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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 RESPONSE IN OPPOSITION TO RELATORS' MOTION IN LIMINE FOR SPOLIATION SANCTIONS

Minnesota Pollution Control Agency ("MPCA") respectfully submits this response in opposition to Relators' Motion *in Limine* for Spoliation Sanctions ("Motion"). The Court should deny Relators' Motion in its entirety because MPCA's duty was to preserve the administrative record, not to issue a litigation hold, and MPCA has not improperly destroyed, discarded, or otherwise failed to preserve agency records.

To the extent MPCA anticipated litigation, it anticipated an administrative challenge to its agency decision subject to judicial review on the administrative record. MPCA's record preservation and production obligations, therefore, are controlled by the Minnesota Administrative Procedures Act ("MAPA"), the Official Records Act, and MPCA's Records and Data Management Manual, not by a litigation hold that would apply in ordinary civil litigation under the rules of civil procedure. *See* Aug. 7, 2019 Hearing Transcript, 92:10 (explaining that the proceeding is not governed by the Rules of Civil Procedure but, instead, by MAPA). MPCA has fully complied with its statutory and

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regulatory record retention obligations, as well as its policies. Furthermore, in this MAPA proceeding, neither Minnesota Rule of Civil Procedure 37.05 nor common law spoliation sanctions are available against MPCA. Even if they were, sanctions are not warranted here where Relators have not shown that they have been denied any information that would show a procedural irregularity; that MPCA acted with any bad faith intent to keep record documents from Relators; or that Relators have suffered any prejudice.

The Court of Appeals transferred this proceeding 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. Court of Appeals' Sept. 9, 2019 Order at 1 (quoting Court of Appeals' June 25, 2019 Order). Relators contend that the absence of scraps of handwritten notes and repetitious communications from the record somehow contaminates the administrative record to the degree that MPCA has committed a procedural irregularity. In the current Motion, Relators take their strained argument a step further: they contend that MPCA should have departed from its longstanding practice and imposed a litigation hold even though the statute and regulations dictate that the case is to be decided on an administrative record. Relators cite no authority for such a proposition. Indeed, administrative practice at both the state and federal levels, and case law in comparable proceedings, dictate that an agency is not required to issue a litigation hold in a setting where the case is to be decided on an administrative record

FACTUAL BACKGROUND

Poly Met Mining, Inc. ("PolyMet") is developing a mine and ore processing facility in northeastern Minnesota ("NorthMet Project"). The deposit to be mined lies

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within a historical mining district and the processing facility is located at an abandoned ore processing area that has not been used for decades. That area lacks environmental controls that would control seepage and assure compliance with modern discharge standards. The "NorthMet Project" underwent extensive environmental review between 2005 and 2015 after which the Department of Natural Resources ("DNR") approved the Final Environmental Impact Statement on March 3, 2016.

On July 11, 2016, PolyMet submitted its initial application for a National Pollutant Discharge Elimination System/State Disposal System permit (the "Permit") that would control discharges to water from the NorthMet Project. Throughout the NorthMet Project permitting process, MPCA followed its Records and Data Management Manual. *See* Exh. 1, MPCA Records and Data Management Manual ("MPCA Manual"), MPCA_021677; Exh. 2, Declaration of Adonis Neblett (Jan. 10, 2020) at ¶ 5. Indeed, the MPCA employees that Relators are now disparaging, are all experienced employees familiar with the MPCA's records management policies and practices. *See* Exh. 3, Declaration of Stephanie Handeland (May 28, 2019) at ¶1; Exh. 4, Declaration of Richard Clark (May 28, 2019) at ¶1; Exh. 5, Declaration of Michael Schmidt (June 12, 2019) at ¶¶ 1, 3. All of them have dedicated their careers to protection of Minnesota's environment. Stephanie Handeland, Environmental Specialist and Permit Writer for MPCA, has worked at MPCA for 24 years. Exh. 3, Handeland Decl. at ¶1. Richard Clark, Supervisor of the Metallic Mining Sector Unit of MPCA, is a technical expert in NPDES/SDS permitting issues who has worked for MPCA for 33 years. Exh. 4, Clark Decl. at ¶1. Michael Schmidt, who worked for the Minnesota Center For Environmental

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Advocacy (one of the Relators in this appeal) before joining MPCA, worked at MPCA for four years and he currently works for as Staff Attorney for the Iowa Environmental Council. Exh. 5, Schmidt Decl. at ¶¶ 1, 3.

On January 17, 2018, two weeks prior to the start of formal public notice, MPCA provided the draft Permit package via email to a number of involved or interested Tribal entities, including Relator Fond du Lac Band of Lake Superior Chippewa, to provide additional time for their review. On January 31, 2018, MPCA announced a 45-day public notice and comment period, pursuant to Minn. R. 7007.0850, for the MPCA Commissioner's preliminary determination to issue the draft Permit. That comment period ended on March 16, 2018. MPCA, together with DNR, held two public meetings for the NorthMet Project on February 7 and February 8, 2018.

In response to these requests for comment on the Permit, MPCA received four requests for contested case hearings and 686 comments from government agencies, Tribal entities, environmental groups, and individuals. MPCA reviewed and organized the 686 comments based upon their respective program/regulatory subject matter, resulting in approximately 1600 individual comments relevant to the Permit. MPCA responded to the requests and the comments received during the comment period.

Separately, and in accordance with its Memorandum of Agreement ("MOA") with the U.S. Environmental Protection Agency ("EPA"), MPCA and EPA staff had regular calls to discuss permitting issues as they arose. Those calls were part of a lengthy back-and-forth process spanning several years (from August 2016 through October 2018), during which the two agencies with regulatory authority to determine the contents of the

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permit shared ideas and concerns. Stephanie Handeland routinely took notes at the MPCA/EPA meetings, and those notes were also included in the administrative record. *See*, *e.g*, Ex. 6 (compiled notes from EPA calls with MPCA between Jan. 31, 2018 and October 22, 2018).

On April 5, 2018, on a telephone call between the agencies, EPA personnel elected to read comments to MPCA staff, rather than submit them in writing. MPCA did not request or require that EPA do so. Additionally, the Memorandum of Agreement between MPCA and EPA does not restrict EPA's authority to comment on the proposed permit, either before, during, or after the public comment period. Nor does the agreement dictate how EPA's comments are to be made. Most importantly, MPCA had no power to prevent EPA from commenting or to require EPA to submit its comments in writing. Subsequently, MPCA revised the permit to address EPA's concerns, nearly all of which had been voiced by other commenters, including the Relators. Indeed, Relators' comments were substantially similar to those presented orally by EPA. Exh. 3, Handeland Decl. at ¶ 7; Exh. 7, Declaration of Jeff Udd (June 12, 2019) at ¶ 10. Thus, MPCA, received and considered the concerns expressed orally.

On December 4, 2018, MPCA provided to EPA a pre-proposed permit for review and comment. Exh. 4, Clark Decl. at ¶ 23. At EPA's request, MPCA gave EPA an extra 45 days (a total of 60 days) to review and comment on the pre-proposed draft of the permit. Exh. 8, Declaration of Jeff Udd (May 28, 2019) at ¶¶ 9-11. Nonetheless, EPA chose not to submit further comments.

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Based on the extensive record, MPCA made a finding of reasonable assurance that the Project would be properly operated in compliance with the requirements and conditions of the Permit and with all applicable state and federal pollution control statutes and rules, and that the conditions of the Permit would not pose a danger to human health or the environment. MPCA issued PolyMet the Permit on December 20, 2018, finding that the Permit met the requirements of Minn. R. 7001.0140, subps. 1 and 2, and none of the justifications to refuse permit issuance described in Minn. R. 7001.0140, subp. 2 existed. The Permit was accompanied by 42 pages of factual findings. Exh. 9, MPCA Findings of Fact (Dec. 20, 2018), WATER_0006163-6206.

On January 18 and 22, 2019, Realtors appealed the Permit under MAPA. Relators sought review pursuant to Minn. Stat. § 14.68 under which, "[t]he review shall be confined to the record."[1] *See* Court of Appeals' June 25, 2019 Transfer Order at 2 ("This court's review under MAPA 'shall be confined to the record. . ."). MPCA, therefore, was obligated to prepare and preserve the administrative record documents for consideration in Relators' appeals. As discussed in detail below, this action, based upon the administrative record, did not trigger a litigation hold.

Subsequently, on June 25, 2019, the Court of Appeals transferred this case to this Court for review of potential procedural irregularities. MPCA issued a litigation hold on

[1] Minn. Stat. § 14.68 permits transfer of the case to the district court and only then is testimony permitted. *Id.*

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the same day.[2] In this transfer proceeding, MPCA has produced a large volume of documents.[3] Between October 4, 2019 and October 17, 2019, MPCA produced approximately 1,190 documents, totaling almost 20,000 pages. *See* Declaration of Alison C. Hunter in Support of Response in Opposition to Relators' Motion for Production of Documents Identified in MPCA's Privilege Log, filed December 30, 2019, ¶ 4.

Despite that, Relators allege that the following documents were destroyed or discarded.[4] MPCA's response as to each category follows in bold.

- Former MPCA counsel Michael Schmidt's handwritten notes from meetings that he typed up after the meeting. **Mr. Schmidt's notes are largely privileged or work-product.** Exh. 5, Schmidt Decl. at ¶ 21. **MPCA produced notes from the dates for which Relators originally claimed substantial need. Mr. Schmidt's typed notes do not omit any substantive elements.**

[2] This transfer happened to occur at the same time that the Office of Legislative Audits initiated its review of this permit. Thus, the litigation hold served to preserve documents both for the transferred litigation and the inquiry from the Office.

[3] Indeed, this is substantially more discovery than ever allowed under Minnesota Statutes Section 14.68 or its predecessor statute. *See, e.g.*, *Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977) (voiding a trial court's discovery order as exceeding the scope of that allowed by MAPA and concluded that "only limited discovery"—in the form of "depositions of witnesses upon written questions"—was permissible); *Ellingson & Associates, Inc. v. Keefe*, 396 N.W.2d 694, 695 (Minn. Ct. App. 1986) (discussing the need to limit discovery in order to protect public officials from undue burdens).

[4] For the most part, however, Relators refer to broad, non-specific categories of documents or receptacles of documents, which is an insufficient basis for a spoliation motion.

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- Stephanie Handeland's handwritten notes from an undisputed April 5, 2018 MPCA/EPA telephone call where EPA read its comments to MPCA. **EPA's comments on that call are clearly, fully and accurately set forth in EPA's April 5, 2018 letter, which Relators have. MPCA has moved to supplement the administrative record with the actual written comments that EPA read to MPCA during the April 5, 2018 phone call. These notes were properly excluded from the initial administrative record because EPA did not submit them in writing to MPCA. Thus, the initial exclusion of these comments did not constitute a procedural irregularity. Moreover, there is now what amounts to a public transcript of the April 5, 2018 phone call, thus negating any speculation regarding the contents of EPA's comments during that call. Further, MPCA has offered to allow Relators to supplement the record with this document, but Relators have not done so.** *See* MPCA Motion to File Supplemented Itemized List of Contents of the Records, Minn. App. Case Nos. A19-0112, A19-0118, A19-0124 (April 12, 2019). **Ms. Handeland started to take notes of the April 5 call but quickly stopped because she could not keep up with the comments being read by EPA and found EPA's comments to be duplicative of prior comments.** Exh. 3, Handeland Decl.at ¶ 7; Exh. 10, Declaration of Stephanie Handeland (June 12, 2019) at ¶ 10.

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- Richard Clark's personal handwritten notes from undated MPCA/EPA calls or meetings. **Mr. Clark discarded his personal notes shortly after the call or meeting because they were meaningless and undecipherable to anyone but him**. Exh. 4, Clark Decl. at ¶10.

Relators also allege that the following sources of documents were destroyed or discarded:

- Ann Foss's computer was wiped 30-days after her departure in January 2018. **That was the routine data protection practice at MPCA**. **No evidence suggests that documents from Ms. Foss's computer were improperly omitted from the administrative record.**
- John Linc Stine's computer was wiped 30-days after his departure in January 2019. **That was the routine data protection practice at MPCA. No evidence suggests that documents from Mr. Stine's computer were improperly omitted from the administrative record.**
- Shannon Lotthammer had unspecified emails which were deleted. **To the extent any of Ms. Lotthammer's emails were deleted, they were not necessary for the administrative record and were deleted pursuant to routine data protection practices at MPCA**. **In any event, Relators acknowledge that MPCA retained Ms. Lotthammer's computer and had the backup files on the shared drive. Motion at 5-6.**

Relators concede that they "do not have conclusive evidence that MPCA directed the deletion of certain evidence outside a normal retention policy." Motion at 13.

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Perhaps more importantly, Relators provide literally no evidence that the administrative record is defective by reason of the claimed omission. To the contrary, MPCA's discussions with EPA are, in fact, well-documented. As stated, MPCA and EPA agreed on agendas for their meetings consisting of lists of numerous topics for discussion. These agendas are in the administrative record before the Court of Appeals. Additionally, Stephanie Handeland of MPCA routinely took notes of those meetings, which MPCA also placed in the administrative record before the Court of Appeals.

ARGUMENT

I. MPCA DID NOT IMPROPERLY DESTROY, DISCARD, OR FAIL TO PRESERVE RECORDS.

Relators assert that MPCA improperly destroyed, discarded, or failed to preserve "documentary evidence" that MPCA should have anticipated would be relevant to pending or future litigation. Motion at 8. However, Relators' assertion is based on two fundamental flaws: *First*, MPCA has no obligation to preserve all "documentary evidence" for future litigation, whether through a litigation hold or otherwise. Rather, MPCA had an obligation to develop an administrative record and transmit the record to the Court of Appeals once the writ of certiorari is served. Minn. Stat. § 14.66. In turn, content of the record for review is dictated by the Minnesota Administrative Rules: Under Minn. R. 7000.0750, "[t]he record upon which the commissioner makes [the] decision . . . consists of the following:

> A. relevant written materials submitted to the commissioner or agency staff within an established comment period, including requests for an informational and petitions for contested case hearings;

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> B. written materials submitted to the commissioner or agency staff within a time period established by the commissioner; and
>
> C. Written documents containing relevant information, data, or materials referenced and relied upon by agency staff in recommending a proposed action or decision.

Minn. R. 7000.0750, Subp. 4. This is the subject matter that comprises the administrative record and review of MPCA's decision is "confined" to that record. Minn. Stat. § 14.68.

A. MPCA Had No Obligation to Issue a Litigation Hold Because Its Record Preservation Duties are Governed by MAPA, Minnesota Rule 7000.0750, Subpart 4, and the Official Records Act.

MPCA's record retention obligations in administrative review cases are governed by MAPA and Minn. R. 7000.0750, Subpart 4. More broadly, the Minnesota Official Records Act, Minn. Stat. § 15.17, governs MPCA's obligations to preserve "records." MPCA is under no obligation to issue a separate litigation hold that would apply in civil litigation to preserve other "documentary evidence" outside the record, where, as here, the propriety of its decision to issue the NorthMet permit is reviewed on the administrative record. Transfer Order at 2 ("This court's review under MAPA 'shall be confined to the record. . .").

1. The Minnesota Administrative Procedure Act

When an agency is served with a writ of certiorari, MAPA requires an agency to "transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review." Minn. Stat. § 14.66. The court's "review shall be confined to the record." *Id.* § 14.68; *see also Zahavy v. Univ. of Minnesota*, 544 N.W.2d 32, 36 (Minn. Ct. App. 1996) ("Review by certiorari is limited to an inspection of the record of

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the administrative tribunal[.]"), *overruled on other grounds by Shaw v. Bd. of Regents of Univ. of Minnesota*, 594 N.W.2d 187, 190 (Minn. Ct. App. 1999).

In accordance with MAPA, on April 12, 2019, MPCA filed a supplemented itemized list of the contents of the record, and on April 17, 2019 transmitted the administrative record to Relators. MPCA Affidavit of Service of Administrative Record, Minn. App. Case Nos. A19-0112, A19-0118, A19-0124 (April 17, 2019); MPCA Motion to File Supplemented Itemized List of Contents of the Records, Minn. App. Case Nos. A19-0112, A19-0118, A19-0124 (April 12, 2019) ("Relators wish to review the documents included on the Supplemented Itemized List and may request to add documents to the Administrative Record. MPCA will give good-faith consideration to such a request."). MPCA's original and supplemental administrative record spans 321,837 pages. *Id*.

The Court must afford MPCA's determination of the proper scope and content of its administrative record presumptions of regularity and correctness. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) ("[T]he designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity."); *see also Reserve Min. Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) ("We . . . adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness"); *City of Moorhead v. Minnesota Pub. Utilities Comm'n*, 343 N.W.2d 843, 849 (Minn. 1984) ("All agency decisions come to this court with the presumption of regularity.").

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Most certainly, MPCA's exercise of its discretion in compiling the administrative record, or practice of not issuing litigation holds in administrative review cases, does not support the broad-sweeping negative inferences Relators request, which presume that procedural irregularities occurred. *See Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 547 F.2d 633, 644 (D.C. Cir. 1976) ("Unless there are statutory directives to the contrary, an agency has discretion to select procedures which it deems best to compile a record illuminating the issues."), *rev'd sub nom. on other grounds Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519 (1978). Relators cite no authority for such broad-sweeping negative inferences in administrative record review cases and such inference would be improper. *See Vroman v. City of Austin*, 169 N.W.2d 61, 62 (Minn. 1969) (explaining that party must satisfy its burden "without speculation or conjecture").

2. The Minnesota Rule

As described above, regulations govern the content of an administrative record supporting the MPCA Commissioner's final decisions. The record consists of *written* materials from the comment period, requests for meetings, petitions, *written* materials submitted to the Commissioner and agency staff and *written* documents containing information *referenced and relied upon by agency staff in recommending a proposed action or decision. See* Minn. R. 7000.0750, Subp. 4. Notably, only written materials qualify for inclusion in the record and, outside of submissions in comment periods or the like, only information referenced or relied upon by the agency staff need be included in the administrative record. Since, ordinarily, judicial review is "confined" to this

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administrative record, an agency is under no obligation to preserve documents that are not comments or that were not "referenced and relied upon" for the recommendation to the Commissioner.

Logically then, the administrative record is limited to the written documentation submitted to the agency and those written documents relied upon in making the decision. Other extraneous material, including indecipherable personal notes or incomplete thoughts that were not referenced or relied upon distinctly are *not* part of the administrative record.

3. The Official Records Act

The Official Records Act, Minn. Stat. § 15.17, governs all state agencies' obligations to preserve records. It provides, in relevant part, that "[a]ll officers and agencies of the state . . . shall make and preserve all records necessary to a full and accurate knowledge of their official activities." While the Official Records Act does not direct the scope or content of MAPA administrative records, case law interpreting the meaning of agency "records" is instructive.

The Minnesota Supreme Court has limited the scope of "records" that agencies must maintain to comply with the Official Records Act. *Kottschade v. Lundberg*, 160 N.W.2d 135, 137–38 (Minn. 1968). The court explained that the statutory language, when "[r]ead literally, … seems to place no bounds on the information which must be made a public record." *Id.* at 137. However, the court found that the "legislature did not intend anything that sweeping" because such a broad reading "would fill official archives to overflowing." *Id.* at 138. Instead, the court found that the record-keeping requirement

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must be bound by "reasonable limits" and those limits are established by what constitutes "official activities." *Id.* Such "official activities" are "limited to official actions *as distinguished from thought processes*"; therefore, "all that need be kept of record is information pertaining to an official decision, and *not information relating to the process by which such a decision was reached*." *Id.* (emphasis added).

Examples of such information that the court found to be outside the scope of "official activities" include "casual jotting [or] any tear-sheet observation." *Id.*; *see also Zangs v The City of St. Paul*, 2006 WL 6639215 (Minn. Dist. Ct. Dec. 08, 2006) (holding agency only has a duty to create a record of what becomes an official transaction and that official transaction did not include notes or comments, like Richard Clark's notes here, which are akin to the "thought processes" referenced in *Kottschade*).

Accordingly, the Minnesota legislature, through MAPA and Official Records Act, has already defined what agencies' records shall include. (And, MPCA's regulations are consistent with that legislative intent.) If this Court were to impose a separate obligation on agencies to impose broad civil litigation holds every time an agency reasonably anticipates a challenge under MAPA, such imposition would undermine the intent and purpose of the statutes and impose overly burdensome obligations on agencies to collect and preserve far more than administrative records. *See Kottschade*, 160 N.W.2d at 138 (criticizing agency record retention obligation that "would fill official archives to overflowing").

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4. Agency Practice

MPCA does *not* ordinarily issue a litigation hold for challenges that are grounded upon an administrative record. *See* Exh. 2, Neblett Decl. at ¶ 4. The agency makes hundreds of administrative decisions each year and if it were required to impose a litigation hold in every one of these cases, it would be very cumbersome and strain the resources of MPCA. *Id.* ¶¶ 4-6. More importantly, since the decision is confined to an administrative record, preserving materials outside of those written documents constituting comments or submissions or that otherwise serve as the basis for the Agency's decision would make no sense. *See id.* ¶¶ 3-4.

5. Federal Practice

In challenges to federal agencies' decisions, regulations, or permits based upon an administrative record under the federal Administrative Procedure Act ("APA"), litigation holds are not issued. Neither agency counsel nor Department of Justice ("DOJ") counsel impose litigation holds. *See* Exh. 11, Declaration of Andrew C. Emrich (Jan. 9, 2020) at ¶¶ 5-8; Exh. 12, Declaration of Thomas L. Sansonetti (Jan. 9, 2020) at ¶¶ 3,7; Exh. 13, Declaration of Thomas A. Lorenzen (Jan. 8, 2020) at ¶ 6. Rather, the agencies and agencies' counsel are responsible for compiling the administrative records for judicial review, with DOJ trial counsel providing advice regarding the scope and content of the record and matters of privilege. Exh. 11, Emrich Decl. at ¶¶ 5-6; Exh. 12, Sansonetti Decl. at ¶¶ 3, 6.

Further, the federal departments (i.e. Department of the Interior, Department of Defense) are responsible for establishing record retention policies, which may call for the

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destruction of records and/or electronically stored information after certain time periods or events. *See* Exh. 12, Sansonetti Decl. at ¶ 6. It is not the practice of DOJ attorneys (nor within the authority of DOJ attorneys) to alter or amend such record retention policies. *Id.* Nor was it the practice of DOJ attorneys to override such policies with litigation holds. *Id.* Agency decisions, regulations, or permits are subject to judicial review on the administrative record; litigation holds are not issued to agencies to preserve any and all evidence that may be related to the agencies' decision. *Id.* ¶¶ 3,7; Exh. 11, Emrich Decl. at ¶¶ 5-8; Exh. 13, Lorenzen Decl. at ¶ 6.

B. Spoliation Sanctions Do Not Apply to Proceedings Conducted on an Administrative Record.

1. Relators' fail to cite any authority for imposing spoliation sanctions in administrative record review cases.

Relators cite various cases addressing a court's authority *in ordinary civil litigation that is not confined to an administrative record* in support of their effort to secure draconian sanctions. In short, Relators' Motion ignores the fact that this is an administrative proceeding under MAPA. *See* August 6, 2019 Conference Transcript at 92:10 15 (case is governed by MAPA). Indeed, the one case Relators cite to support spoliation sanctions against a city government involved a §1983 civil action, *not* an administrative proceeding. *See Browder v. City of Albuquerque*, 187 F. Supp. 3d 1288, 1292 (D.N.M. 2016). Relators are simply unable to muster any authority for their contention.

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2. Spoliation sanctions are unavailable in actions confined to an administrative record.

In the only Minnesota decision that appears to address a request for spoliation sanctions on appeal from an administrative proceeding, the court rejected such request. *Kimmel v. Twp. of Ravenna*, No. A05-362, 2005 WL 3372716, at *3 (Minn. Ct. App. Dec. 13, 2005). In *Kimmel*, the appellant requested that the district court impose spoliation sanctions where "the township erased the original tape recording of the township proceeding." *Id.* The Court of Appeals found that because "the record indicates that the township routinely erased the recordings of its proceedings and that it maintained a sufficient record of the administrative proceedings through the summarized minutes prepared from the recordings, there is no spoliation and, therefore, the district [court] did not abuse its discretion in declining to impose sanctions." *Id.* The *Kimmel* court reasoned that the administrative record was adequate for review and there were no facts showing that the government misrepresented its handling of the record. *Id.*

Courts elsewhere have addressing the propriety of spoliation sanctions in administrative proceedings have uniformly held that the spoliation doctrine does not apply. *See Ammar v. Olatoye*, 136 A.D.3d 585, 586, 26 N.Y.S.3d 42, 43 (N.Y. App. Div. 2016) ("sanctions for spoliation of evidence are inapplicable to this administrative proceeding"); *Yao v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2002 WI App 175, ¶ 19, 256 Wis. 2d 941, 953, 649 N.W.2d 356, 362 (in administrative record review proceeding, court held that "a 'spoliation rule' developed and applied in case law involving civil litigation does not necessarily govern the outcome here").

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Federal case law does not support spoliation sanctions for documents that are outside the administrative record. In a federal APA proceeding, a court refused to impose an adverse inference against the government where government employees were "told to retain documents material to the decision, but were left free to discard others, largely in their own discretion." *Seattle Audubon Soc. v. Lyons*, 871 F. Supp. 1291, 1308 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401 (9th Cir. 1996). Ultimately, the employees had destroyed "[t]housands of pages of notes, memoranda, and other working documents and electronic communications[.]" *Id.* Nonetheless, the court declined to presume that the destroyed documents were adverse to the government. *Id.* The court explained:

> The record here, however, is sufficient to show the decision-making process and to permit judicial review under the APA. That additional documents might provide a fuller record makes no difference if the record as it exists is adequate. This is true even though portions of the administrative record may have been destroyed. *Personal files and notes are not required to be contained in an administrative record*. Since the administrative record is legally sufficient, *the absence of some documents that could have been included does not justify invalidating the agency action or changing the standard of review*.

Id. at 1308-09 (internal citations omitted) (emphasis added).

A similar result occurred in a case where the appellant argued that EPA had a "practice of excluding . . . pre-decisional deliberative documents from the administrative record result[ing] in a skewed record." *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 18–19 (D.D.C. 2009), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010). The court rejected the argument, finding that although appellant "provided examples from two sites where an

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administrative record was arguably incomplete, two anecdotal examples do not form a pattern and practice." *Id.*; *see also S. Forest Watch, Inc. v. Jewell,* No. 3:13-CV-116, 2015 WL 1457978, at *3 (E.D. Tenn. Mar. 30, 2015), (finding plaintiffs had not shown agency acted in bad faith in compiling the record because plaintiffs cannot "merely proffer[ ] broad categories of documents and data that are 'likely' to exist as a result of other documents that are included in the administrative record"), *aff'd,* 817 F.3d 965 (6th Cir. 2016); *Bruce v. Azar*, 389 F. Supp. 3d 716, 725 (N.D. Cal. 2019) ("The administrative record before the agency, however, does not include "every scrap of paper that could or might have been created."); *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (explaining that the Administrative Procedure Act "limits review to the administrative record . . . except when there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review").

The Court should similarly refuse to apply the spoliation doctrine in this limited administrative proceeding.

II. EVEN IF THE SPOLIATION DOCTRINE WAS APPLICABLE, RELATORS CANNOT SHOW ENTITLEMENT TO SANCTIONS.

The Minnesota Supreme Court has outlined three factors for courts to consider in determining whether spoliation sanctions are warranted:

> (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

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Miller v. Lankow, 801 N.W.2d 120, 132 (Minn. 2011). Even assuming the spoliation doctrine applies to this administrative proceeding, which it does not, Relators cannot satisfy the three factors required for spoliation sanctions because Relators cannot show (i) that MPCA was at fault, in any way, for altering or destroying evidence, or (ii) that Relators have been prejudiced.

Further, Relators erroneously base their Motion on their presumption that "MPCA pressured EPA to suppress staff comments regarding the PolyMet water pollution permit." Motion at 4. That premise is false and disingenuous. Relators know full well that Ms. Lotthammer and MPCA asked EPA only to wait until the end of the public comment period to offer EPA comments and extended EPA's time period to do so by 45 days. Exh. 14, March 16, 2018 Email between MPCA and EPA, MPCA(62-cv-19-4626)_008656-57; Exh. 8, Udd Decl. ¶¶ 9-11. Contrary to Relators' repeated assertion, MPCA never asked EPA not to submit EPA's written comments on the PolyMet water pollution permit and there are no emails between Mr. Stine and Ms. Lotthammer with EPA political appointees intended to ensure that EPA's written comments would not become part of MPCA's record, because that request simply did not occur. *See* Motion at 5 and 13. The reality is that MPCA had no power to prevent EPA from commenting in writing or otherwise at any time and, in any event, MPCA had no desire to do so. EPA made its own decisions about what comments it chose to make regarding the NorthMet permit and when and how it made them.

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A. No Degree of Fault Can Be Attributed to MPCA.

As discussed above, MPCA has preserved and produced the administrative record documents relevant to the Commissioner's final decision to issue the NorthMet permit. MPCA has fully complied with its obligations under Minn. Stat. § 15.17; Minn. R. 7000.0755. Moreover, the Court must presume that MPCA correctly compiled its administrative record. *E.g. Reserve Min. Co.*, 256 N.W.2d at 808; *City of Moorhead*, 343 N.W.2d at 849; *Bar MK Ranches*, 994 F.2d at 740. In light of that presumption in MPCA's favor, Relators have a heightened burden to show that MPCA acted in bad faith in failing to preserve records here. *Commercial Drapery Contractors, Inc.*, 133 F.3d at 7 (explaining that the Administrative Procedure Act "limits review to the administrative record . . . except when there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review").

The fact that MPCA may have wiped or otherwise deleted certain data from retired or departed employees' computers, pursuant to routine document retention and destruction policies, does not support a claim that MPCA improperly destroyed record documents. *See* Motion at 5-6, 9-10; *see also Kimmel*, 2005 WL 3372716, at *3; *Seattle Audubon Soc.*, 871 F. Supp. at 1308. The Minnesota Records Management Statute, Min. Stat. § 138.17, requires agencies to establish a "continuing program for the economical and efficient management of records," which necessarily includes time periods for the "disposal of . . . records." To the extent MPCA wiped departed employees' computers 30-days after their departure, that was done in accordance with a retention policy adopted

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under Min. Stat. § 138.17. *See* Nov. Hrg. Tr. 96:5-11; *see* Exh. 1, MPCA Manual at 24-25.

As stated, Relators admit that they "do not have conclusive evidence that MPCA directed the deletion of certain evidence outside a normal retention policy[.]" Motion at 13 n.11 (emphasis added). Accordingly, spoliation sanctions – even if they were available in administrative record review proceedings—are not appropriate here. *Kimmel*, 2005 WL 3372716, at *3 (Minn. Ct. App. Dec. 13, 2005) ("Because we find that the record indicates that the township routinely erased the recordings of its proceedings and that it maintained a sufficient record of the administrative proceedings . . . there is no spoliation"); *Seattle Audubon Soc.*, 871 F. Supp. at 1308 ("That additional documents might provide a fuller record makes no difference if the record as it exists is adequate."). Relators' assertion that even negligent or inadvertent loss of evidence can support spoliation sanctions against MPCA must be rejected. Significantly, none of the cases Relators cite to support this assertion involve administrative agencies or administrative record evidence, or the impact of agencies' compliance with statutory record retention policies. *See Patton v. Newmar Corp*., 538 N.W.2d 116, 117-18 (Minn. 1995) (product liability case where motor home was unavailable for defendant's inspection); *Himes v. Woodings-Verona Tool Works, Inc*., 565 N.W.2d 469, 470 (Minn. Ct. App. 1997) (product liability case where wrench was unavailable for defendant's inspection); *Miller*, 801 N.W.2d 120 (involving intentional destruction of evidence). In fact, the *Patton* case cited by Relators supports MPCA by analogy because MPCA properly preserved and

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maintained agency records for an administrative challenge to its permitting decision that it could anticipate. *Patton*, 538 N.W.2d at 118.

But, even more importantly, Relators' bald statement that "MPCA intended to destroy specific unfavorable records" must be rejected. *See* Motion at 12. Relators claim to have "strong evidence" of MPCA's alleged intent, but all they actually have is wholly unsupported speculation and suspicion that a lack of notes from certain calls with EPA indicates that such notes existed and MCPA destroyed them. *Id.* First, as discussed above, notes of phone calls, meetings or other matters are not the type of documents an agency must retain as part of its records. *Kottschade*, 160 N.W.2d at 137–38; *see also* MPCA Manual at 9-11. Second, Relators fail to point to *any* evidence showing that MPCA staff actually took relevant, substantive notes or had relevant, substantive emails that were not made part of the record or were lost or destroyed without other documentation of record capturing the information contained in them. *See* Motion at 5 (indicating notes would merely "memorialize" dates of EPA meetings) and 13 n. 11 (admitting: "Relators do not have conclusive evidence that MPCA directed the deletion of certain evidence . . .").

Rather than establish any bad faith, Relators seek to upend the law by pronouncing that they "need not prove intent for the Court to exercise its inherent authority to impose a negative presumption sanction for spoliation." Realtors' Mot. at 12. In short, Relators ask the Court to compensate for their lack of evidence by stacking inference upon inference—(i) presuming that MPCA acted in bad faith, and (ii) presuming that there are missing documents that would have been adverse to MPCA. The Court should reject

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Relators' invitation to excuse them from their burden of proof. *See State v. Costello*, 646 N.W.2d 204, 210 (Minn. 2002) ("[W]e have condemned arguments that invite the [fact finder] to speculate about the facts."); *Vroman*, 169 N.W.2d at 62 (explaining that a party must satisfy its burden "without speculation or conjecture"). Relators must, in fact, show that MPCA acted in bad faith to deprive them of documents that should have been made part of the administrative record. *Commercial Drapery Contractors, Inc.*, 133 F.3d at 7 (requiring "strong showing of bad faith or improper behavior'" to look beyond agency's administrative record). Relators have failed to meet their burden.

B. Relators Cannot Show Prejudice Warranting Any Sanctions.

Moreover, Relators suffered no prejudice and, therefore, are not entitled to any sanctions. *See Miller*, 801 N.W.2d at 132; *Foss v. Kincade*, 766 N.W.2d 317, 323 (Minn. 2009) (holding "sanction is only appropriate if the unavailability of the evidence results in prejudice to the opposing party"); *The Valspar Corp. v. Millennium Inorganic Chemicals, Inc*., No. 13-CV-3214, 2016 WL 6902459, at *6 (D. Minn. Jan. 20, 2016) (there needs to be an express finding of prejudice to the requesting party before a court may impose a sanction for the destruction of evidence).

Relators cannot show they have been prejudiced. While Relators have identified certain emails or notes that they believe were destroyed (*see* Motion at 10), Relators have either obtained those emails or notes from the EPA, or they have other sources of such evidence including alternative sources that are a part of the administrative record. For example, Relators admit that the emails Ms. Lotthammer deleted during regular management of her emails were recovered and given to Relators in discovery or from the

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EPA. Motion at 5 ("EPA provided the email string, and other relevant documents to Relators in response to Freedom of Information Act requests") and 10 ("emails . . . were obtained from EPA regional counsel).

Further, Relators admit that, although Mr. Schmidt's original handwritten notes are unavailable, his notes were nonetheless incorporated into typewritten summaries which include all information in his notes. *See* Motion at 4 & n.5. Because Mr. Schmidt's notes were attorney work-product, Mr. Schmidt would reasonably have expected that they would be protected from disclosure under virtually any circumstances. He would not have expected them to be included in any MAPA record, nor would he have expected them to be produced. If either Mr. Schmidt or MPCA had any thought of trying to hide or destroy evidence, these work-product notes would have been a peculiar place to focus. To the extent Mr. Schmidt's notes are not privileged or work product, they have been produced to Relators. *See* Motion at 15. Moreover, MPCA has actually produced his notes that are work product for the days that Relators claimed a substantial need.

In addition, even assuming MPCA staff members like Stephanie Handeland and Richard Clark took notes on April 5, 2018 call with EPA, Relators have the best evidence of the content of EPA's comments – the actual comment letter that EPA prepared and read aloud on the April 5 call. The fact that Relators don't have Ms. Handeland's notes to "memorialize the fact that a call between MPCA and EPA" occurred on April 5, 2018 (*see* Motion at 5) is not prejudicial because nobody disputes that a call took place on that date. Since Relators were not deprived of the content of any notes or emails or of any

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other administrative record-based information, no sanctions are warranted. *SeeMenard, Inc. v. Cty. of Anoka*, No. 02-CV-15-2043, 2018 WL 3826278, at *3 (Minn. Tax Aug. 1, 2018) (rejecting sanctions where emails obtained from other source); *Ducklow v. KSTP-TV, LLC*, No. A13-1279, 2014 WL 802515, at *5 (Minn. Ct. App. Mar. 3, 2014) (spoliation sanctions unavailable where allegedly destroyed evidence was inadmissible based on privilege); *Pitney Bowes Government Solutions, Inc. v. U.S.*, 94 Fed. Cl. 1, 9 (2010) ("Essentially, there is no longer a question of spoliation because the documents were never in fact destroyed.").

Relators have made sweeping allegations that relevant records have been improperly deleted merely because MPCA wiped certain former employees' computers or hard drives as part of MPCA's routine practice following their departure. Relators' spoliation arguments are mere speculation or "suspicion" of potentially destroyed evidence. They do not identify *any* specific record or information that was allegedly lost or destroyed. *See, e.g.* Motion at 6, 9; *see also id.* at 14 ("Relators have a strong suspicion . . ."). Mere speculation or suspicion does not support sanctions. *See Wajda v. Kingsbury,* 652 N.W.2d 856, 860 (Minn. Ct. App. 2002) (affirming sanction upon finding "credible evidence" through witness testimony that relevant evidence likely existed but was destroyed); *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 38 (Minn. Ct. App. 2009) (district court properly declined to impose sanctions for spoliation because there was no proof that the deleted computer files included knowingly destroyed evidence); *Vroman*, 169 N.W.2d at 62 (explaining that a party must satisfy its burden "without speculation or conjecture").

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Therefore, even assuming MPCA unintentionally or inadvertently failed to retain certain emails, notes, or computer files, which MPCA was not obligated to preserve as part of the administrative record under applicable Minnesota statutes and regulations, any such error was harmless because Relators suffered no prejudice.

III. RELATORS' REQUESTED SANCTIONS, IF GRANTED, WOULD DEPRIVE MPCA OF DUE PROCESS UNDER MAPA.

The issue before the Court is whether procedural irregularities occurred in the creation of the administrative record for the NorthMet permit. (Order at 1-5, *In re Denial of Contested Case Hearing Request*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 25, 2019)); *see* Motion at 14 (admitting same). By asking the Court to draw a laundry list of negative presumptions that the allegedly missing notes, emails, and electronic data would have documented procedural irregularities in the permitting process, Relators are asking this Court to make the very determination that the Court of Appeals intended for the transfer proceeding itself. And, Relators are attempting to substitute the negative inferences they seek for actual proof of any procedural irregularity at the hearing.

In other words, Relators are trying to end run the transfer hearing and establish a presumption of procedural irregularity by virtue of negative inferences based on their unfounded "suspicion" regarding allegedly missing documents, without first going through a trial and eliciting the requisite evidence through testimony and examination of witnesses. This Court has already cautioned that the parties are entitled to full due process in this hearing:

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> The issue is whether there should be more in the administrative record than there is. And if some sort of fact finding is not allowed, then it essentially means that there is a substantial risk that the hearing process itself will be useless in whole or in part. And that offends my own notion of due process. The purpose of the Administrative Procedure Act and the appeal right itself is to create a due process for the parties to have the matter fully and fairly heard.

Aug. 7, 2019 Tr. 97:5-13. If the Court were to grant Relators their requested sanctions and negative inferences, MPCA would be deprived of due process under MAPA. In any event, the record does not support any of the negative inferences Relators request and they should not be allowed to override actual testimony under oath and other proof at the hearing the Court of Appeals directed this Court to hold.

CONCLUSION

For the foregoing reasons, MPCA respectfully requests that the Court deny Relators' Motion in its entirety.

DATED: January 10, 2020.

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