

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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, Babbitt,
Minnesota.

Court File Number: 62-CV-19-4626

Honorable Judge John H. Guthmann

**PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER**

FINDINGS OF FACT

I. BACKGROUND

A. The Parties

1. The Minnesota Pollution Control Agency (“MPCA”) is a governmental department of the State of Minnesota that has the authority to issue federal Clean Water Act (“CWA”) National Pollutant Discharge Elimination System (“NPDES”) permits in Minnesota, subject to oversight and NPDES permit veto authority of the U.S. Environmental Protection Agency (“EPA”).

2. Poly Met Mining, Inc. (“PolyMet”) is a mine development company and the applicant for the NPDES permit at issue in this case for the NorthMet copper-nickel mine project (“NorthMet Project” or “Project”). PolyMet’s conduct is not at issue in the proceeding before this Court. Tr. 81:7-8.

3. Center for Biological Diversity, Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy, WaterLegacy, and the Fond du Lac Band of Lake Superior Chippewa (collectively, “Relators”), appealed the MPCA’s decision to issue an NPDES permit for the NorthMet Project. Minnesota Court of Appeals, Case Nos. A19-0112, A19-0118, A19-0124, Order at 1, (June 25, 2019).

B. NPDES Permitting Process

4. An NPDES permit is a permit that authorizes under the CWA the discharge of pollutants to waters of the United States from a point source. Tr. 99:7-11; 33 U.S.C. §§ 1311(a), 1342.

5. The EPA is responsible for oversight and enforcement of the CWA, but EPA may approve a state NPDES program under which the state may issue NPDES permits for point source discharges within the state. Tr. 100:5-9; 33 U.S.C. § 1342(b).

6. MPCA and EPA have entered into a memorandum of agreement specifying their interaction regarding operation of the State’s NPDES program. Tr. 101:5-10; Ex. 328.

7. In general, MPCA’s permitting process begins when it receives an NPDES application, which it reviews for completeness. It also submits copies of the complete application to EPA for its own completeness review. Once MPCA determines the application is complete, it assembles a permitting team to develop a draft permit that is subject to public notice for a minimum of 30 days. MPCA then receives and responds to comments received during the public notice period and makes appropriate adjustments to the draft permit. A proposed final permit is then submitted to the EPA for review. Following EPA review and

absent any objection from the EPA, MPCA then issues the NPDES permit. Tr. 1262:8-17; Ex 328 at 9-10.

8. The NPDES Permit Writers' Manual is a general reference for permitting authorities and provides guidance that explains the core elements of an NPDES permit. Tr. 231:14 – 232:1; Tr. 333:10 – 335:1; Ex. 679. The NPDES Permit Writers' Manual, however, does not have the force and effect of law. Tr. 223:20 – 224:2.

i. The Memorandum of Agreement between MPCA and EPA

9. The Memorandum of Agreement (“MOA”) between the EPA and MPCA lays out the process for MPCA to provide a proposed NPDES permit to EPA for review. Ex. 328, MOA. In relevant part, the MOA provides:

(1) At the time a public notice required by Section 124.32 of the Guidelines is issued, the Director shall transmit one copy of the NPDES public notice, fact sheets, proposed NPDES permit and a list of all persons receiving the public notice, fact sheets and proposed NPDES permit, together with a description of any other procedure used to circulate the public notice to the Regional Administrator, Attention: NPDES Permit Branch. The information transmitted with the proposed permit shall include any and all terms, conditions, requirements or documents which are part of the proposed NPDES permit or which affect the authorization by the proposed NPDES permit of the discharge of pollutants.

(2) After a public notice period has expired, the Agency shall consider all comments received as a result of the public notice and may modify the proposed NPDES permit as it considers appropriate. Public hearings may be held as provided for in Section 124.36 of the Guidelines. If a public hearing is held, the agency shall consider all comments and may modify the proposed NPDES permit as it considers appropriate. If a public hearing is requested and should the Agency decide not to hold a public hearing, the Director shall provide the

Regional Administrator and all parties requesting the hearing, a written explanation of why the hearing was not held before submitting the proposed NPDES permit to the Regional Administrator for approval.

(3) If a proposed NPDES permit issued with a public notice is modified as a result of the public notice or public hearing, a revised copy of the proposed NPDES permit shall be transmitted to the Regional Administrator, Attention: NPDES Permit Branch, together with a copy of all statements received from the public notice, and where a public hearing is held, a summary of all objections, with a request for approval to issue the NPDES permit. In lieu of a summary, the Director may provide a verbatim transcript of the entire public hearing.

(4) If a proposed NPDES permit is not revised after a public notice or where held, a public hearing, the Director shall notify the Regional Administrator, Attention: NPDES Permit Branch, by letter that the proposed NPDES permit issued with the public notice has not been revised and request approval to issue the NPDES permit. The request for approval shall include a copy of all written statements received from the public.

(5) The Regional Administrator shall respond within 15 days from the date of receipt of the letter requesting final approval to issue or deny the proposed permit. The Regional Administrator pursuant to any right to object provided in Section 402(d)(2) of the Act, may comment upon, object to or make recommendations with respect to the proposed NPDES permit. If no written comment is received by the Agency from the Regional Administrator within 15 days, the Director may assume, after verification of receipt of the proposed permit, that the EPA has no objection to the issuance of the NPDES permit.

Ex. 328, MOA at pp. 9-11, § 124.46.

10. EPA can comment on any permit at any time during the permitting process without limitation. Tr. 176:25 – 177:14; 325:19 – 326:10. The MOA does not say whether EPA may comment before, during, or after the public comment period and does not preclude

EPA from doing so. Tr. 108:4-7; 320:20 – 321:21. In fact, nothing in the MOA empowers MPCA to prevent EPA from commenting in writing on a permit at any time. Tr. 322:10-13; 579:1-7; 497:17 – 498:10.

11. The MOA anticipates that EPA will receive the public notice version of the permit and follow the MOA for that permit. The MOA does not say whether EPA must or should review or comment on the public notice version of the permit. The proposed final permit is the point at which the MOA provides that EPA would go on record as objecting or not objecting. Tr. 124:16-22; Ex. 328, MOA at p. 10-11, § 124.46(5). EPA may object to a proposed final permit if the terms of the permit are not consistent with the CWA. Tr. 108:14 – 109:22.

C. EPA's Role and Past Practices

12. Normally, MPCA does not interact with EPA when MPCA is developing an NPDES permit. Tr. 1264:24 – 1265:2. When MPCA does interact with EPA about an NPDES permit, it would typically be a phone call from MPCA to EPA technical staff. Tr. 1265:20-25.

13. EPA can make comments at any stage of permit development, both, inside and outside the comment period. Tr. 176:25 – 177:14; 325:19 – 326:10. EPA has commented on other MPCA-issued NPDES permits at various stages in the permitting process. Tr. 111:22 – 116:1; 118:6 – 128:14; *see generally* Exs. 164, 185, 217, 218, 264, 530, 531, 532, 706. The entire permit development process between EPA and the state is set up to work out issues at the earliest and lowest level possible to make the permit acceptable to EPA and thus avoid an EPA objection. Tr. 110:9-17.

14. Most of the time that EPA has commented on a permit, EPA has provided comments earlier than the public notice version of the permit to allow states to address any “big-ticket issues” in advance of public notice. Tr. 111:22 – 112:17.

15. With complicated permits like the PolyMet Permit, EPA’s preference was to get the draft permit before public notice so that EPA could review it and make any major comments at that time. Tr. 123:24 – 124:3.

D. The PolyMet Project

i. The proposed mine

16. The NorthMet Project includes a proposed copper-nickel mine and associated processing facilities. It is the first copper-nickel mine to go through the permitting process in Minnesota history. Tr. 931:18-20.

17. The Project consists of the Mine Site, the Plant Site, and the Transportation and Utility Corridors that connect them. The Mine Site mining area is a relatively undisturbed site that will be developed into an open pit mine. It is located approximately six miles south of the City of Babbitt and two miles south of the Northshore Mining Company’s active, open taconite mine. The Plant Site ore processing area is located at the former LTV Steel Mining Company / Cliffs Erie L.L.C. taconite processing facility and will include refurbished and new ore processing and waste disposal facilities. Ex. 350 (NorthMet FOF) at ¶¶ 1, 4-5.

18. The PolyMet Project also has several different wastewater streams and several seepage collection areas. Ex. 350 at ¶¶ 6-7.

19. An NPDES permit for the PolyMet Project would authorize the discharge of pollutants to the Partridge and Embarrass Rivers and adjacent wetlands in Minnesota. Tr. 99:12-24.

ii. Environmental permitting requirements and public review

20. The environmental review process for the NorthMet Project had been ongoing for ten years when PolyMet applied for an NPDES permit. Tr. 495:11-24; Ex. 350 at ¶ 2.

II. THE PERMIT DEVELOPMENT PROCESS

A. Permit Application

21. PolyMet submitted an application for an NPDES permit for the NorthMet Project on July 11, 2016. Ex. B, Stipulation No. 1; Tr. 151:20-24; Ex. 1069.

22. It was not EPA's normal practice to review NPDES permit applications during the time that Mr. Pierard was NPDES program manager. He can only remember one other time that EPA did that. Tr. 150:19 – 151:6. EPA did not submit written comments on PolyMet's initial July 2016 application within 20 days, or even within 60 days, of the submittal of that application. Tr. 1340:18 – 1341:14. Nor did EPA submit written comments within 20 or even 60 days of the revised October 2017 application. Tr. 1341:15-22. Under the MOA, MPCA may assume that EPA has no completeness objection if EPA does not comment within 20 days of receiving a copy of the permit from MPCA. Ex. 328, MOA at p. 4, § 124.22.

23. On November 3, 2016 EPA sent a letter to MPCA identifying deficiencies in the original PolyMet permit application. Ex. 306; Tr. 1275:23 – 1276:12.

24. After receipt of EPA's letter dated November 3, 2016, PolyMet updated its permit application in November 2016. Tr. 1280:13-21.

25. PolyMet submitted a revised permit application on October 23, 2017. Tr. 1280:3-9; Exs. 32, 304, 1069. This revised application was updated to take into account the discussions that MPCA had with EPA and with PolyMet. Tr. 1340:6-13. In October 2017, MPCA informed EPA that PolyMet had submitted the updated application. Tr. 153:18-24; Ex. 325.

B. Roles and professional backgrounds of MPCA officials and staff

i. John Linc Stine

26. John Linc Stine graduated from the University of Minnesota in 1980 with a degree in soil and water resource management. Tr. 483:1-7. He then worked at the Department of Natural Resources ("DNR") as a hydrologist and later as an administrator of the section dealing with the rules and regulations for DNR waters, permitting, and land use programs. Tr. 483:22-25. From approximately 2005 until 2011, Mr. Stine worked at the Minnesota Department of Health as an assistant director, director and then assistant commissioner of the Environmental Health Division. Tr. 484:2-10.

27. Mr. Stine served as a deputy commissioner for MPCA from March of 2011 until May of 2012 when Governor Dayton appointed him to be the commissioner of the agency. He served in that capacity until he left MPCA in January of 2019. Tr. 484:11-17.

ii. Laura Bishop

28. Laura Bishop is the current Commissioner for MPCA and has served in that role since January 7, 2019. Tr. 736:1-6.

iii. Shannon Lotthammer

29. Shannon Lotthammer earned a bachelor's degree in biology from the University of Minnesota–Duluth and a master's degree in ecology with an emphasis on aquatic ecology from the University of Minnesota–Twin Cities. Tr. 540:5-9.

30. Ms. Lotthammer's entire career has been in public service. Tr. 659:4-6. She worked at MPCA from 1994 to 2003 and from 2006 to 2019. Tr. 540:14 – 542:11. She was the Assistant Commissioner for Water Policy at MPCA from February 2018 until February 2019, when she became an assistant commissioner at the Department of Natural Resources.

Id.

iv. Jeff Udd

31. Mr. Udd earned a Bachelor of Science degree in chemical engineering from the University of Minnesota Duluth in 1997. Tr. 847:13-17. He began working for MPCA in 2002. Tr. 847:22-24. He has been the Manager of the Water and Mining Section in the Industrial Division of MPCA since January 2018. Tr. 846:21 – 847:2.

v. Richard Clark

32. Richard Clark handled project management and technical support throughout the Project NPDES permit process. Tr. 927:15-19.

33. Mr. Clark has spent most of his career working at MPCA, starting in 1986 as a pollution control specialist. Tr. 1258:23 – 1259:17.

34. In 2015, Mr. Clark was promoted to his current position as supervisor in the Mining Sector in the Industrial Division at MPCA. Tr. 1259:2-21.

35. Mr. Clark has worked on at least 100 NPDES permits as a technical staffer, and approximately 5 to 10 (all mining related) as a supervisor. Tr. 1260:2-11.

vi. Stephanie Handeland

36. Stephanie Handeland earned a Bachelor of Science degree in geology with an emphasis in hydrogeology from Winona State University. Tr. 949:17-19. Ms. Handeland is currently employed by MPCA and has been since 1995. Tr. 949:9-14, 22-24. Her current job title is Environmental Specialist, 4, Permit Writer. Tr. 949:25 – 950:2.

37. In her role as a permit writer, Ms. Handeland develops and writes NPDES permits for mining wastewater, including reviewing and responding to comments on the drafts. Tr. 950:11-21.

38. She has worked on 300 or more NPDES permits at MPCA. Tr. 950:22-24.

39. She has been trained with respect to the EPA NPDES Permit Writer's Manual. Tr. 952:8 – 953:2.

40. Stephanie Handeland was the lead permit writer for PolyMet's NPDES permit. Tr. 927:20.

vii. Michael Schmidt

41. Michael Schmidt received a Bachelor of Arts from the University of Iowa and a Juris Doctorate from the University of Minnesota school of law. Tr. 1120:11-13.

42. After law school, Mr. Schmidt worked as an attorney with the Minnesota Center for Environmental Advocacy from approximately June 2009 through February 2015. Tr. 1120:18-20.

43. Mr. Schmidt then worked as a staff attorney with the MPCA from March 2015 through February 1, 2019. Tr. 1120:21-25. In this position, he focused mainly on water issues, including industrial wastewater, underground storage tanks, rulemaking, permitting and enforcement. Tr. 1121:1-7.

44. Approximately 30 to 40 percent of Mr. Schmidt's job at MPCA was devoted to working on NPDES permits, including the NPDES permitting for the NorthMet Project and the Minntac mine permit. Tr. 1121:21-25; 1123:2-3.

C. Roles and professional backgrounds of EPA officials and staff

i. Kevin Pierard

45. Kevin Pierard was the EPA NPDES program chief during the review of the Project's NPDES permit. Tr. 132:4-7.

46. Mr. Pierard is currently employed at the New Mexico Environmental Department as the Chief of the Hazardous Waste Bureau. Tr. 96:12-16.

47. Mr. Pierard was previously employed as the municipal team manager for the National Pollutant Discharge Elimination System program at the New Mexico Environment Department. Tr. 96:19-24.

48. Mr. Pierard worked for the Environmental Protection Agency ("EPA") for 36 years. Tr. 96:18 – 97:5. Mr. Pierard spent his entire EPA career at EPA Region 5, which is

the EPA Regional Office that exercises EPA oversight in the State of Minnesota. Tr. 97:6-14.

49. Except for his last few months with EPA, Mr. Pierard worked for the nine years prior to his retirement from the EPA as the Chief of the NPDES Programs Branch in Chicago. Tr. 97:6-14.

50. Mr. Pierard was involved with the implementation of the Clean Water Act and its regulations at EPA Region 5 for approximately 25 years. Tr. 98:12-16.

51. The states in EPA Region 5 include: Illinois, Indiana, Ohio, Minnesota, Wisconsin, and Michigan. Tr. 98:25 – 99:3.

52. Part of Mr. Pierard's role at EPA was to make sure that states followed the requirements for issuing an NPDES permit under both that state's memorandum of agreement with EPA and the Clean Water Act regulations. Tr. 101:20-25.

ii. Chris Korleski

53. Chris Korleski was the Water Director at EPA Region 5 during a portion of the Project's NPDES permitting process. Tr. 560:4-5; 1155:22-25. During that period Mr. Korleski was Mr. Pierard's direct supervisor. Tr. 157:10-16.

iii. Cathy Stepp

54. Cathy Stepp was the Regional Administrator for EPA Region 5 during the Project's NPDES permitting process. Tr. 178:4-11.

iv. Kurt Thiede

55. Kurt Thiede was Cathy Stepp's chief of staff during the Project's NPDES permitting process. Tr. 567:17-20.

D. Technical complexity and project controversy

56. The NorthMet Project "was more complex than what [MPCA had] worked on before." Tr. 932:12-13; 962:15-25; 660:11-13; 1334:14-18. Mr. Udd observed that it included a "very complex wastewater treatment process" and a "fairly complex series of seep collection and liner requirements."

57. In 2015, during the project's earlier environmental review, the public had submitted "thousands, tens of thousands" of comments. Tr. 931:4-9.

58. Considering that experience, MPCA "expected a lot of comments because it was a very high-profile project." Tr. 931:13-14. The project received 686 public comments. Ex. 350 at ¶ 23. Mr. Udd testified that that number was less than what MPCA had expected, but "the types of comments that [MPCA] got were very detailed and required substantial work to address." Tr. 934:9-15.

59. The project's complexity placed "an extremely high workload" on the staff (Clark, Handeland, and Schmidt). Tr. 932:14-21. It took the MPCA staff about seven months to respond to the public comments and make changes to the public notice draft of the permit. Tr. 934:20-25.

E. MPCA and EPA meetings

i. The frequency and purpose of the calls

60. MPCA had extensive interactions with EPA regarding the terms of the NorthMet Project—to a much greater extent than other NPDES permits. Tr. 503:3 – 504:1; 660:19-23; 1041:12-19.

61. MPCA asked EPA to be involved in evaluating the NPDES permit for the PolyMet project because it thought the process would be more streamlined if EPA was involved from the beginning. Tr. 135:4-10.

62. EPA discussed the NPDES process for the PolyMet permit with MPCA even before the NPDES application was submitted. Tr. 135:11-15. As a general matter, EPA's goal in meeting with permitting agencies was to avoid later EPA objections to issuance of the final proposed permit. Tr. 330:11-16.

63. At MPCA's request, EPA and MPCA had frequent phone conversations regarding the PolyMet permit, approximately every two weeks in 2016-17, to get EPA's insight and talk through the more difficult and complicated areas of the permit. Tr. 147:10-20; 660:22-24; 961:2 – 962:1; Exs. 692, 708. EPA and MPCA had dozens of meetings or calls about the PolyMet Permit. Tr. 1041:21 – 1042:23; Ex. 708. The calls usually lasted an hour and a half and were to review topics identified by MPCA to discuss with EPA, but EPA expressed concerns on different subjects regarding the permit development process, as well. Tr. 1042:22 – 1043:20.

64. Through these biweekly meetings, MPCA wanted to make sure that EPA was very well informed of the steps MPCA was taking in the permit development process and to receive EPA's feedback throughout that process. Tr. 504:3-15; 661:7-15; 962:15-24;

1041:14-18. In fact, the level of communication between EPA and MPCA was substantial.

Tr. 147:21 – 148:7.

ii. Documentation of the MPCA-EPA meetings

65. When EPA and MPCA completed discussion on items, Mr. Pierard would document those by email and move on. Tr. 149:11-23.

66. MPCA had no requirement that all calls with EPA be documented in the administrative record for an NPDES permit. Tr. 1331:6-10. No one at MPCA was instructed to take notes or not to take notes of calls or meetings with EPA. Tr. 1331:11-18; 1044:2-10; 1128:10-13; 939:18-24; 1044:2-4; 1234:9-15. If notes were taken during phone calls or meetings with EPA, no one at MPCA instructed anyone else at MPCA to save or discard them. Tr. 1331:19 – 1332:1; 1044:14-16. Ms. Handeland's general practice, however, was to take notes at meetings she attended with the EPA on the development of the PolyMet permit. Tr. 969:15-18.

67. Mr. Clark sometimes took shorthand notes for memory retention purposes during the calls with EPA (Tr. 1300:1-14), but he discarded the notes shortly after each meeting where he took them because they were not substantive and he did not intend to rely on them. Tr. 1300:19 – 1301:7; 1304:12-15; 1306:14-20. The purpose of Mr. Clark's notetaking solely related to the meeting at hand. Tr. 1307:13-22.

68. Mr. Schmidt's general practice was to take notes at most meeting he attended if there was something that he "thought was worth keeping track of for the future." Tr. 1128:14-21. Consistent with this practice, Mr. Schmidt took handwritten notes at the

meetings he attended between MPCA and EPA. Exs. 837, 838. Shortly after each meeting, Mr. Schmidt typed up his handwritten notes, sometimes highlighting certain items or adding more information, and then he disposed of the handwritten notes once he was finished typing them up. Tr. 1127:4-22; 1145:17 – 1146:7; Exs. 837, 838.

69. Mr. Schmidt's practice was to label notes or documents he created as "attorney client privileged" and protected under the Minnesota Government Data Practices Act ("MGDPA") if he believed them to be protected under the MGDPA. Tr. 1129:14 – 1130:6; Exs. 837, 838. However, if the notes or documents did not include his mental impressions or other information he thought was protected under the MGDPA, he did not include the "attorney client privileged" header. Tr. 1130:4-8.

70. Mr. Schmidt believed that the notes he took in meetings while at MPCA were not public for purposes of the MGDPA. Tr. 1129:4-13; 1148:1-12. He did not share these notes with any MPCA staff and does not recall sharing them with anyone else. Tr. 1148:13-22.

71. No one ever suggested to Mr. Schmidt that he take notes, as opposed to someone else, to protect them from disclosure under the MGDPA. Tr. 1130:18-22.

72. Mr. Clark did not see or rely on Mr. Schmidt's notes. Tr. 1310:3-9.

F. Public Notice and Comment Period

73. The public comment period for the PolyMet permit started on January 31, 2018. Tr. 331:21-23, Ex. 326.

74. MPCA held open the public comment period for 45 days, rather than the normal 30 days, to ensure that, given the Project's complexity, the public and the interested

stakeholders had plenty of time to review the draft permit and provide their comments. Tr. 661:16 – 662:8; 1059:1-2.

75. MPCA created a public web portal for the NorthMet Project—the first time such a step has been used for an NPDES permit in Minnesota—and established a dedicated phone number and email address for questions or comments from the public. Ex. 350 at ¶¶ 16, 19; Tr. 1058:20-25.

76. MPCA also held two public meetings during the public comment period, one in Aurora and the other in Duluth—both of which had hundreds of attendees. Tr. 929:5-7. The Aurora meeting lasted five hours and the Duluth meeting lasted eight hours. Both allowed people to speak and have their comments recorded and to submit written comments. Tr. 1058:13 – 1060:25. Those meetings were accompanied by lengthy open houses, where the entire permit team spoke with the public one on one, or in small groups, and answered detailed questions from the public. Tr. 929:11-17; 1059:5-10; 663:7-10.

77. MPCA also held a meeting with tribes during the public comment period, during which members of the tribes provided detailed information on their concerns. Tr. 930:2-19.

78. The public comment period for the draft NPDES permit ended on March 16, 2018. Ex. B, Stipulation No. 6.

79. The public filed extensive comments on the draft NorthMet Permit, which included 686 comment submittals made up of approximately 1600 individual comments. Ex. 350 at ¶ 23.

80. Several of the comments were very long and technically detailed, so they needed a lot of consideration and discussion. Tr. 1336:3-11; 934:12-15.

81. Ms. Handeland estimates that she has worked on at least 300 NPDES permits at MPCA. Tr. 950:22-24. The most comments she had ever received on a permit prior to the PolyMet Permit was 15. Tr. 1061:10-15.

G. MPCA Discussions with EPA during the Public Comment Period

i. EPA and MPCA continued to meet during the public comment period

82. EPA and MPCA agreed that MPCA would provide the draft permit to EPA at the same time that MPCA provided it to the affected tribes, approximately two weeks before the public notice date. Tr. 157:17 – 158:1; 1157:4-7; Ex. 815.

83. EPA received a draft of the PolyMet permit on January 17, 2018, two weeks before the draft permit was provided for public notice. Tr. 159:15-17; 331:18 – 332:5; Ex. B, Stipulation No. 5.

84. When EPA received the draft PolyMet permit on January 17, 2018, Mr. Pierard contacted Jeff Udd and Richard Clark at MPCA to discuss the permit and to arrange to continue to discuss the draft permit with MPCA staff. Tr. 160:17 – 161:10.

85. When EPA received the draft PolyMet permit, it was aware of when the public comment period would end. Tr. 159:21-24.

86. Mr. Pierard said EPA's intention was to provide comments on the public notice draft of the PolyMet permit by the close of the comment period. Tr. 160:7-14. EPA's standard practice was to put its comments on a draft permit in writing. Tr. 119:11-14.

87. EPA discussed the PolyMet permit with MPCA in conference calls in January, February and March 2018. Tr. 161:13-16; Exs. 324, 708; Ex. B, Stipulation Nos. 7, 8, 9. Ms. Handeland had notes from meetings with EPA on January 31, February 13, and March 5, 2018 which she generally relied on in drafting the permit. Tr. 972:22 – 973:7; Ex. 324

88. On March 5, 2018, during a phone conversation, Mr. Pierard told Mr. Udd that EPA was considering submitting comments. Tr. 872:6-20. Mr. Udd responded that he would discuss it with the commissioner's office. Tr. 873:5-13.

89. Mr. Udd also inquired of Mr. Pierard whether it made sense for EPA to wait to submit its comments because MPCA expected to receive a lot of public comments on the permit, many of which would be the same as EPA would make, but Mr. Pierard responded that there was no wiggle room. Tr. 166:1-15; 872:17-22; 928:9-19.

ii. Request for delay in EPA comments

90. Following his discussion with Mr. Pierard, Mr. Udd had a telephone conversation with Shannon Lotthammer, who was designated as the lead for the Project in the Commissioner's Office. Tr. 933:14-20. In general, the commissioner's office had little involvement in the MPCA technical permit team's development of the permit. Tr. 927:23-

25. In this call, however, Mr. Udd told Ms. Lotthammer that EPA was recommending sending comments on the draft permit during the public notice period. Tr. 556:18-25; 666:5-7. He also told her that he had thought they would follow the MOA, which lays out a standard process that generally has EPA commenting on the final proposed permit, and that MPCA staff “are maybe overwhelmed with comments because we were expecting a high

volume.” Tr. 900:12-17; 666:7-16. Mr. Udd explained that the environmental review had thousands of comments, and that the public meetings for PolyMet showed that lots of people were interested. Tr. 901:16-25; 556:25 – 557:9.

91. Mr. Udd did not ask Ms. Lotthammer to do anything in particular; nor did he ask her to ask EPA not to submit written comments. Tr. 901:13-15; 902:5-7. Ms. Lotthammer also did not suggest to Mr. Udd during the initial conversation that she was going to ask EPA not to submit written comments. Tr. 902:8-11.

92. Ms. Lotthammer was concerned about the inefficiency of EPA commenting on a draft that would be changing and the significant burden that responding to EPA’s comments would place on MPCA staff. Tr. 667:16 – 668:2. On or around the week of March 5, 2018, she called Mr. Pierard to ask if EPA would consider holding off on providing written comments until MPCA had had a chance to make changes to the permit based on public comments and the feedback it had already received from EPA. *Id.*; Tr. 557:25 – 558:10; 559:7-23. Mr. Pierard responded that EPA would consider the request internally. Tr. 559:24 – 560:5. Mr. Pierard never expressed a concern to Ms. Lotthammer that the MOA prevented the arrangement proposed by Ms. Lotthammer. Tr. 670:4-8.

93. Ms. Lotthammer then spoke with EPA’s Chris Korleski. Tr. 562:6-10. She explained to Mr. Korleski that she understood that EPA could comment whenever it wanted, but in this instance, it made more sense for EPA to wait to comment until after MPCA had the opportunity to make anticipated changes to the permit. Tr. 562:15-18; 673:4-11. Mr. Korleski expressed concern as to the timing of receiving the subsequent draft permit and

ensuring that EPA would have sufficient time for meaningful review. Ms. Lotthammer responded that MPCA also wanted to ensure that EPA had plenty of time to review and comment on the updated permit. Tr. 564:4-25; 673:12-25, 674:11-21. Ms. Lotthammer does not recall Mr. Korleski raising any concerns regarding the MOA. Tr. 674:1-10.

94. Ms. Lotthammer also spoke with Commissioner John Linc Stine regarding concerns about the workload placed on MPCA staff. Both Commissioner Stine and Ms. Lotthammer were concerned with the workload and about finding the most efficient way for MPCA staff to respond to comments. Tr. 506:2-8; 511:9 – 512:10.

95. Neither Commissioner Stine nor Ms. Lotthammer suggested that EPA's concerns should be hidden from the public, or that its comments should be suppressed or prevented. Tr. 513:16-18; 522:3-14; 678:14 – 679:9; 703:19 – 704:6.

96. Following his discussion with Ms. Lotthammer, Commissioner Stine called EPA's Regional Administrator Cathy Stepp on March 12, 2018. Tr. 505:13-24. Mr. Stine suggested that EPA wait before commenting in writing until MPCA had revised the draft Permit. He said that postponement of EPA comments would promote MPCA staff efficiency and ease the burden on MPCA staff. Tr. 418:1-17; 511:12 – 512:10. Mr. Stine recalls telling Ms. Stepp that the permit would be more efficiently reviewed by the EPA team if MPCA could provide a new draft to EPA after changes in response to the public comments were incorporated into the draft permit. Tr. 511:15-21. Mr. Stine and Ms. Stepp agreed to leave resolution of the timing issue to Ms. Lotthammer and to Kurt Thiede, Ms. Stepp's assistant, as indicated in a March 12, 2018 email from Mr. Stine. *See* Ex. 333 at

RELATORS_0060909. Ms. Lotthammer does not recall asking Mr. Stine to call Ms. Stepp or Mr. Thiede to request that EPA not file written comments during the public comment period. Tr. 567:25 – 568:4.

97. On March 13, 2018, Ms. Lotthammer then emailed Mr. Thiede to ask whether EPA would wait until MPCA reviewed and responded to public comments before submitting its written comment letter to MPCA. Ex. 333, p.1, ¶4; 572:11-14. She also offered to give EPA more time to comment on a later draft of the permit than the 15-day period provided in the MOA. Ex. 333. Ms. Lotthammer’s intent in sending this email was not to prevent EPA from commenting. Tr. 678:11 – 679:9.

98. Ms. Lotthammer deleted her March 13, 2018 email to Mr. Thiede (Ex. 60, 333) before leaving MPCA. Tr. 609:24 – 610:2. Ms. Lotthammer did not believe she needed to retain this email because it was a developmental conversation, not a final decision, and her subsequent emails with Mr. Thiede, *see* Ex. 64A, documented the approach to be followed by MPCA and EPA. Tr. 693:1 – 694:2.

99. Ms. Lotthammer never tried to hide the fact that she requested that EPA not comment during the public comment period. Tr. 684:24 – 685:2.

100. Ms. Lotthammer explained in the March 13, 2018 email: “As you’ll note, in the highlighted portions of pages 27 to 28 of the attached PDF, which are pages 10 to 11 of the actual MOA, the established process is for MPCA to place the draft permit on public notice, consider and respond to public comments, and make any resulting changes that are

necessary, and then to submit the proposed permit to EPA for review and comment (which could include objection) prior to final issuance.” Ex. 333; Tr. 573:25 – 574:8.

101. Ms. Lotthammer went on to explain: “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; Tr. 577:1-10.

102. Ms. Lotthammer further stated: “Again, I wish to stress – as I have with Chris Korleski and Kevin Pierard – that the concern here is not about EPA’s authority for review. We recognize and respect that authority. The question is about the timing of that review, and the importance of maintaining the approach laid out in the MOA for the sake of clarity and efficiency, among other goals.” Ex. 333.

103. Ms. Lotthammer subsequently had two phone calls with Mr. Thiede about MPCA’s request that EPA wait to comment until after the public comment period. One phone call took place on March 13, 2018, and the other took place on March 15, 2018. Tr. 585:18-24.

104. Through her March 13, 2018 email and subsequent phone calls with Mr. Thiede, Ms. Lotthammer explained that having EPA delay its comments until after MPCA had a chance to revise the permit based on public comments made “a lot of sense from a clarity standpoint and an efficiency standpoint” because it ensured that EPA had MPCA’s best work

product for formal review and comment. Tr. 578:12-21; 586:3 – 587:17. Ms. Lotthammer conveyed to Mr. Thiede that, from MPCA’s “perspective, it would be a more efficient and a better review process if EPA had the advantage of the updated permit based on the public comments that we had received and then had their review and provided their written comments at that point.” Tr. 579:23 – 580:4. She also explained that this proposed process also conformed with the process laid out in the MOA. Tr. 578:16-21.

105. Ms. Lotthammer did not say EPA lacked the authority to submit written comments during the public comment period and she did not suggest EPA was violating the MOA. Tr. 668:10-14; 579:1-5; 586:14-25; 308:13 – 309:23.

106. Ms. Lotthammer’s suggestion was that EPA wait to submit its comments because its comments would be very similar to other comments that were received and that it would be inefficient for EPA to submit written comments on a permit that MPCA already knew it was going to change. Tr. 309:24 – 310:15. Ms. Lotthammer was “requesting the opportunity to improve the work product that EPA was reviewing before [EPA] weighed in with their formal written comments.” Tr. 586:18-21; *see also* Tr. 603:1-3 (“[W]e really wanted to get EPA’s review and feedback on the improved version of the permit based on the changes that we were already going to be making.”).

107. If EPA had submitted written comments during the public comment period, it would have added to the staff’s burden, although, according to Mr. Udd, “One way or another, we would have gotten through it, I’m sure.” Tr. 902:12-20.

iii. EPA decides not to submit comments during the public notice period

108. On March 12, 2018, Mr. Pierard and Ms. Bauer of EPA informed Mr. Pierard's boss, Mr. Korleski, that March 16, 2018 was the deadline to provide comments during the public comment period for the Polymet permit and EPA staff had a draft letter prepared to discuss with him. Tr. 164:2-9; 181:15-18; Exs. 616, 649.

109. EPA's comments on the draft PolyMet permit were ready by March 14 or 15, 2018, prior to the close of the public comment period. Tr. 190:25 – 191:6.

110. Mr. Pierard learned that EPA would not be sending written comments on March 15 or early March 16, 2018. Tr. 191:17 – 192:7.

111. Mr. Pierard spoke to Jeff Udd on March 16 and informed him that EPA would not be sending comments. Tr. 192:12 – 193:10.

iv. Agreement to an extra 45-day EPA comment period

112. On the March 15, 2018 phone call with Ms. Lotthammer, Mr. Thiede said that EPA had had internal discussions about MPCA's request that EPA wait to submit comment until after MPCA had prepared a revised draft of the permit, as well as the idea of ensuring EPA had sufficient time to review the revised draft. Mr. Thiede further stated that EPA was amenable to this approach and that he would memorialize the agreement in a subsequent email. Tr. 591:7-20.

113. After Mr. Thiede spoke over the telephone with Ms. Lotthammer, he replied by email summarizing their agreement that EPA would have an extra 45 days to comment on the revised draft Polymet permit. Ex. 64A. Specifically, Mr. Thiede wrote: "Once MPCA completes their response to public comments, it will develop a pre-proposed permit and

provide the PPP to EPA Region 5. Region 5 EPA will have up to 45 days to review the PPP and MPCA's responses to public comments and provide written comments on the PPP to MPCA. This would occur prior to MPCA submitting a proposed permit to EPA, which, according to the current MOA, would continue to give EPA 15 days to comment upon, generally object to, or make recommendations with respect to the proposed permit." Ex. 64A; *see also* Tr. 312:1 – 313:1; Ex. 307; Tr. 313:7-23. EPA did not commit itself not to submit comments during the public comment period. Ex. 64A; Tr. 695:15-25; 594:23 – 595:11. Ms. Lotthammer replied that his email correctly described their understanding, copying Mr. Stine, Jeff Udd, and Jeff Smith from MPCA. Ex. 64A.

114. Ms. Lotthammer was not certain that EPA would forego written comments during the public comment period until after the public comment period had actually ended. Tr. 594:14-16.

115. EPA used the term "pre-proposed permit" to describe the revised permit that MPCA would provide to EPA prior to providing the proposed permit for 15-day review. Tr. 592:1-17.

116. In particular, MPCA and EPA agreed that EPA had the right to provide *written* comments to MPCA during the 45-day period. Tr. 313:3-6. In an internal EPA email Mr. Pierard acknowledged that MPCA had agreed to give EPA a revised draft based on the comments received during the public comment period and give EPA 45 days to provide written comments on that draft. Tr. 350:19 – 351:1; Ex. 674.

117. Mr. Pierard acknowledged in an internal EPA email that EPA had agreed not to submit comments on the draft PolyMet permit during the public notice period. Tr. 337:6-10; Ex. 2010. Mr. Pierard is not aware of any statute, regulation, or provision of the MOA that prohibits MPCA and EPA from agreeing that EPA would not submit written comments on the draft permit during the public notice period. Tr. 337:14 – 338:15.

118. In the email string between Mr. Pierard and Mr. Udd, Ex. 2009, Mr. Pierard never suggested that what EPA and MPCA had agreed to do with respect to the PolyMet permit was unlawful or improper. Tr. 342:18 – 343:13.

119. MPCA asked EPA only to delay its comments, not to suppress them entirely. Ex. 151. As MPCA explained in a statement provided to state legislators, MPCA “knew that following the public comment process our permitting staff would be making revisions to the draft permit based on public comments, so we recommended that EPA share their comments after that revision.” Exs. 151, 150, 268.

H. MPCA’s continued work on the draft permit and continued discussion with EPA

i. April 5, 2018 telephone call

120. On March 16, 2018, Mr. Pierard called Mr. Udd and requested that they have routine check-in meetings as they continued through the permitting process. Tr. 911:10-22; Ex. 307.

121. Mr. Pierard called Mr. Udd and told him that the first week of April was a good time to go over EPA’s comments on the public notice draft of the permit. Tr. 911:22-24; Ex.

307. Mr. Pierard said that EPA would “walk through what the comment letter would have said if it were sent.” Tr. 912:14-17; Ex. 307.

122. EPA and MPCA participated in a conference call regarding permitting the PolyMet Project on April 5, 2018. Ex. B, Stipulation No. 12; Tr. 978:22 – 979:16; Ex. 2039.

123. During that call, the MPCA participants (Jeff Udd, Richard Clark, Stephanie Handeland, and Michael Schmidt) were surprised that Mr. Pierard seemed to be reading from a document. Tr. 924:14-17; 980:23 – 981:1; 1192:3-12, 1194:17 – 1195:1; 1342:12-15; Ex. 575, ¶ 11. It was clear to the MPCA participants that Mr. Pierard was reading from a document, but they did not know what it was. Tr. 979:20-24.

124. Mr. Pierard later explained that on the April 5 call, he read word-for-word underlined portions of the comments EPA was prepared to send MPCA on March 15 or 16, 2018 (Ex. 337). Tr. 194:6-24. Prior to the April 5 conference call, Mr. Pierard had underlined portions of the prepared comment letter that he wanted to speak to in his call with MPCA in order to identify the issues and the method MPCA could use to rectify EPA’s concerns. Tr. 193:11 – 194:3.

125. Mr. Pierard told MPCA on the April 5, 2018 conference call that, if unaddressed, some of EPA’s concerns may result in an objection to the proposed permit. He did that by saying “this first set of items that I’m going to read to you we consider at this point are likely objectionable items,” which included all items up through “other recommendations on page 6 of 7.” Tr. 204:21 – 205:7; 207:23 – 208:3. Mr. Pierard, however, had also previously

informed Mr. Korleski at EPA that EPA's concerns regarding the Project were not insurmountable. Tr. 336:17-20; Ex. 641.

126. Many of the topics that were contained in EPA's draft comment letter that was read to MPCA on April 5, 2018 were topics that EPA had brought up during calls it had with MPCA in early 2018. Tr. 233:13-22; 1342:20-24; 986:17-23.

127. In Mr. Pierard's experience, when EPA provides MPCA with written comment letters, MPCA has customarily prepared responses including EPA's comments and MPCA's response to them. Tr. 237:19 – 238:6.

128. Mr. Pierard believed that if EPA had sent its written comments on the draft PolyMet permit to MPCA they would have been in the administrative record when the permit was issued. Tr. 235:10-18.

129. Mr. Pierard could not identify any statute, regulation or provision of the MOA that prohibits MPCA from listening to EPA read its draft comment letter to MPCA during a conference call. Tr. 338:21 – 339:21.

130. Mr. Udd did not take notes during the April 5 call from EPA, and he said that he "wouldn't have been able to write that fast anyway." Tr. 915:16-21.

131. Ms. Handeland attempted to take notes for a couple of minutes of the April 5 call but stopped because Mr. Pierard was reading too quickly for her to take accurate notes. Tr. 979:17 – 980:16. Because the limited notes Ms. Handeland took before she stopped "didn't say anything" and she did not intend to rely on them, she discarded them following the

meeting. Tr. 982:16 – 983:12. She does not recall recycling any other notes from calls with EPA during the permitting process. Tr. 983:25 – 984:7.

132. Richard Clark does not remember whether he took any notes during the April 5 call, but customarily he did not keep his meeting notes because they were taken only for memory retention purposes. Tr. 1300:1 – 1301:2; 1304:6-7.

133. Michael Schmidt took handwritten notes during the April 5 call, which he discarded, consistent with his normal practice, after typing them up. Tr. 1127:15 – 1128:1. He kept his typed notes for later use in advising MPCA staff. 1128:14-21; 1145:17 – 1146:7; Exs. 837, 838.

134. Neither Mr. Clark nor Ms. Handeland reviewed Mr. Schmidt's notes from the meeting. Tr. 1310:3-9; 984:14-24; *see also* Tr. 1199:4-17.

135. MPCA had no plan to conceal EPA's concerns with the public draft of the permit. Tr. 940:10-13; 513:16-18; 522:3-14; 1343:13-16.

136. Mr. Udd knew of no MPCA plan to avoid documenting the views that EPA read over the telephone on April 5. Tr. 939:22-24.

137. Neither Mr. Clark nor Ms. Handeland is aware of any efforts by anyone at MPCA to prevent EPA from submitting written comments or to conceal EPA's concerns from the public. Tr. 1063:12-19; 1343:13-16.

ii. Continued meetings with EPA

138. After April 5, 2018, EPA continued to confer with MPCA regarding the permit and the concerns EPA had previously raised to MPCA, including telephone conference calls

on April 30, June 11, and October 22, 2018. Tr. 250:7-15; 304:13-23; Ex. B, Stipulation Nos. 13, 15, 24; Exs. 708, 774.

139. MPCA and EPA participated in-person meetings regarding the NorthMet Project on September 25 and 26, 2018. Ex. B, Stipulation Nos. 18, 19; Ex. 708; Tr. 962:8-14.

140. MPCA's conversations with EPA after the public notice period until MPCA sent EPA the pre-proposed draft permit were very productive, because, after MPCA spent a lot of time responding to comments, MPCA had its information together "and our ducks in a row, which made for much more productive conversations with EPA." Tr. 937:21 – 938:3.

iii. MPCA response to comments

141. MPCA hired an outside contractor, Shepherd Data Services, to help MPCA organize the public comments before January 2018 because it was expecting a large number of comments. Tr. 850:25 – 851:18; 865:2-7.

142. Shepherd completed its work around June 2018. Tr. 870:10-11.

143. In the first quarter of 2018, Mr. Udd spoke with managers of other staff who were experts in certain areas, to get approval to use them for the PolyMet permit responses to comments. Tr. 867:22 – 868:11. Ultimately, Mr. Udd used four or five experts from other parts of MPCA. Tr. 868:25 – 869:7.

144. MPCA received 686 comment submittals on the draft permit, which made up of approximately 1600 individual comments. Ex. 350 at ¶23. This is "significantly quite a bit more than" any other NPDES permit Ms. Lotthammer has seen in her decades at MPCA. Tr. 663:19-23. It took MPCA almost eight months to carefully consider and respond to all of

these comments—a process that usually only took a month. Ex. 1133 (MPCA Resp. to Comments); Tr. 1061:24–1062:25; Tr. 934:16–25.

145. Three MPCA employees—Stephanie Handeland, Richard Clark, and Michael Schmidt—prepared MPCA’s responses to comments. Tr. 988:3–8; 990:7–12.

146. According to Ms. Handeland, a lot of the comments MPCA received from the public and responded to in its Response to Comments (Ex. 1133) were similar to those in EPA’s April 5 letter that it read to MPCA. Tr. 995:3–5; 1039:10–18.

147. EPA did not provide MPCA any written comments on the draft permit either during the public comment period or after the public comment period. Tr. 337:6–13, 317:25 – 319:4; 701:1–14; 938:25 – 939:6.

148. The workload in responding to public comments was much larger for the PolyMet permit than for other permits. Tr. 1336:3–11; 664:10–18.

149. Ms. Handeland complained to her supervisor, Richard Clark, about the heavy workload resulting from the high volume of comments. Tr. 1062:6–12; 1001:5–11.

150. MPCA revised the draft permit in response to some comments and specified the reasons for such changes. Ex. 350 at ¶ 262; Tr. 495:25 – 496:10.

I. The Pre-Proposed Final Permit

151. On October 25, 2018, MPCA sent its pre-proposed final NPDES permit to EPA for review. Tr. 317:25 – 318:2; 938:5–10; Ex. 674; Ex. B, Stipulation No. 26.

152. The deadline for EPA’s comments after its initial 45-day review period was December 9, 2018. Tr. 318:3–5; 350:23 – 351:1.

153. MPCA had “a number of conversations” with EPA during this review period. Tr. 938:16-17.

154. Mr. Pierard never recommended to the MPCA that there be a second public comment period based on revisions to the permit following the original public notice period. Tr. 367:11-15.

155. On December 3, 2018, Mr. Pierard called Jeff Udd at MPCA and told him to proceed to the proposed permit stage. Tr. 318:6-14; 938:20-21.

J. The Proposed Permit

156. On or about December 4, 2018, MPCA sent EPA the proposed final permit, fact sheets and response to comments from MPCA, commencing EPA’s 15-day comment period. Tr. 318:19 – 319:4; 351:17-21; 352:8-15; Exs. 2020, 2021.

157. Whether or not it submits written comments, once EPA receives the final proposed permit, it has the right to object. Tr. 341:24 – 342:3.

158. Mr. Pierard called Mr. Udd on or about December 18, 2018 and said that EPA had finished its review and that it would not object to the issuance of the permit. Tr. 938:25 – 939:6.

159. On December 20, MPCA issued the final permit. Ex. B, Stipulation No. 28; Ex. 1118.

K. It was not unusual for EPA not to submit substantial written comments.

160. In Michael Schmidt’s experience working at Minnesota Center for Environmental Advocacy (“MCEA”), which “routinely submitted comments on proposed NPDES/SDS

permits to MPCA during the public comment period, it was unusual for EPA to submit written comments on the projects that MCEA commented on.” Tr. 1239:17-21; Ex. 574.

161. During Mr. Pierard’s time as NPDES program chief, he estimates that EPA probably provided comments in a letter or email on more than 500 of the approximately 700 permits EPA reviewed in that time. Tr. 111:5-13. Sometimes, however, these comments would be “very minimal,” such as typographical errors. Tr. 111:13-19.

III. DATA PRACTICES ACT REQUESTS

162. The MGDPA, Minn. Stat. § 13.03, provides that “[a]ll government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified . . . as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential.”

A. The MGDPA Requests

163. Relators submitted their first MGDPA request on March 26, 2018, requesting:

[A]ll records since January 2015 pertaining to any of the following: 1) Comments, 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; and 2) Comments, 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 the cross-media mercury analysis, antidegradation analysis or any other aspect of the MPCA’s proposed or draft recommendation for 401 certification of the Poly Met NorthMet Project.

Ex. 334.

164. Relators submitted a second MGDPA request on April 5, 2018, requesting: “[A]ll Comments received by MPCA pertaining to the draft NPDES/SDS permit and/or draft Section 401 certification for the PolyMet NorthMet Project, including Exhibits and expert reports, EXCEPT excluding any comments submitted by or on behalf of WaterLegacy.” Exs. 336, 437.

165. Relators submitted a third request on September 20, 2018, which similarly requested “all *records*, including but not limited to comments, letters, emails, memos, meeting notes, phone conversation notes, draft permits, draft certifications, presentations, monitoring data, or technical materials since January 2018 pertaining” draft permits and certifications for the NorthMet Projects. Ex. 340.

166. MPCA’s subsequent requests contained the same language as the September 20, 2018 request except that they requested “paper records.” Exs. 341, 346, 352.

B. MPCA’s MGDPA Response Procedures

i. MPCA’s MGDPA regulations and policies

167. MGDPA requests that MPCA receives are sent to the MPCA’s “Records Management Intake/Triage” department, from which the request will be assigned to the appropriate file manager for processing. Ex. 79; Tr. 759:9-25.

168. The file manager then forwards the request on to the relevant parties who would have documents responsive to the request or would know who would have responsive documents. Tr. 761:3-12; 1285:7-14; Ex. 79.

169. The file manager assigned to the request will gather the requested data and contact the requester when they are ready to be reviewed. Tr. 761:3-12; 763:4-12; Ex. 79.

170. MGDPA requests are not ongoing. MPCA does not include documents created after the date the request is received. Tr. 1338:16 – 1339:4; 1144:22-25; 1145:1-7. An MGDPA request applies to documents in existence on or before the date of the request, but not to documents created after the date the request is received. Tr. 1144:11-16; 1338:23 – 1339:4.

ii. MPCA's response procedures for Relators' requests

171. MPCA responded to Relators' MGDPA requests in a timely manner, following the same MGDPA procedures that it customarily uses. Tr. 822:6-13.

172. Lenny Richards was the file manager who received WaterLegacy's requests. Tr. 818:7-9. Mr. Richards then sent the requests on to the mining sector, specifically, Richard Clark, who would then send the request to the MPCA staff who worked on the Project (Ms. Handeland, Mr. Udd, Brian Schweiss and Scott Kyser). Tr. 1290:1-20; 761:3-12; 811:7-10. If the request identified documents from the Commissioner's office, then Mr. Clark provided the request to the assistant commissioner, Katrina Kessler. Tr. 1290:21 – 1291:3. In one instance, Mr. Clark forwarded a request to Shannon Lotthammer. Tr. 1291:4-8.

173. The MPCA staff then collected responsive documents and placed them in a shared drive. Tr. 1138:8-19. Mr. Schmidt then reviewed the documents on the shared drive to ensure all responsive records that were not otherwise subject to an exception were produced.

Tr. 1138:20-23; 1139:19 – 1140:1. Once collection was complete, Mr. Richards was notified and then he would provide the documents to WaterLegacy. Ex. 391.

174. Mr. Udd followed MPCA record retention and data disclosure rules and policies.

Tr. 939:10-17.

175. Mr. Clark is not aware of any failures to produce data in response to any MGDPA requests regarding PolyMet except for one instance when later-discovered documents were produced once they were discovered. Tr. 1339:11-16.

176. No one at MPCA instructed Ms. Handeland not to produce, in response to MGDPA requests, notes from calls with EPA. Tr. 1044:17-20.

177. Mr. Clark discarded his notes of the calls with EPA because he did not intend for the notes to document the telephone discussions or to otherwise use them later. Tr. 1300:1-12; 1300:24 – 1301:2.

178. Mr. Clark had discarded his notes following each meeting. Those discarded notes were not disclosed in response to WaterLegacy's MGDPA requests because they did not exist at the time the requests were received. Tr. 1307:1-10; 1300:19-23.

179. No one told Mr. Clark not to produce notes of EPA calls in response to MGDPA requests. Tr. 1332:2-5.

180. Mr. Clark is not aware of any efforts by anyone at MPCA to conceal EPA's concerns regarding the NorthMet Permit from the public. Tr. 1343:13-16.

181. Ms. Lotthammer testified that she must have deleted her March 13, 2018 email to Mr. Thiede (Ex. 60, 333) before receiving a relevant MGDPA request given that she would have produced it otherwise. Tr. 623:19-25.

IV. MPCA RECORDS MANAGEMENT

182. Pursuant to the Official Records Act, Minn. Stat. § 15.17, all governmental entities such as the MPCA must make and preserve all records necessary to a full and accurate knowledge of their official activities.

183. In order to meet its Official Records Act obligations, MPCA has developed a Records and Data Management Policy and a Records and Data Management Manual. Ex. 77 at 4; *see also* Exs. 76, 1003.

184. While employed at MPCA, Mr. Schmidt advised MPCA staff through training and other discussions about records management. Tr. 1135:1-7, 23-25. He would also sometimes refer MPCA staff to the Records and Data Management Manual (Ex. 77) when they had questions on record retention. Tr. 1137:11-16.

185. MPCA did not have a policy that required notes to be taken during specific occasions or that would have otherwise required MPCA staff to take notes during their informal meetings with EPA on the NorthMet Permit. Tr. 939:18-24; 1044:2-4; 1233:14-18.

186. MPCA never instructed any of the MPCA staff not to take notes during the meetings with EPA, or to discard notes that were taken. Tr. 1044:5-16; 1331:15 – 1332:1.

187. Relators have admitted that they do not have conclusive evidence that MPCA acted outside of the normal document retention policy. Tr. 64:20-22; Relators' Motion *in Limine* for Spoliation Sanctions (Dec. 27, 2019) at 13, n. 11.

188. Throughout her work on the NorthMet Project, Ms. Handeland would scan and save meeting agendas, minutes, if they had any, and notes into MPCA's OnBase system. Tr. 956:4-11. Ms. Handeland would also include comments received on the draft permit, responses thereto and emails or correspondence relevant to developing the permit into MPCA's OnBase system. Tr. 956:19-957:10; 958:11-20.

V. THE ADMINISTRATIVE RECORD FOR THE POLYMET PERMIT

A. MPCA's Process for Compiling the Administrative Record

189. MPCA's duties to compile and preserve the administrative record are guided by the Minnesota Administrative Procedure Act, Minn. Rule 7000.0750, subp. 4, and MPCA's Records and Data Management Manual (which was adopted to comply with the Official Records Act. MPCA's Response to Motion for Spoliation Sanctions, Ex. 2 at ¶ 5 (Decl. of Adonis Neblett).

190. Ms. Handeland has developed hundreds of administrative records. Tr. 1003:18-20. She compiled the record for the PolyMet permit after the permit was issued in January 2019. Tr. 1004:5-9.

191. In anticipation of compiling an administrative record, during the permitting process Ms. Handeland manages the file, develops the permit and fact sheet, keeps track of all of the documentation, and files it appropriately. Tr. 1003:1-8.

192. Ms. Handeland usually includes in the administrative record anything used to develop the permit, any responses to comments, comment letters and, sometimes, emails or notes documenting or discussing the agency's decision. Tr. 1003:9-17. Ms. Handeland does not typically include handwritten notes in the administrative record. Tr. 1071:24 – 1072:3.

193. To compile the administrative record for the Polymet permit, Ms. Handeland asked Mr. Clark for documents, but not Mr. Schmidt because he is an attorney and his documents would be privileged. Tr. 1004:14 – 1005:6; 1010:15-25.

194. If EPA's comments had been submitted, Ms. Handeland would have included those in the administrative record. Tr. 1040:5-11. Indeed, if MPCA had received written comments from EPA before, during or after the public notice period, she would have included them in the administrative record (Tr. 1040:12 – 1041:1) and MPCA would have responded to EPA's comments in writing (Tr. 12332:8-15).

B. Reflection of Telephone Conferences and Meetings in the Administrative Record

195. MPCA did document many of its informal calls with EPA by placing notes and emails concerning those meetings in the administrative record. Exs. 324A (Ms. Handeland's handwritten notes), 325A (Ms. Handeland's handwritten notes), 307A (email states that EPA wanted to have a meeting with MPCA the first week of April to walk through what its comment letter would have said, it if were sent), 2039 (appointment for April 4, 2018 meeting); Tr. 1065:5–1067:6.

196. Mr. Clark is not aware of any efforts by anyone at MPCA to prevent EPA from submitting written comments. Tr. 1343:13-16.

197. Mr. Clark's notes did not appear in the administrative record because when MPCA assembled that record his shorthand jottings did not exist. Tr. 1301:3-7.

198. Mr. Pierard's request for a check-in meeting in April 2018 is in the administrative record. Ex. 307A; Tr. 1073:13 – 1074:6; 1344:24 – 1345:11.

199. The calendar appointment for the April 5 phone call is also in the administrative record. Exs. 2039; 1345:15-20.

C. March 2018 emails and the Thiede/Lotthammer confirmatory emails

200. MPCA placed in the administrative record Mr. Thiede's March 16, 2018 email documenting the EPA/MPCA agreement to provide EPA an additional 45-days to comment and Ms. Lotthammer's concurrence. Exs. 64A, 307A.

VI. LITIGATION HOLD

201. MPCA implemented a litigation hold order on June 25, 2019, the day the Court of Appeals issued its order transferring this proceeding to this Court. MPCA's Response to Motion for Spoliation Sanctions, Ex. 2 at ¶ 8 (Decl. of Adonis Neblett); Tr. 76:22-78.

202. MPCA customarily does not implement a litigation hold order for anticipated litigation to be decided on the administrative record. Tr. 1235:5-12; MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶¶ 3-4 (Decl. of Adonis Neblett). Doing so would consume a large amount of the MPCA's scarce resources. Tr. 1235:13-21; MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶ 7 (Decl. of Adonis Neblett). MPCA's practice is consistent with the customary practices of federal agencies. MPCA's Response to Motion

for Spoliation Sanctions, Ex. 11 at ¶¶ 7-8 (Decl. of Andrew Emrich); MPCA’s Response to Motion for Spoliation Sanctions, Ex. 12 at ¶¶ 3, 7 (Decl. of Thomas Sansonetti).

VII. FORENSIC SEARCH

203. XACT performed a forensic search of devices, network file data, and email accounts of three former MPCA employees—John Linc Stine, Shannon Lotthammer, and Ann Foss. Tr. 1082:20-25; Ex. 839.

204. Minnesota IT Services (“MNIT”) transferred the data subject to the forensic search to XACT without making any changes. Tr. 845:10-13.

205. Pursuant to its forensic search, XACT processed and prepared 107,559 files for the application of search terms. Tr. 1097:22 – 1098:1; Ex. 839 at 4.

206. A forensic search does not necessarily capture one hundred percent of documents or data that may have been deleted or damaged. Tr. 828:14-23.

207. Files are sometimes overwritten on a hard drive in the course of ordinary device operations. If a file is overwritten, there is no way to recover that data. Tr. 1082:16-19.

208. Once a device ceases to be used, its files can no longer be overwritten. Tr. 1100:20-23.

VIII. MPCA’S POST-RECORD RECEIPT AND DISCLOSURE OF EPA’S DRAFT COMMENT LETTER

209. MPCA received its first copy of the EPA comments Mr. Pierard prepared regarding the draft PolyMet NPDES permit and read during the April 5, 2018 phone call when those comments were published by a newspaper in the summer of 2019. Tr. 917:20-24; 746:6-18; Exs. 248, 535.

210. Prior to the newspaper publication of EPA's comment letter in June 2019, MPCA did not know that a written comment letter existed. Tr. 747:22 – 748:1.

211. MPCA moved to supplement the administrative record with the actual written comments that EPA read to MPCA during the April 5, 2018 phone call. Motion to Supplement the Administrative Record with EPA Letter, Case Nos. A19-0112, A19-0118, and A19-0124 (July 26, 2019). These comments were not included in the initial administrative record because EPA did not submit them in writing to MPCA.

212. Relators objected to the motion and the Court of Appeals denied the motion.

213. MPCA had no ability to include the written comment letter in the administrative record.

CONCLUSIONS OF LAW

I. BACKGROUND

1. The Court of Appeals transferred this proceeding to this Court pursuant to Minn. Stat. § 14.68 “for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure” regarding MPCA’s issuance of the National Pollutant Discharge Elimination System (“NPDES”) permit for PolyMet’s NorthMet Project (the “PolyMet Permit”). Transfer Order at 4; Tr. 34:9-14, 47:18-21.

2. The environmental review process for the NorthMet project prior to July 11, 2016, is irrelevant to this proceeding, except to establish a record or a baseline as to what

procedural processes are regular in the context of an NPDES permit application generally.

Tr. 51: 8-14.

3. The environmental impact statement is final and is the law of the case. Tr. 51: 20-21.

4. The Minnesota Rules of Evidence apply to this case. Tr. 34:25 – 35:1.

II. LEGAL STANDARDS

5. Minn. Stat. § 14.68 provides:

The review shall be confined to the record, except that in cases of alleged irregularities in procedure, not shown in the record, the court of appeals may transfer the case to the district court for the county in which the agency has its principal office or the county in which the contested case hearing was held. The district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure. Appeal from the district court determination may be taken to the court of appeals as in other civil cases.

6. Minn. Stat. § 14.69 provides:

In a judicial review under sections 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

7. The term “irregularities in procedure” is not defined under Minnesota law.

8. An “irregularit[y] in procedure” under Minn. Stat. § 14.68 requires a showing of “unlawful procedure,” *see* Minn. Stat. § 14.69, such as a statutory, regulatory, or rule violation. *See also Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977) (the district court’s role was “to determine 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”); *People for Envtl. Enlightenment and Responsibility, Inc. v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978) (the district court’s inquiry is “limited to information concerning the procedural steps that may be required by law”) (quoting and reaffirming *Mampel*); *Matter of Dakota Cnty. Mixed Mun. Solid Waste Incinerator*, 483 N.W.2d 105, 106 (Minn. Ct. App. 1992) (review under Minn. Stat. § 14.68 is “limited to information concerning the procedural steps required by law”).

9. An irregularity in procedure does not mean an irregularity in substance. Tr. 49:4-5.

10. There is a presumption of regularity of MPCA’s administrative acts. *Reserve Min. Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) (“We . . . adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness”); *City of Moorhead v. Minn. Pub. Utilities Comm’n*, 343 N.W.2d 843, 849 (Minn. 1984) (“All agency decisions come to this court with the presumption of regularity.”); *Larson v. Comm’r of Pub. Safety*, 405 N.W.2d 442, 443 (Minn. Ct. App. 1987) (“There is a presumption of regularity to the administrative acts of the Commissioner.”); *In re*

Koochiching Cnty., No. A09-381, 2010 WL 273919, at *7 (Minn. Ct. App. Jan. 2, 2010) (“Decisions of an administrative agency enjoy a presumption of correctness.”).

11. A finding of irregularities in procedure may not be based on speculation or conjecture. *State v. Costello*, 646 N.W.2d 204, 210 (Minn. 2002) (“[W]e have condemned arguments that invite the [fact finder] to speculate about the facts.”); *Vroman v. City of Austin*, 169 N.W.2d at 61, 62 (Minn. 1969) (explaining that a party must satisfy its burden “without speculation or conjecture”).

12. Relators bear the burden of proof in challenging agency action such as that of MPCA here. *Minn. Ctr. for Envtl. Advocacy v. Pollution Control Agency*, 660 N.W.2d 427, 438 (Minn. 2003).

13. This Court may not make a finding of irregularities in procedure absent specific evidence sufficient to overcome the presumption of regularity applied to MPCA’s administrative acts. *See supra* at ¶¶ 11-12.

III. EPA’S CONDUCT CANNOT CONSTITUTE IRREGULARITIES IN PROCEDURE.

14. Both Minn. Stat. § 14.68 and Minn. Stat. § 14.69 are part of the Minnesota Administrative Procedure Act (“MAPA”). MAPA’s express policy is that “*state agencies* must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.” Minn. Stat. § 14.002 (emphasis added). Thus, MAPA applies only to state agencies.

15. “Irregularities in procedure” must stem from the conduct of state agencies. Because EPA is not a state agency, EPA’s conduct cannot constitute any “irregularities in procedure” under Minn. Stat. § 14.68. Tr. 52:15-22; 188:18-22; 190:14-18.

16. In particular, EPA’s decisions not to submit written comments on the PolyMet Permit, and to instead read portions of a draft comment letter to MPCA over the phone, are EPA actions over which MPCA had no control. Those EPA actions cannot constitute “irregularities in procedure” under Minn. Stat. § 14.68. *See supra* at ¶¶ 14-15.

17. Importantly, Relators do not claim that there were any procedural irregularities after April 5, 2018, except that MPCA did not identify EPA’s comments and did not respond to those. Tr. 1050:1-1052:10.

IV. THERE IS NO EVIDENCE THAT MPCA VIOLATED THE OFFICIAL RECORDS ACT.

18. The Official Records Act, Minn. Stat. § 15.17, provides in relevant part that “[a]ll officers and agencies of the state . . . shall make and preserve all records necessary to a full and accurate knowledge of their official activities.” Minn. Stat. § 15.17, subd. 1.

19. When “[r]ead literally,” the Official Records Act “seems to place no bounds on the information which must be made a public record.” *Kottschade v. Lundberg*, 160 N.W.2d 135, 137 (Minn. 1968). However, the “legislature did not intend anything that sweeping” because such a broad reading “would fill official archives to overflowing.” *Id.* at 138. Instead, the record-keeping requirement applies only to “official activities,” which are “limited to official actions as distinguished from thought processes.” *Id.* “[A]ll that need be kept of record is information pertaining to an official decision, and not information

relating to the process by which such a decision was reached.” *Id.* Examples of information outside the scope of “official activities” include “casual jotting [or] any tear-sheet observation.” *Id.* at 137; *see also Zangs v. City of St. Paul*, 2006 WL 6639215 (Minn. Dist. Ct. Dec. 8, 2006) (holding agency has a duty only to create a record of what becomes an official transaction, which does not include notes or comments, because they are akin to the “thought processes” referenced in *Kottschade*).

20. The Official Records Act does not require that MPCA personnel retain informal notes, such as notes taken during calls or meetings with EPA, that are not subsequently relied upon as part of the administrative decision-making process. *See Kottschade*, 160 N.W.2d at 137-38.

21. There is no evidence that MPCA failed to retain any “information pertaining to [the] official decision” of issuing the PolyMet Permit. *Kottschade*, 160 N.W.2d at 138. Thus, there is no evidence that MPCA failed to comply with the Official Records Act with respect to its retention of documents regarding the PolyMet Permit, including but not limited to notes of phone calls or meetings with EPA.

V. THERE IS NO EVIDENCE THAT MPCA VIOLATED ITS STATUTORY AND REGULATORY REQUIREMENTS WITH RESPECT TO THE ADMINISTRATIVE RECORD.

22. Minn. Stat. § 14.66 provides:

Within 30 days after service of the writ of certiorari, or within any further time as the court allows, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or

permit subsequent corrections or additions to the record when deemed desirable.

23. MPCA's regulations define the required contents of the administrative record for the PolyMet Permit as follows:

The record upon which the commissioner shall make a final decision in all matters other than rulemaking and contested case hearings consists of the following:

- 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.

Minn. R. 7000.0755, subp. 4.

24. When an "administrative record is legally sufficient, the absence of some documents that could have been included does not justify invalidating the agency action or changing the standard of review." *Seattle Audubon Soc. v. Lyons*, 871 F. Supp. 1291, 1309 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

25. There is no evidence that MPCA omitted from the administrative record any timely submitted, relevant documents or any written documents on which MPCA relied in issuing the PolyMet Permit, pursuant to Minn. R. 7000.0755, subp. 4. In addition, there is no evidence that MPCA failed to properly transmit the administrative record to the court of appeals, pursuant to Minn. Stat. § 14.66. As a result, there is no evidence that MPCA

violated Minn. Stat. § 14.66 or Minn. R. 7000.0755 with respect to its compilation of the administrative record for the PolyMet Permit.

VI. THERE IS NO EVIDENCE THAT MPCA VIOLATED THE MINNESOTA GOVERNMENT DATA PRACTICES ACT.

26. The Minnesota Government Data Practices Act, Minn. Stat. ch. 13 (“MGDPA”), defines “government data” as “all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use.” Minn. Stat. § 13.02, subd. 7.

27. Because Minn. Stat. § 13.02 uses the past tense, it pertains to “government data” that already exists. As a result, a request for “government data” under the MGDPA applies only to data already in existence at the time the request is submitted. *See also Lipton v. United States Envtl. Prot. Agency*, 316 F. Supp. 3d 245, 250 (D.D.C. 2018) (analyzing the Freedom of Information Act, the federal counterpart to the MGDPA, and explaining that “[t]he statutory text clearly contemplates that only extant information, and not information that an agency may create in the future, needs to be published”).

28. Minn. Stat. § 13.03, subd. 1, provides that “[a]ll government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified . . . as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential.”

29. There is no evidence that MPCA withheld responsive public data when responding to requests for documents regarding the PolyMet Permit. Thus, there is no evidence that

MPCA violated the MGDPA when responding to requests for documents regarding the PolyMet Permit.

VII. THERE IS NO EVIDENCE THAT MPCA VIOLATED THE MEMORANDUM OF AGREEMENT.

30. MPCA and EPA have entered into a Memorandum of Agreement (“MOA”) setting forth “the terms and conditions for approval by the EPA of the State of Minnesota’s [NPDES] permit program . . .” Ex. 328 at 1.

31. Pursuant to the Clean Water Act and the MOA, EPA retains the authority to prevent the issuance of the PolyMet Permit by objecting in writing. 33 U.S.C. § 1342(d)(2); *see also* Ex. 328 at 10-11, § 124.46(5).

32. Section 124.46 of the MOA is entitled “Transmission to [EPA] Regional Administrator of Proposed NPDES Permits.” Ex. 328 at 9. It provides:

(1) At the time a public notice required by Section 124.32 of the Guidelines is issued, the Director shall transmit one copy of the NPDES public notice, fact sheets, proposed NPDES permit and a list of all persons receiving the public notice, fact sheets and proposed NPDES permit, together with a description of any other procedure used to circulate the public notice to the Regional Administrator, Attention: NPDES Permit Branch. The information transmitted with the proposed permit shall include any and all terms, conditions, requirements or documents which are part of the proposed NPDES permit or which affect the authorization by the proposed NPDES permit of the discharge of pollutants.

(2) After a public notice period has expired, the Agency shall consider all comments received as a result of the public notice and may modify the proposed NPDES permit as it considers appropriate. Public hearings may be held as provided for in Section 124.36 of the Guidelines. If a public hearing is held, the agency shall consider all comments and may modify the proposed NPDES permit as it considers appropriate. If a public hearing is requested and should the Agency decide not to hold a public hearing, the Director shall provide the Regional Administrator and all parties requesting

the hearing, a written explanation of why the hearing was not held before submitting the proposed NPDES permit to the Regional Administrator for approval.

(3) If a proposed NPDES permit issued with a public notice is modified as a result of the public notice or public hearing, a revised copy of the proposed NPDES permit shall be transmitted to the Regional Administrator, Attention: NPDES Permit Branch, together with a copy of all statements received from the public notice, and where a public hearing is held, a summary of all objections, with a request for approval to issue the NPDES permit. In lieu of a summary, the Director may provide a verbatim transcript of the entire public hearing.

(4) If a proposed NPDES permit is not revised after a public notice or where held, a public hearing, the Director shall notify the Regional Administrator, Attention: NPDES Permit Branch, by letter that the proposed NPDES permit issued with the public notice has not been revised and request approval to issue the NPDES permit. The request for approval shall include a copy of all written statements received from the public.

(5) The Regional Administrator shall respond within 15 days from the date of receipt of the letter requesting final approval to issue or deny the proposed permit. The Regional Administrator pursuant to any right to object provided in Section 402(d)(2) of the Act, may comment upon, object to or make recommendations with respect to the proposed NPDES permit. If no written comment is received by the Agency from the Regional Administrator within 15 days, the Director may assume, after verification of receipt of the proposed permit, that the EPA has no objection to the issuance of the NPDES permit.

Ex. 328, MOA at 9-10. Section 124.46(2) references the public notice period but does not reference EPA comments. Section 124.46(5) states that EPA “may comment upon, object to or make recommendations with respect to the proposed NPDES permit” submitted for “final approval.”

33. The MOA neither requires nor prohibits EPA from submitting comments during the public comment period. Ex. 328. Thus, MPCA’s request that EPA wait to submit comments after the public comment period was not inconsistent with the MOA.

34. The MOA neither requires nor prohibits MPCA from providing EPA with a pre-proposed permit for EPA review and comment. Thus, MPCA’s agreement to provide EPA 45 days to review and provide comments on a pre-proposed permit was not inconsistent with the MOA.

35. The MOA provides that MPCA “may assume, after verification of receipt of the application, that no comment is forthcoming if [MPCA] has received no response from the [EPA] Regional Administrator at the end of 20 days.” Ex. 328 at 4 (§ 124.22(7)).

36. Because EPA did not submit a comment letter within 20 days of either PolyMet’s initial or revised permit application, and because MPCA coordinated with EPA throughout the development of the PolyMet Permit, MPCA’s processing of PolyMet’s permit application was not inconsistent with the MOA. *See* Ex. 328 at 4 (§ 124.22(7)).

37. There is no evidence that MPCA violated the MOA with respect to the PolyMet Permit.

38. Because there is no evidence that MPCA violated the MOA with respect to the PolyMet Permit, there is no evidence that an amendment to the MOA was required in order for MPCA to process and issue the PolyMet Permit.

VIII. MPCA DID NOT COMMIT IRREGULARITIES IN PROCEDURE WITH RESPECT TO ITS APRIL 5, 2018 PHONE CALL WITH EPA.

39.40 C.F.R. § 124.17(a)(2) requires MPCA to “[b]riefly describe and respond to all significant comments on the draft permit or the permit application (for section 404 permits only) raised during the public comment period, or during any hearing.” Similarly, Minn. R. 7001.1070, subp. 3, requires MPCA to “respond to all significant comments received under part 7001.0110 during the public comment period. The response may be made either orally or in writing.”

40. Because Kevin Pierard’s oral statements on the April 5, 2018 phone call with MPCA were not made “during the public comment period” or “during any hearing,” MPCA was not required to respond to those comments pursuant to 40 C.F.R. § 124.17(a)(2) or Minn. R. 7001.1070, subp. 3.

41. Because EPA did not intend to elicit a formal response to Kevin Pierard’s oral statements, MPCA was not required to respond to those comments pursuant to 40 C.F.R. § 124.17(a)(2) or Minn. R. 7001.1070, subp. 3.

IX. THERE IS NO EVIDENCE THAT MPCA COMMITTED IRREGULARITIES IN PROCEDURE.

42. Based on the findings of fact and the above conclusions of law, there is no evidence that MPCA violated any statutory provisions with respect to the PolyMet Permit.

43. Based on the findings of fact and the above conclusions of law, there is no evidence that MPCA violated any regulatory provisions with respect to the PolyMet Permit.

44. Based on the findings of fact and the above conclusions of law, there is no evidence that MPCA violated the Memorandum of Agreement with respect to the PolyMet Permit.

45. Based on the findings of fact and the above conclusions of law, there is no evidence that MPCA committed any “irregularities in procedure” with respect to the PolyMet Permit.

X. SPOILATION SANCTIONS ARE NOT APPROPRIATE IN THIS PROCEEDING.

46. The appeals of the PolyMet Permit before the court of appeals will be reviewed pursuant to a writ of certiorari. Minn. Stat. §§ 14.63-14.68; Transfer Order at 1. Certiorari “review shall be confined to the record.” Minn. Stat. § 14.68; *see also Amdahl v. Fillmore Cnty.*, 258 N.W.2d 869, 874 (Minn. 1977) (“Certiorari is, by its nature, a review based solely upon the record.”).

47. Minn. Stat. § 14.66 requires MPCA to develop an administrative record and transmit the record to the court of appeals once the writ of certiorari is served. Minn. R. 7000.0755 prescribes the content of the record that MPCA must transmit to the court of appeals. Together, Minn. Stat. § 14.66 and Minn. R. 7000.0755 govern MPCA’s duty to preserve documents for an anticipated certiorari appeal. There is no statutory or regulatory requirement that an agency implement a litigation hold order for certiorari appeals.

48. Until the court of appeals issued its June 25, 2019 order transferring this proceeding to this Court, the PolyMet Permit was subject only to certiorari review, for

which no litigation hold order is required. *See Minn. Stat. §§ 14.63-14.68; Transfer Order at 1.*

49. Motions asking the court of appeals to transfer proceedings to the district court under Minn. Stat. § 14.68 have rarely been granted. Moreover, when they have been granted, discovery has been limited to written interrogatories or written deposition questions. *See In re Application of Lecy*, 304 N.W.2d 894, 900 (Minn. 1981); *Mampel*, 254 N.W.2d at 377-78; *Ellingson & Associates, Inc. v. Keefe*, 396 N.W.2d 694, 695 (Minn. Ct. App. 1986). Requests for production of documents traditionally have not been allowed in proceedings such as the instant transfer proceeding. Thus, MPCA had no basis to reasonably anticipate that its documents would be subject to document requests even if Relators' transfer motion was granted. For these reasons, MPCA was not required to implement a litigation hold order upon Relators' filing of their transfer motion.

50. Although no litigation hold was required during the 39-day period from May 17 (when the motion to transfer was filed) to June 25, 2019 (when the motion to transfer was granted and MPCA issued a litigation hold order), there is no evidence that MPCA altered or destroyed any documents during this time, or at any time thereafter.

51. Based on the findings of fact in this proceeding, there is also no evidence that MPCA improperly altered or destroyed relevant documents at any earlier time. For the reasons described in previous sections of these conclusions of law, the notes or emails

that MPCA staff discarded were not required to be maintained under the laws and regulations that govern MPCA's duties to preserve documents.

52. Relators suggest that MPCA employees may have destroyed documents that they do not know about, but this Court may not presume that relevant documents have been altered or destroyed. *See Costello*, 646 N.W.2d at 210 ("[W]e have condemned arguments that invite the [fact finder] to speculate about the facts."); *Vroman*, 169 N.W.2d at 62 (explaining that a party must satisfy its burden "without speculation or conjecture").

53. There are additional reasons why it would be inappropriate for this Court to issue spoliation sanctions. A party seeking spoliation sanctions must establish prejudice resulting from the improper alteration or destruction of evidence. *Miller v. Lankow*, 801 N.W.2d 120, 132 (Minn. 2011); *Foss v. Kincade*, 766 N.W.2d 317, 323 (Minn. 2009) (holding "sanction is only appropriate if the unavailability of the evidence results in prejudice to the opposing party"); *The Valspar Corp. v. Millennium Inorganic Chemicals, Inc.*, No. 13-CV-3214, 2016 WL 6902459, at *6 (D. Minn. Jan. 20, 2016) (there needs to be an express finding of prejudice to the requesting party before a court may impose a sanction for the destruction of evidence).

54. Here, there is no evidence that Relators were prejudiced by any alleged alteration or destruction of evidence by MPCA.

55. The *Miller* case identifies three factors for courts to consider in determining whether spoliation sanctions are warranted:

(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Miller, 801 N.W.2d at 132 (quoting *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994)).

56. Thus *Miller* teaches that spoliation sanctions are not appropriate in this matter for three independent reasons: (i) there is no evidence that MPCA altered or destroyed relevant evidence, (ii) it follows that there is no evidence that MPCA was at fault for any alleged alteration or destruction of relevant evidence, and (iii) there is no evidence that Relators were prejudiced by any alleged alteration or destruction of relevant evidence.

Miller, 801 N.W.2d at 132.

ORDER

IT IS HEREBY ORDERED:

Being fully advised, the Court hereby finds that there were no procedural irregularities in the permitting process for the PolyMet permit. The Court further finds that:

1. The Court conducted an evidentiary hearing for 7 days beginning on January 21, 2020, and ending on January 29, 2020, heard the testimony and received and reviewed the exhibits admitted during that hearing, and has reviewed the parties' pre-and post-hearing briefs, findings of fact and conclusions of law and all other

submissions. The Court incorporates the Findings of Fact and Conclusions of Law above.

2. MPCA did not violate any statute, regulation or rule or any provision of its Memorandum of Agreement with the U. S. Environmental Protection Agency (“EPA) in its development of the PolyMet permit. The Court also finds no evidence that MPCA acted arbitrarily or capriciously or was subject to undue influence in the permitting process.

3. MPCA engaged and interacted with the EPA and the public at an unprecedented level in order to obtain, consider and address their comments on the PolyMet permit. EPA and MPCA had numerous meetings and telephone calls throughout the permitting process. EPA had the opportunity to submit comments on the PolyMet permit, orally or in writing, throughout the permitting process.

4. EPA’s statements conduct and decisions during the PolyMet permitting process do not constitute a procedural irregularity by MPCA.

5. EPA decided not to submit any written comments on the PolyMet permit during the public comment period or at any time. Although MPCA had requested that EPA wait until after the public comment period to submit its comments on the draft permit, the decision not to submit comments at that time or at any time was EPA’s.

6. Pursuant to an agreement between EPA and MPCA, EPA had an additional 45 days to review and comment upon a draft of the PolyMet permit that incorporated

the revisions MPCA made to address the public comments it received. EPA did not submit any written comments on the draft permit during or at the end of that 45-day period.

7. EPA had a 15-day period within which to object to the PolyMet permit after the conclusion of the 45-day review period. EPA did not object to the permit and informed MPCA that it was not going to object.

8. MPCA did not preclude EPA from making comments on or objecting to the PolyMet permit, nor did MPCA have the authority or ability to do so.

9. MPCA did not attempt to suppress EPA's comments or keep them out of the record.

10. MPCA did not violate the Minnesota Government Data Practices Act or the Minnesota Official Records Act.

11. There is no evidence that MPCA destroyed any evidence relevant to these proceedings. No adverse inferences in favor of Relators are appropriate and none will be entered.

12. None of Relators' alleged procedural irregularities has merit.

Accordingly, the Court finds that no procedural irregularities occurred in the permitting process for the PolyMet permit. The Court will transfer this matter back to the Court of Appeals.

Dated this ____ day of _____, 2020.

By: _____

Judge John H. Guthmann

Minnesota District Court Judge for the Second Judicial District

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