hearing, are to be submitted in writing." *In re Avon Custom Mixing Servs., Inc.*, 2002 WL 2005529, at \*5 (E.A.B. Aug. 2002); 40 C.F.R. § 124.11. Only oral comments made "at a public hearing" that are "taped or transcribed" or later "summarized in writing and submitted to the Region" by the commenter are "comments" that must be documented in the

administrative record and addressed in the response to comments. *Id.* MPCA is not required to create “comments” out of informal feedback that it receives, when a formal comment has not otherwise been submitted to the agency for consideration. *Id.* (stating that “[i]t is [the commenter’s] obligation, not the Region’s to demonstrate that [the commenter] has satisfied th[e] burden” of submitting comments in the proper form).

12. Relators failed to produce testimony identifying any statute, regulation, or provision of the MOA that prohibited the arrangement that MPCA and EPA agreed to that: after MPCA completed its responses to public comments, MPCA would develop and deliver a pre-proposed permit to EPA, and then EPA would have 45 days to review the pre-proposed permit and MPCA’s responses to public comments and provide written comments on the pre-proposed permit to MPCA. (Ex. 64A.) This arrangement was set forth in the administrative record. (Ex. 64A.)

13. Any failure by MPCA to properly reference or characterize the events of April 5, 2018 does not constitute an “irregularity in procedure.” Such supposed failures to reference or characterize the events do not involve the requisite procedures that “enter into the fundamental decision-making process.” *Mampel*, 254 N.W.2d at 378.

14. An “irregularity in procedure” does not mean an irregularity in substance.

15. The Minnesota Government Data Practices Act does not set forth specific procedural requirements for approving a permit. *See* Minn. Stat. § 13.01 *et seq.* Nor does the Official Records Act. Minn. Stat. § 15.17. Neither act prescribes any procedures for permit approval that enter “into the fundamental decision-making process.” *Mampel*, 254 N.W.2d at 378. Nor does either act proscribe any such procedures.

16. An MPCA staff person's decision to withhold documents based on a good faith assertion of privilege is not an irregularity in procedure.

17. An MPCA staff person's decision to delete documents based on a good faith interpretation of a document retention policy is not an irregularity in procedure.

18. MPCA did not violate any statute, rule, regulation, or established procedure. Accordingly, there are no irregularities in procedure.

**Remedies for violations of the Official Records Act and Data Practices Act are beyond the scope of this proceeding.**

19. This Court's jurisdiction is limited to determining whether any irregularities in procedure occurred. Minn. Stat. § 14.68. This Court does not have jurisdiction to decide whether MPCA violated the Official Records Act or Data Practices Act. *Id.*

20. In any event, MPCA did not violate the Official Records Act or Data Practices Act.

21. MPCA retained documentation of all official decisions. MPCA did not need to retain "information relating to the process by which such a decision was reached" under the Official Records Act. *See Kottschade*, 160 N.W.2d at 138.

22. MPCA responded to the Data Practices Act requests, releasing non-privileged materials that remained in its custody or control.

23. The Data Practices Act does not require the release of attorney-client privileged materials or attorney work product. *Kobluk v. Univ. of Minnesota*, 574 N.W.2d 436, 439 (Minn. 1998). MPCA made a good faith assertion of privilege in withholding

Schmidt's notes from calls with EPA, since the notes contain mental impressions, conclusions, and opinions of counsel.

24. Even if MPCA did violate the Data Practices Act, a violation of the Data Practices Act does not constitute an "irregularity in procedure" under Section 14.68. The Data Practices Act does not prescribe or proscribe any procedures for permit approval that enter "into the fundamental decision-making process." *Mampel*, 254 N.W.2d at 378.

25. The remedies available to a litigant for a violation of the Data Practices Act are the civil remedies outlined in and must be pursued through an action under the Data Practices Act. *See* Minn. Stat. § 13.08. Where a statute expressly provides remedies, a court should not read other remedies into the statute.

26. The Data Practices Act provides Relators with adequate civil remedies. *See* Minn. Stat. § 13.08. Relators may not elevate alleged violations of the Data Practices Act into "irregularities in procedure" under Section 14.68. Remedies under the Data Practices Act are beyond the scope of this proceeding.

**No spoliation occurred and an adverse inference is unwarranted.**

27. Up until the Court of Appeals granted the transfer order, MPCA had no obligation to save documents other than those that constituted "records."

28. MPCA did not delete any "records." Accordingly, no spoliation occurred.

29. MPCA promptly placed a litigation hold on June 25, 2019, when the Court of Appeals issued its order transferring the case to the district court. There is no evidence

that MPCA deleted any materials relevant to this Section 14.68 challenge after that date.<sup>12</sup>

30. Even if MPCA did delete records before implementing the June 2019 litigation hold, an MPCA staff person's decision to delete documents based on a good faith interpretation of a document retention policy does not amount to spoliation. Accordingly, no spoliation occurred.

31. Even if spoliation occurred, an adverse inference would not be the proper remedy for spoliation in this context. An adverse inference would unfairly prejudice PolyMet. The proper remedies for spoliation in this context would be the civil remedies outlined in the Data Practices Act.

32. Even if an adverse inference were an appropriate remedy, Relators are not entitled to an adverse inference. The fact of the arrangement between MPCA and EPA is in the administrative record. And Relators have failed to point to any relevant facts or documents that should have been, but were not, in the administrative record due to MPCA's deletion of documents. Accordingly, Relators failed to identify any gaps in evidence for which an adverse inference would be appropriate. (*See* Jan. 17, 2020 Order; Tr. 20:1–21:3.)

33. Relators also did not prove that any MPCA personnel deleted data after receiving a Data Practices Act request.

---

<sup>12</sup> Nor is there any evidence that MPCA deleted materials relevant to this Section 14.68 appeal after Relators filed their transfer motion, on May 17, 2019.

**ORDER**

**IT IS HEREBY ORDERED** that the foregoing findings of fact and conclusions of law be filed with this District Court and then submitted to the Minnesota Court of Appeals.

Dated: \_\_\_\_\_, 2020

---

The Honorable John H. Guthmann  
Chief Judge of District Court