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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 MOTION FOR PARTIAL SUMMARY JUDGMENT TO NARROW AND DEFINE ISSUES FOR HEARING

The Minnesota Pollution Control Agency ("MPCA") hereby requests that the Court enter an order of partial summary judgment in order to refine the scope of the evidentiary hearing scheduled to begin on January 21, 2020. Specifically, MPCA seeks an order that (i) any alleged procedural irregularities must be based on MPCA actions, (ii) MPCA action that complies with a Memorandum of Agreement between MPCA and the U.S. Environmental Protection Agency ("EPA") does not constitute a procedural irregularity, and (iii) MPCA's decisions not to supplement responses to Minnesota Government Data Practices Act ("MGDPA") requests with newly created documents or attorney notes do not constitute a procedural irregularity.

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RELEVANT BACKGROUND

This proceeding stems from Relators' appeal of MPCA's issuance of a water quality permit ("NorthMet Permit") for the NorthMet Mining Project ("NorthMet Project"). The NorthMet Project has received an unprecedented level of review by MPCA and other government agencies, including the Minnesota Department of Natural Resources ("DNR"), the EPA, and the U.S. Forest Service. Following 10 years of environmental review, MPCA led a permit review process that spanned an additional two and a half years. Findings of Fact and Conclusions of Law and Order for the NorthMet Permit ("NorthMet FOF") at ¶¶ 2-3.[1] The NorthMet Permit, which was issued on December 20, 2018, is supported by 42 pages of factual findings. The permitting requirements remedy currently uncontrolled seepage at an existing facility. In the absence of the NorthMet Permit, uncontrolled seepage would continue to flow from the abandoned facility to receptors near the site. *See* NorthMet FOF at ¶¶ 5, 9.

Moreover, the DNR's Permit to Mine for the NorthMet Project contains robust financial assurances that cover the costs of remediation should the project cease before planned. *See* NorthMet Permit to Mine, Attachment 1.[2]

As part of the NorthMet Permit permitting process, MPCA had extensive interactions with EPA regarding the terms and conditions of the permit. These interactions were governed by a Memorandum of Agreement ("MOA") which was executed by MPCA

[1] Available at https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-51pp.pdf.

[2] Available at https://files.dnr.state.mn.us/lands_minerals/northmet/final_permit/01-polymet-ptm-northmet-approval.pdf.

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and EPA in 1974 and governs National Pollutant Discharge Elimination System ("NPDES") permitting procedures in Minnesota. Ex. A (MOA). EPA retained full authority to veto the proposed NorthMet Permit. Ex. A at 124.46(5)-(6), MPCA(62-cv-19-4626)_008557-58, after an intensive and much-longer-than-usual review, EPA chose not to exercise that authority here.

LEGAL AND PROCEDURAL BACKGROUND

In January 2019, Relators filed three separate appeals challenging the NorthMet Permit. These actions were consolidated pursuant to a January 25, 2019 order from the Court of Appeals.

On June 25, 2019, the Court of Appeals transferred this matter to this Court "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure" regarding the NorthMet Permit permitting process. Sept. 9, 2019 Order at 1 (quoting June 25, 2019 Order). The evidentiary hearing is limited to the discrete alleged procedural irregularities identified by the Court of Appeals order. This approach is consistent with Minn. Stat. § 14.68, which vests the district court with narrow jurisdiction "to take testimony and to hear and determine the alleged irregularities in procedure." All substantive issues remain to be determined by the Court of Appeals in a review that "shall be confined to the record." Minn. Stat. § 14.68.

Thus, this Court's sole task is to determine whether MPCA engaged in "irregularities in procedure" during the permitting process for the NorthMet Permit.

The Minnesota Legislature has not defined the term "irregularities in procedure." In the absence of a statutory definition, courts look to the "plain and ordinary meaning"

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assigned to the term. *State v. Overweg*, 922 N.W.2d 179, 183 (Minn. 2019). And to ascertain the "plain and ordinary meaning" of a term, courts look to dictionary definitions. *State v. Henderson*, 907 N.W.2d 623, 626 (Minn. 2018).

"Irregularity" is ordinarily defined as "something that is irregular (such as improper or dishonest conduct)."[3] And "irregular" is defined as "not being or acting in accord with laws, rules, or established custom." "Irregular" can also sometimes mean "not following a usual or prescribed procedure."[4] In the context of this case, however, Minn. Stat. §14.69 provides important context: the reviewing court can set aside agency action only for use of "unlawful" procedures, not those that are merely unusual, and the term "irregularity" should be interpreted accordingly in Section 14.68.

This interpretation of procedural irregularities is further supported by the case law. In *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165 (Minn. Ct. App. 2001), the court found that a city council engaged in procedural irregularities when it violated the procedures set forth in its own policy manual in a hearing regarding business license revocation. The court noted that "[t]he city council was to make its decision in accordance with its Manual," and its failure to do so constituted irregularities in procedure. *Id.* at 174.

In light of this framework, MPCA moves the Court to enter partial summary judgment on three discrete types of actions that, as a matter of law, cannot be procedural irregularities. First, EPA's actions cannot form the basis of procedural irregularities by

[3] https://www.merriam-webster.com/dictionary/irregularity.

[4] https://www.merriam-webster.com/dictionary/irregular.

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MPCA. Second, MPCA actions that adhere to and comply with the MOA cannot constitute a procedural irregularity. And third, because the MGDPA does not require MPCA to supplement responses to MGDPA requests with newly created documents or to produce attorney work product, MPCA's longstanding practice of declining to produce subsequently created documents and attorney notes does not constitute a procedural irregularity.

ARGUMENT

I. Any Alleged Procedural Irregularities Must Be Based on MPCA Actions.

Minn. Stat. § 14.68—the statute governing this proceeding—is a state statutory provision within the Minnesota Administrative Procedure Act ("MAPA"). MAPA's express policy is that "***state agencies*** must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals." Minn. Stat. § 14.002 (emphasis added). MAPA applies only to state agencies and therefore does not govern the actions of federal agencies such as EPA. Thus, the reference in Minn. Stat. § 14.68 to "irregularities in procedure" does not apply to EPA's actions. Additionally, EPA is not a party to this proceeding, so it has no opportunity to explain or defend its actions or its interactions with MPCA.

Relators make numerous allegations regarding EPA's conduct throughout their List of Alleged Procedural Irregularities, filed on August 14, 2019. But MAPA provides a remedy only for "unlawful procedures" by MPCA. Accordingly, the Court should determine as a matter of law before the evidentiary hearing that allegations of procedural

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irregularities by EPA are irrelevant and do not constitute evidence of any procedural irregularity by MPCA.

II. MPCA Actions in Compliance with the MOA Cannot Constitute a Procedural Irregularity.

MPCA and EPA executed the MOA in 1974. Ex. A, MPCA(62-cv-4626)_008565. For nearly half a century, this agreement has governed the interactions between MPCA and EPA with respect to Minnesota's NPDES permitting procedures. Notably, Relators have raised no challenge to the validity of the MOA.

By definition, the MOA sets forth the "usual or prescribed procedure" for MPCA-EPA interactions during the NPDES permitting process.[5] Thus, to the extent MPCA's actions regarding the NorthMet Permit complied with the MOA, such actions are the procedural norm and therefore cannot form the basis of a procedural irregularity. Indeed, compliance with the MOA is the antithesis of a procedural irregularity. To hold otherwise would turn *Hard Times Cafe* on its head by faulting a government entity for adhering to its policies. 625 N.W.2d at 174 ("The city council was to make its decision in accordance with its Manual.").

Here, Relators contend that some of MPCA's conduct constitutes a procedural irregularity even though such conduct was indisputably compliant with the MOA. Specifically, Relators make allegations regarding an email in which MPCA personnel requested that EPA not send written comments during the public comment period. Relators' Motion for Findings of Fact, Conclusions of Law and Order, filed August 1, 2019

[5] https://www.merriam-webster.com/dictionary/irregular.

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("Relators' FOF") at ¶ 58. That cannot constitute a procedural irregularity because it is perfectly consistent with the MOA.

Section 124.46(2) of the MOA provides, in relevant part: "After a public notice period has expired, [MPCA] shall consider all comments received as a result of the public notice and may modify the proposed NPDES permit as it considers appropriate." Ex. A, MPCA(62-cv-19-4626)_008556. This provision does not mention EPA. Rather, EPA comments are subsequently addressed in Section 124.46(5), which provides that the EPA Regional Administrator "may comment upon, object to or make recommendations with respect to the proposed NPDES permit" for which MPCA seeks EPA's "final approval." Ex., MPCA(62-cv-19-4626)_008557-58. Taken together, these two provisions prescribe a procedure whereby MPCA considers public comments, makes any necessary modifications, and then develops a final proposed NPDES permit, which EPA "may comment upon . . . .".

Notably, the MOA contemplates EPA comments only on the proposed NPDES permit that is developed after the public comment period and sent to EPA for "final approval." The MOA does not establish – or event mention – EPA's comments on the public-comment draft permit. Thus, MPCA's encouragement of EPA to provide comments after the public comment period fully accords with the procedures set forth in the MOA. As a result, MPCA's encouragement of EPA comments after the public comment period cannot constitute a procedural irregularity.

MPCA's accommodation of EPA comments—consistent with the MOA—is further underscored by the fact that MPCA quadrupled the time EPA usually has to

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comment or object on a proposed NPDES permit. Specifically, although Section 124.46(5) of the MOA calls for EPA comments or objections to the proposed permit within 15 days of receipt, MPCA agreed to allow 60 days for EPA review of the NorthMet Permit. Ex. B (May 28, 2019 Declaration of Jeff Udd at ¶¶ 9-11). Thus, MPCA's conduct fostered more—not less—EPA oversight and feedback and cannot be deemed a procedural irregularity.

III. There is no Requirement to Supplement Responses to MGDPA Requests with Newly Created Documents, or to Provide Attorney Work-Product: MPCA's Practices under the MGDPA Do Not Constitute Procedural Irregularities.

Relators further allege that MPCA engaged in procedural irregularities regarding its responses to Relators' MGDPA requests. *E.g.*, Relators' FOF at ¶¶ 75-76; Relators' List of Alleged Procedural Irregularities, filed August 14, 2019, at ¶¶ 5, 13. This claim fails as a matter of law.

Minn. Stat. § 13.02 defines "government data" as "all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use." Notably, this definition uses five different verbs with respect to "data," all of which are used in the past tense. Thus, the statutory text plainly describes only "government data" that already exist. As a result, a request for "government data" under the MGDPA applies only to data already in existence at the time the request is submitted.

Although there is limited Minnesota case law on this point, the conclusion that an MGDPA request encompasses only existing data is bolstered by federal courts' interpretation of requirements for responding to requests filed pursuant to the Freedom of

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Information Act ("FOIA"). *See, e.g.*, *Lipton v. United States Envtl. Prot. Agency*, 316 F. Supp. 3d 245, 250 (D.D.C. 2018) ("The statutory text clearly contemplates that only extant information, and not information that an agency may create in the future, needs to be published.").

Finally, there is no evidence to suggest that MPCA typically discloses data created after the agency receives an MGDPA request. To the contrary, MPCA's general policy has been to disclose only data already in existence when the request is received. Ex. C (June 12, 2019 Declaration of Michael Schmidt) at ¶ 19 ("It was MPCA's policy, which was consistent with the Data Practices Act, that a records request applies only to documents in existence on or before the date of the request. MPCA's obligation to release responsive documents is not an ongoing obligation; if it were, there would be no way to adequately respond to and complete a records release, because more responsive records may always be created."). Because MPCA's "usual or prescribed procedure" is to produce only data that already exists at the time of an MGDPA request,[6] MPCA's handling of Relators' DPA requests was consistent with Minnesota law. As a result, MPCA's decision not to produce subsequently created documents in response to Relators' MGDPA requests does not constitute a procedural irregularity.

Finally, contrary to Relators' allegations, MPCA's decision not to produce attorney notes in response to Relators' MGDPA requests cannot constitute a procedural irregularity.

[6] https://www.merriam-webster.com/dictionary/irregular.

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Relators' FOF at ¶¶ 75-76; Relators' List of Alleged Procedural Irregularities at ¶ 5. Minn. Stat. § 13.393 provides:

> Notwithstanding the provisions of this chapter and section 15.17, the use, collection, storage, and dissemination of data by an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility.

Mike Schmidt was "acting in a professional capacity"—as an MPCA attorney—when he took notes regarding an April 5, 2018 phone call with representatives from EPA Region 5. Thus, his notes are governed by "professional standards concerning discovery," which protect attorney work product. Minn. R. Civ. P. 26.02(b), (d); *Leininger v. Swadner*, 156 N.W.2d 254, 258-59 (Minn. 1968). Because Mr. Schmidt's notes are protected attorney work product, MPCA was not required to produce his notes in response to an MGDPA request. As a result, MPCA's decision not to produce Mr. Schmidt's notes in response to Relators' MGDPA requests cannot constitute a procedural irregularity.

CONCLUSION

For the foregoing reasons, MPCA respectfully requests that the Court grant this Motion for Partial Summary Judgment and enter an order that (i) any alleged procedural irregularities must be based on MPCA actions, (ii) MPCA's conduct in compliance with the MOA cannot constitute a procedural irregularity, and (iii) there is no requirement to supplement responses to MGDPA requests with newly created documents, or to produce attorney notes so any failure by MPCA to do so is not a procedural irregularity.

DATED: December 27, 2019.

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