

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

**RELATORS' LIST OF
ALLEGED PROCEDURAL
IRREGULARITIES**

Relators 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 (the “Band”) (collectively, “Relators”), identify the following alleged irregularities in procedure pertaining to the National Pollutant Discharge Elimination System/State Disposal System Permit (“NPDES Permit”) that Respondent Minnesota Pollution Control Agency (“MPCA”) issued to Respondent Poly Met Mining Inc. (“PolyMet”) for the NorthMet (the “NorthMet Project”) pursuant to the Court’s August 7, 2019 oral ruling. Relators raised these alleged procedural irregularities before the Court of Appeals in the Motion for Transfer to District Court or, in the Alternative, for Stay Due to Irregular Procedure and Missing Documents (“Transfer Motion”) and supporting papers.¹

¹ Relators attach copies of documents filed in connection with the Transfer Motion in *In re Denial of Contested Case Hearing Request 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* (“*In re Proposed NorthMet Project*”), Nos. A19-0112, A19-0118, A19-0124 to this List of Alleged Procedural Irregularities as Attachments 1-7. Relators’ references to the Transfer Motion and supporting papers may not include all potential citations.

1. MPCA sought to prevent and used irregular procedures to prevent creation of a record of United States Environmental Protection Agency (“EPA”) concerns about NPDES Permit expectations, requirements, process, and conditions during NorthMet Project environmental review and throughout the NPDES Permit process.²

2. MPCA and EPA departed from typical procedures in addressing the NPDES Permit, engaging in multiple telephone conferences and in-person meetings, some of which are not reflected in the administrative record.³

3. MPCA and EPA leadership acted in concert and used irregular and unusual procedures to prevent EPA staff from submitting written comments on the draft NPDES Permit, including, but not limited to: MPCA’s request that EPA not provide written comments, EPA leadership’s decision to withhold and conceal already prepared EPA written comments on the draft NPDES Permit from the public (“EPA Comments”), and EPA reading the EPA Comments to MPCA during an April 5, 2018 telephone call rather than submitting them in written form.⁴

4. MPCA improperly destroyed, discarded, and failed to retain portions of the written record of communications with EPA regarding the NPDES Permit, including, but not limited to, handwritten notes of the April 5, 2018 phone call where EPA staff read the EPA

² WaterLegacy Mot. for Transfer to District Ct. or, in the Alternative, for Stay Due to Irregular Procedure and Missing Docs. at 5-7, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. May 17, 2019) (“Transfer Mot.”); WaterLegacy Reply Mem. in Supp. of Mot. for Transfer to District Ct. or, in the Alternative, for Stay Due to Irregular Procedure and Missing Docs. at 1, 4, 5-6, 12-13, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 5, 2019) (“Transfer Reply”); Decl. of Paula Maccabee (“Maccabee Decl.”), Exs. A, C, F-H, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. May 17, 2019); *see also* Order at 4, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 25, 2019) (“Order”) (disputed issue (2)).

³ Order at 3 (undisputed issue (1)).

⁴ Transfer Mot. 2, 5-7; Transfer Reply 1, 5-8, 13; Maccabee Decl. ¶¶ 6, 12, 14 & Exs. C, F-G; *see also* Order at 3-4 (undisputed issues (2)-(4) and disputed issue (1)).

Comments over the phone to MPCA, and other records reflecting phone conferences, meetings, emails, and other communications with EPA pertaining to the NPDES Permit.⁵

5. Despite Relators' numerous pertinent requests under the Minnesota Government Data Practices Act ("MGDPA"), MPCA failed to produce public data reflecting communications between MPCA and EPA during NorthMet Project environmental review and the NPDES Permit process, including emails between MPCA and EPA, handwritten notes, and other documentation of pertinent meetings and phone conversations between MPCA and EPA.⁶

6. EPA wrote to MPCA citing deficiencies in the PolyMet NPDES Permit application in November 2016.⁷ Neither the administrative record nor MPCA's MGDPA responses include a subsequent letter from EPA stating that deficiencies in the application were resolved, although such a letter is required for MPCA to proceed with an NPDES permit under the Memorandum of Agreement establishing MPCA's delegated authority to issue NPDES permits.⁸

7. Although EPA was highly involved with NorthMet Project environmental review and the NPDES Permit process, and communicated substantive expectations and concerns to MPCA regarding the NorthMet NPDES application and NPDES Permit, the NPDES Permit procedures and final NPDES Permit conditions are inconsistent with EPA expectations, concerns, and communications, including but not limited to those in EPA Comments.⁹

⁵ Transfer Mot. 11-12; Transfer Reply 1, 5-6, 8; *see also* Order at 3 (undisputed issue (5)).

⁶ Transfer Mot. 3, 11-12; Transfer Reply 1, 5-6, 19-20; Maccabee Decl. ¶ 5 & Ex. B.

⁷ Transfer Mot. 3; Transfer Reply 4; Maccabee Decl., Ex. A; Reply Decl. of Paula Maccabee ("Maccabee Reply Decl."), Ex. H, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 5, 2019).

⁸ Transfer Reply 4, 20; Maccabee Decl., Ex. B at 1-5; Maccabee Reply Decl., Ex. H.

⁹ Transfer Mot. 2-5; Maccabee Decl., Ex. A at 1-12, Exs. C, F-G; Maccabee Decl., Ex. H; Decl. of Jeffrey Fowley ("Fowley Decl.") ¶¶ 17-23, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 5, 2019); Relators' Notice of Withdrawal of Mot. for a

8. MPCA responses to comments improperly failed to mention or respond to any EPA comments on the draft NPDES Permit and affirmatively conveyed the false impression that the NPDES Permit complied with all EPA's comments and concerns.¹⁰

9. MPCA's extra-record claims that MPCA and EPA had fundamentally agreed on NPDES Permit terms after a meeting between MPCA and EPA in September 2018 are highly disputed, undocumented in the administrative record, and such "resolution" without a written confirmation by EPA would be irregular.¹¹ The absence of an EPA objection blocking the final NPDES Permit does not signify that EPA concerns were resolved.¹²

10. MPCA's and EPA's procedures related to the NPDES Permit were irregular and did not follow customary EPA and MPCA practices in comparable NPDES permitting cases.¹³

11. MPCA's procedural irregularities undermine EPA oversight under the Clean Water Act ("CWA") and affect Relators' substantive claims that the NPDES Permit did not comply with MAPA and the CWA.¹⁴

12. MPCA failed to act with truthfulness, accuracy, disclosure, and candor in connection with the NPDES Permit.¹⁵

13. MPCA's procedural irregularities conflict with MGDPA, Minn. Stat. ch. 13.¹⁶

Stay and Continuing Req. for Transfer to District Ct. Due to Irregular Procedure at 1-2 & Attach. A ("Notice Attach."), *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 13, 2019).

¹⁰ Transfer Mot. 8, 10-11; Transfer Reply 1, 9-10, 13-14; Maccabee Decl., Ex. C; Maccabee Reply Decl., Ex. I; Fowley Decl. ¶¶ 24-25.

¹¹ See Transfer Mot. 2, 5; Transfer Reply 10; Maccabee Decl., Ex. C; Maccabee Reply Decl., Ex. H; Fowley Decl. ¶ 17.

¹² Transfer Reply 10-11, 20-21; Fowley Decl. ¶¶ 13, 26-27.

¹³ Transfer Reply 4, 6-9, 13-14; Fowley Decl. ¶¶ 9-13, 15-16; Maccabee Decl., Exs. E-F; Maccabee Reply Decl. ¶ 5 & Ex. I.

¹⁴ Transfer Mot. 2, 13-14; Transfer Reply 24; Maccabee Decl. ¶¶ 14-15 & Exs. A, C; Maccabee Reply Decl. ¶ 6 & Ex. H.

¹⁵ Transfer Reply Mem. 13.

14. MPCA's procedural irregularities conflict with the Official Records Act, Minn. Stat. ch. 15.¹⁷

15. MPCA's procedural irregularities conflict with 40 C.F.R. § 124.17, which requires states to provide publicly available responses to all significant comments on an NPDES permit application or draft NPDES permit.¹⁸

16. MPCA's procedural irregularities conflict with its duty of candor established in Minn. R. 7000.0300 in issuing the NPDES Permit and these irregularities continued after the NPDES Permit was issued.¹⁹

17. MPCA's and EPA's irregular, improper, and unlawful procedures preventing the creation of a complete administrative record of EPA's comments and concerns regarding the NPDES Permit prejudiced Relators in their appeals from issuance of the NPDES Permit.²⁰

18. Upon information and belief, MPCA sought to withhold documents and communications from the administrative record, upon which documents and communications MPCA relied in its decision to issue the NPDES Permit, so that such documents and communications could not be fully and fairly reviewed by the Court of Appeals in the event of a challenge to the issuance of the NPDES Permit before the Court of Appeals.²¹

¹⁶ Transfer Mot. 11-12; Transfer Reply 5-6, 15-16.

¹⁷ Transfer Reply 15-16.

¹⁸ Transfer Mot. 10-11; Transfer Reply 4, 14-15; Maccabee Decl., Exs. C, I; Fowley Decl. ¶¶ 6(c), 6(e), 24, 29, 31.

¹⁹ Transfer Mot. 12-13; Transfer Reply 6, 13, 17-18, 24.

²⁰ Transfer Mot. 2, 6, 9-10; Transfer Reply 23-25; Maccabee Decl. ¶ 14.

²¹ Transfer Mot. 2, 6, 18, Transfer Reply 2, 11.

19. Upon information and belief, MPCA improperly based its decision to issue the NPDES Permit on communications and or documents exchanged between MPCA, PolyMet, and/or EPA and other irregular procedures, which are not reflected in the administrative record.²²

20. Critical documents are missing from the administrative record as a result of procedural irregularities, including but not limited to documents pertaining to alleged violations of the MGDPA, the Official Records Act, and CWA regulations.²³

21. Because MPCA used irregular procedures, additional information may be uncovered during transfer proceedings which disclose the nature of the NPDES Permit process, the content of documents not present in the administrative record, and the degree to which MPCA and EPA leadership went to prevent public and judicial scrutiny of the NPDES Permit.²⁴

²² Transfer Mot. 2, 8, 13-14; Transfer Reply 10-11, 19-20.

²³ Transfer Reply 1-2, 13-15, 24; Maccabee Decl. ¶ 14.

²⁴ Transfer Reply 18-21.

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