

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Court File Number: 62-CV-19-4626

Honorable Judge John H. Guthmann

**MINNESOTA POLLUTION CONTROL AGENCY'S
RESPONSE IN OPPOSITION TO RELATORS' 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 have moved to strike the declarations of Adonis Neblett, Thomas Sansonetti, and Andrew Emrich (collectively, the "Declarations"), as well as all references thereto, from MPCA's post-hearing brief and proposed findings of fact. The Court should deny Relators' motion, as it is a baseless attempt to preclude MPCA from reasserting arguments that it properly made before the hearing.

The Declarations are not new to this proceeding. Rather, MPCA filed each before the hearing began, as an exhibit to MPCA's response to Relators' motion *in limine* for spoliation sanctions. The relevant timeline is as follows:

- December 9, 2019: Deadline for all parties to designate witnesses
- December 16, 2019: Deadline for all parties to designate exhibits
- December 27, 2019: Relators filed their motion *in limine* for spoliation sanctions.

- January 10, 2020: MPCA filed its response in opposition to Relators' motion *in limine* for spoliation sanctions, including as exhibits the Declarations that Relators now seek to strike.
- January 21, 2020: First day of the hearing; the Court deferred ruling on Relators' spoliation motion until after the hearing.
- April 22, 2020: In their post-hearing brief, Relators continued to request spoliation sanctions. In its post-hearing brief, MPCA continued to oppose spoliation sanctions, referencing the Declarations as support.
- May 11, 2020: Relators moved to strike the Declarations and all references thereto.

I. The Declarations Are Properly Before the Court.

Relators' pre-hearing spoliation motion, and MPCA's response thereto, are governed by Minnesota General Rule of Practice 115.04. This rule explicitly calls for the filing of "[a]ny relevant affidavits and exhibits" in response to a pre-hearing nondispositive motion. Minn. Gen. R. Prac. 115.04(b)(2). Thus, the Declarations were properly filed as exhibits to MPCA's response to Relators' spoliation motion. Relators did not object to this filing or the attached Declarations.

Even though the Declarations were properly filed as exhibits to MPCA's pre-hearing response, Relators now claim that MPCA is barred from making any reference to the Declarations in its post-hearing briefing. This novel argument defies common sense and is based on a misinterpretation of the Court's own words.

On the first day of the hearing, the Court announced that it would defer ruling on Relators' spoliation motion until the hearing was complete. The Court stated: "I have some legal issues, the resolution of which may depend upon what I hear during the hearing process." Tr. at 84:21-23. The Court continued to explain that "you can include your ultimate advocacy as it relates to whether there actually was spoliation using the record as it was admitted by the Court." Tr. at 85:21-24. Relators argue that this statement confines the parties' spoliation arguments *exclusively* to the hearing record, precluding the Court from considering the previously filed pleadings and exhibits thereto.

MPCA interprets the Court's statement differently—the Court was informing the parties that the Court would *also* consider evidence presented at the hearing, not that it would refuse to consider what had already been properly submitted. If the Court had intended not to consider previously filed papers, the Court could have denied the motion without prejudice. It did not. Instead, the Court "deferred" ruling on the spoliation motion, so the motion was pending throughout the hearing. Tr. at 85:25. Given that Relators' pre-hearing motion is still before the Court as filed, MPCA should be allowed to maintain its response based on materials it had already properly filed in opposition to that motion, plus any further evidence and information that arose at the hearing.

Relators' argument is also problematic from a timing standpoint. MPCA had no idea any of the declarants' testimony would be relevant or necessary until Relators filed their spoliation motion, which did not occur until after the parties' deadlines for designating witnesses and exhibits. And the Court did not announce that it would defer ruling on the spoliation motion until after the evidentiary hearing had begun. Thus,

MPCA was not in a position to call the declarants as witnesses.¹ If the Court had intended the hearing to fully supplant all pre-hearing briefing, the Court could have so informed the parties. Further, if Relators felt that the Declarations should be stricken, they could have moved the Court to do so before the hearing. MPCA then could have requested leave to amend its witness and exhibit lists to include testimony on MPCA's and federal agencies' practices regarding litigation holds.

II. **The Hearsay Rule Does Not Preclude the Court from Considering the Declarations.**

Relators argue that the Declarations are barred by the hearsay rule. Mot. at 4. But this argument is premised on a misrepresentation of how MPCA is using the Declarations. The hearsay rule applies only to statements offered into evidence. Minn. R. Evid. 801(c). MPCA did not seek to offer the Declarations into evidence at the hearing. Rather, MPCA is simply referring to exhibits from its pre-hearing opposition to Relators' pending spoliation motion. The Declarations were indisputably proper exhibits to MPCA's opposition brief under Rule 115.04, which expressly provides for the submission of supporting affidavits.

III. **The Sansonetti and Emrich Declarations Merit Consideration.**

Relators also take issue with the declarations of Sansonetti and Emrich, asserting that each lacks sufficient personal knowledge to opine on federal litigation hold policies

¹ Relators assert that because Mr. Neblett was in the courtroom during the hearing, he "could have been proffered as a witness at any time." Mot. at 2. This assertion ignores the witness designation deadline, the Court's order to sequester witnesses, and the fact that MPCA was not aware of any need to call Mr. Neblett to testify. Tr. at 19:6-20.

because federal administrative norms may have materially changed since Sansonetti and Emrich last served in a federal agency. Mot. at 5. First, this argument goes to the weight of the evidence, not to its admissibility. Second, this argument is based on sheer speculation—that there may have been a fundamental sea change in federal agencies’ litigation hold policies since Sansonetti and Emrich left their positions. Relators offer no evidence to support their hypothesis. Indeed, despite bearing the burden of showing that spoliation sanctions are warranted, Relators offer not a single instance in which any agency—state or federal—has ever imposed a litigation hold for a case adjudicated on the administrative record. There is no basis for discounting—let alone excluding—declarants’ testimony based on Relators’ unsupported speculation that this longstanding federal policy might conceivably have changed.

Relators further assert that the Sansonetti and Emrich declarations are irrelevant because they pertain to the practices of federal agencies under federal law, whereas the instant case involves the obligations of a Minnesota agency under Minnesota law. Mot. at 6. But Relators’ spoliation argument is rooted in common law, not a Minnesota statutory or regulatory requirement. Thus, the actions of federal agencies can guide the Court in assessing the duties of MPCA in preserving documents for litigation. Furthermore, in their spoliation motion, Relators themselves cite to two Eighth Circuit cases, a federal district court case in New Mexico, and a federal district court case in New York, none of which dealt with Minnesota law. Relators’ Mot. *in Limine* for Spoliation Sanctions at 7, 10, 13. If Relators can rely on federal norms, then MPCA can as well.

CONCLUSION

Given that Relators continue to seek spoliation sanctions—based on a motion they filed before the hearing—MPCA is entitled to oppose their request with the same arguments and evidence MPCA filed before the hearing. Of course, as the Court has indicated, both sides are now also permitted to supplement their arguments with evidence from the hearing itself. MPCA would be severely prejudiced if the Court allowed Relators to continue pressing their pre-hearing spoliation argument while eliminating MPCA's ability to present defenses it properly raised before the hearing. Relators' request for this unfounded advantage should be denied.

DATED: May 14, 2020

/s/ Richard E. Schwartz

Sarah Koniewicz

MN Attorney License No. 0389375

John C. Martin (pro hac vice)

Richard E. Schwartz (pro hac vice)

Bryson C. Smith (pro hac vice)

Holland & Hart LLP

25 S. Willow St.

Jackson, WY 83001

(307) 739-9741

SMKoniewicz@hollandhart.com

JCMartin@hollandhart.com

RESchwartz@hollandhart.com

BCSmith@hollandhart.com

*Attorneys for Respondent Minnesota
Pollution Control Agency*