

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Center for Biological Diversity, Friends of the
Boundary Waters Wilderness, Minnesota
Center for Environmental Advocacy,
WaterLegacy, and Fond du Lac Band of Lake
Superior Chippewa,

Court File No. 62-CV-19-4626
Judge John H. Guthmann

**MEMORANDUM IN SUPPORT OF
MOTION FOR SCHEDULING ORDER**

Plaintiffs,

vs.

Minnesota Pollution Control Agency and
PolyMet Mining, Inc.,

Defendants.

Plaintiffs Center for Biological Diversity, Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy, WaterLegacy, and Fond du Lac Band of Lake Superior Chippewa (“Band”) (collectively “Plaintiffs”), move the Court for a Scheduling Order that includes pre-hearing discovery and a date certain for an evidentiary hearing. Plaintiffs contacted Defendants Minnesota Pollution Control Agency’s (“MPCA”) and PolyMet Mining, Inc. (“PolyMet”) to confer regarding a joint schedule that includes pre-hearing discovery. Defendants indicated their opposition to any discovery.

BACKGROUND

Pursuant to Minn. Stat. § 14.68, the Minnesota Court of Appeals transferred three certiorari appeals to the Court for “an evidentiary hearing and determination of the alleged irregularities in procedure” with respect to MPCA’s issuance of the National Pollutant Discharge Elimination System/State Disposal System Permit (“NPDES Permit”) to Defendant PolyMet for the NorthMet

copper-nickel mine project (“NorthMet Project”). *In re Denial of Contested Case Hearing Requests and Issuance of NPDES Permit No. MN0071013 for the Proposed Northmet Project St. Louis County Hoyt Lakes and Babbitt Minnesota*, Case Nos. A19-0112, A19-0118, A19-0124, slip op. at 4 (Minn. Ct. App. June 25, 2019) (“Transfer Order”). In the Transfer Order, the Minnesota Court of Appeals charged this Court with holding an evidentiary hearing “to determine alleged irregularities in procedure” and conferred on this Court jurisdiction to issue an order “that includes findings of fact on alleged irregularities.” This Court’s determination will be a final appealable order pursuant to Minn. Stat. § 14.68 and the Minnesota Court of Appeals’ Transfer Order.

As with any other civil action, the Minnesota Rules of Civil Procedure govern this proceeding. The Minnesota Rules of Civil Procedure provide procedures for developing a record and engaging in factfinding through discovery. Discovery is critical in this case because there are disputed issues of fact and MPCA has failed to disclose relevant information in the administrative record and in response to requests under the Minnesota Government Data Practices Act (“MGDPA”). Plaintiffs are entitled to discovery in order to prove the claims set forth in their Rule 7.02 Motion for Findings of Fact, Conclusions of Law and Order.

ARGUMENT

The Minnesota Rules of Civil Procedure “govern the procedure in the district courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81.” Minn. R. Civ. P. 1. Neither Minn. R. Civ. P. 81.01 nor Appendix A exclude this action from the applicability of the Minnesota Rules of Civil Procedure. Therefore, in accordance with Minn. R. Civ. P. 26.02(a), Plaintiffs seek discovery on matters relevant to their claims through depositions by oral examination, written interrogatories, production of documents, and requests for admission.

Discovery is particularly necessary in this case because MPCA sought to prevent EPA from sending its written comments reflecting concerns with the NPDES Permit. Plaintiffs only obtained EPA comments pertaining to PolyMet's draft NPDES Permit read on the phone to MPCA on April 5, 2018 in June 2019 as a result of Freedom of Information Act ("FOIA") litigation. In addition, before and during the permitting process, MPCA and EPA engaged in an unusual procedure of telephone conferences and in-person meetings, some of which were not reflected in the administrative record.

It has also recently come to light that notes and emails of critical communications involving MPCA, EPA, PolyMet, and potentially even Minnesota Congressional leaders, were not produced by MPCA despite multiple requests under the MGDPA. MPCA has admitted that it destroyed some of this data, potentially engaging in spoliation of key evidence. In addition, leaks from EPA whistleblowers have disclosed portions of missing documents, and upon information and belief, there are other documents relevant to the issuance of the NPDES Permit which are being unlawfully withheld and are yet undiscovered.

Plaintiffs' discovery of EPA's written comments on the draft NPDES Permit, which highlighted EPA's extensive concerns about the NPDES Permit, has depended on EPA whistleblowers, five MGDPA requests, the efforts of a retired EPA attorney, leaks by the EPA union, and FOIA litigation. Despite more than a year of effort by some of the Plaintiffs to discover EPA's concerns about the NPDES Permit and the nature of MPCA's and EPA's irregular and unlawful procedures, the administrative record is still incomplete, and little is known either about outside influences on MPCA's NPDES Permit decisions or the communications between MPCA management and the EPA.

Discovery from MPCA and PolyMet in this case is necessary in order to fully determine the extent and scope of the irregularities that occurred pertaining to the NPDES Permit. The proposed discovery schedule will provide Plaintiffs with sufficient time to gather information about witnesses and evidence relevant to matters to be determined through an evidentiary hearing before this Court. Indeed, based on information outside of the record obtained to date, it appears that MPCA has concealed names, documents, and emails related to key people within the agency who were involved in creating the plan to keep EPA comments out of the record. It also appears that discussions occurred among MPCA, PolyMet, EPA, and potentially other third parties, related to EPA's concerns, that will show MPCA's intent to conceal EPA's critical comments, including comments related to compliance with Minnesota water quality standards and downstream mercury pollution impacts to waters on the Band's Reservation. This information may be in the possession of EPA, MPCA or PolyMet, or may only be available from recently retired MPCA or EPA officials. As such, Plaintiffs would be prejudiced in proving their claims without the ability to seek discovery before an evidentiary hearing.

In fact, Plaintiffs have identified almost thirty witnesses from EPA, MPCA and PolyMet, including PolyMet's consultants, that need to be questioned in connection with the irregularities that occurred throughout the permitting process. To date, MPCA and PolyMet have denied any irregularities occurred and MPCA has been allowed to cherry-pick declarants from within MPCA. But based on the extra-record evidence obtained by Plaintiffs to date, there is a much larger circle of individuals who have first-hand knowledge of what actually occurred before and during the NPDES Permit process. Moreover, during discovery it is likely that new names or information will come to light that will require additional investigation. The proposed scheduling order provides some flexibility in the discovery process to allow for follow up on new names or

information that may surface during discovery. Plaintiffs submit that the extraordinary circumstances by which this case comes before the Court and the difficulties to date securing information without discovery requires the time requested in the proposed scheduling order in the interest of factfinding and to avoid prejudice to Plaintiffs' interests.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion and issue the proposed Scheduling Order.

Dated: August 1, 2019

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

MASLON LLP

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

NILAN JOHNSON LEWIS, P.A.

JUST CHANGE LAW OFFICES

/s/ Paula G. Maccabee

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

Attorney for Plaintiff WaterLegacy

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA LEGAL AFFAIRS OFFICE

/s/ Seth Bichler

SEAN W. COPELAND (#0387142)
SETH BICHLER (#0398068)
1720 Big Lake Road
Cloquet, MN 55720
Phone: (218) 878-2607
Email: seancopeland@fdlrez.com
sethbichler@fdlrez.com

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

**SONOSKY, CHAMBERS, SACHSE,
MIELKE & BROWNELL, LLP**

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

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