

MASLON**Evan A. Nelson**
Direct Dial: 612.672.8396
Direct Fax: 612.642.8396
evan.nelson@maslon.com

December 27, 2019

Via E-filing and hand deliveredThe Honorable John H. Guthmann
Ramsey County District Court
1470 Ramsey County Courthouse
15 Kellogg Boulevard West
St. Paul, MN 55102**Re: Ramsey County Court File No. 62-cv-19-4626**

Dear Judge Guthmann:

Pursuant to paragraph 7 of the Court's Amended Order Setting Evidentiary Hearing ("Amended Order") and Telephone Conference Tr. ("Conf. Tr.") 35:1-10 (Dec. 6, 2019), Relators move the Court to amend Relators' Exhibit List to include documents Respondent Minnesota Pollution Control Agency ("MPCA") recently provided to Relators through the Minnesota Government Data Practices Act ("DPA"), documents recently provided to Relators by the U.S. Environmental Protection Agency ("EPA") in response to a Freedom of Information Act ("FOIA") request, attachments inadvertently not included with their parent document on Relators' Exhibit List, and a response only made potentially relevant due to the listing of a document on MPCA's Exhibit List.

I. BACKGROUND**A. DPA Documents**

As discovery progressed and MPCA continued to divulge evidence showing MPCA had destroyed relevant information, Relators determined that it was relevant to know when MPCA placed a litigation hold on materials related to the PolyMet NPDES Permit. (Declaration of Elise L. Larson ("Larson Decl.") ¶ 4 (Dec. 27, 2019)). During a November 11, 2019 meet and confer, Relators asked MPCA's counsel whether MPCA had a litigation hold in place and, if so, its timing and content. (*Id.* ¶ 5). MPCA's counsel refused to provide that information to Relators. (*Id.*) In response, Relator Minnesota Center for Environmental Advocacy ("MCEA") submitted a DPA request form to MPCA on November 14, 2019. (Larson Decl. ¶ 6-7 & Ex. A), stating:

I request, pursuant to the MGDPA, Minn. Stat. s. 13.03 that the Department make available the following: any and all litigation hold notices and subsequent documents (e.g. litigation hold letters, notices, emails, memoranda, and acknowledgment of litigation hold letters, notices, emails, memoranda by MPCA staff, etc.) related to the PolyMet Northmet project, and, in particular, all litigation

December 27, 2019

Page 2

holds and subsequent documents related to the PolyMet NPDES Permit MN0071013.

(Larson Decl. ¶ 7 & Ex. A).

On December 17, 2019, MPCA responded to MCEA's DPA Request. (*See* Larson Decl. ¶ 10 & Ex. B). MPCA's response stated: "The above is what we have in response to your request." (*Id.*) The response included a forwarded email from June 26, 2019 from Adonis Neblett to MPCA Staff. (*Id.*) The email also attached a copy of a litigation hold to Minnesota Information Technology dated November 27, 2019 indicating a litigation hold needed to be placed on data from Rebecca Flood, Ann Foss, Shannon Lotthammer, and John L. Stine. (*See* Larson Decl. ¶ 11 & Ex. C).

B. FOIA Documents

Relator WaterLegacy first sought EPA records, including notes, pertaining to meetings with MPCA regarding the PolyMet water pollution permit on March 27, 2018. (Declaration of Paula G. Maccabee ("Maccabee Decl.") ¶ 3 (Dec. 27, 2019)). WaterLegacy was initially denied a fee waiver for these records and advised in April 2018 that EPA's search alone would cost from \$6,500 to \$10,000. (*Id.* ¶4). A July 2018 appeal from the fee waiver denial was granted by EPA on August 14, 2019, but the records produced as a result included no EPA notes. (*Id.* ¶¶ 4-6).

WaterLegacy filed a separate and specific FOIA request for EPA's notes from the September 25 and 26, 2018 meetings between EPA, MPCA and PolyMet on June 19, 2019. (*Id.* ¶ 7). EPA denied this FOIA request, and WaterLegacy appealed on October 18, 2019. (*Id.* ¶ 8). EPA initially lost track of the appeal, requiring its resubmission and request for expedited review. (*Id.*) On November 15, 2019, EPA granted WaterLegacy's appeal in part, and on December 18, 2019, EPA informed WaterLegacy that EPA would release segregable responsive documents. (*Id.* ¶¶ 8-9). Those documents, including EPA notes of the September 2018 meetings, were downloaded on December 23, 2019 and copies were provided to Respondents' counsel the next day. (*Id.* ¶ 9)

C. Relators' Exhibit List Submission

On December 16, 2019, Relators submitted their Exhibit List to the Court, listing MCEA's DPA request as Exhibit 760. (Larson Decl. ¶ 9). Relators' Exhibit List also listed exhibits documenting WaterLegacy's efforts under the FOIA to secure EPA's notes of the September 25 and 26, 2018 meetings between EPA, MPCA, and PolyMet. (Maccabee Decl. ¶ 10).

Relators' Exhibit List included an email to EPA regarding upcoming September 2018 meetings, but meeting agenda attachments that document what information EPA received were inadvertently left off the Exhibit List. (*Id.* ¶ 12). Relators' Exhibit List also did not include the response by the Fond du Lac Band of Lake Superior Chippewa (the "Band") to a June 12, 2019 letter from Regional Administrator Cathy Stepp. (*Id.*), since this response only became relevant when MPCA listed Ms. Stepp's letter as an exhibit. (*Id.*) Without the Band's response, Ms. Stepp's characterization of EPA's release of PolyMet permit comments to the Band is incomplete. (*Id.* ¶ 13).

II. ANALYSIS

In the Amended Order Setting Evidentiary Hearing, the Court scheduled an Exhibit List deadline for December 9, 2019. (Am. Order ¶ 7). The Court provided that "[u]nlisted exhibits shall not be

December 27, 2019

Page 3

admitted unless the court determines that good cause existed for failing to disclose the exhibit.” (*Id.* (emphasis omitted)). At the December 6, 2019 conference, this Court moved the Exhibit List deadline to December 16, 2019. (Conf. Tr. 35:1-10).

The Court’s discussion at the conference clearly establishes that Relators have good cause to amend their Exhibit List to include MPCA’s response to MCEA’s November 14, 2019 DPA request and EPA’s response to WaterLegacy’s June 19, 2019 FOIA request. At the December 6, 2019 conference, the Court specifically stated that good cause exist and post deadline use of a document justified, even if opposing counsel objected, where Relators had no control of a document in the possession of the government, sought to procure the document in a timely fashion, and received it for the first time after the December 16, 2019 deadline. (Conf. Tr. 36:14-25).¹

As explained above and in the attached declarations, the documents MCEA received in response to its DPA request and the documents WaterLegacy received in response to its FOIA request fall precisely into this exception the Court described. Relators would be prejudiced without the ability to use these documents at the hearing. (Larson Decl. ¶ 13; Maccabee Decl. ¶ 11).

For the remaining documents, Relators meet the good cause standard for allowing such a slight modification to the pretrial scheduling order. *See Cotroneo v. Pilney*, 343 N.W.2d 645, 649 (Minn. 1984) (stating that the degree to prejudice to the parties, the impact of the modification at the state of litigation and the degree of willfulness, bad faith or inexcusable neglect are the factors used to determine good cause to amend a scheduling order). Relators will suffer prejudice if the September 25 and 26, 2018 agendas provided to EPA and the Band’s response to the letter from Regional Administrator Stepp were not allowed as exhibits because they are relevant and important to this matter. (Maccabee Decl. ¶¶ 12-13). Further, the Band’s response letter only became relevant after Relators reviewed MPCA’s exhibit list. (*Id.*)

Respondents MPCA and PolyMet will suffer no prejudice from the use of these documents as hearing exhibits. The agenda documents provided to EPA and the Band’s response to Ms. Stepp’s letter were supplied to Respondents in discovery. Further, allowing Relators add a handful of documents to the Exhibit List will in no way modify the litigation. Finally, Relators submit this request within two weeks after the Exhibit List deadline and in the middle of numerous deadlines and holidays. Relators have shown no willfulness, bad faith, or inexcusable neglect in requesting post-deadline use of these documents.

For these reasons, Relators respectfully request this Court find Relators have shown good cause to add the documents provided in Exhibits A through F to Relators’ Exhibit List so that they may be used as hearing exhibits.

[signature blocks on following page]

¹ Relators sent Counsel a meet-and-confer email on December 23, 2019, but received no response either objecting to or supporting Relators’ Informal Motion to Amend the Exhibit List.

December 27, 2019

Page 4

Respectfully submitted,

MASLON LLP/s/ Eyan A. Nelson

WILLIAM Z. PENTELOVITCH (#0085078)
 MARGARET S. BROWNELL (#0307324)
 EVAN A. NELSON (#0398639)
 90 South Seventh Street
 3300 Wells Fargo Center
 Minneapolis, MN 55402-4140
 Phone: (612) 672-8200
 Email: bill.pentelovitch@maslon.com
 margo.brownell@maslon.com
 evan.nelson@maslon.com

MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY/s/ Elise L. Larson

ELISE L. LARSON (#0393069)
 KEVIN REUTHER (#0266255)
 1919 University Avenue West
 Saint Paul, MN 55105
 Phone: (651) 223-5969
 Email: elarson@mncenter.org
 kreuther@mncenter.org

NILAN JOHNSON LEWIS PA/s/ Daniel Q. Poretti

DANIEL Q. PORETTI (#185152)
 MATTHEW C. MURPHY (#0391948)
 120 South Sixth Street, Suite 400
 Minneapolis, MN 55402-4501
 Phone: (612) 305-7500
 Email: dporetti@nilanjohnson.com
 mmurphy@nilanjohnson.com

*Attorneys for Relators Center for Biological
 Diversity, Friends of the Boundary Waters
 Wilderness, and Minnesota Center for
 Environmental Advocacy*

JUST CHANGE LAW OFFICES/s/ Paula Maccabee

PAULA G. MACCABEE (#0129550)
 1961 Selby Avenue
 Saint Paul, MN 55104
 Phone: (651) 646-8890
 Email: pmaccabee@justchangelaw.com

Attorneys for Relator WaterLegacy

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA/s/ Sean Copeland

SEAN W. COPELAND (#0387142)
 1720 Big Lake Road
 Cloquet, MN 55720
 Phone: (218) 878-2607
 Email: seancopeland@fdlrez.com

VANESSA L. RAY-HODGE (*pro hac vice*)
 500 Marquette Avenue NW, Suite 660
 Albuquerque, NM 87102
 Phone: (505) 247-0147
 Email: vrayhodge@abqsonosky.com

MATTHEW L. MURDOCK (*pro hac vice*)
 1425 K Street N.W., Suite 600
 Washington, D.C. 20005
 Phone: (202) 682-0240
 Email: mmurdock@sonosky.com

*Attorneys for Relators Fond du Lac Band of
 Lake Superior Chippewa*

Enclosures

cc: Counsel of Record (via Odyssey)

