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STATE OF MINNESOTA | **DISTRICT COURT**

COUNTY OF RAMSEY | **SECOND JUDICIAL DISTRICT**
Case Type: Civil Other/Misc.

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project, St. Louis County, Hoyt Lakes and Babbitt, Minnesota

Court File No. 62-CV-19-4626
Judge John H. Guthmann

RELATORS' POST-TRIAL RESPONSE BRIEF

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INTRODUCTION

Relators proved at least one dozen Minnesota Pollution Control Agency ("MPCA") irregularities in procedure in developing and issuing a National Pollutant Discharge Elimination System/State Disposal System ("NPDES") permit to PolyMet Mining Inc. ("PolyMet"), which irregularities are described in detail in Relators' Proposed Conclusions of Law ("Concl."). Among other things, the evidence adduced at the hearing shows that:

1. MPCA's repeated requests to the United States Environmental Protection Agency ("EPA") not to send EPA's written comments on the draft PolyMet permit to MPCA were irregularities in procedure. (Concl. ¶ 8.) MPCA's rationalizations were misleading, pretextual, and post-hoc. (¶¶ 188-212, 215-64.)[1] Further, Respondents' claims that MPCA need only respond to EPA written comments underscore the benefit to MPCA if EPA withheld its draft PolyMet permit comment letter. (PolyMet's Post-Hr'g Mem. ("PolyMet Mem.") at 19, 22, 26; MPCA's Post-Hr'g Br. ("MPCA Br.") at 37-40.)

2. MPCA's agreement with EPA to provide a "pre-proposed permit" was a departure from MPCA's regular practice. (Concl. ¶ 9.)

3. MPCA's failure to respond in writing to EPA's comments on the draft PolyMet permit was a departure from MPCA's regular practice. (Concl. ¶ 10.)[2]

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[1] Paragraph citations ("¶") without other designations are to Proposed Findings in Relators' Proposed Findings of Fact, Conclusions of Law, and Order (Apr. 22, 2020) filed with Relators' Post-Trial Brief ("Relators Br.").

[2] EPA cases cited by PolyMet, (PolyMet Mem. at 19-20), stating commenters must transcribe their own comments rely on 40 C.F.R. §§ 124.18-.19, which do not apply to state-issued permits under 40 C.F.R. § 123.25.

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4. MPCA's deletion and failure to preserve or produce Shannon Lotthammer's ("Lotthammer") March 13-15, 2018 emails regarding EPA's comments on the draft PolyMet permit violated the Minnesota Official Records Act ("Records Act") and the Minnesota Government Data Practices Act ("DPA"), MPCA's written policies, and MPCA's common law duty to preserve evidence when litigation is anticipated. (Concl. ¶ 11.)

5. MPCA's failure to disclose staff attorney Michael Schmidt's notes violated the DPA and was contrary to MPCA's written policy. (Concl. ¶ 14.)

6. MPCA's systematic conduct to withhold evidence of EPA's comments on the draft PolyMet permit and MPCA's own irregular procedures from the administrative record violated statutes, rules, policies and MPCA's obligations under common law, and was contrary to MPCA's regular practice. (Concl. ¶ 16.)

As a result of the proven irregularities in procedure, MPCA submitted an incomplete and misleading administrative record to the Court of Appeals.[3]

[3] Respondents' proposed Findings of Fact, in many instances, misstate the evidence submitted to the Court, but space limitations prevent Relators' from addressing those errors here. Misleading factual statements include but are not limited to: MPCA Proposed Findings ¶¶ 22, 65, 95, 97, 99, 107, 161, 166, 187, 202; PolyMet's Proposed Findings ¶¶ 26, 30, 58, 67, 102, 111, 136, 152, 167, 194. Similarly, space limitations prevent Relators from responding to each erroneous argument advanced by MPCA and PolyMet in their respective briefs.

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ARGUMENT

I. IRREGULARITIES IN PROCEDURE UNDER MINN. STAT. § 14.68 INCLUDE CONDUCT NOT IN ACCORDANCE WITH MPCA POLICIES, MANUALS, AND REGULAR PRACTICE, AS WELL AS VIOLATIONS OF LEGAL DUTIES AND AUTHORITIES.

The rules of statutory interpretation are well-established. "The first step is to examine the language of the statute to determine if it is ambiguous." *Dupey v. State*, 868 N.W.2d 36, 39 (Minn. 2015). "Statutory language is ambiguous only if, as applied to the facts of the particular case, it is susceptible to more than one reasonable interpretation." *Id.* "If the statutory language is unambiguous, [the Court] must enforce the plain meaning of the statute." *Id.* Only if the statue is ambiguous should the Court "look beyond the language of the statute to ascertain the Legislature's intent." *Id.* Thus, the Court can only look to the interpretation of a former law, or other statutory factors for ascertaining legislative intent when a statute is ambiguous. Minn. Stat. § 645.16; *Lapenotiere v. State*, 916 N.W.2d 351, 359 (Minn. 2018).

A. Respondents concede that Relators' interpretation of "irregularities in procedure" is the plain meaning of the phrase.

The plain meaning of the phrase "irregularities in procedure" encompasses both legal violations *and* an agency's failure to comply with policies, manuals, and regular practice. (Relators Br. at 16-20.) MPCA provides no definition for the phrase, and so concedes the point. (*See* MPCA Br. at 14-18.) PolyMet's citation to the Oxford English Dictionary supports Relators' plain language interpretation. (PolyMet Mem. at 12-13.) The Oxford English Dictionary—in accord with Black's Law Dictionary and The American

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Heritage Dictionary (Relators Br. at 17-18)—defines "irregularity" to mean "deviations from or violation of a rule, law, or principle; disorderliness in action; deviation from what is usual or normal; abnormality, anomalousness." (PolyMet Mem. at 12-13 (quoting Oxford English Dictionary).) The Oxford English Dictionary also defines "procedure" as a "particular action or course of action, a proceeding; a particular mode of action" or a "set of instructions for performing a specific task." (*Id*. at 12 (same).) In short, PolyMet's chosen definition supports Relators' argument that "irregularities of procedure" plainly means a course of action not in accordance with legal obligations, policies and principles, or normal and regular practice.

B. Respondents' cases are inapplicable and do not conflict with the plain meaning.

Respondents claim caselaw requires this Court to interpret "irregularities in procedure" as used in Minn. Stat. § 14.68 to mean only "unlawful procedure." (MPCA Br. at 16; PolyMet Mem. at 7.) Respondents rely on what they describe as a "trilogy" of Minnesota Supreme Court cases and four Court of Appeals' decisions. None of this caselaw supports their interpretation.

1. Supreme Court precedent does not support Respondents' interpretation.

Respondents' Supreme Court "trilogy" includes: *Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375 (Minn. 1977); *People for Envtl. Enlightenment and Responsibility, Inc. (PEER) v. Minn. Envtl. Quality Council*, 266 N.W.2d 858 (Minn. 1978) ("*PEER*"); and *In re Application of Lecy*, 304 N.W.2d 894 (Minn. 1981). These cases have

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no application here. The cases are not binding precedent. *Fletcher v. Scott*, 277 N.W.270, 272 (Minn. 1938) (stare decisis only invoked where "the judicial mind has been applied to and passed upon the precise question"). The cases were decided before 1983 when the Legislature codified Minn. Stat. § 14.68 in its current form, coincident with creation of the Court of Appeals, specifying that appeals from administrative actions would be by certiorari rather than by an action in district court. Laws 1983, ch. 247, § 14. The cases are inapplicable because they do not interpret the phrase "irregularities in procedure." Instead, the cases address the scope of permissible discovery where the only claimed "irregularities in procedure" were statutory or rule violations. Nonetheless, because Respondents so heavily rely on these cases, we discuss them in more detail.

In *Mampel*, the aggrieved parties challenged an agency decision on the grounds that it violated Minn. Stat. § 15.0421, arguing "a majority of the officials of the agency who are to render the final decision have not read or heard the evidence."[4] 254 N.W.2d at 377. The Supreme Court ruled that "limited and narrow" discovery was permissible into whether the agency complied with Minn. Stat. § 15.0421. *Id*. at 378. *Mampel* does not address—let alone resolve—the interpretation of the phrase "irregularities in procedure." In fact, the Supreme Court expressly refused to undertake such an inquiry, expressing no opinion on "whether failure to comply with the [Open Meeting] law is a procedural irregularity within the contemplation" of the predecessor statute to Minn. Stat. § 14.68. *Id.* at 378 n.2.

[4] The language requiring officials who render a decision to have read or heard the evidence is no longer part of MAPA. Laws 1975, ch. 380, § 7.

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Like *Mampel*, *PEER* addressed the proper scope of discovery when it is alleged that commissioners violated Minn. Stat. § 15.0421. 266 N.W.2d at 872. The Supreme Court reaffirmed *Mampel*, noting that it was "extremely important for appellants to discover whether the officials themselves actually made the decision as the [M]APA requires or whether they simply rubber-stamped" the decision. *Id.* at 873. The predecessor statute to Minn. Stat. § 14.68, Minn. Stat. § 15.0424, was not at issue. *PEER* does not discuss the meaning of the phrase "irregularities in procedure."

In *Lecy*, the aggrieved parties alleged a number of procedural errors. 304 N.W.2d at 897. As relevant here, the Supreme Court determined no procedural deficiencies occurred, but did not discuss whether any of the alleged errors were "irregularities in procedure" *Id.* The *Lecy* decision has no precedential value here.

2. Respondents fare no better with Court of Appeals' decisions.

Although the relators in *In re Dakota Cty. Mixed Mun. Solid Waste Incinerator*, another case cited by Respondents, contended procedural irregularities occurred before MPCA, the Court of Appeals did not describe the alleged irregularities in the opinion. 483 N.W.2d 105 (Minn. App. 1992). Noting that *Mampel*, *PEER*, and *Lecy* were decided before 1983, the Court of Appeals declined to follow those cases or allow discovery. *Id.* at 106. The Court of Appeals neither discusses nor references the meaning of the phrase "irregularities in procedure" as used in Minn. Stat. § 14.68. The portion of the opinion which Respondents quote and describe as a holding is not a holding (MPCA Br. at 17,

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PolyMet Mem. at 10); it is just the Court of Appeals' summary of the *Mampel* decision. *Dakota Cty.*, 483 N.W.2d at 106.

Respondents mischaracterize *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165 (Minn. App. 2001), claiming the case holds that only statutory violations are procedurally irregular. (PolyMet Mem. at 10.)[5] There is no such holding in *Hard Times.* Rather, the Court of Appeals found that "it is undisputed that the city council violated both the procedures set forth in the Manual and the explicit instructions of the city attorney," and concluded "based on relator's extensive documentation of alleged irregularities in procedures, we are exercising our authority to transfer this case to the district court pursuant to section 14.68 . . . ." *Hard Times*, 625 N.W.2d at 174. Nowhere does the Court of Appeals construe "irregularities in procedure," let alone hold that irregularities are limited to violations of law. Indeed, the Court of Appeals ordered a Minn. Stat. § 14.68 transfer on the grounds that a manual, an attorney's instructions, and an email were evidence of improper influences within the scope intended by the phrase "irregularities in procedure." Notably, *Hard Times* does not discuss, nor even cite, *Mampel*, *PEER*, *Lecy*, or *Dakota Cty.*

PolyMet cites *In re North Metro Harness, Inc.*, 711 N.W.2d 129 (Minn. App. 2006) for the proposition that "no procedural irregularities exist without violations of established rules." (PolyMet Mem. at 11.) The case is inapposite. The process for issuing a racing license was not governed by MAPA and, therefore, no part of MAPA – including Minn. Stat. § 14.68 – applied. *North Metro*, 711 N.W.2d at 135. Both Respondents rely on *In re*

[5] MPCA implies the same in a string citation. (MPCA Br. at 17.)

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Koochiching Cty., No. A09-381, 2010 WL 273919 (Minn. App. Jan. 26, 2010), a non-precedential decision. *See* Minn. Stat. § 480A.08, subd. 3. Although the relator contended that their claims under Minn. Stat. § 14.69 were analogous to *Hard Times*, the Court of Appeals disagreed. *Id*. The relator neither claimed "irregularities in procedure" nor requested a transfer under Minn. Stat. § 14.68. *Id.* at *9-10.

C. This Court is bound by the Court of Appeals' determination of the meaning of "irregularities in procedure" in the Transfer Order.

Respondents fail to cite or discuss the most pertinent authority to interpret the phrase "irregularities in procedure" in Minn. Stat. § 14.68: the Transfer Order in this case. The Court of Appeals concluded that, based on the evidence Relators provided, there was "substantial evidence of procedural irregularities not shown in the administrative record" and that it was "appropriate under Minn. Stat. § 14.68 to transfer this matter to district court for a hearing and determinations of the alleged irregularities."[6] (Transfer Order at 3.) Despite filing five declarations and two briefs totaling forty-five pages in length to oppose the transfer, MPCA did not assert in the Court of Appeals that the phrase "irregularities in procedure" was limited to violations of statutes, rules, or regulations.[7] Neither did PolyMet

[6] No presumption of regularity applies to a matter that has been transferred due to substantial evidence of irregularities in procedure. *See, e.g.*, *Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (presumption of regularity does not apply when "an administrative agency deviates from its established procedures"); *United States v. Zuniga*, 767 F.3d 712, 720 (7th Cir. 2014) (presumption assumes that the government "adheres to established procedures").

[7] In its briefing MPCA conceded that the Court of Appeals' transfer order in *Hard Times* was based on the fact that the city council "ran afoul of the express procedures set forth in . . . the city attorney's letter"; an attorney's letter is obviously not a statute, rule, or

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in its opposition to the transfer motion.[8] It is too late for Respondents to raise questions about the meaning of "irregularities in procedure." *See Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 480 (Minn. App. 2006) (party waived argument by not raising it in the first instance).

Under the law of the case doctrine, the Transfer Order is controlling here. *See Townsend v. State*, 867 N.W.2d 497, 501 (Minn. 2015) (the law of the case doctrine bars issues that have been previously decided in the same case). The Court of Appeals found that the record before it contained "undisputed evidence" that there had been a departure from "typical procedures" as well as "disputed evidence" as to whether the actions of MPCA were "unusual." (Transfer Order at 3-4.) Without referring to any statutes, rules, or regulations, the Court of Appeals concluded, based on evidence showing a failure to follow "typical" procedures and "unusual" actions, that Relators had shown "substantial evidence of procedural irregularities not shown in the administrative record" and transferred the case to this Court. (*Id.* at 4.) Thus, failure to follow typical procedures and engaging in unusual procedures are deemed by the law of the case doctrine to be "irregularities in procedure, not shown in the record." This Court does not have discretion to ignore those determinations by the Court of Appeals. *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 917 (Minn. App. 2001) (district court committed reversible error by admitting evidence that reexamined issue previously decided by Court of Appeals).

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regulation. (MPCA's Resp. to WaterLegacy's Mot. for Transfer to the Dist. Ct. or, in the Alternative, for Stay Due To Irregular Procedures and Missing Docs. at 22.)

[8] For that matter, neither MPCA nor PolyMet cited *Mampel*, *PEER*, or *Lecy*.

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D. Respondents' interpretation of "irregularities in procedure" is unreasonable.

Respondents offer no reasonable interpretation of "irregularities in procedure"; the phrase is plain and unambiguous. *Dupey*, 868 N.W.2d at 39.

1. It is unreasonable to define "irregularities in procedure" in Minn. Stat. § 14.68 to have the same meaning as Minn. Stat. § 14.69(c).

Respondents contend that "irregularities in procedure" in Minn. Stat. § 14.68 and "unlawful procedure" in Minn. Stat. § 14.69(c) have the same meaning. (MPCA Br. at 14-18; *see* PolyMet Mem. at 7-14.) This interpretation is contrary to the context of the statute.[9] *Chiodo v. Bd. of Ed. of Special Sch. Dist. No. 1*, 215 N.W.2d 806, 808 (Minn. 1974). When interpreting statutes, this Court must "assume that when the drafters use different terms, they mean different things." *State v. Strobel*, 932 N.W.2d 303, 308 (Minn. 2019). Respondents' proposed interpretation would violate statutory direction that, where possible, a statute must be construed "to give effect to all its provisions." Minn. Stat. § 645.16.

Respondents' argument proceeds from the assumption the only basis upon which the Court of Appeals can use this Court's determinations under Minn. Stat. § 14.68 is to analyze whether an agency committed "unlawful procedures" under Minn. Stat. § 14.69(c). That assumption is contradicted by the statute. Minnesota Statutes § 14.69 expressly

[9] PolyMet also contends that Minn. Stat. § 14.68 "must be read in light of" Minn. Stat. § 14.06. (PolyMet Mem. at 13.) But PolyMet fails to note that under Minn. Stat. § 14.06, not all procedures are rules that have the force of law. *See, e.g.*, *In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 73-74 (Minn. App. 1994) (no rule needed for informal procedures regarding "internal management of the agency").

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provides for "judicial review under sections 14.63 to 14.68" using all the Minn. Stat. § 14.69 factors—factors delineated in the disjunctive. *State v. Bakken*, 883 N.W.2d 264, 268 (Minn. 2016) (requiring that "only one of the possible factual situations linked by the 'or' be present for the statute to be violated"). Thus, if there are irregularities in procedure, the Court of Appeals will review the entire record as supplemented to determine whether *any* of the *six* Minn. Stat. § 14.69(a)-(f) factors require reversal, remand, or modification.

Further, Respondents' interpretation is inconsistent with caselaw analyzing agency procedures under Minn. Stat. § 14.69 factors other than Minn. Stat. § 14.69(c). *See, e.g.*, *Montella v. City of Ottertail*, 633 N.W.2d 86, 89 (Minn. App. 2001) (analyzing an informal procedure under Minn. Stat. § 14.69(f)); *Cable Commc'ns Bd. v. Nor-W. Cable Commc'ns P'ship*, 356 N.W.2d 658, 669 (Minn. 1984) (reviewing a Board's procedure under Minn. Stat. § 14.69(e)). MAPA's context indicates that "irregularities in procedure" means more than just an "unlawful procedure."

2. It is unreasonable to exclude violations of statutes, rules, and authorities proved by Relators in these proceedings from the meaning of "irregularities in procedure."

MPCA's Records Act and DPA violations are "irregularities in procedure" under Minn. Stat. § 14.68. Respondents assert that violating the Records Act and DPA cannot constitute an irregularity in procedure because neither relates to a "permitting decision." (MPCA Br. at 27-28; PolyMet Mem. at 31-32.) Respondents wish Minn. Stat. § 14.68 read "alleged irregularities in [permitting] procedure." But it does not. This Court cannot "add

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words of qualification to the statute that the Legislature has omitted." *City of Brainerd v. Brainerd Invs. P'ship*, 827 N.W.2d 752, 756 (Minn. 2013).

In addition, the Records Act[10] and DPA[11] violations by their nature are irregularities in procedure "not shown in the administrative record" under Minn. Stat. § 14.68. Violations of the Records Act and the DPA kept critical documents pertaining to the PolyMet permit out of the administrative record. Email correspondence between MPCA and EPA from March 12, 2018 through March 15, 2018, (Exhibits 58, 60, 612, 62, 33, and 691), which were deleted and not preserved by MPCA, were all missing from the administrative record. (Ct. Ex. F; ¶ 386.) On the other hand, where MPCA notes – such as the notes prepared by Stephanie Handeland for dates other than April 5, 2018 – were provided to WaterLegacy under the DPA, those notes were included in the administrative record. (Ct. Ex. F; Exs. 324, 325.)

Respondents' argument also disregards the role DPA requests play in certiorari appeals, allowing relators and the courts to investigate whether the administrative record is adequate and complete. *See, e.g.*, *Trout Unltd., Inc. v. Minn. Dep't of Agric.*, 28 N.W.2d

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[10] PolyMet cites *Kottschade v. Lundberg*, 160 N.W.2d 135 (Minn. 1968) for the proposition that the Records Act only requires MPCA to retain the MCPA's Findings of Fact, Conclusions of Law, and Order. (PolyMet Mem. at 32-33.) *Kottschade* does not indicate that in a permitting process an agency only engages in one "official activity." 160 N.W.2d at 137-38. Indeed, MPCA made *numerous* decisions that constituted "official activities," including the decision to request EPA withhold written comments. *See also Minneapolis Star & Tribune Co. v. State*, 163 N.W.2d 46, 49 (Minn. 1968) (Board must describe circumstances that prompted an action).

[11] Respondents argue the DPA cannot be an irregularity in procedure because the DPA has provisions to compel compliance. *See* Minn. Stat. §§ 13.08, .085. Relators do not ask this Court to compel MPCA to produce anything under the DPA.

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903, 907-08 (Minn. App. 1995) (government data used to assess omission from the record).[12] Noncompliance with the DPA undermines the ability of the public and the courts to assess an administrative record's adequacy and an agency's review of critical issues.

Finally, MPCA's argument that violations of the Records Act and DPA are not irregularities in procedure is contrary to directions and requirements it imposed on its staff. (*See* Ex. 77 at 30 (MPCA's Records and Data Management Manual stating that MPCA's records are "governed by three statutes: the [Records Act], the Record Management Act, and the [DPA]"; *see also* Ex. 71 at 32 (Minnesota Records Retention Schedule requiring permanent retention of NPDES permit records).) It is an irregular procedure for an agency to disregard its own manuals and policies. *See Hard Times*, 625 N.W.2d at 174.

F. Respondents have not only advanced an unreasonable interpretation of "irregularities in procedure," but their proposed interpretation would violate legislative intent.

If the phrase "irregularities in procedure" were ambiguous—which it is not—then the Court would resolve any ambiguity in favor of legislative intent as ascertained under the Minn. Stat. § 645.16 factors. Fortunately, ascertaining legislative intent is easy, as the Legislature spelled out MAPA's purpose, in relevant part: "to provide oversight of powers and duties delegated to administrative agencies; to increase public accountability of administrative agencies; to ensure a uniform minimum procedure; to increase public access to governmental information . . . ." Minn. Stat. § 14.001(1)-(4) (numbering removed).

[12] Federal cases also illustrate the importance of data disclosure laws to assessing whether an agency submitted a complete record. *See, e.g.*, *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1265 (D. Colo. 2010).

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Thus, the Court must resolve any ambiguity regarding Minn. Stat. § 14.68 in favor of public access, accountability, and oversight over MPCA. Minn. Stat. § 645.16(3) (legislative intent ascertained from the "mischief to be remedied"). Respondents' interpretation cuts against this legislative intent, as it would preclude review of MPCA's course of conduct to hide information from the public and the Court merely because some of MCPA's conduct, according to Respondents, was not a direct violation of a statute or rule.

The legislative history of Minn. Stat. § 14.68 also supports Relators' interpretation of "irregularities in procedure." Minn. Stat. § 645.16(7). In the earlier version of the statute prior to 1980, Minn. Stat. § 15.0424, subd. 6, review of agency decisions was confined to the record, "except that in cases of alleged irregularities in procedure *before the agency*, not shown in the record," where additional testimony could be taken in district court. (Emphasis added). However, the qualifying language requiring that irregularities take place "before the agency" was deleted from the statute in 1980 and not restored when the statute was recodified in 1982 or modified in 1983. Laws 1980, ch. 615, § 21; Laws 1982, ch. 424, § 130; Laws 1983, ch. 247, § 14. The Legislature decided not to limit "irregularities in procedure" to those that took place "before the agency." Again, Respondents may not "add words of qualification to the statute that the Legislature has omitted." *City of Brainerd*, 827 N.W.2d at 756.

Finally, Respondents' conflation of the phrases in Minn. Stat. §§ 14.68 and 14.69(c) leads to an absurd result and serious consequences. *See* Minn. Stat. §§ 645.16(6), .17(1). Respondents' interpretation would require this Court's analysis to subsume the Court of

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Appeals' jurisdiction to determine whether MPCA violated Minn. Stat. § 14.69, inconsistent with this Court's "limited" jurisdiction. (Rule 16 Conf. Tr. 93:17-95:18 (Aug. 7, 2019).)

The plain and unambiguous text of Minn. Stat. § 14.68 supports Relators' definition of "irregularities in procedure." Respondents' strained interpretation is inconsistent with the plain language of the statute, contrary to the Transfer Order, inconsistent with precedent, and is unreasonable.

II. RESPONDENTS' REPEATED CLAIMS ABOUT EPA'S CONDUCT AND DECISIONS ARE OUTSIDE THE SCOPE OF THIS HEARING, IRRELEVANT, AND MISLEADING.

A. Minn. Stat. § 14.68 does not allow MPCA to excuse its irregularities in procedure by pointing a finger at EPA.

Respondents offer nothing but a distraction in attempting to excuse MPCA's many irregularities in procedure by shifting responsibility to EPA. (*See* MPCA Br. at 1-3, 18-20; PolyMet Mem. at 3-4, 28-29.) Respondents make much of EPA's authority to submit written comments and object to MPCA's proposed final permit. But Respondents provide no law or evidence that EPA's conduct somehow normalizes MPCA's irregularities in procedure. In short, *MPCA's* conduct is the source of Relators' alleged procedural irregularities and the cause of a misleading administrative record.

EPA is not a party to this case, and EPA's conduct is outside this Court's jurisdiction.[13] In fact, EPA was represented by U.S. Department of Justice ("DOJ") counsel

[13] EPA's conduct in this matter is at issue in an EPA Office of Inspector General investigation and litigation brought by Relator Fond du Lac Band in federal district court.

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in these proceedings to ensure that no evidence regarding EPA's decision-making was put before this Court, and DOJ counsel's objections to such questioning were sustained. (Tr. 188:5-21, 191:17-192:7, 220:17-20, 287:13-20.) There is no evidence in this record, and nor should there be, as to why or when EPA decided not to object to the PolyMet permit, (¶ 367), and the Court of Appeals, not this Court, will determine whether the final PolyMet permit adequately responded to EPA's comments, (*see* Tr. 49:4-50:4).

B. Respondents' Speculation as to EPA's "Intent" Neither Waives Violations of MPCA's Legal Duties Nor Excuses MPCA's Deviation from Regular Practice.

The 1974 memorandum of agreement between EPA and MPCA ("MOA") required that MPCA transmit PolyMet's NPDES permit application to EPA and that, should EPA submit a deficiency letter, no application be processed unless and until EPA sent a second letter stating that the deficiencies had been corrected. (Ex. 328, Part II, §§ 124.23(1).) In addition to citing an inapplicable section of the MOA, PolyMet claims that MPCA need not meet its legal obligations because EPA "interpreted" the MOA not to require a deficiency resolution letter. (PolyMet Mem. at 18; *see also* MPCA Br. at 34-35.) Even if the EPA could waive compliance with the MOA, no evidence supports PolyMet's conjecture. The Court did not admit the document PolyMet offered: it did not prove EPA did not object to processing the application since it was not written by EPA and pertained to the permit, not the application. (Tr. 1358:3-14.) Richard Clark provided no testimony as to MPCA's interpretation of the MOA, let alone speculation as to EPA's views. (Tr. 1359:3-6, 18-24.)

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Similarly, MPCA's claim that no response was needed to EPA's oral comments read aloud to MPCA on April 5, 2018 because there is "no evidence that EPA intended to elicit a formal MPCA response to these statements" is nonsensical. (MPCA Br. at 37.) EPA never agreed that MPCA need not specifically describe or respond to EPA's comments. (¶ 327.) MPCA's speculations about EPA's decisions and intentions are nothing more than a tactic to divert attention from MPCA's procedural irregularities.

III. RESPONDENTS' CHALLENGES TO SPOLIATION SANCTIONS ARE BASELESS.

MPCA spoliated evidence by permitting its principal, Lotthammer, to selectively and intentionally delete her emails regarding the PolyMet permitting process despite anticipating litigation regarding that process. MPCA failed to take the reasonable step to place a litigation hold on its principals' devices, which would have caused Minnesota IT ("MNIT") to create a forensic image of the devices before they were wiped clean. Respondents' arguments against spoliation shadowbox with Relators' motion as it was filed prior to the evidentiary hearing.[14] As the Court anticipated when it deferred Relators' motion, the evidentiary hearing changed the contours of Relators' motion and requested relief. (*See* Tr. 58:22-59:6.)

[14] Additionally, the Court should grant Relators' Motion to Strike the Declarations Submitted with MPCA's Post-Hearing Brief, which Motion was submitted May 11, 2020. These declarations are not evidence and have no place in a post-hearing brief.

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A. A litigation hold was a reasonable step to preserve evidence that would have created no burden on the part of MPCA.

MPCA's claims that a litigation hold would create a burden on the agency are belied by testimony. All MPCA had to do was request the hold. (Tr. 829:15-20, 837:5-14.) After receiving a request, MNIT (and not MPCA) would preserve any emails within the scope of the hold, obtain data held on state servers, store any devices subject to a hold in its lab, and create and store a forensic image of any such devices. (Tr. 829:11-15, 830:23-831:10, 836:1-847:4.) There is a completely separate agency whose job is to manage litigation holds. It cannot be said a litigation hold places a burden on MPCA.

B. PolyMet is not prejudiced by a sanction against MPCA.

PolyMet claims it is prejudiced by spoliation sanctions by making a spurious argument that the Court cannot issue a spoliation sanction because there are DPA actions to compel compliance. (PolyMet Mem. at 38-39.) This argument is cobbled together by relying on inapposite, non-precedential cases. *See* Minn. Stat. § 480A.08, subd. 3. PolyMet cites two unpublished Court of Appeals cases that do not discuss spoliation. *Fageroos v. Lourey*, No. A18-1692, 2019 WL 2571705, at *2 (Minn. App. June 24, 2019) (DPA claims for compensatory damages); *Zangs v. City of Saint Paul*, No. A07-1862, 2008 WL 4300405, at *4 (Minn. App. Sept. 23, 2008) (agency not liable under DPA to produce documents it never kept). PolyMet also cites an unpublished District of Minnesota case, in which the court *expressly reserved* judgment on spoliation sanctions in a case that involved an alleged violation of the DPA. *Lang v. City of Minneapolis*, No.13-3008, 2014 WL

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2808918, at *6 (D. Minn. June 20, 2014). None of these cases have anything to do with the spoliation sanctions Relators seek, let alone demonstrate PolyMet's supposed prejudice.

IV. PIERARD'S TESTIMONY WAS CREDIBLE AND CORROBORATED BY CONTEMPORANEOUS DOCUMENTS, DISCOVERY, AND MPCA TESTIMONY.

The Court should disregard PolyMet's fabricated attacks on Pierard's credibility. Pierard worked for EPA Region 5 for thirty-six years, nine years as Chief of the NPDES Program. (¶¶ 30-31.) He gained nothing from testifying and risked retribution. (Relators' Informal Letter Mot. to J. Guthmann at 2 (Dec. 4, 2019).) EPA sent a lawyer to monitor and object to his testimony. (Tr. 16:9-12.) Pierard's personal lawyer made a record of his client's concerns that the length of testimony resulted in personal hardship to his client. (Tr. 302:1-12.) Pierard's brief conversations with an attorney for one of the Relators do not impugn his credibility. (Tr. 346:13-18, 347:18-23.)

PolyMet misuses this Court's conjecture pertaining to a memorandum not admitted into evidence to claim Pierard acted as a disgruntled employee. (PolyMet Mem. at 22.) In fact, EPA's comments on the draft PolyMet permit were written by the NPDES program team of scientists and counsel, not by Pierard. (¶ 297.) In addition, Pierard's supervisor supported Pierard's position. (¶¶ 32, 164, 178.) Further, Pierard's testimony was corroborated. For example, his testimony that MPCA made numerous requests to EPA program staff and political appointees to prevent EPA from sending its written comments on the draft PolyMet permit was corroborated by trial exhibits and testimony of MPCA

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witnesses. (Exs. 58, 60-62, 333, 591, 837 at 25; Tr. 417:18-418:10, 558:3-8, 562:6-11, 580:19-581:17, 586:9-13, 667:18-23, 675:2-676:1.)

Similarly, Pierard's testimony that MPCA's request to EPA not to send comments on a draft NPDES permit was an unprecedented departure from regular practice was corroborated by the evidence and MPCA testimony. (Tr. 418:18-25, 611:5-14.) EPA's regular practice was to comment on MPCA draft NPDES permits during the public comment period, (¶¶ 69-71, 77-84, 88-92), but MPCA expressly "asked that EPA Region 5 not send a written comment letter *during the public comment period* . . . ." (Ex. 333 (emphasis added).) MPCA's misleading and pretextual reasons for doing so, (¶¶ 188-212, 215-64), do not change the central fact, as Pierard testified, that MPCA made a request it had never made before with no justifiable reason for doing so.

It is not surprising that Respondents would try anything to challenge Pierard—the sole witness not tied to MPCA. But, as the evidentiary hearing unfolded, Pierard's testimony regarding the regular practice for NPDES permits issued by MPCA and the irregular procedures MPCA adopted for the PolyMet permit was consistently confirmed.

CONCLUSION

Relators have proven MPCA committed multiple irregularities in procedure. Based on the foregoing, Relators' Post-Trial Brief, all the files, records, and proceedings herein, Relators pray that this Court adopt Relators' proposed findings of fact, conclusions of law, and order.

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DATED: May 13, 2020

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CERTIFICATION

The undersigned hereby acknowledges that sanctions may be imposed under Minn. Stat. § 549.211.

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