

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
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

**DECLARATION OF
PAULA G. MACCABEE IN
SUPPORT OF SECOND MOTION
TO AMEND EXHIBIT LIST**

State of Minnesota)
) ss.
County of Ramsey)

I, Paula G. Maccabee, hereby declare as follows:

1. I am an attorney licensed in Minnesota. I represent WaterLegacy in the above-captioned matter.

2. Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, Center for Biological Diversity, WaterLegacy, and the Fond du Lac Band of Lake Superior Chippewa (collectively, “Relators”) are the Relators in the above-captioned matter.

3. In late October 2019, WaterLegacy secured documents from the U.S. Environmental Protection Agency (“EPA”) as a result of a March 27, 2018 Freedom of Information Act (“FOIA”) request and the granting of a fee waiver appeal. These EPA FOIA documents suggested that Respondent Minnesota Pollution Control Agency (“MPCA”) may have had phone calls and conferences with EPA not yet confirmed in any records produced to Relators.

4. On November 15, 2019, I filed another FOIA request on behalf of WaterLegacy, FOIA request EPA-R5-2020-001126. This FOIA request sought EPA notes pertaining to phone conferences or meetings that may have occurred between MPCA and EPA on March 12, 2018;

March 15, 2018; April 30, 2018; June 11, 2018; October 22, 2018; November 8, 2018 and November 28, 2018. I followed up this request with phone calls to EPA requesting an expedited response to the extent possible, due to imminent Court deadlines to disclose exhibits. EPA released an initial set of notes on December 27, 2019. The Court allowed Relators to amend their Exhibit List to include these notes on January 17, 2020.

5. On Friday, January 17, 2020, EPA sent WaterLegacy a supplemental disposition regarding EPA-R5-2020-001126. This supplemental disposition provided, for the first time, copies of Kevin Pierard's notes of meetings on March 12, 2018; April 30, 2018; June 11, 2018; and October 22, 2018. Mr. Pierard's notes of these meetings are critical both because they contain a contemporaneous record of information on important conferences between EPA and MPCA that is not otherwise available in this record and because they may demonstrate that no privilege applies to matters to which the U.S. Department of Justice might otherwise object under a claim of privilege.

6. **Attachment A** to this declaration contains true and correct copies of a cover email received today from EPA providing EPA's supplemental disposition documents, the supplemental disposition documents, Mr. Pierard's notes, and a .pdf screenshot of the information provided at FOIAOnline. These documents demonstrate that Mr. Pierard's notes were only released today and prior to today were not in the custody or control of Relators.

7. **Attachment B** to this declaration contains true and correct copies of the ten pages of Mr. Pierard's notes provided today by EPA under FOIA as they were downloaded from FOIAOnline and as they were provided in the cover email from EPA hours ago. Relators have marked these pages with Bates numbers RELATORS_0066012-21. Relators request that these notes be accepted as Relators' Exhibit 836.

8. There is good cause for Relators' failure to disclose Mr. Pierard's notes proposed

as Relators' Exhibit 836 since, despite due diligence, Relators only gained access to those notes today, on January 17, 2020.

9. Relators would be severely prejudiced if Mr. Pierard's notes secured today from EPA pursuant to EPA-R5-2020-001126 were not allowed as exhibits in this matter. These notes provide contemporaneous, unique, and important information as to the conferences between EPA and MPCA on March 12, 2018; April 30, 2018; June 11, 2018; and October 22, 2018 and provide highly probative evidence of Relators' alleged procedural irregularities in this matter.

I declare under penalty of perjury that everything that I have stated in this document is true and correct

Dated: January 17, 2020

s/s Paula G. Maccabee
PAULA G. MACCABEE

Friday, January 17, 2020 at 3:15:56 PM Central Standard Time

Subject: Supplemental Response FOIA Request EPA R5-2020-001126
Date: Friday, January 17, 2020 at 9:54:49 AM Central Standard Time
From: no-reply@foiaonline.gov
To: pmaccabee@justchangelaw.com
Attachments: SupplementalRespFOIA2020-001126_1.pdf, SupplementalAttBFOIA2020-001126_1.pdf

01/17/2020 Ms. Paula G Maccabee WaterLegacy



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JAN 13 2020

REPLY TO THE ATTENTION OF

WP-16J

Ms. Paula Maccabee, Esq.
Water Legacy
1961 Selby Avenue
Saint Paul, Minnesota 55104

Re: Freedom of Information Act Request No. EPA-R5-2020-001126
Supplemental Response

Dear Ms. Maccabee:

On December 19, 2019, EPA Region 5 provided its response to FOIA Request No. EPA-R5-2020-001126 and produced three pages of notes from custodians Krista McKim and Mark Ackerman (Enclosure A). Subsequent to that response, we located previously unknown responsive records, additional handwritten notes prepared by departed employee Kevin Pierard. Therefore, at this time we are supplementing our response to your above-referenced FOIA and providing you with these recently located records.

The Agency would like to provide some context for the records that are produced today. These are the personal notes of Mr. Pierard, which he kept for his personal use. For that reason, the notes may be disorganized, unpolished, or otherwise reflect that he did not intend that the notes would be used by others. While the Agency does not necessarily take the position that these personal notes are subject to the FOIA, they are being produced today in the interest of transparency.

EPA will be providing the records responsive to your request through the FOIA Online system. An index of the records we are releasing is included with this letter as Enclosure B.

You will receive a "Final Disposition" email from the Region 5 FOIA Office when the responsive records are available. There is no charge applicable to the records provided in this supplemental response.

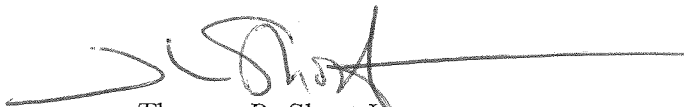
You can access the records responsive to your request by doing the following

1. Wait for the Final Disposition email to arrive;
2. Go to <https://foiaonline.gov/foiaonline/action/public/search>;
3. Enter the tracking number in the box next to "Keyword Search" and click Go;
4. A list of the records will come up. To access a record, click on the "+" under the Detail column, then click on the Title.

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals *received* after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (301) 837-1996 or (877) 684-6448; or fax, (301) 837-0348.

If you have questions regarding this response please contact Mark Ackerman, at (312) 353-4145 or ackerman.mark@epa.gov; or Barbara Wester at (312) 353-8514 or wester.barbara@epa.gov.

Sincerely,



Thomas R. Short Jr.
Acting Director, Water Division

Enclosures



Enclosure A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

DEC 19 2019

WP-16J

Ms. Paula Maccabee, Esq.
Water Legacy
1961 Selby Avenue
Saint Paul, Minnesota 55104

RE: Freedom of Information Act Request
EPA-R5-2020-001126

Dear Ms. Maccabee:

This letter responds to your Freedom of Information Act (FOIA) request dated November 15, 2019. You requested the following:

All handwritten notes, emails or memoranda reflecting the factual content of phone conferences, or meetings between EPA and the Minnesota Pollution Control Agency (MPCA) occurring on any of the following dates: March 12, 2018, March 13, 2018, March 15, 2018, April 30, 2018, June 11, 2018, October 22, 2018, November 8, 2018, and November 28, 2018.

The response is from the following offices at EPA Region 5: Water Division, Office of Regional Counsel, and the Office of the Regional Administrator. Our response today includes only employees' personal handwritten notes and electronic notes taken during the meetings that occurred on the dates specified in your request and not any records that are not housed in the Agency's Outlook system. The Agency's responses to previous FOIA requests, that have been made available to you (and for which links are provided for convenience below), cover other Agency records, including those housed in the Agency's Outlook system and calendar entries and invitations for the meetings listed in your current request above, relating to the following: EPA's internal and external communications and deliberations regarding EPA's oversight of the MPCA Clean Water Act (CWA) Section 402 permitting process and EPA's records relating to the applicability of CWA Section 401(a)(2) (FOIA EPA-R5-2019-002881); and EPA's role in review of the U.S. Army Corps of Engineers CWA 404 permit and the associated state 401 certification and the applicability of CWA Section 401(a)(2) (EPA-R5-2019-003224). The period of time covered by these two FOIA requests is calendar year 2018. Therefore, that portion of your request relating to records other than handwritten notes, or electronic notes for the above meetings, can be found by reviewing the records released in response to the two aforementioned FOIAs. The following links will allow you to access the records previously released.

EPA-R5-2019-002881

<https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-R5-2019-002881&type=request>

EPA-R5-2019-003224

<https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-R5-2019-003224&type=request>

In response to your above-referenced request dated November 15, 2019, three pages of notes from the custodians, as noted in Enclosure A, are being produced. The nine pages of notes from Attorney Advisors Barbara Wester and Jillian Rountree are withheld in full pursuant to FOIA Exemption 5, the Attorney Work Product Privilege. An itemized list of the withheld records, along with the basis for withholding and an estimate of the volume of withheld records, is provided in Enclosure B to this letter.

The Agency would like to provide some context for the records that are produced today. These are the personal notes of individual staff. The staff taking these notes did so for their personal use, and, for that reason, some notes may be disorganized, unpolished, or otherwise reflect that the staff did not intend that the notes would be used by others. While the Agency does not necessarily take the position that these personal notes are subject to the FOIA, they are being produced today in the interest of transparency.

EPA will be providing the records responsive to your request through the FOIA Online system. An index of the records we are releasing is included with this letter as Enclosure A. We are unable to provide you with other records, or portions of other records, responsive to your request because we have determined that those records are exempt from mandatory disclosure under Exemption 5 of 5 U.S.C. §§ 552(b)(5). Exemption 5, 5 U.S.C. § 552(b)(5), protects inter- or intra-agency documents that would not be available by law to a party in litigation with the agency, which includes the attorney/client, attorney work product and deliberative process privilege(s) recognized under common law. An itemized list of the withheld material, along with the bases for withholding and an estimate of the volume of withheld materials, is provided in Enclosure B.

You will receive a "Final Disposition" email from the Region 5 FOIA Office. An invoice will be attached to the email if there are any applicable charges for search, review, and duplication of responsive records. If no invoice is attached to the email, then no charge is applicable for processing your request.

You can access the records responsive to your request by doing the following

1. Wait for the Final Disposition email to arrive;
2. Go to <https://foiaonline.gov/foiaonline/action/public/search>;
3. Enter the tracking number in the box next to "Keyword Search" and click Go;
4. A list of the records will come up. To access a record, click on the "+" under the Detail column, then click on the Title.

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals *received* after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (301) 837-1996 or (877) 684-6448; or fax, (301) 837-0348.

If you have questions regarding this response please contact Mark Ackerman, at (312) 353-4145 or ackerman.mark@epa.gov; or Barbara Wester at (312) 353-8514 or wester.barbara@epa.gov.

Sincerely,



Thomas R. Short Jr.
Acting Director, Water Division

Enclosure

Enclosure A

EPA Region 5 Water Division and Office of Regional Counsel

Index of released records for FOIA EPA-R5-2020-001126

Title	Author	To	From	Date	FOIA Exemption	Reason for Withholding	Length (pages)
Call With MPCA	Krista McKim	N/A	N/A	April 30, 2018	N/A	N/A	1
MPCA Call	Krista McKim	N/A	N/A	March 12, 2018	N/A	N/A	1
PolyMet	Mark Ackerman	N/A	N/A	March 12, 2018	N/A	N/A	1

Enclosure B

EPA Region 5 Water Division and Office of Regional Counsel

Index of Index of withheld records for FOIA EPA-R5-2020-001126

Title	Author	To	From	Date	FOIA Exemption	Reason for Redaction	Length (pages)
Wester Polymet Call Notes June 11 2018	Barbara L. Wester	Attorney's Personal File	N/A	June 11, 2018	Exemption 5	Attorney Work Product	2
Wester Polymet Call Notes October 22 2018	Barbara L. Wester	Attorney's Personal File	N/A	October 22, 2018	Exemption 5	Attorney Work Product	3
Wester Polymet Call Notes November 8 2018	Barbara L. Wester	Attorney's Personal File	N/A	November 8, 2018	Exemption 5	Attorney Work Product	2
FW: PolyMet Permitting (Handeland, 757-2405 POST)	Jillian Rountree	Attorney's Personal File	N/A	March 12, 2018	Exemption 5	Attorney Work Product	2

“(Call in number: 888-742-5095, Code: ***-***-****) Call with MPCA on Polymet”	Jillian Rountree	Attorney’s Personal File	N/A	April 30, 2018	Exemption 5	Attorney Work Product	2
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