



John C. Martin  
**Holland & Hart LLP**  
Richard E. Schwartz  
**Crowell & Moring LLP**

October 28, 2019

*VIA EMAIL*

**MASLON LLP**

William Z. Pentelovitch  
Margaret S. Brownell  
Evan A. Nelson  
90 S. Seventh Street  
3300 Wells Fargo Center  
Minneapolis, MN 55402-4140  
[bill.pentelovitch@maslon.com](mailto:bill.pentelovitch@maslon.com)  
[margo.brownell@maslon.com](mailto:margo.brownell@maslon.com)  
[evan.nelson@maslon.com](mailto:evan.nelson@maslon.com)

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY**

Elise L. Larson  
Kevin Reuther  
1919 University Avenue West  
St. Paul, MN 55105  
[el Larson@mncenter.org](mailto:el Larson@mncenter.org)  
[kreuther@mncenter.org](mailto:kreuther@mncenter.org)

**JUST CHANGE LAW OFFICES**

Paula G. Maccabee  
1961 Selby Avenue  
St. Paul, MN 55104  
[pmaccabee@justchangelaw.com](mailto:pmaccabee@justchangelaw.com)

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

Vanessa Ray-Hodge  
500 Marquette Avenue N.W., Suite 660  
Albuquerque, NM 87102  
[vrayhodge@abqsonosky.com](mailto:vrayhodge@abqsonosky.com)

**SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & PERRY, LLP**

Matthew L. Murdock  
1425 K Street N.W., Suite 600  
Washington, DC 20005  
[mmurdock@sonosky.com](mailto:mmurdock@sonosky.com)

**NILAN JOHNSON LEWIS PA**

Daniel Q. Poretti  
Matthew C. Murphy  
120 South Sixth Street, Suite 400  
Minneapolis, MN 554702-4501  
[dporetti@nilanjohnson.com](mailto:dporetti@nilanjohnson.com)  
[mmurphy@nilanjohnson.com](mailto:mmurphy@nilanjohnson.com)

Re: Relators' Discovery Responses in 62-CV-19-4626

Dear Counsel:

MPCA has identified significant shortcomings in Relators' discovery responses. Relators' Privilege Log is plainly incomplete and fails to provide even basic information on the few items listed. Relators also appear to have withheld documents in the absence of applicable privileges and to have withheld documents without including them in the Log. Further, our review thus far of the documents provided in response to MPCA's interrogatories to Relators' designated witness confirms concerns raised during Mr. Chris Knopf's deposition on written questions: Relators have not described with particularity the basis for their allegations contrary to the clear import of the propounded deposition questions.

Holland & Hart LLP Attorneys at Law



Relators' discovery responses do not satisfy the court's requirements. In addition, those responses again purport to expand the scope of this proceeding beyond the District Court's jurisdiction under the Court of Appeal's referral and even beyond the scope of Relators' own list of purported procedural irregularities. Unless Relators' correct these failures immediately, MPCA will file a motion to compel with the District Court on Wednesday, October 30, 2019.

### **Relators' Privilege Log**

Relators' Privilege Log is incomplete. The entries it includes are insufficiently descriptive. Further, those entries plainly cannot represent all documents that Relators' have withheld. In addition, MPCA respectfully notes that Relators are not entitled to withhold documents based on claims of "sovereign immunity." Those documents must be produced.

The entries in the Privilege Log do not sufficiently identify the documents withheld, and do not provide MPCA, other parties, or the Court any basis for evaluating or testing the sufficiency of the claimed privileges. The Log does not specify the author or recipients of the withheld documents, and provides no other meaningful description of the documents. Providing appropriate descriptive information is particularly important for documents that Relators identify as withheld based on a "confidential source" claim. Relators must also provide the basis, under Minnesota law, for this designation.

Presumably, most of these documents can be produced if the name (or other identification) of the source is redacted. Relators should redact the name and email address of the "confidential source" and produce these documents, as they did with Document 0064134. Certainly, Relators are not free to withhold selectively documents that they claim are from a "confidential source."

Relators' Log is less than a page long. It consists of 21 entries. Two of these entries – both in the custody of the Fond du Lac Band – are identified as work product and confidential attorney client privileged communications. Neither MCEA nor Water Legacy identify any work product documents or attorney-client communications in the Log. It seems entirely implausible that neither MCEA nor Water Legacy are in possession of any responsive documents for which they would claim these protections, and that the Band has only two such documents. This is particularly true in view of Relators' repeated protestations before Judge Guthmann about the large number of work-product and privileged documents that were implicated by MPCA's discovery. Relators must include all such documents in a revised Privilege Log.

The Privilege Log includes an annotation for withheld documents identified as subject to "sovereign immunity." The Band represented to Judge Guthmann that it had "many" responsive documents that were protected from discovery by sovereign immunity. It thus appears incongruous that no documents are listed in the Privilege Log as subject to this claim. MPCA respectfully believes that sovereign immunity does not exempt the Band from discovery in this context but, in any event, the Band is obligated to include all these documents in Relators' revised Privilege Log.



### **Mr. Knopf's Response to Interrogatories on Written Questions**

Relators designated Mr. Chris Knopf as their Rule 30.02 witness for purposes of responding to MPCA's written deposition questions. Mr. Knopf did not answer MPCA's deposition questions. Rather, for every question, Relators provided only documents. MPCA is left with the impossible task of guessing from the text of a multitude of documents the answers to direct questions. And, more fundamentally, Relators ignore the Court's directive that the purpose of this discovery is to avoid "surprise" at trial. MPCA is entitled to know Relators' claims and the basis for those claims. Relators may not simply provide a "document dump" and expect MPCA to sift through reams of data and guess at Relators' case. Thus, Mr. Knopf's response is directly contrary to the Court's instructions.

This collection of documents certainly does not serve to "describe with particularity" (i) "procedural irregularities that Relators allege occurred regarding the NPDES Permit," (ii) "the basis for Relators' allegation that MPCA and/or EPA sought to prevent EPA's comments from becoming part of the administrative record for the NPDES Permit," (iii) "the basis for Relators' allegation that MPCA sought to prevent documents or communications from being fully and fairly reviewed by the Court of Appeals," (iv) "each instance in which Relators allege that MPCA failed to act with truthfulness, accuracy, disclosure, or candor in connection with the NPDES Permit," (v) "each instance in which Relators allege that MPCA improperly destroyed, discarded, or failed to retain written records of communication with EPA regarding the NPDES Permit," (vi) "how relators allege that they were prejudiced by the alleged Procedural Irregularities associated with the NPDES Permit," and (vii) "for each document [alleged to have been improperly excluded] why Relators allege the document should be included in the administrative record." These are straightforward questions for which a response should have been provided.

MPCA acknowledges that a response concerning "the basis for Relators' allegation that MPCA's issuance of the NPDES Permit was based on communications or documents that are not reflected in the administrative record" may be answered with the list of all communications that Relators allege were not improperly excluded from the administrative record. And, of course, we expect that Relators have provided all of the documents they claim to have been omitted improperly from the administrative record. We acknowledge that this is the sort of question Judge Guthmann expected to have been answered with a list of documents.

In short, Relators' position provides no meaningful opportunity for MPCA to discern the answers to any of its interrogatories. The response simply does not comply with the Court's instructions. Unless Relators' agree to correct this, MPCA will be forced to file a motion to compel.

We look forward to hearing from you and trust that you will correct these deficiencies so that the parties can avoid the necessity of raising these issues before the District Court. Thank you for your consideration.



Sincerely,

*/s/ John C. Martin*

John C. Martin  
Holland & Hart LLP

*/s/ Richard E. Schwartz*

Richard E. Schwartz  
Crowell & Moring LLP

13755397\_v1