

**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*

**DECLARATION OF
RICHARD CLARK, P.G.**

Appellate Case Nos.
A19-0112
A19-0118
A19-0124

I, RICHARD CLARK, in accordance with section 358.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

Background

1. My job title is Supervisor, Metallic Mining Sector Unit, Water and Mining Section, Industrial Division, for the Minnesota Pollution Control Agency (“MPCA”). I have been employed by MPCA since July 23, 1986.

2. My job responsibilities have included developing and drafting National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 (“Water Permit”) for the Poly Met Mining, Inc. NorthMet Mine Project.

3. I was involved in developing the Water Permit from the beginning of preliminary discussions in 2015 until issuance on December 20, 2018. I also participated in regular meetings and conference calls with EPA during the development of the Water Permit, including the April 5, 2018, telephone call with EPA referenced in WaterLegacy’s May 17, 2019, Motion for Transfer to the District Court or, in the Alternative, for Stay Due to

Irregular Procedures and Missing Documents (“Motion”) and in its June 7, 2019, Reply in support of the Motion.

4. I submit this Declaration based on my personal knowledge and in support of MPCA’s Sur-reply to WaterLegacy’s Motion.

Questions Raised in WaterLegacy’ Reply

5. WaterLegacy asks several questions that it argues require transfer to the district court for additional fact finding to answer. *See* WaterLegacy Reply, at 19–20. I answer several of these questions below.

6. WaterLegacy asks what actions MPCA took “to request, encourage or otherwise affect” EPA’s decision not to submit written comments on the Poly Met Permit. *See id.* at 19, ¶ 1. I worked on the Poly Met Permit from before Poly Met even submitted its permit application and through the entire permit-development process. Throughout this entire period, I communicated with other members of the MPCA staff and management, and I participated in all of the twice-monthly conference calls with EPA. I never had any discussions with anyone about taking any action to suppress EPA written comments. I have no knowledge of anyone else from MPCA attempting to suppress EPA written comments. I do not know anything about an alleged telephone call between MPCA Commissioner John Linc Stine and EPA Regional Administrator Cathy Stepp concerning EPA’s draft written comments.

7. WaterLegacy wonders whether “these actions” were designed to keep EPA’s criticisms out of the administrative record. *See id.* ¶ 2. Again, I know of no such actions. EPA decides for itself whether to submit written comments, and to my knowledge MPCA

had no impact in EPA's decision. In any event, WaterLegacy has all of the substantive notes that were subject to release under the Data Practices Act ("DPA") or subject to inclusion in the administrative record. Those notes, combined with the public comments that covered the same ground as the EPA April 5, 2018, concerns with the January 2018 draft permit, provide a complete record of EPA's criticisms and concerns with the draft permit that MPCA made available for public comment.

8. WaterLegacy asks about the contents of EPA's comments that it read to us over the phone on the April 5, 2018, conference call. *See id.* ¶ 3. As I have declared before, the concerns that EPA voiced on the phone 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. We also responded to the substance of EPA's April 5, 2018, comments in our responses to public comments because EPA's comments completely overlapped with other written public comments, except for one small issue about domestic wastewater, which we addressed in the fact sheet. 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.

9. WaterLegacy asks about what happened to the notes from the April 5, 2018, conference call with EPA. *See id.* ¶ 4. I saw Mike Schmidt take notes throughout the call and Stephanie Handeland take notes for the first few minutes. I thought that the April 5 call, like all of the other calls and meetings we had with EPA, call would be more of a back-and-forth discussion about their comments on the draft permit. But in reality, the call did not involve any discussion, it was just EPA voicing its concerns while we listened. It

was clear that EPA staff on the call were reading from something, although I did not know whether that document was a formal letter, a draft letter, or a set of notes or bullet points. We knew that we would be changing the draft permit based on the written public comments we received, so we expected that not all of EPA's concerns would be uniquely relevant, since they largely overlapped stakeholders' concerns. In any event, 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. I have no first-hand knowledge of what happened to either set of notes.

10. WaterLegacy asks if there are other notes from telephone calls or meetings with EPA. *See id.* ¶ 6. 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. There are no other substantive notes that WaterLegacy has not seen. I was never directed or encouraged to destroy notes. At meetings, I would sometimes take basic notes in my own shorthand to help me remember what had come up in the meeting, but 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. I would discard the notes shortly after the call or meeting.

11. WaterLegacy asks if MPCA staff were ever directed or encouraged to not take notes or to not retain notes of conversations with EPA. *See id.* at 20, ¶ 7. I was never directed or encouraged to not take notes or to not retain notes from any 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.

12. WaterLegacy asks if, at any time, after November 3, 2016, MPCA received from EPA any letters or communications memorializing the results of any conference calls or meetings. *See id.* ¶ 8. Other than one letter we received that EPA had reviewed Poly Met's permit application, we never received any memorializing communications. We never received any memorializing emails or letters after any of the twice-monthly conference calls, even when issues were resolved to both agencies' satisfaction. We would often send EPA documents such as excerpts from the application or technical memos from the applicant before the 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. In fact, we would sometimes get frustrated with EPA because sometimes EPA would tell us that something was not agreeable to them, but when we would ask them what would be agreeable, they would not tell us. In these circumstances, we would have to provide additional explanation, propose additional solutions or table the


discussion until the next call. In short, EPA did not memorialize any of our conversations or meetings, and neither did we.

13. WaterLegacy asks whether MPCA ever received a letter from EPA stating that the deficiencies identified by EPA in Poly Met's permit application had been cured and was complete. *See id.* ¶ 9. 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.

14. WaterLegacy asks whether MPCA discussed what its obligations were in terms of responding to EPA's oral comments. *See id.* ¶ 10. 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.

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Dated: June 12, 2019
Ramsey County
St. Paul, Minnesota


Richard Clark, P.G.
Supervisor, Metallic Mining Sector Unit
Water and Mining Section, Industrial Div.
Minnesota Pollution Control Agency