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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
Case Type: Civil Other/Misc.
Judge John H. Guthmann

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis County Hoyt Lakes and Babbitt Minnesota	Case No. 62-CV-19-4626 **POST-HEARING MEMORANDUM BY POLY MET MINING, INC.**

Poly Met Mining, Inc. ("PolyMet") respectfully submits this Post-Hearing Memorandum to explain why Relators have failed to prove any "irregularities in procedure" under Minnesota law.

INTRODUCTION

Relators contend that MPCA's decision to issue a National Pollutant Discharge Elimination System ("NPDES") permit for PolyMet's NorthMet project was affected by "irregularities in procedure" under Minnesota Statutes Section 14.68. So before anything else, this case requires the Court to define "irregularities in procedure." The Minnesota Supreme Court decided a trilogy of cases that makes that task easy. Those cases hold that courts should ask "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." *Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977).

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MPCA's decision to issue an NPDES permit to PolyMet involved several statutorily defined procedures, rules, and regulations. Most relevant for purposes of this case is the Memorandum of Agreement ("MOA") that defines the permitting relationship between MPCA and the U.S. Environmental Protection Agency ("EPA") under the Clean Water Act. And while that MOA includes certain deadlines for MPCA-EPA interactions during the application and permit review process, it also leaves room for the agencies to adapt their relationship to the circumstances of each individual permit. In this case, that adaptation included an extraordinary amount of communication between MPCA and EPA staff that was designed to resolve EPA's concerns informally.

Relators want to equate extraordinary and irregularities in procedure. But their equation ignores the flexibility created by the MOA and the Supreme Court precedent that makes violating the MOA (or a statute or rule) a requirement for finding irregularities in procedure. Relators have barely alleged, much less proved, that MPCA's interactions with EPA violated the MOA. And to the extent that Relators rely on other laws—such as the Data Practices Act and the Official Records Act—they have shown neither that those laws govern permitting procedure nor that they were violated in this case.

Relators always have framed their argument in sweeping terms. Before the evidentiary hearing, Relators proclaimed that a "fraud on the public"[1] had occurred and that "only due to" their Minnesota Government Data Practices Act and Freedom of

[1] Relators' Pre-Trial Brief 3 (Jan. 10, 2020).

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Information Act requests, a secret "was revealed": EPA had drafted a comment letter that it did not send to MPCA.[2] Rushing to accuse MPCA of a "cover up" and lack of "transparency,"[3] Relators overlooked the fact that the administrative record includes an email stating that, during the first week of April 2018, EPA staff wanted to walk through with MPCA what EPA's "comment letter would have said if" EPA had sent it.[4] There was no secret and no cover up.

The administrative record already reflected the fact that EPA had a draft "comment letter" that it did not send to MPCA.[5] Relators flat-out failed to prove their allegations of a "cover up"[6] about the draft comment letter that EPA did not send to MPCA.

MPCA cannot put a comment letter from EPA into the administrative record if MPCA never received a comment letter from EPA.[7] And the decision not to send a comment letter was EPA's alone.[8] MPCA lacks legal authority to stop EPA from sending a comment letter.[9] After EPA decided not to send a comment letter, it was not illegal or even improper for MPCA to listen to what EPA staff had to say about the draft permit.

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[2] Relators' Pre-Trial Brief 2.

[3] Relators' Pre-Trial Brief 3.

[4] Ex. 307A; *see infra* at n.17.

[5] Ex. 307A.

[6] Relators' Pre-Trial Brief 3.

[7] Tr. 1003:9–17.

[8] Tr. 597:14–598:2, 703:12–21; *see also* Exs. 641, 649, 307A.

[9] Tr. 497:17–498:10, 676:4–12, 681:10–18, 1063:24–1064:10, 1232:3–7, 1343:17–1344:2; Exs. 328, 333.

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Contrary to Relators' accusations, the evidence does not show that MPCA "concealed that EPA had prepared written comments on the draft Permit."[10] Again, the administrative record specifically mentions a "comment letter" that EPA prepared but did not send to MPCA.[11]

Relators also failed to support their contention that they were "bringing sunlight" to "a dark and shameful chapter in the history of MPCA."[12] The administrative record explains what MPCA and EPA had agreed to do for the agencies' review of the PolyMet permit.[13] The administrative record includes an email explaining the arrangement: After MPCA completed its responses to public comments, MPCA would develop and deliver a pre-proposed permit to EPA.[14] After that, EPA would have 45 days to review and comment on the pre-proposed permit and MPCA's responses to public comments.[15] As reflected by the numerous meetings between the agencies, EPA expressed an intent to "continue a dialog between" MPCA staff and EPA staff and "work toward a NPDES permit that both parties can support."[16]

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[10] Relators' Pre-Trial Brief 22.

[11] Ex. 307A.

[12] Relators' Pre-Trial Brief 3.

[13] Ex. 64A.

[14] Ex. 64A.

[15] Ex. 64A.

[16] Ex. 64A.

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It does not matter whether EPA or MPCA first raised the idea of this arrangement. A clear summary of the arrangement between EPA and MPCA appears in the administrative record.[17] Contrary to Relators' accusations, it cannot be a "fraud on the public,"[18] or the product of a "cover up."[19]

To the extent that EPA and MPCA agreed to incorporate more process into the permit review, it was due to the extraordinary nature of the project and the permit. The additional process was not prohibited by statute, regulations, rules, or the MOA. It did not constitute an irregularity in procedure under Minnesota law.

The permitting process was extraordinary because PolyMet proposes to build Minnesota's first copper-nickel-platinum-group-elements mine and associated processing facilities—known as the NorthMet Project.[20] PolyMet's application for an NPDES permit to MPCA was both complex and lengthy.[21] Because of those complexities, MPCA provided more opportunities for the public to comment on and respond to the permit application. Unlike with any other permit, and even though MPCA was not obligated to do

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[17] Ex. 64A. Like Exhibit 307A, Exhibit 64A was not included in the March 26, 2019 Draft Itemized List, but was included in the April 12, 2019 Supplemented Itemized List. (Ex. 568.) Relators failed to prove that either Exhibit 64A or Exhibit 307A was included in the Administrative Record for any reason other than MPCA's good faith attempts to compile the record.

[18] Relators' Pre-Trial Brief 3.

[19] Relators' Pre-Trial Brief 3.

[20] Permit (Ex. 349) at 3; Updated Application (Ex. 1069) at 1069–021; Tr. 133:8–14, 931:18–932:7, 945:21–22.

[21] Tr. 494:17, 661:12–13, 662:4–5, 931:24–932:7, 962:18–23, 1041:14, 1061:1–8, 1330:9–11, 1332:10, 1334:14–18; Ex. 1069.

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so, MPCA hosted two public hearings and open houses during the public notice period, which were attended by over one thousand people.[22] MPCA also created a web portal to facilitate the public's submission of comments, which it had never done before.[23]

But the fact that the permit process was "unusual" does not mean that any "irregularities in procedure" under Minnesota law occurred. Relators may not leverage the "unusual" nature of the project itself as somehow proving that "irregularities in procedure" happened.

Under Relators' flawed interpretation of the law, any processes that had not been undertaken for a previous permit—such as two public hearings, a longer public notice period, a web portal, or a pre-proposed permit sent to EPA for extra review[24]—could amount to "irregularities in procedure." Relators' interpretation provides no principled basis for determining which additional or new processes constitute "irregularities in procedure." Their interpretation instead would determine "irregularities in procedure" based on which procedures they like and which ones they don't like. That cannot be the law. And it is not the law, as discussed in Section 1 below.

[22] Tr. 928:21–929:10, 1059:2–1060:11, 1332:15–18.

[23] Tr. 1058:20–25, 1060:12–25.

[24] Tr. 1058–1060; Ex. 64A.

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ARGUMENT

1. Whether "irregularities in procedure" exist turns on whether the agency complied with procedures defined by statutes or by the agency's own rules and regulations for the decision-making process.

The NPDES permitting process for PolyMet's NorthMet project—Minnesota's first copper-nickel mine—was extraordinary. As it should have been. But the fact that MPCA's permitting process was unusual does not mean that it involved "irregularities in procedure." The Minnesota Supreme Court and Court of Appeals have held that the term "irregularities in procedure," as used in Minnesota Statutes Section 14.68, requires a violation of procedures defined by statute, regulations, or rules that enter into the fundamental decision-making process.

a. The Minnesota Supreme Court's trilogy of decisions in *Mampel*, *PEER*, and *Lecy* held that irregularities in procedure require violations of statutorily defined procedures or the agency's own procedural rules and regulations.

The Minnesota statute governing judicial review of agency decisions has long provided that review would "be on the record only except . . . in cases of alleged irregularity in procedure not shown in the record." *Mampel*, 254 N.W.2d at 376 (citing Minn. Stat. § 15.0424, subd. 6, now codified at Minn. Stat. § 14.68). In a trilogy of cases, the Minnesota Supreme Court explained that "irregularities in procedure" means violations of statutorily defined procedures or the agency's own rules and regulations that define the process.

First, in *Mampel*, the Supreme Court explained that the irregularities in procedure statute authorized inquiry "to determine whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into

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the fundamental decision-making process." *Mampel*, 254 N.W.2d at 378. The district court's inquiry must be "limited and narrow" because the question was "whether there was compliance with [the statute], and whether any materials, communications or other information outside the record were relied upon in reaching the commission's decision." *Id.* In *Mampel*, the parties challenging the commission's decision alleged that "certain procedural requirements" of a statute had been "violated." *Id.* at 377. Specifically, they alleged that a majority of commissioners did not hear or read the evidence as required by the statute, and that the challengers did not receive the opportunity to file exceptions and present arguments to the commission as required by the statute. *Id.*

Second, in *People for Environmental Enlightenment and Responsibility (PEER), Inc.*, the Minnesota Supreme Court reaffirmed its holding in *Mampel*. *People for Envt'l Enlightenment and Responsibility, Inc. v. Minn. Envt'l Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978). The Supreme Court explained that discovery in the district court is "limited to information concerning the procedural steps that may be *required by law*." *Id.* (emphasis added). For example, the Supreme Court explained, "when a statute requires specified persons to make decisions," the district court must determine "whether the officials themselves actually made the decision as the APA requires." *Id*.

Third, in *Lecy*, the Minnesota Supreme Court not only reaffirmed its holding in *Mampel*, it warned against using "procedures" that "went far beyond what was intended by the *Mampel* case." *In re Application of Lecy*, 304 N.W.2d 894, 900 (Minn. 1981). The parties challenging the commission's decision in *Lecy* claimed that "the commissioners should be required to hold a collegial discussion on each of their objections or to discuss

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those objections in a written memorandum." *Id.* at 899. The Supreme Court rejected this claim because "nothing in the statutory requirements applicable to the Commission requires a collegial discussion between the commissioners prior to a final decision." *Id*. The Supreme Court determined that the applicable law did not require the procedures that the objectors wanted. *Id*. The Supreme Court reasoned that "[t]o require the commissioners to orally discuss in public a decision on which they have reached an independent judgment just for the sake of form is absurd." *Id*. In sum, the Supreme Court "agree[d] with the trial court's determination that no procedural deficiencies occurred." *Id*. at 898.

The Minnesota Supreme Court in *Lecy* concluded by providing guidance to cases in the future. It identified key questions, including: "[d]id the commissioner adhere to all statutory and administrative procedural rules in reaching his decision?"; "[d]id the commissioner rely on information outside of the record in making the decision?"; and if so, "what information outside of the record was relied upon in making the decision?" 304 N.W.2d at 900.

The trilogy of cases starting with *Mampel* and ending with *Lecy* demonstrate that establishing "irregularities in procedure," requires violations of statutorily defined procedures or violations of the agency's own procedural rules and regulations. Where "nothing in the statutory requirements applicable" required the procedures that the objectors wanted, *Lecy* expressly rejected a procedural irregularities claim. 304 N.W.2d at 899.

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b. Decisions by the Minnesota Court of Appeals also require violations of statutorily defined procedures or rules and regulations on procedures to establish "irregularities in procedure."

Like the trilogy of Minnesota Supreme Court cases, the court of appeals' decision in *Hard Times Cafe, Inc. v. City of Minneapolis*, holds that "irregularities in procedure" must be violations of statutorily defined procedures or violations of the agency's own rules and regulations. 625 N.W.2d 165 (Minn. Ct. App. 2001). The court of appeals transferred the case to the district court under Section 14.68 after finding substantial evidence of irregularities. *Id.* at 175. The court held that the city was required to make decisions according to its manual, which "prohibited the council from allowing or initiating ex parte contacts, forming an opinion as to sanctions until after the close of all hearings, and considering material outside the record." *Id.* at 174. Based on the materials submitted, the court of appeals found that "the city council violated both the procedures set forth in the Manual and the explicit instructions of the city attorney," who had advised the council not to consider material outside the record. *Id*. As a result, the court of appeals transferred the case to the district court under Section 14.68 to take testimony and "determine the alleged irregularities in procedure." *Id*. In short, the "irregularities in procedure" question that *Hard Times Cafe* identified was "whether the procedures were unlawful" in light of extra-record evidence. *Id.* at 173; *see also Matter of Dakota Cty. Mixed Mun. Solid Waste Incinerator*, 483 N.W.2d 105, 106 (Minn. Ct. App. 1992) (stating that the inquiry into "irregularities in procedure" under Minn. Stat. § 14.68 before the district court is "limited to information concerning the procedural steps required by law").

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Another decision by the court of appeals affirms that no procedural irregularities exist without violations of established rules. In *In re North Metro Harness, Inc*., the relator requested remand to the district court to determine alleged procedural irregularities. 711 N.W.2d 129, 138 (Minn. Ct. App. 2006). The relator suggested that *Hard Times Cafe* supported the motion for remand. *Id.* at 139. But the court of appeals rejected the relator's argument, pointing out that in *Hard Times Cafe* "the city council was to make its decision in accordance with its manual, which prohibited ex parte contacts." *Id.* (citing *Hard Times Cafe*, 625 N.W.2d at 174). The court of appeals easily distinguished *Hard Times Cafe* because in *North Metro Harness* the relator had offered "no similar guidelines that the commission is required to use in making its decisions." *Id.*

Yet another decision by the court of appeals underscores this point. In *In re Koochiching County*, the relator argued that "procedural irregularities" similar to the activities at issue in *Hard Times Cafe* had occurred. No. A09-381, 2010 WL 273919, at *9 (Minn. Ct. App. Jan. 26, 2010). The court of appeals rejected the relator's argument. The court reasoned that the activities in *Hard Times Cafe* were "in direct violation of the manual governing license adverse action proceedings, which specifically instructed the council members to 'avoid ex parte contacts, base [their] decision[s] solely on the record, and not make [their] final decision until after the hearing.'" *Id.* (quoting *Hard Times Cafe*, 625 N.W.2d at 170). Unlike the *Hard Times Cafe* circumstances, the relator in *Koochiching* had "provided no similar rules governing the [agency] or the commissioner." *Id.*

The lesson from *Hard Times Cafe*, *North Metro Harness,* and *Koochiching* is that absent a rule violation, there are no irregularities in procedure. That's just as *Mampel* held.

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Here, the court of appeals transferred this case for a hearing to decide whether such a rule violation occurred.

c. The text of the statute supports the Minnesota appellate decisions interpreting the meaning of "irregularities in procedure."

The foregoing Minnesota appellate decisions are consistent with the plain and ordinary meaning of the phrase "irregularities in procedure" in Minnesota Statutes Section 14.68. When interpreting statutes, the courts "'give words and phrases their plain and ordinary meaning.'" *Gilbertson v. Williams Dingmann, LLC*, 894 N.W.2d 148, 151 (Minn. 2017) (quoting *In re Welfare of J.J.P.*, 831 N.W.2d 260, 264 (Minn. 2013)). At the outset, the statute is not concerned with simply any "irregularity." It is concerned with "irregularities *in procedure*." Minn. Stat. § 14.68 (emphasis added). So "irregularities" must not be read in isolation from "in procedure." "'A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant.'" *Martin v. Dicklich*, 823 N.W.2d 336, 345 (Minn. 2012) (quoting *Am. Family Ins. Grp. v. Schrodl*, 616 N.W.2d 273, 277 (Minn. 2000)).

The word "procedure," in a legal context like this, is defined as "the steps taken in a legal action." XII Oxford English Dictionary 543(2nd ed. 1989). The word "procedure," also is defined 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.* The word "irregularity" is defined as "[t]he quality or state of being irregular," or "[w]ant of conformity to rule; deviation from or violation of a rule, law, or principle; disorderliness

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in action; deviation from what is usual or normal; abnormality, anomalousness," or "a breach of rule or principle; an irregular, lawless, or disorderly act." VIII Oxford English Dictionary 93 (2nd ed. 1989).

If these definitions were not enough, the phrase "irregularities in procedure" also must be read in the full context of Minnesota Statutes chapter 14, which is the state's Administrative Procedure Act. When interpreting statutory text, a court must read the statute "'as a whole so as to harmonize and give effect to all its parts.'" *Matter of Restorff*, 932 N.W.2d 12, 19 (Minn. 2019) (quoting *Van Asperen v. Darling Olds, Inc*., 93 N.W.2d 690, 698 (Minn. 1958)). "The statutory language in dispute is not examined in isolation; rather, all provisions in the statute must be read and interpreted as whole." *State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019). "[V]arious provisions of the same statute must be interpreted in the light of each other, and the legislature must be presumed to have understood the effect of its words and intended the entire statute to be effective and certain." *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015) (quoting *Van Asperen*, 93 N.W.2d at 698). One purpose of the Minnesota Administrative Procedure Act ("MAPA") is to require agencies to "adopt rules . . . setting forth the nature and requirements of formal and informal procedures." Minn. Stat. § 14.06. The phrase "irregularities in procedure" in Section 14.68 must be read in light of Section 14.06's requirement to adopt procedures. Departure from those procedures is the commonsense, contextual meaning of "irregularities in procedures."

For all these reasons, this Court should reject Relators' argument that a definition of "irregularity" does not require a violation of law. As this Court has already explained

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(with Relators' agreement), its task is to determine what "*statutes and rules* . . . set forth those [proper] procedures," and "whether those procedural *statutes and rules* were followed."[25] Relators' oversimplified interpretation ignores the phrase "in procedure" that follows "irregularities" in Section 14.68, fails to consider that phrase in Section 14.68 in the context of MAPA, and is contrary to Minnesota case law.

Relators define "irregularities in procedure" far more broadly. Their interpretation would mean that any processes that had not been undertaken for a previous permit—such as two public hearings, a longer public notice period, a web portal, or a pre-proposed permit sent to EPA for extra review[26]—would amount to "irregularities in procedure." Relators' interpretation offers no principled basis for determining which additional or new processes constitute "irregularities in procedure." Relators apparently would allow arbitrary and capricious determinations based on which processes they favor and which processes they disfavor. Theirs is not the proper way to interpret and apply the law.

2. Relators failed to meet their burden of proof that EPA and MPCA's conduct during the permitting process was an irregularity in procedure.

Before the evidentiary hearing, Relators laid out twenty-one alleged procedural irregularities. Relators bear the burden of proving that these twenty-one circumstances occurred and are irregularities in procedure in the permit process, just as relators challenging an agency decision under Section 14.69 bear the burden of proof. *See*, *e.g.*, *Matter of RS Eden/Eden House*, 928 N.W.2d 326, 333 (Minn. 2019) ("'[A]ppellant bears

[25] Aug. 7, 2019 Hr'g Tr. at 24 (emphasis added).

[26] Tr. 1058–1060; Ex. 64A.

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the burden of establishing that the agency findings are not supported by the evidence in the record.'") (quoting *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 118 (Minn. 2009)); *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 660 N.W.2d 427, 433 (Minn. 2003) ("[R]elator has the burden of proof when challenging an agency decision."). Although the court of appeals transferred this matter to this Court under Section 14.68 "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure,"[27] Relators' burden of proof is not changed by the transfer from the court of appeals to this Court. The matter is still a certiorari appeal from the agency's decision. At the hearing, Relators failed to meet their burden of proving their alleged irregularities in procedure.

a. Relators failed to prove that EPA's decision not to send a deficiency resolution letter and MPCA's decision to process the revised permit application were irregularities in procedure. The MOA does not require a deficiency resolution letter if a revised application is submitted and complete.

Relators allege that "[n]either the administrative record nor MPCA's MGDPA responses include a subsequent letter from EPA stating that deficiencies in the application were resolved"[28] and that "resolution" of any deficiencies or EPA concerns "without a written confirmation by EPA would be irregular."[29] Although EPA never sent a deficiency resolution letter, Relators failed to prove that "such a letter is required for MPCA to proceed

[27] Transfer Order at 4 (June 25, 2019).

[28] List of Alleged Procedural Irregularities ¶ 6 (Aug. 14, 2019).

[29] List of Alleged Procedural Irregularities ¶ 9.

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with an NPDES permit under the MOA establishing MPCA's delegated authority to issue NPDES permits."[30] Indeed, the MOA that governs Minnesota's authority to implement its NPDES permit program does not support Relators' allegations. *See* 40 C.F.R. § 123.24.

In their pre-trial brief, Relators' asserted that, under Section 124.22 of the MOA, EPA was required to submit "a resolution letter on the PolyMet Permit application."[31] Section 124.22 of the MOA sets out a clear process the agencies should follow if EPA determines that the permit application is not complete. First, MPCA must "transmit two copies of the completed [NPDES permit] application" to the EPA Regional Administrator.[32] If EPA determines that the application is not complete, the Regional NPDES Permit Branch "shall identify the deficiencies by letter to the [MPCA] Director."[33] That deficiency letter must be sent "no later than 20 days from the date of receipt of [the] application from the [MPCA]."[34] If EPA sends a timely deficiency letter, "[t]he Director [of MPCA] shall attempt to resolve all deficiencies within 20 days of date of receipt of notification."[35] "No NPDES application shall be processed by the Agency until all deficiencies identified by the EPA are corrected and the Director receives a letter from the

[30] List of Alleged Procedural Irregularities ¶ 6.

[31] Relators' Pre-Trial Brief 5 ¶ 11.

[32] Ex. 328 at 3, Section 124.22 ¶ 5.

[33] Ex. 328 at 3–4, Section 124.22 ¶ 6.

[34] Ex. 328 at 4, Section 124.22 ¶ 7. The Regional Administrator may request "additional time" to review the application "not to exceed a total of 40 days." *Id*.

[35] Ex. 328 at 3–4, Section 124.22 ¶ 6.

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EPA concurring with the Director that the application is complete."[36] But if EPA does not send a letter identifying deficiencies within 20 days, "[t]he [MPCA] Director may assume, after verification of receipt of the application, that no comment is forthcoming . . . ."[37]

Here, PolyMet submitted its application for the NorthMet permit on July 11, 2016.[38] EPA acknowledged receipt of the application on August 5, 2016.[39] About 90 days later, on November 3, 2016, EPA sent a letter to MPCA identifying certain deficiencies in the application.[40] Then, PolyMet submitted a revised version of the application in October 2017.[41] MPCA transmitted to EPA the revised application.[42] EPA did not send another deficiency letter.

Because EPA did not send a deficiency letter within 20 days (or even 60 days) of receiving PolyMet's initial application, MPCA "assume[d] . . . that no comment [was] forthcoming"[43] and processed the application. After PolyMet submitted the revised application in October 2017, MPCA never received a deficiency letter from EPA. Thus, under the terms of the MOA, MPCA assumed that no comment was forthcoming and processed the application. Neither EPA nor MPCA ever suggested that the revised

[36] Ex. 328 at 4, Section 124.22 ¶ 8.

[37] Ex. 328 at 4, Section 124.22 ¶ 7.

[38] Court Ex. B at 1.

[39] Ex. 290; Tr. 150:17–20.

[40] Ex. 306.

[41] Exs. 32, 304, 1069.

[42] Ex. 32.

[43] Ex. 328 at 4, Section 124.22 ¶ 7.

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application was incomplete or deficient in any manner. Instead, both agencies continued to work together to process the revised application. They engaged in multiple conference calls.[44] On September 25 and 26, 2018, almost a year after PolyMet submitted the revised application, the agencies met in person to discuss permitting issues.[45] They did not discuss a deficiency resolution letter, because neither agency interpreted the MOA to require a deficiency resolution letter under the circumstances.[46] The fact that Relators interpret the MOA to require a deficiency resolution letter—even though EPA's initial letter was untimely and even after PolyMet submitted a revised application—does not mean that there were any irregularities in procedure.

Relators failed to solicit any testimony showing that EPA's and MPCA's interpretation of the MOA was incorrect. Relators also failed to produce any witness that could identify any rule, statute, or regulation requiring that (1) EPA send a deficiency resolution letter after PolyMet submitted a revised application or (2) MPCA refuse to process the revised permit application until EPA sent a deficiency resolution letter, even after receipt of a revised permit application.[47] In other words, Relators failed to carry their burden of proving any procedural irregularities stemming from MPCA's decision not to formally respond to EPA's belated November 2016 deficiency letter; EPA's decision not

[44] Ex. 708; Tr. 961:21–962:10.

[45] Tr. 962:11–14, 962:25–963:9; Court Ex. B at 3.

[46] Tr. 1358:20–1359:6.

[47] Tr. 1358:20–1359:6.

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to send a deficiency resolution letter after PolyMet's October 2017 revised application; or MPCA's decision to process the revised application.

b. Relators failed to prove that EPA's decision not to send a written comment letter is an irregularity in procedure.

Relators allege that "MPCA and EPA . . . used irregular and unusual procedures to prevent EPA staff from submitting written comments on the draft NPDES Permit."[48] It is undisputed that EPA did not send written comments to MPCA. Relators failed to prove that EPA was required to do so.

The Clean Water Act does not require EPA to provide written comments on a proposed state NPDES permit. *See* 33 U.S.C. §§ 1341, 1342, 1344. Nor do any federal regulations require EPA to provide written comments on a proposed state NPDES permit. *See* 40 C.F.R. § 123.44(a)(1). Federal regulations concerning public disclosure focus on responses to "*written* comments," not oral ones. 40 C.F.R. § 124.11 (emphasis added). At the same time, federal regulations do not prohibit oral comments. To be considered official "comments," however, the comments must be "submitted orally to the Region at a public hearing" and either "taped or transcribed" or "summarized in writing and submitted to the Region" by the commenter. *In re Masonite Corp.*, 5 E.A.D. 551, 1994 WL 615380, at *6 n.10 (E.A.B. Nov. 1, 1994); *cf.* 40 C.F.R. § 24.18(b)(2). In other words, "comments on [] draft permit[s], other than those made orally at a public hearing, are to be submitted in

[48] Listed of Alleged Procedural Irregularities ¶ 3.

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writing." *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 2002 WL 2005529, at *5 (E.A.B. Aug. 27, 2002).

Consistent with the Clean Water Act and related regulations, the MOA requires MPCA to send proposed NPDES permits to EPA at the time of public notice.[49] That requirement contemplates that EPA may provide formal written comments during the public notice period.[50] But nothing in the MOA mandates that EPA comment—in any form—on a proposed (i.e., draft) permit.

Because EPA never sent written comments, MPCA did not have any EPA comments to include in the administrative record. Minnesota law is clear that an agency need not "consider or include in the administrative record documents *never submitted to* or *received by* it." *Nat'l Audubon Soc. v. Minn. Pollution Ctrl. Agency*, 569 N.W.2d 211, 216 (Minn. Ct. App. 1997) (emphases added). Equally important here, an agency is "not required to look beyond the official comment issued by another commenting agency" in making its permitting decision, even if that commenting agency's staff is "divided." *Id.* Minnesota law thus prohibits Relators from pointing to EPA's alleged "internal debate" about the permit as evidence that might support its claims. *Id.* Because Relators failed to produce any evidence showing that EPA was required to submit written comments, Relators did not prove that EPA's decision not to submit written comments is a procedural irregularity.

[49] Ex. 328 at 9, Section 124.46 ¶ 1.

[50] Ex. 328 at 9–11.

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c. Relators failed to prove that Kevin Pierard's decision to read an unsent comment letter to MPCA over the phone and MPCA's decision to listen were irregularities in procedure. No laws preclude MPCA from orally communicating with EPA.

Relators next allege that "MPCA and EPA departed from typical procedures in addressing the NPDES Permit, engaging in multiple telephone conferences and in-person meetings, some of which are not reflected in the administrative record."[51] But Relators failed to prove that the extensive oral communications between EPA and MPCA were precluded or otherwise unwarranted in light of the complexity of the permit application. That includes the April 5, 2018 call initiated by EPA staffer Kevin Pierard, after EPA decided not to send a written comment letter, to read "what the comment letter would have said if it were sent."[52]

Numerous witnesses testified about the extraordinary nature of PolyMet's permit application. To ensure it had EPA's full input, MPCA engaged in extensive conversations with EPA, including bi-monthly calls.[53] The bi-monthly conversations allowed for more communication between MPCA and EPA staff than with other permits. MPCA and EPA also met in person on September 25 and 26, 2018.[54] Relators failed to prove that any of the oral conversations or in-person meetings between the agencies were unlawful or unwarranted.

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[51] List of Alleged Procedural Irregularities ¶ 2.

[52] Ex. 307A; Tr. 911:10–912:1, 12–17.

[53] Tr. 147:10–148:7, 660:19–661:15.

[54] Tr. 962:11–14, 963:5–7.

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Despite making much of the April 5, 2018 call, Relators also failed to elicit any testimony showing that any of the telephone conversations between MPCA and EPA were precluded by law. As explained above, the MOA does not prohibit MPCA from orally communicating with EPA. Nor do any MPCA regulations or rules prohibit MPCA from orally communicating with EPA.

In any event, EPA did not instruct Pierard to read the unsent comment letter to MPCA on the April 5, 2018 call.[55] Pierard had drafted the comment letter and presented it to his boss, Chris Korleski, but EPA decided not to send it.[56] In other words, the official agency position was to not submit any written comments to MPCA. Thus, nothing Pierard communicated to MPCA constituted an official "comment" of the agency. *See In re Avon*, 2002 WL 2005529, at *5 ("It is [the commenter's] obligation, not the Region's to demonstrate that the [commenter] has satisfied th[e] burden" of submitting comments in the proper form. Unless a commenter "submit[s] written comments or . . . assur[es] that a written record summarizing any oral comments conveyed . . . is reflected in the administrative record," the Region need not catalogue, evaluate, or respond to it.); *see also* 40 C.F.R. § 124.11. Instead, Pierard was acting as a disgruntled employee whose actions cannot be imputed to the agency.[57]

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[55] Tr. 193:13–194:3.

[56] Tr. 164:6-9, 191:17–192:7; Ex. 641.

[57] *See* Tr. 272:23–273:6 ("[T]hey have never argued that 100 percent of all of the employees of the EPA agreed that all these issues have been resolved. They have only said publicly that the EPA as an agency agreed that all these issues were resolved, because the EPA as an agency chose not to veto the permit. [EPA] also chose not to file any written

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For all these reasons, Pierard's decision to read an unsent comment letter to MPCA over the phone and MPCA's decision to listen were not irregularities in procedure. Not only are oral communications between the agencies well within the procedure outlined in the statutes and regulations, but, as discussed below, the fact that those oral communications occurred is properly reflected in the administrative record.[58]

d. Relators failed to prove that MPCA's decision not to include a response to what Kevin Pierard read from the unsent comment letter in the response to comments is an irregularity in procedure.

Relators allege that "MPCA['s] responses to comments improperly failed to mention or respond to any EPA comments on the draft NPDES Permit."[59] However, Relators failed to prove that the April 5, 2018 call qualified as formal comments from EPA. Thus, MPCA was not required to include in its comment responses a written response to what Kevin Pierard read on the April 5, 2018 call.

Under the procedure established by Minnesota statutes, "[t]he commissioner [of MPCA] shall respond to all significant comments received . . . during the public comment period." Minn. R. 7001.1070, subp. 3. EPA did not submit written comments to MPCA.[60]

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comments to the permit even under the agreement that the EPA reached with the MPCA to delay their written comments to a later date."); Tr. 290:13–23 (stating that "[t]he agency, the EPA as a whole, chose not to file general objections" and excluding from evidence "documentation of an internal agency process that was ultimately not accepted by the agency").

[58] *See* Section 2(e), *infra*.

[59] List of Alleged Procedural Irregularities ¶¶ 8, 12, 15–16.

[60] Ex. 2010; Tr. 376:20–21.

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MPCA thus had no obligation to draft written responses. To the extent Relators may contend that federal regulations require states issuing NPDES permits to provide written responses to oral comments,[61] those regulations do not require written responses to comments that are not submitted in writing. *See* 40 C.F.R. § 124.11.

e. Relators failed to prove irregularities in procedure related to the creation of the administrative record.

Relators alleged that MPCA "used irregular procedures to prevent creation of a record of [EPA] concerns about NPDES Permit expectations, requirements, process, and conditions . . . throughout the NPDES Permit process" and that "critical documents are missing from the administrative record."[62] In particular, Relators alleged that "MPCA improperly destroyed, discarded, and failed to retain portions of the written record of communications with EPA regarding the NPDES Permit, including . . . notes of the April 5, 2018 phone call" and emails sent to or from Shannon Lotthammer regarding the agreement between EPA and MPCA.[63]

Relators failed to carry their burden of proof. The administrative record contains documentation of (1) the fact that EPA staff wanted a call in early April to walk through

[61] *See* List of Alleged Procedural Irregularities ¶ 15 (citing 40 C.F.R. §§ 124.17(a)(2), (c)).

[62] List of Alleged Procedural Irregularities ¶ 1, 20; *see also id.* ¶¶ 17–19, 21.

[63] List of Alleged Procedural Irregularities ¶ 4; *see also* Relators' Pre-Trial Brief 11–12 (listing alleged inadequacies in the administrative record). At the evidentiary hearing, the Court properly limited testimony to the time period after PolyMet submitted the initial application for the NorthMet project. Tr. 51:3–21.

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with MPCA what EPA's "comment letter would have said if" EPA had sent it[64]; (2) the fact that the April 5, 2018 call between EPA staff and MPCA occurred[65]; and (3) the fact that MPCA and EPA agreed that MPCA would submit a pre-proposed permit to EPA for review.[66] The fact that the record does not include a letter that was never sent or notes from an attorney on the April 5 call that MPCA reasonably considered privileged is not an irregularity in procedure.

To the extent that Relators believe that the Administrative Record should have contained more granular details of EPA and MPCA's agreed-upon arrangement or Michael Schmidt's notes of the April 5, 2018 call, the rules and regulations governing administrative records are to the contrary. The "record in a certiorari appeal comprises the papers, exhibits, and transcripts of any testimony considered" by the agency when reaching its decision. *Stephens v. Bd. of Regents of Univ. of Minn.*, 614 N.W.2d 764, 769 (Minn. Ct. App. 2000) (citing Minn. R. Civ. App. P. 110.01, 115.04). Relators bore the burden of showing "materials, communications or other information outside the record [that] were relied upon in reaching the [agency's] decision." *See Mampel*, 254 N.W.2d at 378; *see also* Minn. R. 7000.0755, subp. 4(C) (stating that the record consists of written materials containing relevant information "relied upon by agency staff in recommending a proposed action or decision").

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[64] Ex. 307A.

[65] Ex. 2039.

[66] Exs. 64A, 307A.

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Relators have not met their burden since they did not demonstrate that MPCA "relied upon" any omitted materials, or engaged in any kind of a "cover up," when reaching its decision to issue the NPDES permit. Commissioner John Linc Stine testified about the decision he made.[67] Relators have not explained how emails leading up to EPA and MPCA's agreement to a *process* by which EPA would review the draft permit and provide written comments (if any), were relevant to MPCA's *decision* to issue the permit. Similarly, there is no evidence that the agency relied upon Pierard's reading of the draft comment letter, as reflected in Schmidt's notes of the April 5 call, when issuing the permit. To the contrary, Stephanie Handeland, Richard Clark, and Jeffrey Udd all testified that they did not review Schmidt's notes after the April 5 call or while preparing the permit.[68]

Nor was MPCA obligated to document EPA staff's oral comments for the sole purpose of inclusion in the administrative record.[69] Nothing requires MPCA to create records or documents that do not exist for the mere purpose of including them in the administrative record.[70] Relators have not demonstrated that the administrative record before the Court of Appeals is deficient and lacks documents relied on by the agency in making its decision. Relators also have not demonstrated that MPCA tried to exclude EPA comments from the record. Neither the MOA nor any other statute or rule prohibits MPCA

[67] Tr. 493:25–494:25.

[68] Tr. 926:1–3, 943:16–944:5, 984:18–24, 1199:9–17, 1324:12–1325:1, 1325:6–1326:7, 1342:25–1343:3.

[69] Tr. 1331:6–10.

[70] Tr. 1331:6–10.

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from working with EPA to resolve its concerns without the need for written comments. The fact that MPCA made extraordinary efforts to work with EPA in this case—as demonstrated by the fact that EPA did not object to the permit—does not suggest any irregularities in procedure.

Additionally, Relators allege that "MPCA's conduct preventing EPA comments on the draft PolyMet Permit from becoming part of the record and MPCA's concealment of its role in their suppression violated Minn. R. 7000.0300, which imposes a duty of candor on MPCA."[71] But Relators have failed to prove that MPCA acted in anything other than good faith when compiling the administrative record. Each MPCA employee testified that they were not aware of any efforts by anyone at MPCA to delete, hide, or conceal documentation of the permitting process.[72] Instead, MPCA employees followed MPCA's document retention policies to the best of their ability to create the administrative record.[73] When MPCA located additional documents that should be included in the administrative record, it proactively moved the court of appeals to supplement its draft of the itemized contents of the administrative record.[74]

Finally, Relators "do not claim that there are any new events occurring after April 5, 2018 that, in and of themselves, constitute a procedural irregularity."[75] In short,

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[71] Relators' Pre-Trial Brief 18.

[72] Tr. 522:3–8, 684:24–685:2, 939:22–24, 940:10–13, 983:19–24, 1044:14–24, 1063:16–19, 1228:3–5, 1331:23–1332:1, 1343:13–16.

[73] Tr. 553:6–9, 939:10–17, 957:17–20, 1133:10–12, 1135:1–7.

[74] Ex. 568.

[75] Tr. 1050:1–1052:10.

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Relators do not allege that any procedural irregularities occurred after April 5, 2018. MPCA compiled the administrative record after April 5, 2018. Thus, Relators waived their claims that MPCA engaged in procedural irregularities when compiling the administrative record (or, as discussed below, when responding to the Data Practices Act requests) after April 5, 2018.

f. EPA's decision not to object to the permit is not an irregularity in procedure. EPA possessed legal authority to object to the permit but chose not to exercise that discretionary authority.

EPA's decision not to object to the permit is not an irregularity in procedure. Relators allege that "MPCA's and EPA's procedures related to the NPDES Permit were irregular"[76] and that "MPCA's procedural irregularities undermine EPA oversight under the Clean Water Act."[77] Those allegations are at odds with Relators' recognition that EPA could have—but did not—send a letter objecting to the permit.[78]

EPA possessed the legal authority to object to the NPDES permit, and even to compel revisions or a denial.[79] *See* 42 U.S.C. § 1342; 40 C.F.R. § 123.44 (describing EPA authority to review and object to state NPDES permits). But EPA did not object to—or otherwise prevent the implementation of—the final permit that MPCA issued on December 20, 2018.[80] When EPA reviewed the final permit, it did not exercise its

[76] List of Alleged Procedural Irregularities ¶ 10.

[77] List of Alleged Procedural Irregularities ¶ 11.

[78] Tr. 43:6–12 ("EPA didn't object."); *see also* Tr. 273:13–14 (discussing "[t]he agency choosing not to object").

[79] Tr. 498:11–499:3; Ex. 328 at 10–11, Section 124.46 ¶ 5.

[80] Tr. 316:16–317:7, 318:13–14.

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discretionary authority to object. EPA's decision not to act on the permit was a discretionary one that MPCA had no power to control or question. *See, e.g.*, 42 U.S.C. § 1342(d)(1), (4) (allowing EPA to assume exclusive authority to issue the permit if the state refuses to modify the permit to comply with EPA objections); *S. California All. of Publicly Owned Treatment Works v. U.S. Envtl. Prot. Agency*, 853 F.3d 1076, 1078 (9th Cir. 2017) ("Even when a state assumes primary responsibility for issuing NPDES permits, EPA retains supervisory authority over state permitting programs under 33 U.S.C. § 1342(d).").

Relators suggest that the Court cannot be sure that EPA approved of the permit, even though EPA did not object to the final permit, and that EPA's lack of explicit approval somehow constitutes a procedural irregularity.[81] This Court should not second guess EPA's decision not to object to the permit. Because the Clean Water Act "demonstrates an intent for the EPA and the states to work through differences in permitting decisions, and the EPA needs a range of discretion to accomplish this goal . . . courts should leave EPA with its discretion to review state-issued permits." *Am. Paper Inst., Inc. v. U.S. E.P.A.*, 890 F.2d 869, 875 (7th Cir. 1989); *Friends of Crystal River v. U.S. E.P.A.*, 35 F.3d 1073, 1079 (6th Cir. 1994) ("[A]n EPA . . . decision not to object is within the sole discretion of the agency."); *Menominee Indian Tribe of Wisconsin v. U.S. E.P.A*, 360 F. Supp. 3d 847, 855 (E. D. Wis. 2018) ("[T]he EPA's discretionary decision to object and subsequently withdraw those objections is not reviewable."). EPA's decision not to object to the permit

[81] *See* Tr. 41–45.

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lies completely within EPA's discretion, and no procedural irregularity resulted from that decision.

g. The Court correctly determined that the substance of the permit is irrelevant to whether any irregularities in procedure occurred.

At the evidentiary hearing, Relators attempted to solicit testimony that "the NPDES Permit procedures and final NPDES Permit conditions are inconsistent with EPA expectations, concerns, and communications."[82] The Court properly excluded testimony on the substantive nature of the permit as outside the scope of the Court's jurisdiction, recognizing that "[a]n irregularity in procedure does not mean an irregularity in substance."[83] The Court should deny any further attempts to expand the scope of the proceeding.

3. The alleged violations of the Official Records Act and Data Practices Act do not constitute irregularities in procedure.

Relators devoted a significant portion of their argument and evidence to attempting to show that MPCA violated the Official Records Act and Data Practices Act. These are two statutes that concern the retention and production of government data—not the procedures applicable to Clean Water Act permitting.[84] Whether MPCA violated either act should be a question for a different proceeding (if any) because violations of the Official Records Act and Data Practices Act do not constitute irregularities in *administrative*

[82] List of Alleged Procedural Irregularities ¶ 7.

[83] Tr. 49:4–5; *see also id.* 45–53.

[84] List of Alleged Procedural Irregularities ¶¶ 5, 13, 14.

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procedure under Section 14.68. Further, even if this court were to consider the merits of Relators' argument, there is insufficient evidence that MPCA violated either act.

a. The Official Records Act and Data Practices Act are directed to the retention and production of government data, not permitting procedures.

A failure to adhere to the Official Records Act or the Data Practices Act would not constitute an irregularity in procedure because neither act prescribes procedures for permit approval that enter "into the fundamental decision-making process." *Mampel*, 254 N.W.2d at 378. Nor do those acts proscribe procedures for permit approval. The Official Records Act requires state agencies "to 'make and preserve all records necessary to a full and accurate knowledge of their official activities.'" *Westrom v. Minn. Dep't of Labor & Indus.*, 686 N.W.2d 27, 32 (Minn. 2004) (quoting Minn. Stat. § 15.17, subd. 1). Access to those records "is governed in relevant part by section 13.03 of the [Data Practices Act]." *Id.*; *see also Webster v. Hennepin Cty.*, 910 N.W.2d 420, 427 (Minn. 2018) ("The Data Practices Act governs the storage of government data and public access to that data."). The Data Practice Act's purpose "is to facilitate public data accessibility." *Nat'l Council on Teacher Quality v. Minn. State Colleges & Univs.*, 837 N.W.2d 314, 319 (Minn. Ct. App. 2013).

The storage and dissemination of public, government data is important. But that storage and dissemination does not impact the process by which MPCA decides to issue an NPDES permit. *Mampel* makes clear that not just any failure to "adhere[] to statutorily defined procedures" may constitute an irregularity in procedure, but rather only violations of those statutes, rules, and regulations that "enter into the fundamental decision-making process" of the action being reviewed can qualify as irregularities in procedure. 254

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N.W.2d at 378. Whether MPCA *recorded* all necessary information under the Official Records Act, or properly *released* information to Relators under the Data Practices Act, does not fundamentally impact MPCA's decision to *issue* an NPDES permit. Accordingly, such issues do not raise questions about irregularities in procedure.

But even if the Court were to consider the merits of Relators' arguments under the acts, Relators failed to prove that MPCA violated either the Official Records Act or the Data Practices Act.

b. The Official Records Act does not mandate retention of preliminary documents.

The Minnesota Supreme Court has given the Official Records Act a limiting construction: a state agency needs to maintain a record of only that "information pertaining to an official decision, and not information relating to the process by which such a decision was reached." *Kottschade v. Lundberg*, 160 N.W.2d 135, 138 (Minn. 1968); *see also Peterson v. Martinez*, No. A17-0355, 2017 WL 6418224, at *5 (Minn. Ct. App. Dec. 18, 2017) (applying *Kottschade* in case in which agency retained discharge assessment report but not underlying data supporting the report). Otherwise, "[a]ny casual jotting, [or] any tear-sheet observation, which discloses the promptings of official action" would need to be recorded and "public records would fill official archives to overflowing." *Kottschade*, 160 N.W.2d at 137–38.

Relators have not, and cannot, argue that MPCA failed to retain information about its official decision to issue PolyMet's NPDES permit. MPCA issued a detailed findings of fact, conclusions of law, and order, documenting the agency's official decision to issue

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PolyMet an NPDES permit.[85] That MPCA may not have retained all emails and notes "relating to the process by which . . . [that] decision was reached" does not violate the Official Records Act. *See Kottschade*, 160 N.W.2d at 138.[86] In fact, even if EPA officials *had* decided to send a written comment letter (which they did not) and MPCA had destroyed that comment letter (which it did not), there still may not have been a violation of the Official Records Act because MPCA nonetheless maintained information regarding its ultimate and official decision to issue the permit—the findings of fact, conclusion of law, and order.

This conclusion is consistent with MPCA's Records and Data Management Manual, which permitted the deletion of notes that do not qualify as personal papers, as well as the deletion of nonrecords including materials used when preparing documents for official agency action that have been incorporated or summarized in a final product.[87] MPCA's "records management" intranet page also specifically addressed how to handle emails and

[85] Ex. 350.

[86] To the extent that Relators assert that the procedure that MPCA and EPA decided to follow with respect to EPA's timing for providing written comments on the draft NPDES permit also constituted an "official action," that procedure was recorded. There is no dispute that MPCA retained the email from Kurt Thiede setting forth that process. (Ex. 307A.) Lotthammer's antecedent email, by comparison, is an email "relating to the process by which . . . [that] decision was reached" and did not need to be kept under the Official Records Act. *See Kottschade*, 160 N.W.2d at 138. Indeed, it is because Lotthammer maintained Thiede's email memorializing the final agreed upon arrangement that Lotthammer reasonably believed that she could delete her earlier emails. Tr. 609:24–610:14, 693:1–694:2.

[87] Tr. 487:14–488:10; 488:25–490:14, 726:18–727:15; Ex. 77 at 11 (defining "nonrecords").

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advised employees to "[d]elete messages that are not records when no longer needed."[88] Relators have not demonstrated that MPCA violated MPCA's record-management policy, let alone the Official Records Act.

c. Relators have not demonstrated that MPCA violated the Data Practices Act.

Nor have Relators shown that MPCA violated the Data Practices Act. To start with a basic principle, the failure to provide a document not in a government entity's possession cannot violate the Data Practices Act. *Zangs v. City of Saint Paul*, No. A07-1862, 2008 WL 4300405, at *3 (Minn. Ct. App. Sept. 23, 2008) ("[I]t is undisputed that individual raters' notes sought by appellant were not in the city's possession."). MPCA never received or maintained a copy of EPA's draft written comment letter because EPA officials decided not to send that letter, either during the comment period or thereafter. MPCA's inability to provide EPA's draft letter to Relators cannot support a Data Practices Act claim.

Other than in a few specifically delineated circumstances, the Data Practices Act generally governs public *access* to information, not "[d]ata retention." *Scheffler v. City of Anoka*, 890 N.W.2d 437, 448 n.1 (Minn. Ct. App. 2017). Retention "generally is covered by other statutes," including the Official Records Act. *Id.* Relators repeatedly argue that MPCA should have "kept" certain documents, but they have not pointed the Court to any specific Data Practices Act provision mandating that MPCA keep the documents. *See* Relators' Pre-Trial Brief at 17 ("Had these critical records been *kept* and disclosed as required *by statute* . . . ." (emphasis added).). Lotthammer's deletion of her preliminary

[88] Ex. 76 at 1.

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emails with Thiede (which she believes occurred before *any* Data Practices Act requests), and Schmidt and Handeland's decision to discard notes from the April 5, 2018 conference call (*after* the March 26, 2018 Data Practices Act request, which was not deemed a continuous request), accordingly do not appear to violate the Data Practices Act, since the relevant documents were not in MPCA's possession at the time of the requests.

These two principles dispose of the bulk of Relators' alleged Data Practices Act violations. To the extent that Relators want to wade into the merits of their remaining Data Practices Act arguments, they have another way to do so. Under the Data Practices Act, aggrieved individuals may file civil actions, seeking damages, an injunction, and civil penalties. Minn. Stat. § 13.08. But Relators may not use the Data Practices Act to undermine a permit granted to a permittee such as PolyMet.

A separate civil action would be the better format to wade into the nuances of the Data Practices Act in any event. For example, documents "protected by the attorney-client privilege . . . [are] exempt from production under the Data Practices Act." *Kobluk v. Univ. of Minnesota*, 574 N.W.2d 436, 439 (Minn. 1998). As this Court recognized, portions of Schmidt's notes of meetings between EPA and MPCA contain mental impressions, conclusions, and opinions of counsel.[89] The presence of such attorney work product indicates that MPCA had a good faith understanding that Schmidt's notes contained

[89] Part Two of Order Granting in Part and Denying in Part Relators' Motion to Compel Documents Identified in MPCA's Privilege Logs at 9–10 (Jan. 17, 2020); *see also* Tr. 1130:4-6 (stating that Schmidt would label notes "that included impressions from a meeting" privileged).

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privileged work product protected from disclosure under the Data Practices Act. *See, e.g.*, *City Pages v. State*, 655 N.W.2d 839, 846 (Minn. Ct. App. 2003) (analyzing whether billing records contained "opinions, conclusions, legal theories, or mental impressions of counsel" and were protected from disclosure under the Data Practices Act). The impact of any waiver of the privilege and the impact of Relators' ability to overcome the work product privilege in this matter due to need and hardship can be resolved in a separate proceeding under the Data Practices Act.

In sum, even if MPCA violated the Data Practices Act (which does not appear to be the case), the Data Practices Act prescribes remedies for such a violation—that can be determined in a separate civil action. None of those remedies would affect PolyMet. Relators may not use the Data Practices Act as a weapon here to attack PolyMet's NPDES permit. The Data Practices Act does not include as a remedy the reversal of a permitting decision, or even a determination of irregularities in procedure.

4. To the extent spoliation occurred—which it did not—the proper remedy is not an adverse inference in favor of Relators.

Relators allege that MPCA destroyed physical and electronic evidence during anticipated litigation and "breached its duty to preserve evidence pertaining to conversations between EPA and MPCA regarding the PolyMet water permit."[90] Relators ask "to have inferences drawn against MPCA in favor of Relators" where there is a "lack of evidence" showing irregularities in procedure or "missing information."[91]

[90] Relators' Motion in Limine for Spoliation Sanctions 11 (Dec. 27, 2019).

[91] Relators' Motion in Limine for Spoliation Sanctions 15 n.12.

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The Minnesota Supreme Court has outlined three factors used in determining whether a sanction is appropriate for the spoliation of evidence: "(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 v. Lankow*, 801 N.W.2d 120, 132 (Minn. 2011) (quotation omitted). The Court has a "duty to impose the least restrictive sanction available under the circumstances" that nonetheless remedies the prejudice suffered by the other party. *Patton*, 538 N.W.2d at 118 (quotation omitted).

In this case, Relators failed to present any evidence that an adverse inference spoliation sanction is warranted. There is no evidence that MPCA intentionally deleted or destroyed evidence. Relators admit as much.[92] Relators produced no evidence, for instance, that MPCA deleted data after Relators filed their motion seeking transfer to the district court, or even after Relators filed their certiorari appeal challenging MPCA's decision to issue the NorthMet NPDES permit. There is likewise no evidence that MPCA employees believed they were improperly deleting, destroying, or concealing evidence.[93] To the contrary, Schmidt testified that it would be unworkable if the mere prospect of judicial review on an administrative record initiated a litigation hold for MPCA. If that were the case, it would mean that the agency "would essentially retain every document or every

[92] Relators' Motion in Limine for Spoliation Sanctions 13 n.11.

[93] Tr. 553:6–9, 957:6–20, 963:20–964:1.

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decision it ever made, which is not a feasible approach to document retention" and "would create a huge burden on the agency."[94]

Relators also failed to present any evidence that they were prejudiced by MPCA's deletion of certain emails. There can be no prejudice because the facts Relators suggest were concealed were otherwise available to Relators. The Administrative Record documents: (1) the fact that the April 5, 2018 call occurred[95]; (2) the fact that EPA staff shared concerns with MPCA over the phone[96]; and (3) the fact that MPCA and EPA agreed that MPCA would submit to EPA a pre-proposed permit.[97] On top of that, MPCA and Relators obtained documents from EPA that were allegedly missing from MPCA's files.[98]

Even if any spoliation sanction were warranted—it is not—Relators would be entitled to nothing more than the civil remedies outlined in the Data Practices Act. The legislature already determined that injunctive relief to stop ongoing or future violations is the appropriate consequence for an agency's non-willful failure to properly produce documents. Minn. Stat. § 13.08; *see also Lang v. City of Minneapolis*, No. 13-cv-3008, 2014 WL 2808918, at *4 (D. Minn. June 20, 2014) ("Persons denied access to data to which they believe they are entitled may: bring a suit for damages; seek an injunction with

[94] Tr. 1235:5–21.

[95] Ex. 2039.

[96] Ex. 307A.

[97] Ex. 64A.

[98] Tr. 77:3–20; *see also* Relators' Letter to Judge Guthmann requesting leave to file motion for reconsideration at 1 (Oct. 28, 2019); Pre-Hearing Conference Tr. 31:21–32:19, 34:16–19 (Nov. 13, 2019); Relators' Motion in Limine for Spoliation Sanctions 5; Exs. 58, 60–62, 333.

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respect to practices that violate the act; or bring an action to compel compliance against the government entity in control of the data."); *Zangs*, 2008 WL 4300405, at *5 (concluding that because the notes sought by the appellant "do not exist," the "production of these notes is not a viable remedy" and the "only other remedy available . . . would be an injunction compelling the city and its third party contractor to make more thorough records of their exam scoring procedures *in the future*." (emphasis added)).

An adverse inference sanction against MPCA is inappropriate because it would prejudice PolyMet. Since remedies may be available to Relators under the Data Practices Act, the Court should decline to impose any spoliation sanctions in favor of Relators in this certiorari matter. *See Fageroos v. Lourey*, No. A18-1692, 2019 WL 2571705, at *2 (Minn. Ct. App. June 24, 2019) ("Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."). As discussed in the preceding section, Relators may avail themselves of the remedies under the Data Practices Act in a separate proceeding that does not prejudice PolyMet.

5. Kevin Pierard did not testify on behalf of EPA, and many parts of his testimony are unreliable because he is so closely aligned with Relators.

The Court should take the testimony of Relators' first witness, Kevin Pierard, with several grains of salt. Pierard lacked legal authority to testify as to official EPA positions—just as he lacked final authority within the agency to decide whether to send a comment letter to MPCA during the permitting process. Beyond that, Pierard's testimony

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demonstrated that he is not fully credible, given his close alignment with Relators and their counsel.

a. Pierard lacked legal authority to speak for EPA.

Pierard testified at the evidentiary hearing in his individual capacity, not on behalf of or as a representative of EPA.

Federal law precludes the Court from assuming that any of Pierard's testimony portrays EPA's official positions. 40 C.F.R. §§ 2.401, 2.402(b); *see, e.g.*, *Boron Oil Co. v. Downie*, 873 F.2d 67, 69–70 (4th Cir. 1989) (approving the EPA housekeeping rules). EPA regulations require employees testifying about "information acquired in the course of performing official duties . . . [to] state for the record that their testimony does not necessarily represent the official position of EPA." 40 C.F.R. § 2.401. This limitation on testimony is not relaxed "[w]here employees voluntarily testify as private citizens with respect to environmental matters." *Id.* § 2.401(b)(4). Even then, "employees must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA." *Id.*

The purpose of this limitation on EPA employee testimony is to prevent giving an air of credence to an employee's partial, uninformed opinions because of the employee's affiliation with the agency. *See Boron Oil Co.*, 873 F.2d at 70 ("The policy behind such prohibitions on testimony of agency employees is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business."). For that reason, the statute applies equally to former employees like Pierard. *See Pleasant Gardens Realty Corp. v. H.*

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Kohnstamm & Co., Civ. No. 08-5582, 2009 WL 2982632, at *4 n. 8 (D.N.J. Sept. 10, 2009) ("The ownership of the EPA's 'official' information' [by the United States] is not dependent on whether the information is possessed by a present or former employee."). Because Pierard could not and did not testify on behalf of the agency, the Court should disregard any suggestions Pierard offered about EPA's procedures and whether EPA departed from those procedures in this case.

b. Pierard's credibility was undermined by his bias and his multiple conversations with Relators' counsel, combined with his inability or unwillingness to describe those conversations.

The Court should further disregard Pierard's testimony because he was not a credible witness. Pierard was disgruntled by EPA's rejection of his recommendations, was apparently coached by Relators' counsel before and during the hearing, and offered unreliable testimony.

Pierard's coordinated testimony illustrated his bias toward Relators' interests. Relators' primary alleged procedural irregularity was that EPA and MPCA tried "to prevent *EPA staff* from submitting written comments on the draft NPDES Permit."[99] Pierard is the EPA staff referenced in that allegation. It was Pierard's "intention" to provide written EPA comments on the public record.[100] Pierard is the one who planned to sign EPA's comment letter on the draft PolyMet permit.[101] Pierard "disagreed" with the notion

[99] Listed of Alleged Procedural Irregularities ¶ 3 (emphasis added).

[100] Tr. 160:10–14, 183:19–184:11.

[101] Tr. 191:7–10.

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that EPA would not send written comments.[102] Pierard's superiors at EPA informed him that EPA would not send written comments.[103] Pierard had an "interest" in making MPCA aware of specific draft comments he had wanted to send.[104] Pierard is the one who "felt so strongly about" reading the draft comments to MPCA.[105] Pierard also lobbied his superiors at EPA—unsuccessfully—in an attempt to change their minds about not issuing an objection letter to PolyMet's permit.[106] His interest in the decisions by EPA and MPCA was more than professional—it was personal. That undermines his credibility. *See, e.g.*, *State v. Soderbloom*, No. A17-0925, 2018 WL 1902445, at *3 (Minn. Ct. App. Apr. 23, 2018) (witness relationship "could be evidence of bias affecting their credibility").

Moreover, Pierard was apparently coached by Relators' counsel in a way that removes any semblance of neutrality from his testimony. Pierard communicated with Relators' counsel about the substance of his testimony at least three times before he was sworn in to testify, including one in-person meeting.[107] Relators "went over the exhibits," "what questions would be coming out" of Relators' counsel, and "what questions might likely be asked of [him]."[108] Relators even went over Pierard's answers "[t]o some

[102] Tr. 186:24–187:18.

[103] Tr. 192:5–7.

[104] Tr. 193:2–6.

[105] Tr. 235:5–9.

[106] Tr. 290:17–23, 299:15–24.

[107] Tr. 343:14–344:13.

[108] Tr. 343:14–345:2.

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degree,"[109] as shown in part by Relators' response to an objection sustained by the Court that "that's not what this witness would have testified."[110]

Even after starting his testimony, Pierard communicated with Relators' counsel at least four more times[111]: (1) during the afternoon break of the first day of his testimony, (2) after the first day of his testimony, (3) in the morning before the second day of his testimony, and (4) during the lunch break of the second day of his testimony.[112] During those conversations, Relators' counsel previewed upcoming questions, "prepared [Pierard] for what was coming up," showed him "exhibits that might come up," and told him "what she would be asking during that time."[113] Relators' counsel even went so far as to ask Pierard questions about testimony that she believed needed to be clarified.[114] In fact, it was Relators' counsel who suggested the timing of the afternoon break on the first day of Pierard's testimony and then, immediately after that break (during which she communicated with Pierard), went back to elaborate further on the answer that Pierard

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[109] Tr. 345:8–13.

[110] Tr. 202:4–5; *see also, e.g.*, Tr. 294:3–6 ("I believe that had this document been introduced, we would have been able to further explain what was contained on the pages of that document.").

[111] Tr. 345:14–24.

[112] Tr. 345:18–346:10.

[113] Tr. 346:11–24.

[114] Tr. 347:3–8. Counsel also seemingly attempted to clarify the record after conversing with Pierard. *See* Tr. 366:6–21 (requesting permission to ask question beyond the scope of cross because Court's ruling earlier in the day didn't "seem at all to be what the witness said" and Relators' counsel wanted "to have a chance to put it on the record" what Pierard actually intended to be the purpose of the December 18 memo to the file).

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provided immediately before Relators' counsel asked Pierard whether he "need[ed] a little break."[115] As the United States Supreme Court has recognized:

> [I]t is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is *more likely to lead to the discovery of truth* than is cross-examination of a witness who is given time to pause and consult with [an] attorney.

Perry v. Leake, 488 U.S. 272, 282 (1989) (emphasis added). Here, the witness was counseled not just between direct and cross examination, but throughout both. The truth-seeking function was undermined by Relators' counsel's and Pierard's frequent and substantive conversations in the midst of his testimony. Such witness "coaching goes to the weight of the witness's testimony." *United States v. Fearon-Hales*, 224 F. App'x 109, 112 (2d Cir. 2007).

When asked about these episodes, Pierard showed himself to be an unreliable witness. Pierard purported to recall details from early 2018 in extremely fine detail,[116] but somehow could not remember the details of conversations he had with Relators' counsel during the lunch break of the second day of his testimony mere minutes before he returned to the stand to continue cross examination.[117] It "strains credibility" to believe that Pierard

[115] Tr. 165:6–166:3. At other times, when Relators' counsel suggested a break, it was because counsel was moving on to an entirely new topic. *See, e.g.*, Tr. 1209:7–8 ("You Honor, this would be a good place to break because it's a brand new topic.").

[116] *See, e.g.*, Tr. 166:4–15, 185:14–20, 204:21–205:7, 245:3–6.

[117] *See, e.g.*, Tr. 348:3–349:3. In fact, Pierard could not provide a detailed recollection of any of the conversations that he had with Relators' counsel after he was sworn in. *See, e.g.*, Tr. 346:13–14 ("She told me I was doing good. And beyond that, I can't really tell you.").

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could recall the former, but not the latter. *See In re M.D.S.*, 345 N.W.2d 723, 735 (Minn. 1984) (analyzing "the selectivity of [defendant's] memory").

c. Pierard was unable to identify legal authorities creating procedures that MPCA violated.

Pierard's testimony failed to help Relators meet their burden of proof. Pierard was unable to identify any legal authorities that created procedures that could have been violated by MPCA:

- Pierard could not identify "any statute that prohibits MPCA and EPA from agreeing that EPA would not submit written comments on the draft permit during the public notice period."[118]
- Pierard could not identify "any regulation that prohibits MPCA and EPA from agreeing that EPA would not submit written comments on the draft permit during the public notice period."[119]
- Pierard could not identify "any provision of the memorandum of agreement between EPA and MPCA that prohibits MPCA and EPA from agreeing that EPA would not submit written comments on the draft permit during the public notice period."[120]
- Pierard could not identify "any statute that prohibits MPCA from listening to EPA read its draft comment letter to MPCA during a conference call to ensure that MPCA fully understood EPA's questions and concerns as MPCA developed the pre-proposed permit."[121]

[118] Tr. 337:14–22.

[119] Tr. 337:24–338:3.

[120] Tr. 338:9–15.

[121] Tr. 338:21–339:1.

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- Pierard could not identify "any regulation that prohibits MPCA from listening to EPA read its draft comment letter to MPCA during a conference call."[122]

- Pierard could not identify "any provision of the memorandum of agreement between EPA and MPCA that prohibits MPCA from listening to EPA read its draft comment letter to MPCA during a conference call."[123]

Pierard also acknowledged that MPCA had not engaged in improper conduct.

- Pierard admitted that when he acknowledged the agreement between MPCA and EPA in an email to Linda Holst he did not tell MPCA that the agreement was "in any way improper."[124]

- Pierard admitted that when he later described the agreement between MPCA and EPA, he did not "say that what EPA and MPCA had agreed on was unlawful"[125] or "improper."[126]

- Pierard admitted that he did not "express a concern that [the agreement between MPCA and EPA] was improper."[127]

- Pierard admitted that MPCA did not undermine EPA's oversight authority because he "understood that whether or not EPA submitted written comments, EPA had the power to object to the permit."[128]

In short, Pierard's testimony does not prove that anything improper occurred between MPCA and EPA.

[122] Tr. 339:13–16.

[123] Tr. 339:17–21.

[124] Tr. 341:7–18.

[125] Tr. 342:18–22.

[126] Tr. 342:23–343:9.

[127] Tr. 343:11–13.

[128] Tr. 341:24–342:3.

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CONCLUSION

For the foregoing reasons, the Court should determine that no irregularities in procedure under Minnesota Statutes Section 14.68 occurred during the permitting process for the NorthMet Project.

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