Exhibit A

Filed in District Court
State of Minnesota
12/30/2019 4:15 PM

FILED
June 12, 2019
OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA
IN COURT OF APPEALS

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

Consolidated Appeal Case Nos.

A19-0112
A19-0118
A19-0124

RESPONDENT MINNESOTA POLLUTION CONTROL AGENCY'S SUR-REPLY TO RELATOR WATERLEGACY'S MOTION FOR TRANSFER TO THE DISTRICT COURT OR, IN THE ALTERNATIVE, FOR STAY DUE TO IRREGULAR PROCEDURES AND MISSING DOCUMENTS

Pursuant to this Court's June 10, 2019, order, and in accordance with rules 127 and 128 of the Minnesota Rules of Civil Appellate Procedure, Respondent Minnesota Pollution Control Agency ("MPCA") respectfully files this sur-reply to relator WaterLegacy's reply in support of its motion to transfer or stay.

INTRODUCTION

Transfer of this case to the district court would bring unwarranted delay. Transfer would be expensive, time-consuming, and serve no useful purpose. This case will be decided on the administrative record. WaterLegacy nevertheless seeks to transfer this case to the district court so that WaterLegacy can conduct discovery outside that record.

WaterLegacy's brief indicates that this discovery would be extensive. WaterLegacy lists ten subjects on which it seeks discovery. *See* WaterLegacy Reply at 19–20. It wants to take discovery into "the nature of the NorthMet permit process, the content of documents not contained in the administrative record," and the alleged "desire" to protect the NorthMet permit from public and judicial scrutiny. WaterLegacy Reply, at 20. WaterLegacy also wants to introduce new testimony from EPA employees so they can "come forward and place evidence on the record." *Id.* at 21.

ARGUMENT

I. Contrary to WaterLegacy's Accusations, MPCA Followed Proper Legal Procedures and Engaged in No Improper Conduct.

WaterLegacy claims that discovery outside the administrative record is justified by "irregular procedures" and "MPCA's improper conduct." *Id.* at 18. In fact, MPCA's procedures complied with the law. It engaged in no "improper conduct." The requested discovery would produce nothing that belongs in the administrative record.

A. There Are No Gaps in the Administrative Record.

Even if WaterLegacy obtained a copy of whatever document EPA read from during the April 5, 2018, call with MPCA, that document still would not belong in the administrative record, because it was never submitted to MPCA. *See Nat'l Audubon Soc. v. MPCA*, 569 N.W. 2d 211, 216 (Minn. Ct. App. 1997) ("A reviewing agency is not required to consider or include in the administrative record documents never submitted or received by it.").

WaterLegacy is attacking one aspect of the lengthy collaboration between MPCA and EPA to develop the Poly Met Permit: the agencies' agreement at the close of the public-comment period that EPA would provide oral (rather than written) comments to MPCA.

They scheduled that call for April 5, 2018, which was roughly three weeks after the close of the public-comment period.

That approach did not create gaps in the administrative record. Those EPA oral comments repeated concerns that EPA had already voiced during its prior twice-monthly calls with MPCA. Ex. 1 (Schmidt Decl.) ¶¶ 9–10; Ex. 3 (Handeland Decl.) ¶ 8. MPCA placed its substantive notes about those EPA concerns in the administrative record. Ex. 4 (Handeland Decl.) ¶ 7.

Moreover, those same EPA concerns were also raised in comments submitted by the public during the public-comment period. Those public comments and MPCA's responses are in the administrative record. The only concern that EPA voiced in the April 5, 2018, call that was not also raised in public comments was related to domestic wastewater. When MPCA issued the permit, it described that EPA concern and responded in the public Fact Sheet that is in the administrative record. Ex. 4 (Handeland Decl.) ¶ 8.

B. <u>There Was No Improper Conduct.</u>

EPA's opportunity to send written comments was never waived. The April 5, 2018, phone call came after the close of the public-comment period, but EPA could have objected in writing to issuance of the permit long afterwards.

The concerns that EPA voiced to MPCA were about the January 2018 draft permit that MPCA knew would be reconsidered based on the public comments it had already received. If EPA had put its April 5, 2018, comments in writing, MPCA would have simply referenced the EPA comments in the responses it made to the corresponding public comments. Ex. 1 (Schmidt Decl.) ¶ 14.

EPA agreed to delay (not waive) sending written comments so its comments would address a version of the permit that MPCA actually intended to issue. To make sure that EPA would have ample time to submit any written objections to that later version of the permit, MPCA agreed to give EPA an extra 45 days to review that version, bringing EPA's total review time from 15 days to 60. Shannon Lotthammer, then Assistant Commissioner for Water Policy at MPCA, explained the reasons for this arrangement:

> [The arrangement] was advantageous to MPCA because it allowed MPCA to apply what it had learned during the public-comment period before EPA commented in writing. In that way, EPA's written comments would be more relevant and would address a draft that would be a better work product.

Ex. 2 (Lotthammer Decl.) ¶ 7.

MPCA attorney Michael Schmidt's decision to discard his notes of the April 5, 2018, call was not improper. EPA's recitation of concerns it had already voiced in other calls with MPCA provided no new information and was duplicated by comments MPCA had received from the public. *See* Ex. 1 (Schmidt Decl.) ¶¶ 9–10. Thus, there was no reason for Mr. Schmidt to keep those notes.

The same is true for Stephanie Handeland, who discarded her notes of the first few minutes of the call for the same reason: they were duplicative and had no value for development of the permit. *See* Ex. 4 (Handeland Decl.) ¶¶ 8–9.

WaterLegacy's contention that Mr. Schmidt's email reply to Mr. Reuther's email about EPA review of the October 25 draft ("We have received no feedback from EPA") disregards the context of both emails. Mr. Reuther was inquiring and Mr. Schmidt was commenting only about the October 25 draft. This response was not intended to indicate that EPA had never provided any feedback during permit development. Mr. Schmidt knew that Mr. Reuther was aware of EPA's prior participation in that process, which was "no secret." *See* Ex. 1 (Schmidt Decl.) ¶¶ 25–26.

MPCA staff has responded directly to WaterLegacy's unsupported accusations that MPCA conspired to "suppress" EPA comments or to "conceal" EPA's involvement in the Poly Met NPDES/SDS permit development process. They did not. *See infra* § II.A.1–4.

C. The Lack of an EPA Confirmatory Acceptance Letter Does Not Signal Irregularity.

Mr. Fowley argues that if EPA had decided that the permit was acceptable after the September 25–26 face-to-face meeting, it would have sent written confirmation to MPCA: he is apparently suggesting that EPA must not really have accepted the outcome of the meeting. *See* WaterLegacy Reply Ex. F (Fowley Decl.) ¶ 17. To the contrary, EPA expressly accepted the revised permit that MPCA submitted to EPA after the meeting. EPA phoned Mr. Udd twice during the review period: first to confirm that EPA did not need the entire 45 extra review days, and second to confirm that it had no objections to the permit. *See* Ex. 5 (Udd Decl.) ¶ 8. Second, Mr. Fowley's inference does not accord with MPCA's experience. MPCA staff state that it was unusual to get a written communication like the one Mr. Fowley posited. *See* Ex. 1 (Schmidt Decl.) ¶ 16. Ms. Handeland states that the only time she ever received a communication like that from EPA was after she had specifically asked for one. *See* Ex. 4 (Handeland Decl.) ¶ 13.

D. Mr. Schmidt's and Ms. Handeland's Discarding Notes From the April 5 Call Did Not Violate the Data Practices Act.

WaterLegacy argues that Mr. Schmidt's and Ms. Handeland's discarding of their notes from the April 5, 2018, call violated the Minnesota Government Data Practices Act ("DPA") because on March 26, 2018, WaterLegacy had made a DPA request that covered those notes. *See* WaterLegacy Reply at 1, 15–17. Those notes, however, were not covered by that DPA request, because it preceded creation of those notes. As Michael Schmidt explains:

> It was MPA'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.

Ex. 1 (Schmidt Decl.) ¶ 19.

Mr. Schmidt goes on to explain that he believes that he treated his notes from the April 5, 2018, call "the same way I treated other legal notes that I created during my time at MPCA." *Id.* ¶ 20. His general practice was to "go paperless." He would not retain his handwritten notes, because he would integrate them into his typed legal work product. As a result, those notes would become superfluous. *Id.*

II. The Extra-record Material Provided Herein by MPCA Demonstrates that Transfer to the District Court is Not Necessary to Further Develop the Record.

The Court of Appeals will transfer a matter to the district court only if it determines that additional evidence is "necessary" to further develop the record. *See State ex rel. Friends of Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 591 (Minn. Ct. App. 2008). Where the record is sufficient to review the alleged procedural irregularities, the Court of

Appeals will decline to transfer the matter to the district court for additional fact finding. *See In re Deeb*, 2016 WL 4723345, at *8, n.3. (Minn. Ct. App. Sept. 12, 2016) (unpublished opinion) (attached as Ex. 5 to MPCA's May 31, 2019, response) (declining to transfer a matter to the district court because the relator did not establish that the record was insufficient to review any alleged procedural irregularities). In determining whether transfer to the district court is appropriate, the Court of Appeals "examine[s] the extra-record materials to determine whether there is substantial evidence of irregularities." *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 174 (Minn. Ct. App. 2001).

A. The Declarations Provided Herein Answer Each of the Questions that WaterLegacy Poses to Justify Transfer to the District Court.

In its June 5, 2019, reply in support of its motion to transfer or stay, WaterLegacy raises ten unanswered questions that, it contends, justify transfer to the district court for additional fact finding. The declarations that accompany this sur-reply answer each of these questions. Accordingly, WaterLegacy has not met its burden to justify transfer of this appeal to the district court. *See, e.g., Hard Times Café*, 625 N.W.2d at 174.

1. *"What actions did MPCA take to request, encourage or otherwise affect the decision of EPA Administrator Stepp to prevent EPA Region 5 professional staff from sending the written comments they had prepared on the draft NorthMet permit in March 2018?"* WaterLegacy Reply, at 19 ¶ 1.

MPCA did not take any actions to "request, encourage or otherwise affect" EPA's decision to not submit written comments on the Poly Met Permit. *See* Ex. 1 (Schmidt Decl.) ¶ 17; Ex. 2 (Lotthammer Decl.) ¶ 8; Ex. 3 (Clark Decl.) ¶ 6; Ex. 4 (Handeland Decl.) ¶ 6; Ex. 5 (Udd Decl.) ¶ 5. Shannon Lotthammer, who served as Assistant Commissioner for

Water Policy at MPCA during the final year of the permit-development and -issuance process, declares that she was "not aware of any MPCA discussions of a strategy to keep EPA's written comments permanently out of the administrative record." Ex. 2 (Lotthammer Decl.) ¶ 8. Instead, the only goal was for those written comments, if EPA exercised its discretion to send them, to "come at a time that would make the permit-development process more efficient." *Id.*

Ms. Lotthammer was involved in the discussions with EPA that resulted, in part, in the April 5, 2018, conference call in which EPA read its comments to MPCA on the public-comment draft Poly Met Permit. *See id.* ¶ 4. On March 16, 2018, which was the final day of the public-comment period, she exchanged emails with Kurt Thiede, Chief of Staff to the EPA Region 5 Administrator. At that point, MPCA knew that it would be making changes to the public-comment draft based on the written public comments that it received. *See id.* ¶ 5; *see also* Ex. 5 (Udd Decl.) ¶ 6.Thus, rather than having EPA submit written comments on the public-comment draft that was going to change, MPCA "believed that it would be more efficient—both for us and for EPA—if EPA waited to give us any written comments based on the next draft, in which we had the opportunity to address concerns shared by the public." Ex. 2 (Lotthammer Decl.) ¶ 5; *see also* Ex. 5 (Udd Decl.) ¶ 6. Ms. Lotthammer explains that the March 16, 2018, agreement with Mr. Thiede served the interests of both agencies:

> For its part, EPA expressed the need to preserve a meaningful review of the next draft of the permit. That concern was based on the 1974 Memorandum of Agreement between the agencies, which allowed EPA only 15 days to review and object to the revised permit (the "proposed" permit). Our goal was not to foreclose adequate EPA review, but simply to make the process

> more efficient, so we agreed to give EPA an additional 45 days to review the "pre-proposed permit," before the 15-day clock stared ticking. Thus, EPA's total review period would be 60 days instead of 15 days. This was the approach that satisfied both parties: MPCA would get a chance to improve the draft permit before EPA sent written comments, and EPA would have ample time to review the revised draft permit before its comment deadline.

Ex. 2 (Lotthammer Decl.) ¶ 6. This arrangement allowed MPCA to craft a better final permit because it allowed MPCA to apply what it learned during the public-comment period from the public's written comments before EPA commented in writing. *Id.* ¶ 7. In this respect, EPA's comments would be more relevant and valuable because would address a draft that had been improved by incorporating suggestions set forth in the public comments. *Id.*

Jeffrey Fowley's declaration in support of WaterLegacy's reply cites to an email from Jeff Udd, Manager of the MPCA Water and Mining Section, in which Mr. Udd wrote, in reference to a phone conversation he had with EPA's Kevin Pierard, "[Kevin] would like to have a [phone call] the first week of April to walk through what the [comment] letter would have said if it were sent." *See* Fowley Decl., Ex. 1. Mr. Fowley quotes this exchange to support his contention that MPCA was trying "to prevent EPA written comments from being sent at that time." *See id.* (Fowley Decl.), at 7. As Mr. Udd explains, Mr. Fowley misinterprets the context of this exchange. By the time of this email—March 16, 2018—MPCA knew that EPA would not be submitting written comments on the public-comment draft. Consistent with Ms. Lotthammer's recollection, Mr. Udd explains that the plan for EPA feedback would benefit both agencies:

> The plan for EPA feedback is reflected in the email exchange: we knew that we were going to change the permit in response to written public comments,

> so rather than respond to duplicative comments that EPA would have sent on a version of the draft permit that we were going to change anyway, the more efficient process was for EPA to review the post-comment, pre-proposed draft, the version of the Poly Met Permit that had been changed to reflect our responses to public comments. We agreed to give EPA up to 60 days to respond to that revised draft. The April 5, 2018, call was therefore about the issues that EPA had previously raised with earlier drafts of the Poly Met Permit and, as I interpreted it, what EPA would be looking for in evaluating the adequacy of the pre-proposed draft.

Ex. 5 (Udd Decl.) ¶ 7.

MPCA staff members state that even though they worked with other MPCA staff members, MPCA management, and EPA throughout the permit-development process, they never had any discussions with anyone about taking any action to "suppress" EPA comments and have no knowledge of anyone at MPCA attempting to do so. *See* Ex. 1 (Schmidt Decl.) ¶ 17; Ex. 3 (Clark Decl.) ¶ 6; Ex. 4 (Handeland Decl.) ¶ 6; Ex. 5 (Udd Decl.) ¶ 6. None of the MPCA staff members, or staff attorney Michael Schmidt, have any knowledge of any communications between MPCA Commissioner John Linc Stine and EPA Region 5 Administrator Cathy Stepp about alleged complaints with EPA's written comments. *See* Ex. 1 (Schmidt Decl.) ¶ 17; Ex. 3 (Clark Decl.) ¶ 6; Ex. 4 (Handeland Decl.) ¶ 6; Ex. 5 (Udd Decl.) ¶ 5.

2. *"Was the purpose of these actions to prevent the creation of a written record disclosing EPA's criticism of the NorthMet permit and the legal and policy basis for EPA's concerns?"* WaterLegacy Reply, at 19 ¶ 2.

As set forth above, MPCA staff uniformly reject the allegation that MPCA took any "actions" to prevent EPA's written comments from entering the administrative record. *See* Ex. 3 (Clark Decl.) ¶ 7; Ex. 4 (Handeland Decl.) ¶ 7; Ex. 5 (Udd Decl.) ¶ 9. Furthermore, "all notes MPCA staff took from the twice-monthly conference calls or meetings with EPA were included in the Data Practices Act releases and in the administrative record, so long as those notes were not privileged." Ex. 5 (Udd Decl.) ¶ 9; *see also* Ex. 1 (Schmidt Decl.) ¶ 21; Ex. 3 (Clark Decl.) ¶ 7; Ex. 4 (Handeland Decl.) ¶ 7. All of the substantive notes of conversations that MPCA relied on in developing the Poly Met Permit are included in the administrative record. Those notes—combined with the public comments that covered the same ground as the concerns EPA expressed to MPCA on the April 5, 2018, conference call about the public-comment draft permit—provide a complete record that includes EPA's criticisms and concerns with the public-comment draft of the permit. *See* Ex. 3 (Clark Decl.) ¶ 7; Ex. 4 (Handeland Decl.) ¶ 7.

3. *"What was the content of the EPA's comments on the draft NorthMet permit read over the phone to MPCA on April 5, 2018? What were EPA's concerns about the NorthMet permit?"* WaterLegacy Reply, at 19 ¶ 3.

MPCA staff members state that the concerns that EPA voiced during the April 5, 2018, conference call "were duplicative of concerns that they had voiced throughout the permit-development process, which concerns are captured in other notes included in the administrative record." Ex. 3 (Clark Decl.) ¶ 8; *see also* Ex. 4 (Handeland Decl.) ¶8 (noting that EPA raised one new issue about domestic wastewater, which MPCA summarized and addressed in the fact sheet for the final Poly Met Permit); Ex. 5 (Udd Decl.) ¶ 10. MPCA also responded to the substance of all of EPA's April 5, 2018, comments on the public-comment draft permit in its responses to comments because EPA's comments "overlapped with other stakeholders' comments, so in summarizing and responding to all of the other stakeholders who actually submitted written comments, MPCA was summarizing and responding to EPA's substantive comments as well." Ex. 4 (Handeland Decl.) ¶ 8; *see also* Ex. 3 (Clark Decl.) ¶ 8; Ex. 5 (Udd Decl.) ¶ 10. "Every EPA concern that remained after MPCA issued the January 2018 draft permit was considered in the development of the final permit and fact sheet and is addressed in the administrative record." Ex. 3 (Clark Decl.) ¶ 8; *see also* Ex. 5 (Udd Decl.) ¶ 10.

Throughout its reply, WaterLegacy accuses MPCA of efforts to "suppress[]" EPA's feedback and to mislead the public by not disclosing in MPCA's response to comments that EPA's feedback overlapped with other stakeholders' written comments that the latter submitted during the public-comment period. *See* WaterLegacy Reply, at 1, 17–18. As Mr. Schmidt declares, "those accusations are misguided." Ex. 1 (Schmidt Decl.) ¶ 11. MPCA responded to the written comments it received during the public-comment period and to EPA's oral comments orally, "which satisfies MPCA's obligations under Minnesota law." Id. Mr. Schmidt points out that MPCA did respond to the "content of [EPA's] comments," *see* WaterLegacy Reply, at 6, in its responses to overlapping written comments by public commenters:

> [MPCA] just did not attribute those comments to EPA, because EPA did not submit comments during the public-comment period. In MPCA's response to comments, we cross-referenced where multiple commenters raised the same issue. Had we included EPA comments in the responses to comments, we would only have cross-referenced to the responses that we had already made because EPA's concerns overlapped with the concerns of other stakeholders who submitted written comments. As a substantive matter, MPCA had already responded in writing to all of the concerns that EPA voiced to us orally. Thus, had we attributed certain substantive comments to EPA, we would not have changed the substance of MPCA's responses at all. We would have just cross-referenced answers to the concerns EPA shared

> with other stakeholders (who actually submitted written comments that we could cite to).

Ex. 1 (Schmidt Decl.) ¶ 14.

Mr. Schmidt participated in the April 5, 2018, conference call with EPA. *See id.* ¶ 8. As Mr. Clark, Ms. Handeland, and Mr. Udd have already recounted, "EPA's call consisted of concerns that EPA had already discussed with MCPA during the permit-development process." *Id.* ¶ 9. EPA's comments "also overlapped with written comments that MPCA had received on the draft Poly Met Permit during the public-comment period that ended March 16, 2018 (about three weeks before the call)." Id. Shortly before the call, Mr. Schmidt reviewed written comments from relators WaterLegacy, MCEA, and at least one of the tribes. *See id.* ¶ 10. "As I took notes on the EPA call, I saw that (except for one issue involving domestic wastewater) EPA's feedback overlapped with relators' written comments; thus, the issues raised by EPA's comments had already been raised by relators and other stakeholders." Id. In short, to read the summary of public comments and MPCA's responses thereto is to read EPA's comments and MPCA's responses.

4. *"What happened to the notes from April 5, 2018 created by MPCA attorney Mike Schmidt and the unnamed member of MPCA's water permitting team? Were they actually destroyed? If so, when, by whom, at whose discretion, and for what reasons?"* WaterLegacy Reply, at 19 ¶ 4.

Mr. Schmidt took, but did not retain, his handwritten notes from the April 5, 2018, conference call with EPA. *See* Ex. 1 (Schmidt Decl.) ¶ 20. Mr. Schmidt declares, "I do not remember specifically what I did with my handwritten notes from the April 5 conference call, but I believe I treated notes from this call the same way I treated other legal notes that

I created curing my time at MPCA." *Id.* The notes that Mr. Schmidt would take—including those he took on the April 5, 2018, call—"were not verbatim transcriptions or notes about issues outside my purview as staff attorney." He explains:

> They were notes about the legal issues that the call or meeting raised in my mind so that I could properly advise MPCA in my capacity as a staff attorney. It was my general practice to "go paperless." I would not retain my handwritten notes, because I would integrate those notes into my typed legal work product. As a result, the notes would become superfluous because the relevant points were incorporated into my legal research and other legal work product.

Id.

WaterLegacy argues in reference to these notes that "MPCA did not retain the notes MPCA staff took during this critical phone call, even though a Minnesota Government Data Practices Act request had already been made explicitly requesting any notes of phone conversations with EPA." WaterLegacy Reply, at 1; *see also id.* at 15–17. But as Mr. Schmidt explains, his notes were not subject to release under the DPA for several reasons. First, WaterLegacy filed its request on March 26, 2018, which is before his April 5, 2018, handwritten notes were created. It was MPCA's policy, which is consistent with the DPA, that a records request applies only to documents in the agency's possession on or before the date of the request. *See* Ex. 1 (Schmidt Decl.) ¶ 19. MPCA's obligation to respond is not an ongoing obligation. See id. Second, because Mr. Schmidt's notes were taken in his capacity as attorney for MPCA, his notes are privileged and not subject to release, even if WaterLegacy had properly requested them by filing a later DPA request. *See id.* ¶¶ 20–21. Thus, even if they existed, the handwritten notes would be properly withheld from any DPA records release and from the administrative record. As Mr. Schmidt points out, "[i]nsofar as I know, my legal research and resulting work product that grew out of my notes from the conference call may still exist, but they would not be subject to disclosure under DPA section 13.393." *Id.* ¶ 21.

Ms. Handeland is the other "unnamed member of MPCA's water permitting team." Ex. 4 (Handeland Decl.) ¶ 9. She explains that she expected the April 5, 2018, call to be like all previous calls and meetings that MPCA staff had with EPA—conversational and deliberative. Id. Instead, it became clear from the beginning of the call that EPA staff were reading from a document, though it was not clear "whether the document was a formal comment letter, a draft, or some other format." *Id.*; *see also* Ex. 3 (Clark Decl.) ¶ 9; Ex. 5 (Udd Decl.) ¶ 11. As Ms. Handeland explains, she discarded her notes because they were worthless:

> EPA read the document very rapidly. For the first one or two minutes, I attempted to take notes on what EPA was saying, but because EPA was reading so quickly, I could not keep accurate notetaking. I noticed that Mike Schmidt was also taking notes, so I stopped. I discarded the notes, (recycled the paper) right after the call because my brief note taking was worthless. No one directed me to discard my brief notes. I did so on my own because the notes had no value. I discarded them directly after the call. I did not initially retain the notes and then discard them after WaterLegacy filed its subsequent [DPA] request.

Ex. 4 (Handeland Decl.) ¶ 10. Although he has no first-hand knowledge of what happened to either set of notes, Mr. Clark recalls that "EPA read their comments very quickly, and the concerns were all ones that we had heard before, so Ms. Handeland stopped taking notes after a couple of minutes, although Mr. Schmidt kept taking notes throughout the call." Ex. 3 (Clark Decl.) ¶ 9. Mr. Udd declares that "EPA staff read the comments very quickly, which accounts for why there were no substantive notes taken on this call, other than those taken by MPCA staff attorney Mike Schmidt." Ex. 5 (Udd Decl.) ¶ 11.

> 5. *"If the April 5, 2018 notes were not destroyed, where are they being kept, and why have they not been released?"* WaterLegacy Reply, at 19 ¶ 5.

As explained above, both sets of handwritten notes were discarded. *See* Ex. 1 (Schmidt Decl.) ¶ 20; Ex. 4 (Handeland Decl.) ¶ 10. Mr. Schmidt believes that the legal research and work product he generated from his handwritten notes still exist, but they would not be subject to release under the DPA or inclusion in the administrative record. *See* Ex. 1 (Schmidt Decl.) ¶ 21.

> 6. *"Are there other MPCA notes of phone conversations or meetings with EPA regarding the NorthMet permit that were created but not retained? If so, on what dates were the notes taken, by whom, when were they destroyed, at whose discretion, and for what reasons?"* WaterLegacy Reply, at 19 ¶ 6.

MPCA staff is not aware of any substantive notes of phone conversations or meetings with EPA that staff created but did not retain. *See* Ex. 3 (Clark Decl.) ¶ 10; Ex. 4 (Handeland Decl.) ¶ 11; Ex. 5 (Udd Decl.) ¶ 13. As Mr. Clark states, "I believe that all of the notes that MPCA took during these calls and meetings subject to release under the DPA were turned over to WaterLegacy and that all of the notes that we relied on in developing the Poly Met Permit are included in the administrative record." Ex. 3 (Clark Decl.) ¶ 10.

Ms. Handeland observes that the "administrative record has many sets of notes, including my notes from the September 2018 two-day, in-person meeting with EPA." Ex. 4 (Handeland Decl.) ¶ 11. Mr. Udd declares that it was his general practice not to take notes, *see* Ex. 5 (Udd Decl.) ¶ 12, and that, in any event, "all of the notes that were subject to release under the DPA or subject to inclusion in the administrative record have been treated accordingly," *id.* ¶ 13. "Furthermore, many of the substantive issues in the notes that MPCA included in the administrative record were discussed in the final fact sheet and statement of basis, where MPCA explained the purpose and underlying substantive basis for the terms of the Poly Met Permit." *Id.* Mr. Clark states that he "would sometimes take basic notes in my own shorthand to help me remember what had come up in the meeting." Ex. 3 (Clark Decl.) ¶ 10. He explains:

> I never intended these to be used by anyone else: their only purpose was for my own memory retention—I remember and process things better if I write them down in my shorthand. this shorthand was never intended to inform the permit-development process and did not, in fact, inform that process. I never intended to, nor did I ever, refer back to this shorthand; I took the shorthand notes only to help commit the issues to memory as they were being communicated to me.

Id. Because they were purely for memory retention, once he wrote the shorthand, he had no further need for the notes, so he "would discard the notes shortly after the call or meeting." *Id.*

7. *"Were MPCA staff directed at any time not to create or retain notes of phone conversations or meetings with EPA regarding the NorthMet permit? If so, on what dates, and for what reasons?"* WaterLegacy Reply, at 20 ¶ 7.

MPCA staff members declare categorically that they were never instructed to not take notes or to not retain notes taken on conference calls or at meetings with EPA. *See* Ex. 3 (Clark Decl.) ¶ 11 ("I was never directed or encouraged to not take notes or to not retain notes from my communications with EPA. Any time I felt the need to take my shorthand notes to aid my memory of the conversation, I did so. I never discarded any substantive notes that we intended to rely on in developing the Poly Met Permit.); Ex. 4 (Handeland Decl.) ¶ 12 ("At no time was I ever directed or encouraged to not take notes or to destroy any notes that I did take."); Ex. 5 (Udd Decl.) ¶ ("I never took notes, and I have never heard anyone discuss not taking or retaining notes of MPCA-EPA discussions").

> 8. *"Did MPCA at any time after November 3, 2016 prepare or receive from EPA draft or final emails or letters memorializing conversations or meetings and describing the resolution or failure to resolve EPA's concerns regarding the NorthMet permit? If so, were these drafts or final documents destroyed or retained but not disclosed?"* WaterLegacy Reply, at 20 ¶ 8.

MPCA staff members declare that it was not EPA's regular practice to send any written communications memorializing conversations or meetings describing the resolution (or lack thereof) of EPA's concerns with the Poly Met Permit. *See* Ex. 3 (Clark Decl.) ¶ 12; Ex. 4 (Handeland Decl.) ¶ 13; Ex. 5 (Udd Decl.) ¶ 15. Mr. Clark recalls that other than one letter that MPCA received from EPA stating that EPA had reviewed Poly Met's permit application, MPCA never received memorializing communications. *See* Ex. 3 (Clark Decl.) ¶ 12. MPCA never received any memorializing emails or letters after the twice-monthly conference calls, "even when issues were resolved to both agencies' satisfaction." *Id.* MPCA "never received anything . . . in writing from EPA about resolution of its concerns throughout the entire permit-development process." Ex. 4 (Handeland Decl.) ¶ 13.

Mr. Clark explains that is was Region 5's regular practice to communicate orally, not in writing:

> We would often send EPA documents such as excerpts from the permit application or technical memos from the applicant before the [twice-monthly] calls to facilitate more productive conversations, but to the extent

> that EPA had any feedback on any of these documents, EPA staff communicated them orally to us over the phone or in meetings, never in writing. We never sent any communications to EPA, and EPA never sent any communications to us, that memorialized any substantive agreements.

Id. In short, "EPA did not memorialize any of our conversations or meetings, and neither did we." *Id.*

Ms. Handeland declares that EPA Region 5's failure to send memorializing communications to MPCA was not unique to the Poly Met Permit but was instead a general practice. "In my experience, only once did EPA send a letter stating that all issues with a permit had been resolved to its satisfaction, and only then because I personally requested the letter. In my experience, it is not common practice for EPA Region 5 to send those types of communications." Ex. 4 (Handeland Decl.) ¶ 14 (rebutting Mr. Fowley's statement that in his experience, "if the EPA had agreed that all issues were resolved, it would have sent MPCA an email or letter confirming such a key fact" (Fowley Decl. ¶ 17)).

9. *"Did MPCA receive at any time a letter from EPA stating that the deficiencies in PolyMet's NPDES permit application identified by EPA on November 3, 2016 had been cured so that the application was complete?"* WaterLegacy Reply, at 20 ¶ 9.

MPCA staff members declare that, to their knowledge, MPCA did not receive a letter, or any other written correspondence, from EPA stating that the deficiencies in Poly Met's permit application had been cured and that the application was complete. *See* Ex. 3 (Clark Decl.) ¶ 13 ("MPCA never received a letter, or any other communication, of this kind. At this stage in our conversations with EPA, we would just address specific topics in the application that EPA was concerned about. There was nothing from EPA stating that the permit application was complete in EPA's eyes."); Ex. 4 (Handeland Decl.) ¶ 15 ("To my knowledge, we did not receive any EPA correspondence subsequent to the November 3, 2016, letter from EPA stating that Poly Met's permit application was complete."); Ex. 5 (Udd Decl.) ¶ 16 ("I am not aware of any letters or emails from EPA memorializing anything substantive about the provisions of the Poly Met Permit application at any point in the permit-development process.").

> 10. *"Did MPCA discuss internally what its obligations were in terms of responding to the comments received orally from EPA on the draft NorthMet permit in writing accessible to the public? What were the nature of these discussions?"* WaterLegacy Reply, at 20 ¶ 10.

MPCA staff members declare that they never had any internal discussions about how to respond to EPA's April 5, 2018, oral comments, because they knew that when they responded to other stakeholders' written comments, they would necessarily also be responding to EPA's overlapping oral comments. *See* Ex. 3 (Clark Decl.) ¶ 14 ("I do not recall ever discussing how we would handle EPA's oral comments as compared to others' written comments. Having heard EPA's comments and read all of the written comments submitted during the public-comment period, I knew that as we were responding to all of the written comments in our responses to comments, we were also responding to EPA's comments because (except for EPA's domestic wastewater issue that we addressed in the fact sheet) EPA's oral comments and other written comments fully overlapped."); Ex. 4 (Handeland Decl.) ¶ 16 ("I do not recall any internal conversations about how to address EPA's oral comments. Because EPA's comments were not written, we did not think to identify them separately in our responses to comments. We knew we had addressed the substance of EPA's comments in the response-to-comments document because (except for

EPA's comment about domestic wastewater) EPA's comments fully overlapped with other stakeholders' written comments, so we knew that when we responded in writing to those written comments, we would also have responded in writing to EPA's oral comments.); Ex. 5 (Udd Decl.) ¶ 17 ("I never participated in any discussions about how to respond to EPA's oral comments. We did not think to attribute EPA's comments specifically, because they were not written comments. Having heard EPA's oral comments and read the public's written comments, I knew that EPA's comments overlapped with the public comments, so we knew that we had addressed them in our responses to comments. We knew that when we replied to the written public comments, we would have necessarily replied to EPA's comments.").

CONCLUSION

For the reasons set forth herein, the Court should deny WaterLegacy's motion to transfer the case to the district court or, in the alternative, stay the appeal and the Poly Met Permit.

RESPECTFULLY SUBMITTED this 12th day of June 2019.

Crowell & Moring LLP

/s/ Richard E. Schwartz
Richard E. Schwartz (*Pro Hac Vice*)
A. Xavier Baker (MN #0337894)
1001 Pennsylvania Avenue NW
Washington, D.C. 20004-2595
Telephone: 202.624.2500
Email: rschwartz@crowell.com
xbaker@crowell.com

*Attorneys for Respondent Minnesota
Pollution Control Agenc*

FILED

June 12, 2019

OFFICE OF
APPELLATE COURTS

Exhibit 1

Exhibit 2

Exhibit 3

FILED
June 12, 2019
OFFICE OF
APPELLATE COURTS

Exhibit 4

Exhibit 5