

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' MEMORANDUM IN
SUPPORT OF MOTION TO STRIKE
THE DECLARATIONS OF ADONIS
NEBLETT, ANDREW EMRICH, AND
THOMAS SANSONETTI AND
STATEMENTS MADE IN RELIANCE
ON THEM FROM MPCA'S POST-
HEARING BRIEF AND PROPOSED
FINDINGS OF FACT**

Relators object to Minnesota Pollution Control Agency's ("MPCA") reliance in its Post-Hearing Brief ("MPCA Br.") and Proposed Findings of Fact ("MPCA Prop. FOF") on three declarations that were neither offered nor admitted as evidence from declarants who did not testify at the Jan. 21, 2020 to Jan. 29, 2020 evidentiary hearing ("Hearing"). In submitting these three attorneys' declarations, MPCA ignored the Court's instruction that arguments regarding spoliation were to be made "using the record as it was admitted by the Court." (Evidentiary Hr'g Tr. ("Tr.") 85:22-24.)

In determining whether to sanction MPCA for spoliation, the Court must consider whether MPCA reasonably decided to not institute a litigation hold. (Relators' Post-Trial Br. at 37-40.) But instead of relying on evidence admitted by the Court at the Hearing to

justify its failure to place a litigation hold, MPCA relies on the declaration of its General Counsel, Adonis Neblett. (MPCA Br. at 45, 47; MPCA Prop. FOF ¶¶ 189, 201, 202 (citing MPCA’s Response to Motion for Spoliation Sanctions, Ex. 2 (“Neblett Decl.”).) Neblett did not testify, although he was present in the courtroom throughout the Hearing, (Tr. 6, 216, 431, 651, 892, 1112, 1320), and could have been proffered as a witness at any time had MPCA chosen to do so. MPCA also attempts to justify its failure to place a litigation hold on the supposed “custom” of federal agencies, relying on what MPCA clearly intends to be expert testimony contained in the declarations of Andrew Emrich and Thomas Sansonetti. (MPCA Br. at 45 n.4; MPCA Prop. FOF ¶ 202 (citing MPCA’s Response to Motion for Spoliation Sanctions, Exs. 11 (“Emrich Decl.”) & 12 (“Sansonetti Decl.”).) However, neither Emrich nor Sansonetti testified or were disclosed or qualified to provide expert testimony in this case. The Court should strike the declarations of Neblett, Emrich, and Sansonetti (collectively, the “Declarations”) and all statements made in reliance on them from MPCA’s Post-Hearing Brief and Proposed Findings of Fact.¹

LEGAL STANDARD

The Court has broad discretion to exclude evidence. *Rew v. Bergstrom*, 845 N.W.2d 764, 788 (Minn. 2014).

¹ To the extent MPCA relies on the Declarations in its Post-Hearing Response Brief to be filed May 13, 2020, Relators object to those statements as well.

ARGUMENT

I. MPCA Did Not Offer the Declarations—Nor Did the Court Admit Them—as Evidence at the Hearing.

The Declarations are not evidence and have no place in a post-hearing brief, let alone in proposed findings of fact. The Court stated that the parties' briefs would serve as their final argument. (Tr. 85:8-11). Closing arguments "must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995); *cf. In re Dykes*, No. 17-4022-KHS, 2018 WL 5819371, at *4 (Bankr. D. Minn. Feb. 26, 2018), *aff'd*, 954 F.3d 1157 (8th Cir. 2020) (refusing to consider business records that "were not admitted into evidence" but were cited in post-trial briefing).

Further, the Court directed the Parties to make arguments for or against spoliation "using the record *as it was admitted by the Court.*" (Tr. 85:22-24 (emphasis added).) MPCA should not be permitted to flout the Court's directive and rely on Declarations neither offered nor admitted into evidence of witnesses never subject to cross-examination.² The Hearing is over. The record is closed. MPCA's Declarations are not part of that record.

² The only declarations admitted into evidence in this case are those of witnesses who also testified and were subject to cross-examination. (Ex. 573 (Shannon Lotthammer Declaration), Ex. 757 (Jeff Udd Declaration), Ct. Ex. E (Michael Schmidt Declaration).)

II. The Declarations are Inadmissible Hearsay.

MPCA has offered no excuse, let alone good cause for offering the Declarations at this late date. Even if MPCA attempted to do so, the Declarations would all be inadmissible out of court statements offered for the truth asserted. Minn. R. Evid. 801(c); *Bronczyk v. Bronczyk*, A09-1004, 2010 WL 1029738, at *3 (Minn. App. Mar. 23, 2010) (affirming finding that year-old affidavit of since-deceased affiant was hearsay). The main evil of hearsay is that it is untested by cross-examination, and therefore untrustworthy. *Dallum v. Farmers Union Cent. Exch., Inc.*, 462 N.W.2d 608, 614 (Minn. App. 1990); *see also* 2A C.J.S. Affidavits § 57 (2020) (“Affidavits are unsatisfactory as forms of evidence as they are not subject to cross-examination, combine facts and conclusions, and, unintentionally or sometimes even intentionally, omit important facts or give a distorted picture of them.”).

MPCA’s self-serving Declarations exemplify the pitfalls of such hearsay evidence. Neblett attempts to justify his own failure to place a litigation hold. (Adonis Decl. ¶ 3.) Emrich and Sansonetti simply back the legal strategy of their law firm partners who represent MPCA in this proceeding. (Emrich Decl. ¶ 1 (partner at Holland & Hart LLP, the same firm as MPCA’s counsel); Sansonetti Decl. ¶ 1 (same).) MPCA did not call these declarants as witnesses, where their credibility and patent bias could be tested by cross-examination. This failure is most glaring in the case of Neblett, who was present every day of the Hearing. MPCA could have easily called Neblett to testify once the Court stated that the decision on spoliation would be based on the evidentiary record at the Hearing.

III. The Emrich and Sansonetti Declarations are Nothing More Than Inadmissible and Irrelevant Opinion Testimony.

To add icing to the cake, the Emrich and Sansonetti Declarations are also inadmissible and irrelevant opinion testimony. MPCA uses the declarations of Emrich and Sansonetti to claim that it is “not the custom of federal agencies to implement litigation hold orders for matters expected to be adjudicated on the administrative record.” (MPCA Br. at 45 n.4; MPCA Prop. FOF ¶ 202.) Neither Emrich nor Sansonetti have demonstrated sufficient personal knowledge as to the “custom of federal agencies” to offer this opinion. Minn. R. Evid. 602. Further, the sheer number and diversity of various federal agencies, which are subject to change as administrations change, makes any claim about a consistent “custom” dubious. Emrich has not worked for a federal agency since 2005, and Sansonetti has not since 2004. (Emrich Decl. ¶ 2; Sansonetti Decl. ¶ 2.) There have been two Presidential administrations since the Presidential administration in which they served, totaling about fifteen years of time for “custom” to change between their departure from government and the time the PolyMet permit was issued. Whatever knowledge Emrich or Sansonetti may have once had of any federal agency’s custom is remote in time as well as ill-defined.

Emrich and Sansonetti have more recent experience representing industry clients seeking permits, but that experience hardly qualifies either as experts in the customs of federal agencies. Minn. R. Evid. 702. Even if it did, MPCA did not qualify either as experts.

Id.

Finally, any opinions of federal agencies' custom would not assist the Court in determining the facts at issue, namely, whether it would have been reasonable for MPCA (which is obviously not a federal agency) to put a litigation hold in place. (Relators' Post-Trial Br. at 37-40.) Neither Emrich nor Sansonetti claim to be admitted to practice law in Minnesota, nor do they claim any prior experience with the requirements of Minnesota law for imposition of litigation holds, so they are utterly unqualified to offer any opinion relevant in this proceeding. The Declarations could not be admitted and the opinions stated in them are irrelevant.

PRAYER FOR RELIEF

For these reasons, Relators request the following relief from the Court:

1. An Order striking from MPCA's Post-Hearing Brief

a. The following from page 45:

see also MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶¶ 6-7 (Decl. of Adonis Neblett) (explaining that implementing litigation hold orders on all matters potentially reviewed on the administrative record “would be very burdensome” and would “consume a large amount of this Agency's scarce resources”). Here, MPCA did not reasonably anticipate that the PolyMet Permit would be the subject of litigation beyond the administrative record until the Court of Appeals transferred this proceeding to this Court on June 25, 2019. MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶ 3 (Decl. of Adonis Neblett). Once the Transfer Order was issued, MPCA promptly issued a litigation hold order. *Id.* at ¶ 8. Thus, MPCA's handling of litigation holds was consistent with its standard practice. *Id.* at ¶ 4;

b. Footnote 4 on page 45; and

c. The following from page 47:

Until the Court of Appeals issued its Transfer Order on June 25, 2019, MPCA anticipated that the PolyMet Permit would give rise only to judicial review on the administrative record. MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶ 3 (Decl. of Adonis Neblett);

2. And an Order striking from MPCA's Proposed Findings of Fact

- a. Finding 189;
- b. Finding 201; and
- c. The following from Finding 202:

MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶¶ 3-4 (Decl. of Adonis Neblett)

[and]

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).

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CERTIFICATION

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

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