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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

Case Type: Civil Other/Misc.

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project, St. Louis County, Hoyt Lakes and Babbitt, Minnesota

Court File No. 62-CV-19-4626
Judge John H. Guthmann

RELATORS' POST-TRIAL BRIEF

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INTRODUCTION

Relators[1] have more than met their burden of proof that the Minnesota Pollution Control Agency's ("MPCA") development and issuance of PolyMet Mining Inc.'s ("PolyMet") National Pollutant Discharge Elimination System/State Disposal System ("NPDES") permit ("PolyMet permit") for the NorthMet mine project ("PolyMet project") was riddled with irregularities in procedure. MPCA resisted lawful oversight by the U.S. Environmental Protection Agency ("EPA") and sought at every turn to keep EPA's substantial concerns about the PolyMet permit out of the written record. When EPA told MPCA that EPA was going to submit written comments on the draft PolyMet permit during the public comment period, MPCA engaged in an unprecedented and deceptive campaign to keep EPA's written comments on the draft PolyMet permit hidden from the public and the courts. MPCA then violated Minnesota statutes, rules, policies, and practices to erase any trace of the official records that revealed MPCA's requests to EPA not to send comments on the draft PolyMet permit. MPCA lied to the press, to the public, and to this Court in sworn testimony that it had no notes detailing the conference call where EPA read its comment letter word for word to MPCA. These proceedings under Minn. Stat. § 14.68 will determine MPCA's procedural irregularities, add missing evidence to the administrative record, and allow the Court of Appeals to adjudicate whether MPCA's

[1] Relators are the Fond du Lac Band of Lake Superior Chippewa, WaterLegacy, Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, and Center for Biological Diversity.

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issuance of the PolyMet permit must be remanded, modified, or reversed pursuant to Minn. Stat. § 14.69.

QUESTIONS PRESENTED

1. Whether there were procedural irregularities not shown in the administrative record in MPCA's development and issuance of the PolyMet permit.

2. Whether evidence must be added to the administrative record in order for the Court of Appeals to fairly adjudicate these cases on appeal.

STANDARD OF PROOF

Relators' underlying appeals address the merits of the PolyMet permit. MPCA's Findings of Fact, Conclusions of Law and Order ("Findings and Order") on December 20, 2018 denied Relators' request for a contested-case hearing and granted the PolyMet permit. The Court of Appeals transferred Relators' consolidated appeals to this Court on June 25, 2019, pursuant to Minn. Stat. § 14.68, due to "substantial evidence of procedural irregularities not shown in the administrative record." *In the Matter of the Denial of Contested Case Hr'g Requests and Issuance of Nat'l Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis Cty. Hoyt Lakes and Babbitt Minn., Nos. A19-0112, A19-0118, A19-0124* (Minn. App. June 25, 2019) ("Transfer Order") at 3.

Minnesota Statutes § 14.68 grants the district court jurisdiction to hear and determine alleged irregularities in agency procedures. The Court of Appeals' explained that the "statute creates a special proceeding, for which no summons or complaint is required" and the Court's determination "may be appealed as in other civil cases." *Id.* at 4.

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The preponderance of the evidence standard applies to this proceeding because the legislature prescribed no other standard of proof under Minn. Stat. § 14.68. *C.O. v. Doe*, 757 N.W.2d 343, 353 (Minn. 2008) (citing *State v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 790 (Minn. 1993)).

STATEMENT OF FACTS

A. MPCA Authority and EPA Oversight in PolyMet Permitting.

Discharge of a pollutant to navigable waters is prohibited by the Clean Water Act ("CWA"), except under an NPDES permit that prevents violation of EPA-approved state water quality standards. 33 U.S.C. §§ 1311(a), 1342. EPA is authorized to issue and enforce NPDES permits under the CWA, 33 U.S.C. §§ 1319, 1342(a)(1), and may only delegate that authority to a state if the state's program is consistent with the CWA. 33 U.S.C. § 1342(b).

MPCA's delegated authority to issue NPDES permits derives from a 1974 memorandum of agreement ("MOA") between EPA and MPCA. Ex. 328; ¶ 17.[2] MPCA must comply with the MOA, and EPA's role is to oversee MPCA's compliance with the MOA as well as with the CWA and its implementing regulations. ¶¶ 44-46. The PolyMet project requires an NPDES permit because it would discharge pollutants to navigable

[2] Paragraph citations ("¶") without other designations are to Proposed Findings in Relators' Proposed Findings of Fact, Conclusions of Law and Order (Apr. 22, 2020) filed simultaneously with this Relators' Post-Trial Brief. The Proposed Findings cite the evidentiary record upon which they are based.

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waters. ¶ 47. EPA's scrutiny of the PolyMet project began when environmental review disclosed there would be potential discharge governed by the CWA. ¶¶ 93-94.

B. MPCA's Irregular Conduct in the PolyMet Permit Application Process.

Even before PolyMet submitted its application in July 2016, MPCA made the unusual request that EPA not document its concerns about the PolyMet permit in writing. ¶¶ 95-98. EPA agreed to hold frequent phone conferences with MPCA, but EPA never agreed that such conversations would take the place of formal written comments. ¶ 99.

When MPCA received PolyMet's permit application on July 11, 2016, MPCA failed to transmit it to EPA. ¶¶ 100-03. In fact, EPA only learned that an application had been submitted 21 days later when MPCA told PolyMet the application was complete, and EPA only secured a copy by finding and downloading one online. Ex. 306; ¶¶ 103-04. Once EPA obtained the PolyMet application, EPA told MPCA, and MPCA acknowledged that, EPA would provide comments on its completeness. ¶¶ 104-06.

On November 3, 2016, EPA sent MPCA a letter identifying deficiencies in PolyMet's application, citing a provision of the MOA that precludes MPCA from processing an NPDES application unless deficiencies are corrected and EPA sends a letter to MPCA stating the application is complete. Ex. 306; ¶¶ 107-08. MPCA never asked for and never received a letter from EPA that PolyMet permit application deficiencies were corrected; yet MPCA processed and approved the PolyMet application. ¶¶ 109-10.

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C. MPCA Prevented EPA's Pre-Public Notice Comment on a Draft Permit.

EPA and MPCA selected the PolyMet permit for EPA review when the permit process began. ¶ 122. But during 2016 and 2017 phone calls with MPCA, when EPA asked MPCA for draft PolyMet permit language to review, MPCA provided none. ¶¶ 124-26. In November 2017, EPA explicitly asked MPCA to provide a pre-public notice draft of the PolyMet permit in time for EPA to have 60 days for review and comment before the public comment permit began. ¶¶ 127-28. MPCA refused EPA's request. ¶ 129. Without sufficient time to review and comment before the draft PolyMet permit went out on public notice, EPA reached agreement with MPCA on November 20, 2017 that EPA would send written comments on the draft PolyMet permit during the public comment period. Exs. 372, 815; ¶¶ 135, 138-41.

EPA first received the draft PolyMet permit on January 17, 2018, just two weeks before the public comment period started. Ex. 35; ¶131. However, PolyMet received a pre-public notice draft of the permit from MPCA and had an opportunity to comment before December 10, 2017. ¶ 130.

D. MPCA's Campaign to Prevent EPA from Sending Comments on the Draft PolyMet Permit.

In phone conferences with MPCA on January 31, February 13, and March 5, 2018, EPA raised substantial questions and concerns regarding the draft PolyMet permit. ¶¶ 189-96. Eleven days before the March 16, 2018 end of the public comment period, ¶ 142, MPCA launched its unprecedented campaign to prevent EPA from sending its highly-critical comment letter on the draft PolyMet permit during the public comment period.

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¶¶ 145-87. Subsequently, MPCA systematically concealed both EPA's comments and MPCA's campaign to keep them hidden from the public and out of the administrative record. ¶ 562.

During a March 5, 2018 conference call with EPA, MPCA Mining Sector Manager Jeff Udd ("Udd") initiated the discussion inquiring about EPA's intent to send comments, to which EPA responded that EPA would submit comments on the draft PolyMet permit during the public comment period. ¶¶ 147-48. Udd asked EPA Region 5[3] NPDES Program Chief Kevin Pierard ("Pierard") whether there was any "wiggle room," an odd request to which Pierard responded there was not. ¶ 148-49. Not hearing the answer he wanted, Udd told EPA he planned to take up EPA's comment plan with the MPCA Commissioner's office. ¶¶ 150-51.

After the March 5, 2018 conference call with EPA, Udd sent the newly-promoted MPCA Assistant Commissioner, Shannon Lotthammer ("Lotthammer"), a copy of the MOA and called her to relay his concern that EPA would be sending comments on the draft PolyMet permit. ¶¶ 20, 152, 216-17. Lotthammer then phoned Pierard asking that EPA hold off sending written comments until the public comment period lapsed. ¶¶ 155-56. For a second time, Pierard turned down MPCA's request to withhold EPA's comments. ¶¶ 158-59. Lotthammer's next effort was a call to Water Division Director, Chris Korleski, the most senior water program staff person in EPA Region 5, who, for the third time, rejected MPCA's request that EPA withhold comments on the draft PolyMet permit. ¶¶ 32, 163-64.

[3] EPA Region 5 includes Minnesota, Wisconsin, Illinois, Indiana, Michigan and Ohio.

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Undeterred and contrary to its November 20, 2017 agreement with EPA, ¶¶ 138-40, MPCA pressed on. On March 12, 2018, MPCA Commissioner John Linc Stine ("Stine") spoke with two EPA Region 5 political appointees who had been in their jobs for only a matter of weeks – Regional Administrator Cathy Stepp ("Stepp") and her Chief of Staff, Kurt Thiede ("Thiede") – citing the MOA between EPA and MPCA as a basis to insist that EPA not send comments on the draft PolyMet permit during the public comment period. ¶¶ 35-36, 167-72. Two emails reflect Stine's call with Stepp and Thiede. Exs. 58, 591. The next day, on March 13, 2018, Lotthammer sent a "smoking gun" email to Thiede, attaching the MOA and prior emails from Stepp and Stine, plainly stating, "we have asked that EPA Region 5 not send a written comment letter during the public comment period." Ex. 333; ¶ 172.

MPCA's concerted action to suppress EPA's comments on the draft PolyMet permit continued, with at least three more phone calls and a half-dozen emails between Lotthammer and Thiede from March 13 through March 15, 2018. Exs. 60, 61, 62; ¶¶ 174-83. Although Korleski told Lotthammer that EPA should follow its standard procedure and comment on the draft PolyMet permit, Thiede eventually capitulated that EPA would withhold its comments on the draft PolyMet permit. ¶¶ 178, 183. Thiede's and Lotthammer's email exchanges on March 16, 2018, the last day of the public comment period, stated that an agreement had been reached between EPA and MPCA. Exs. 64, 307; ¶¶ 184-86. As discussed below, just as smoking guns are disposed of so they cannot be

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found, MPCA's copies of these emails were disposed of so even a forensic search could not recover them.

EPA's comment letter on the draft PolyMet permit was complete before March 16, 2018, and it would have been signed and sent to MPCA during the public comment period but for MPCA's repeated requests to EPA to withhold EPA's written comments. ¶¶ 265-70. Pierard and MPCA witnesses agreed there was no other instance when MPCA asked EPA not to send MPCA's written comments on a draft NPDES permit during the public comment period, ¶¶ 271-73; MPCA's process for the PolyMet permit was unprecedented. ¶ 275. In fact, to the best of Pierard's knowledge, EPA Region 5 has never received another request from any state not to comment on a draft NPDES permit. ¶ 274.

Without explicitly disclosing the terms of this arrangement in their March 16, 2018 exchange of emails, MPCA and EPA agreed that MPCA would provide a "pre-proposed permit" to EPA with 45 days for EPA review in exchange for EPA's agreement not to submit its comments on the draft PolyMet permit during the public comment period. ¶¶ 276-84. MPCA's extraordinary conduct had immediate and far-reaching effects.

E. EPA Read PolyMet Permit Comment Letter to MPCA on April 5, 2018.

Before the public comment period for the draft PolyMet permit ended, on March 16, 2018, Pierard asked Udd to schedule a conference with MPCA to walk through what EPA's comment letter would have said had it been sent. Ex. 307; ¶ 291. In preparation for this phone conference, Pierard actually underlined the substance of the comment letter he was going to read aloud to MPCA. ¶ 293. On April 5, 2018, Pierard read the underlined

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portions of the comment letter prepared by the Region 5 NPDES program team of scientists and counsel, ¶ 297, word for word over the phone to Udd, mining unit supervisor Richard Clark ("Clark"), permit writer Stephanie Handeland ("Handeland"), and staff attorney Michael Schmidt ("Schmidt"). Ex. 337; ¶¶ 25-27, 294-97. Pierard also told MPCA which items EPA considered objectionable in relation to the CWA. ¶ 295.

Pierard read EPA's PolyMet permit comments to MPCA to make sure MPCA "understood exactly what we were saying and what our concerns were and how to rectify that." ¶ 292. In Pierard's experience at EPA, there was never another time when he had to read an EPA comment letter to staff at the MPCA, or in any other state, in order for staff to learn what EPA's comments on a draft permit would have said. ¶¶ 302-03. Likewise, other than for the PolyMet permit, MPCA had never known a situation where EPA prepared written comments on a draft NPDES permit, did not send them, and then read the comments aloud to MPCA. ¶¶ 299-301.

Both EPA and MPCA witnesses testified that, unlike prior back-and-forth discussions between EPA and MPCA, EPA provided oral comments to MPCA on April 5, 2018, by reading EPA's comment letter on the draft PolyMet permit aloud to MPCA. ¶¶ 338-41. Throughout the call, MPCA asked EPA either to slow down or repeat a comment, indicating that MPCA was taking notes. ¶¶ 458-59.

F. EPA's Comments Were Highly Critical of the Draft PolyMet Permit.

EPA's comments on the draft PolyMet permit concluded the draft permit would not comply with the CWA. EPA comments stated the permit "does not include water quality

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based effluent limitations . . . as stringent as necessary to ensure compliance with the applicable requirements of Minnesota, or of all affected States, as required of all state programs by CWA Section 402(b)" and "appears to authorize discharges that would exceed Minnesota's federally-approved human health and/or aquatic life waters quality standards." Ex. 337. EPA's comments detailed why the draft PolyMet permit was legally unenforceable, the federal procedures MPCA failed to apply in deciding not to impose WQBELs, and that neither the pilot study, the permit, nor supporting materials explained how downstream waters would be protected from excessive mercury. Ex. 337; ¶ 298. EPA's comments also stated concerns not detailed in comments from the public: MPCA's plan to transfer the Cliffs Erie permit for existing tailings would complicate or preclude enforcement for seep discharges exceeding effluent limits, and MPCA's plans for a general construction stormwater permit, rather than individual or NPDES permit coverage, could leave mercury draining from over 900 acres of wetlands "wholly unregulated." Ex. 337; ¶¶ 298, 328-29, 346.

G. Missing Records of Phone Call When EPA Read Its Comments to MPCA.

As was his regular practice in meetings or calls between MPCA and EPA since May 19, 2016, Schmidt took detailed handwritten notes during the April 5, 2018 call with EPA, prepared typed notes on or about the same day, and then discarded his handwritten notes. ¶¶ 344-45, 473-78. Schmidt's typed notes from April 5, 2018 provide a highly detailed record of EPA's oral comments. Ex. 837 at 27-29. For the April 5, 2018 call, all of the "issues," "solutions" and "cites" in Schmidt's typed notes are based on what Pierard read

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to EPA; Schmidt's notes even separately reflect Pierard's testimony that he explained to MPCA, rather than reading from EPA's letter, which comments pertained to objectionable items. Ex. 837 at 27; ¶¶ 295, 342-43. MPCA failed to disclose the existence of Schmidt's notes during the permitting process and development of the administrative record. ¶¶ 503, 505-06. And MPCA subsequently denied in sworn testimony that Schmidt's April 5, 2018 notes existed, even after the PolyMet permit appeals were transferred to this Court. ¶¶ 565-67.

Although Schmidt took highly-detailed and accurate notes of EPA's comments on April 5, 2018 without any special shorthand skills, Handeland implausibly claimed that she stopped taking notes because she could not keep up. ¶¶ 456-57, 462-64. Handeland did not ask EPA to slow down. ¶ 460. She discarded and recycled her notes from the April 5, 2018 call with EPA that day. ¶ 465. In order to do so, Handeland had to tear her notes out of her spiral notebook. ¶ 466. Handeland assumed that Schmidt's notes would neither be disclosed to the public nor in the administrative record, because "he's an attorney." ¶ 469. Despite the critical nature of EPA's comments, Handeland never talked with anyone at MPCA about how to document the April 5, 2018 call, since she discarded and destroyed her notes, and never discussed the call with anyone at MPCA after it occurred. ¶ 470.

H. MPCA Failed to Attribute, Describe, or Respond to EPA Comments.

MPCA treated EPA comments on the draft PolyMet permit differently from those of other commenters and did not attribute, describe or specifically respond to EPA comments. For all other NPDES permit cases where EPA submitted comments and for all

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commenters on the draft PolyMet permit other than EPA, whether comments were oral or written, similar or dissimilar to other comments, within the public comment period or received by MPCA after the public comment period closed was to specifically attribute, describe and respond to comments in written responses to comments. Ex. 1133; ¶ 351. MPCA admitted it would have followed its regular practice and done so if EPA had submitted written comments. ¶¶ 206-12. In fact, MPCA asked EPA not to send its comments for the very purpose of avoiding the requirement that MPCA "had to respond in writing to the EPA's written comments." ¶ 210.

MPCA did not use Schmidt's April 5, 2018 notes of EPA's comments on the draft PolyMet permit to identify and specifically respond to EPA's concerns in MPCA's responses to comments. ¶¶ 347-48. Had MPCA done so, members of the public would know which concerns raised by EPA were shared by members of the public, as well as EPA's additional concerns. ¶¶ 346, 350.

I. MPCA Destroyed Records of Requests to EPA to Withhold Comments.

Lotthammer admitted that she deleted her March 13-15, 2018 emails to EPA, Exhibits 333, 60, 61, 62, in which MPCA asked that EPA not send written comments on the draft PolyMet permit. ¶¶ 368-73. Lotthammer claimed she had no specific recollection of when she deleted her emails, and implausibly testified that she "must have" deleted them prior to March 26, 2018, when WaterLegacy made its first DPA request to MPCA for communications with EPA on the PolyMet permit. ¶¶ 418-27. When Lotthammer deleted the March 13-15, 2018 emails, she did so "knowing that, at least to the best of [her]

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knowledge, this was the only email that contained the request." ¶¶ 374-75. Lotthammer's destruction of the key emails is even more egregious in light of the undisputed fact that, well before March 2018, MPCA fully anticipated litigation over the permit. ¶¶ 410-13.

Both Lotthammer's emails and Stine's March 12, 2018 emails to Stepp and Thiede, Exhibits 58 and 591, pertain to MPCA's request that EPA withhold comments on the draft PolyMet permit, were only secured from EPA, were not recoverable from MPCA even with a Court-ordered forensic search, and were not preserved by MPCA from loss or destruction. ¶¶ 382-86. None of Lotthammer's or Stine's state-issued cell phones were provided for the search, and Stine's computer was recycled and wiped clean of data when he left MPCA in January 2019. ¶¶ 431-38. Whether other relevant emails and documents at MPCA were also deleted could not be determined through discovery, even after the forensic search, ¶ 447, and any such records are lost forever. What is known is that Lotthammer's and Stine's March 2018 emails asking EPA to withhold comments on the draft PolyMet permit were neither provided in response to WaterLegacy's seven DPA requests, placed in the administrative record, or preserved by MPCA. Ct. Ex. F; ¶¶ 386, 419.

J. MPCA Failed to Disclose or Produce Schmidt Notes.

Beginning on May 16, 2016, Schmidt regularly took notes of meetings and phone conferences with EPA regarding the PolyMet project. Exs. 837, 838; ¶¶ 473-79. On March 26, 2018, when WaterLegacy made its first DPA request for MPCA's meeting notes and phone conversations of MPCA communications, meetings, or conferences with EPA,

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Schmidt had 30 pages of notes responsive to that request. ¶ 496. Schmidt was aware of WaterLegacy's DPA requests of March 26, 2018, April 5, 2018, September 20, 2018, October 4, 2018, December 12, 2018, and January 1, 2019. ¶¶ 497-98. Indeed, Schmidt "reviewed every record" for these DPA requests to ensure that all responsive records that were subject to an exception were turned over. ¶¶ 492-93. When Schmidt left MPCA on February 1, 2019, his exit memorandum to MPCA General Counsel, Adonis Neblett, described his notes and the restricted folder where they were located. ¶¶ 509-10.

WaterLegacy made repeated requests for notes of meetings with EPA, and on October 19, 2018, and February 3, 2019, explicitly asked that MPCA disclose the existence of any responsive documents in non-public files. ¶¶ 499-502. Yet, none of Schmidt's notes were produced in response to WaterLegacy's DPA requests, and none are in the administrative record. Ct. Ex. F.; ¶ 503. No privilege log was prepared for any of Schmidt's notes, MPCA never disclosed that they existed, and, in fact, MPCA explicitly told WaterLegacy that there was nothing in "not public" files, so there was "no need to assert that any documents are exempt from disclosure." ¶¶ 508, 511-12.

K. MPCA Concealed EPA's Comments and MPCA's Process.

MPCA actively concealed EPA's comments on the draft PolyMet permit and MPCA's requests to EPA to withhold EPA's written comments on the draft PolyMet permit by omission and affirmative statements in final permitting documents, media communications, briefings within MPCA, and in statements and sworn testimony to the courts. MPCA's Findings and Order stated that PolyMet's application had been approved

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by MPCA, but failed to disclose that EPA had found the application deficient. ¶ 537. MPCA's Findings and Order and responses to comments also affirmatively claimed that the "permit complies with Clean Water Act requirements identified by EPA," despite EPA's explicit conclusion in its comments that the draft PolyMet permit did *not* comply with the CWA. ¶ 539.

Once media inquiries began in January 2019, MPCA's talking points and statements to the public and elected officials were false and misleading. MPCA actively concealed that EPA had written a comment letter on the draft PolyMet permit, that EPA had withheld its comment letter at MPCA's request, and that EPA had read its comment letter aloud to MPCA. ¶¶ 540-56. MPCA's February 2019 public statement untruthfully stated: "The Minnesota Pollution Control Agency did not, at any time, ask EPA to suppress or withhold comments on the PolyMet NPDES permit." ¶¶ 554-55. MPCA's concerted campaign to conceal EPA's comments on the draft PolyMet permit was a closely-held secret even within MPCA, and Governor Walz's new MPCA Commissioner, Laura Bishop, testified that she first learned that EPA had written comments and read them to MPCA on the phone by reading this information in a newspaper in June 2019. ¶¶ 557-61.

MPCA's administrative record filed with the Court of Appeals on April 12, 2019, ¶ 7, included no comments from EPA, no documents reflecting MPCA's requests to EPA not to send comments, and no record that EPA read its comments to MPCA on April 5, 2018, or the substance of that call. Ct. Ex. F; ¶ 562. MPCA continued to misrepresent and conceal information during the judicial process. At the Court of Appeals, MPCA submitted

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sworn declarations creating the misleading impression that MPCA had not requested EPA to withhold written comments on the draft PolyMet permit. ¶¶ 563-64. In its designee deposition on written questions, MPCA falsely testified under oath, "As of December 20th, 2018, MPCA did not have any notes from the April 5, 2018 phone call with EPA." ¶¶ 565-68. In the first hearing in these transfer proceedings, MPCA falsely represented to the Court, "MPCA never destroyed documents." ¶¶ 569-70.

ARGUMENT

I. THE DISTRICT COURT MUST DECIDE MPCA'S PROCEDURAL IRREGULARITIES NOT SHOWN IN THE ADMINISTRATIVE RECORD AND WHAT EVIDENCE MUST BE ADDED TO THE POLYMET PERMIT RECORD FOR THE COURT OF APPEALS.

Minnesota Statutes § 14.68 states,

> The review shall be confined to the record, except that in cases of alleged irregularities in procedure, not shown in the record, the court of appeals may transfer the case to the district court for the county in which the agency has its principal office or the county in which the contested case hearing was held. The district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure.

In its Transfer Order pursuant to Minn. Stat. § 14.68, the Court of Appeals directed that the Court make a "determination of the alleged irregularities in procedure," citing irregularities based on documents "none of which are included in the administrative record" and irregularities "not shown in the administrative record." Transfer Order at 3-4. This Court's determination of procedural irregularities and what additional evidence must be made part of the administrative record is necessary for the Court of Appeals to adjudicate whether MPCA's issuance of the PolyMet permit should be affirmed, remanded,

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modified, or reversed under the Minnesota Administrative Procedure Act ("MAPA"), Minn. Stat. § 14.69.

A. The Court Should Apply the Plain Meaning to Broadly Determine MPCA "Irregularities in Procedure."

The phrase "irregularities in procedure" was not defined by the Legislature in Minn. Stat. § 14.68. If the Legislature's intent is clear from the statute's plain and unambiguous language, the Court must "interpret the statute according to its plain meaning without resorting to other principles of statutory interpretation." *City of Brainerd v. Brainerd Invs. P'ship*, 827 N.W. 2d 752, 755 (Minn. 2013); *see also* Minn. Stat. § 645.16. In the absence of a statutory definition, Minnesota courts look to "'the common dictionary definition of the word or phrase' to discover its 'plain and ordinary meaning.'" *Jaeger v. Palladium Holdings*, LLC, 884 N.W.2d 601, 605 (Minn. 2016); *see also Matter of Restorf*, 932 N.W.2d 12, 20 (Minn. 2019). Courts "separate a phrase into its 'component terms' and then reconstruct it to determine its meaning if the phrase is not a term of art, lacks a technical meaning, and is not otherwise defined in the statute or rule." *Jaeger*, 884 N.W.2d at 605 (citing *Nelson v. Schlener*, 859 N.W.2d 288, 293 (Minn. 2015); *KSTP-TV v. Ramsey Cty*., 806 N.W.2d 785, 790 (Minn. 2011)). "This separate-and-reconstruct method of interpretation is a corollary of [the] obligation to give words and phrases their plain and ordinary meaning." *Id*.

The Legislature's intended meaning of "irregularities in procedure" in the context of MAPA is clear from the plain and ordinary meanings of "irregular" and "procedure." Black's Law Dictionary defines "procedure" as a "specific method or course of action" and

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defines "irregular" as "[n]ot in accordance with law, method, or usage; not regular." *Procedure*, Black's Law Dictionary (11th ed. 2019); *Irregular*, Black's Law Dictionary (11th ed. 2019). Similarly and consistently, The American Heritage Dictionary defines "procedure" as a "manner of proceeding; a way of performing or effecting something" and defines "irregular" as "[c]ontrary to rule, accepted order, or general practice." *Procedure*, The American Heritage Dictionary, https://ahdictionary.com; *Irregular*, The American Heritage Dictionary, https://ahdictionary.com. Putting these definitions together, it is clear that the Legislature intended "irregularities in procedure" to mean instances in which an agency's method or course of conduct related to an agency decision was not a regular procedure because it was not in accordance with or was contrary to statutes, rules, regulations, authorities, duties, policies, manuals, or regular or general practice.

This plain and ordinary meaning is consistent with the Court of Appeals' application of the term. In *Hard Times Café v. City of Minneapolis*, the Court of Appeals observed that an irregularity in procedure could result from a city council's failure to comply with a policy manual prohibiting *ex parte* conversations and from city counsellors making up their minds before the council hearing. 625 N.W.2d 165, 174 (Minn. App. 2001). The court determined it was "impossible . . . to untangle these improper influences . . . and determine whether the evidence in the record support[ed] the council's decision." *Id.* As such, transfer to the district court was based on extra-record evidence that the city council did not follow its normal procedure in compliance with its policy manual.

In the PolyMet permit appeals, the Court of Appeals explicitly embraced the

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inclusion of conduct "contrary to . . . general practice" in emphasizing conduct that was "atypical" or "unusual."[4] In describing the evidence establishing a *prima facie* case of MPCA procedural irregularities meriting transfer under Minn. Stat. § 14.68, the court stated that MPCA "*departed from typical procedures* in addressing the NorthMet permit" and highlighted that "it was *unusual* for EPA not to submit written comments." Transfer Order at 3-4 (emphasis added). Examples of conduct "contrary to . . . general practice" not shown in the administrative record referenced by the Court of Appeals also include: that MPCA engaged in "multiple telephone conferences and in-person meetings, some of which *are not reflected in the administrative record*;" that EPA's comments on the PolyMet permit "were never submitted to the MPCA and *are not part of the administrative record*," and that any notes of the April 5, 2018 phone call when EPA comments were read to MPCA "*have not been included in the administrative record*." *Id.* at 2 (emphasis added).

As is clear from the plain and ordinary meaning of the phrase, violations of statutes, rules or regulations are "irregularities in procedure," a point which Respondents do not dispute.[5] However, contrary to the plain meaning of "irregularities in procedure" and contrary to precedent, Respondents have argued this Court should narrowly define the phrase "irregularities in procedure" so that this Court may only consider unlawful procedures.[6] Respondents improperly ask this Court to "add words of qualification to the

[4] *See also* the definition of "practice" as a "habitual or customary action or way of doing something." *Practice*, The American Heritage Dictionary, https://ahdictionary.com.
[5] MPCA Pre-Trial Br. at 5; PolyMet Pre-Trial Memo at 4.
[6] MPCA Pre-Trial Br. at 5; PolyMet Pre-Trial Memo at 11.

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statute that the Legislature has omitted" and to add words to Minn. Stat. § 14.68 that were "purposefully omitted or inadvertently overlooked." *City of Brainerd*, 827 N.W. 2d at 756 (quoting *Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 760 (Minn. 2010)).

Respondents' argument is inconsistent with the canon that "no word, phrase or sentence should be deemed superfluous, void or insignificant." *In re Annexation of Certain Prop. to City of Proctor from Midway Twp.*, 925 N.W.2d 216, 218 (Minn. 2019); *see also* Minn. Stat. § 645.16 (statute must be construed "to give effect to all its provisions"). Within MAPA, Minn. Stat. §§ 14.63-.69, the word "procedure" appears twice. The phrase "irregularities in procedure" is used in Minn. Stat. § 14.68, and the phrase "unlawful procedure" is used in Minn. Stat. § 14.69. When interpreting MAPA, this Court must "assume that when the drafters use different terms, they mean different things." *State v. Strobel*, 932 N.W.2d 303, 308 (Minn. 2019); *see also Dereje v. State*, 837 N.W.2d 714, 720 (Minn. 2013) (noting that when different words are used in the same context, the words have different meanings). Had the Legislature intended to restrict "irregularities in procedure" in Minn. Stat. § 14.68 to "unlawful procedure," they would have done so. It would be unreasonable to limit judicial review of irregularities in procedure to only those actions that constitute unlawful procedure given MAPA's statutory scheme.

Based on the plain meaning of Minn. Stat. § 14.68, the phrase "irregularities in procedure" means procedures that are not in accordance with or are contrary to statutes, rules, regulations, authorities, duties, policies, manuals, or regular or general practice. This plain meaning is consistent with precedent and the rules of statutory construction.

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B. Documents in Evidence Revealing EPA's Comments and MPCA's Procedural Irregularities Must be Added to the Administrative Record.

The Transfer Order was issued to ensure that the administrative record on certiorari appeal contains EPA's missing comments, MPCA's missing records, and other evidence of procedural irregularities. This Court has explained from the beginning:

> THE COURT: And in fact, the purpose of the transfer statute is to create a mechanism for expanding the administrative record solely for the purpose of identifying procedural irregularities. Rule 16 Conf. Tr. 44:17-20 (Aug. 7, 2019);
>
> THE COURT: Which means the purpose of this proceeding is to develop an additional record for the court of appeals to consider. *Id*. at 55:5-7.

Minnesota governmental bodies "must take seriously their responsibility to develop and preserve a record that allows for meaningful review by appellate courts." *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999) (reversing an agency decision to avoid rewarding a county's "actions and legal strategy" in providing an inadequate record); *see also Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d 238, 240 n.1 (Minn. 1984) (explaining that a procedural irregularity under Minn. Stat. § 14.68, "might, in fairness, require supplementation or clarification" of the record).

Under the federal Administrative Procedure Act ("APA"), "[e]ven the possibility that there is . . . one administrative record for the public and this court and another for the [agency] and those 'in the know' is intolerable." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977). Accordingly, "the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those

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representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings." *Id.*

The U.S. Supreme Court recently affirmed remand of a decision back to the agency under the federal APA based on extra-record discovery, after reviewing the district court's ruling on pretext "in light of all the evidence in the record before the court, including the extra-record discovery." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019) (holding that reasons expressed by Secretary of Commerce for adding a citizenship question to the 2020 census were contrived and the decision was properly remanded). In *Department of Commerce*, Chief Justice Roberts, speaking for the Court, explained that "[a]ltogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision . . . We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process." *Id*. at 2575.

The evidence in this transfer hearing similarly reveals a story incongruent with the administrative record. This Court has determined what evidence is relevant and probative to determine MPCA's procedural irregularities. At this Court's request,[7] the Parties identified hearing exhibits not in the administrative record. Ct. Ex. F (Feb. 7, 2020). Relators request that this Court determine MPCA's procedural irregularities and add evidence (¶ 580) probative of EPA's comments and MPCA's procedural irregularities to the administrative record to permit a full and just adjudication by the Court of Appeals.

[7] Evidentiary Hearing Transcript ("Hr'g Tr.") 475:12-17; 1312:7-13.

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II. MPCA'S DEVELOPMENT AND ISSUANCE OF THE POLYMET PERMIT WAS SUBJECT TO IRREGULARITIES IN PROCEDURE.

A. MPCA's Transmittal and Processing of the PolyMet Permit Application Were Irregular Procedures.

Since it was signed in 1974, the MOA has required that when an applicant submits an NPDES permit application to MPCA, MPCA's Commissioner "shall transmit" copies of that application to EPA. Ex. 328, Part II, § 124.23(1); ¶ 17 (text of MOA), ¶¶ 101-02. Yet, when MPCA received PolyMet's permit application on July 11, 2016, MPCA failed to transmit it to EPA. ¶ 103. EPA only found the application later online. ¶ 104. MPCA's failure to transmit PolyMet's permit application to EPA violated the MOA and was an irregular procedure.

Once EPA found the PolyMet application, EPA notified MPCA that EPA would provide comments on its completeness. ¶¶ 105-06. On November 3, 2016, EPA sent MPCA a letter stating the PolyMet application was deficient and alerted MPCA that the MOA precluded MPCA from processing the application "until the deficiencies are corrected and [MPCA] has been advised in writing by the EPA that the NPDES application form is complete." Exs. 306, 328, Part II, § 124.23(1); ¶¶ 107-08.

Despite EPA's directive, MPCA never requested or received a letter from EPA that deficiencies in the PolyMet permit application were corrected; yet MPCA processed and approved the application nonetheless. ¶¶ 109-10. Although Respondents now argue that PolyMet's October 2017 submission was a "new" application, all contemporaneous

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records, including MPCA's Findings and Order and the final permit show this *post hoc* rationalization to be false. ¶¶ 111-16.

MPCA argues that the MOA only allotted EPA twenty days to review PolyMet's application for completeness,[8] but its argument misreads the MOA. The section of the MOA cited by MPCA applies only to NPDES permits transferred from EPA to MPCA in 1974, when the MOA was first signed and has no applicability to later permits. Ex. 328, Part II, § 124.22 (1), (2); ¶¶ 117-18. The MOA section applicable to the PolyMet permit has no deadline for EPA's deficiency letter. Ex. 328, Part II, § 124.23 (1); ¶¶ 119-21. MPCA's processing of the PolyMet application without a letter from EPA advising that the deficiencies EPA previously detailed had been corrected violated MPCA's delegated authority under the MOA and was an irregular procedure.

B. MPCA's Denial of EPA's Request for Pre-Public Notice Draft Permit Review Was an Irregular Procedure.

Although the PolyMet permit was selected by MPCA and EPA for EPA review, MPCA denied EPA's requests that the draft PolyMet permit be provided so that EPA could review and comment prior to the public comment period; this denial was a departure both from MPCA's regular practice and express policy. ¶¶ 122-37.

EPA's Region 5 had a well-established practice when an NPDES permit was selected for EPA review. The state would send an early pre-public notice draft permit to EPA, and EPA would send comments before the public even saw the draft to foster CWA

[8] Hr'g Tr. 44:1-45:12.

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compliance and provide documentation. ¶¶ 48, 52-58, 62. In the nine years during which Pierard was NPDES program chief, EPA reviewed and provided written comments on about 700 draft permits. ¶¶ 49-50. MPCA followed this established practice with EPA on other permits, including mining permits, giving EPA time to review and comment in writing on pre-public notice draft permits before the public comment period. ¶¶ 63-68. Yet, for the PolyMet permit, MPCA denied EPA's request that it receive a pre-public notice draft for review and comment, electing to provide EPA with the draft PolyMet permit only two weeks before it was placed on public notice. ¶¶ 129, 131. This effectively prevented EPA from submitting comments on permit language before the public comment period and ensured no EPA pre-public notice comments would be in the administrative record. ¶ 134-35.

It was unusual for MPCA to reject a request from EPA to provide EPA with a pre-public notice draft of a permit for review and comment, ¶ 133, and there is no evidence that MPCA ever did so for any permit other than the PolyMet permit. ¶ 137. MPCA's denial of EPA's request for an early pre-public notice draft of the PolyMet permit was a departure from regular practice and a procedural irregularity.

MPCA also had a specific written policy applicable for NPDES permits that EPA and MPCA had identified for EPA review. ¶ 59. MPCA's EPA Permit Review Policy ("Review Policy") states that for each permit on the review list, MPCA permit writers should send early review drafts to EPA Region 5, together with a draft of the public notice document and a request that EPA complete its review in 30 days. Ex. 83; ¶ 60. The Review

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Policy also states that EPA needs to provide written comments or a "no objection" letter before MPCA is allowed to proceed to put a review list permit on public notice. ¶ 61. MPCA refused to send a pre-public notice draft despite the fact the PolyMet permit was on EPA's review list, provided EPA less than 30 days for review, and proceeded to public notice without EPA's written comments or no objection letter. ¶¶ 122, 126-37. These actions were contrary to MPCA's written policy and constituted a procedural irregularity.

C. MPCA's Systematic Campaign to Prevent EPA from Sending Comments on the Draft PolyMet Permit During the Public Comment Period Was an Irregular Procedure.

The record, including contemporaneous notes, emails secured from the EPA, and witness testimony, proves that MPCA made repeated requests to EPA not to send EPA's written comments on the draft PolyMet permit during the public comment period. Exs. 58, 60, 61, 62, 333, 591, 775, 837; ¶¶ 145-87. There is no evidence that EPA had any other reason to withhold its comment letter. ¶¶ 265-70. MPCA achieved its intended result: denying the public the opportunity to learn of the EPA's serious concerns, and robbing the Court of Appeals of a complete record to review. ¶ 562.

1. MPCA's requests to EPA to withhold comments were an unprecedented departure from regular practice.

MPCA's repeated requests to EPA to withhold EPA's written comments on the draft PolyMet permit during the public comment period were not only atypical, but wholly unprecedented. ¶¶ 271-75. Neither MPCA nor any other state in EPA Region 5 had ever requested EPA not to comment on a draft NPDES permit. ¶¶ 273-74. MPCA's extreme deviation from normal practice was a highly irregular procedure.

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2. MPCA blocked EPA's comments on the draft PolyMet permit to hide EPA's comments from the public and the courts.

MPCA's reasons to block EPA's written comments on the draft PolyMet permit are in evidence. MPCA made repeated efforts beginning in 2015 to prevent a written record of EPA's concerns about the PolyMet permit. ¶¶ 95-98, 100-04, 126-37. MPCA also knew from phone calls with EPA that took place from January 31, 2018 through March 5, 2018 that EPA's written comments would be highly critical of the draft PolyMet permit. ¶¶ 188-96. MPCA knew that if EPA submitted written comments, the comments would be available to the public through DPA requests and included in the administrative record on appeal. ¶¶ 197-205. MPCA would also be required under CWA regulations to describe and respond in writing to all of EPA's significant comments. ¶¶ 206-12.

3. MPCA's campaign to block EPA submittal of comments resulted in a misleading administrative record.

MPCA's insistent requests to EPA to withhold EPA's comments on the draft PolyMet permit prevented EPA's comments in Exhibit 337 from seeing the light of day either through the DPA, in MPCA's responses to comments, or in the administrative record on certiorari review. ¶¶ 188-212, 265-70, 562. But for FOIA requests and litigation, EPA's comments would still be hidden. ¶ 579. MPCA's abnormal efforts to keep EPA from sending its comments on the draft PolyMet permit were also an irregularity in procedure because they resulted in a misleading record.

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4. MPCA's rationalizations for requests to EPA not to send EPA's comments are misleading and pretextual.

MPCA's rationalizations for asking that EPA withhold its comments on the draft PolyMet permit are misleading and pretextual. Lotthammer's claim in her March 13, 2018 email to Thiede, Exhibit 333, that delaying EPA's comments was necessary to "follow the steps outlined in the MOA" and for "maintaining the approach laid out in the MOA" were untrue. EPA's submittal of written comments on the draft PolyMet permit during the public comment period was customary and consistent with the MOA, as both Lotthammer and Stine admitted. Ex. 328, Part II, §124.46(1); ¶¶ 17, 72-76, 83, 222-26.

Similarly, MPCA's assertion in Exhibit 333 that "the established process" was that EPA would delay written comments until MPCA submitted the final proposed permit was false. EPA's regular practice was to comment on MPCA draft NPDES permits during the public comment period. ¶¶ 69-71, 77-84, 88-92.

MPCA's claim that it was more "efficient" for EPA to withhold comments because similar comments or permit changes were expected is spurious. ¶ 241. MPCA did not know on March 5, 2018 or March 15, 2018 if EPA comments would be similar to those of the public, ¶¶ 231-32, 256, and had neither made nor planned any permit changes, whether big or small. ¶¶ 238-39. No custom, practice, or authority suggests that EPA comments should be discouraged on these grounds, ¶ 233, and Pierard testified that delay of EPA comments "doesn't make any sense . . . it wouldn't speed up the process . . . . It actually slows it down." ¶ 240.

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No contemporaneous records suggest MPCA's request to EPA in March 2018 to withhold EPA's comments was due to concerns about staff "workload" in responding to other comments, as MPCA asserted. ¶¶ 242-45. This *post hoc* claim[9] is also plainly inconsistent with the evidence. MPCA had the resources to respond to public comments on the PolyMet permit, including an outside contractor, reimbursement from PolyMet, and the ability to involve additional MPCA staff, as needed. ¶¶ 246-55. Further, the timing of events flatly contradicts MPCA's claims. MPCA staff first complained of workload pressure in June of 2018, three months after MPCA managers requested EPA not to send comments on the draft PolyMet permit. ¶¶ 256-61. MPCA's "workload" defense is a *post hoc* rationalization "completely unconnected with the actual basis" for its decision. *Hurrle v. Cty. of Sherburne ex. Rel. Bd. of Comm'rs*, 594 N.W.2d 246, 250 (Minn. App. 1999); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012) (no deference to a "post hoc rationalization . . . to defend past agency action from attack").

5. *MPCA's coverup of its requests to EPA to withhold comments shows MPCA knew its conduct was irregular.*

MPCA's misrepresentations to the media and the public are compelling evidence that MPCA's requests that EPA withhold comments on the draft PolyMet permit were irregular and MPCA knew it. Even in a criminal case, where the standard is proof beyond a reasonable doubt, evidence of a coverup may be "probative as circumstantial evidence of appellant's consciousness of guilt." *State v. Roy*, 408 N.W.2d 168, 172 (Minn. App. 1987).

[9] It appears this theory was first raised in MPCA's Pre-trial Brief at 11-12.

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When media began to inquire about EPA comments on the PolyMet permit in January 2019, MPCA could have simply told the press and the public the truth. MPCA knew EPA had prepared a comment letter, MPCA knew EPA had serious concerns, MPCA made repeated requests by phone and in writing that EPA not send its comment letter, EPA eventually agreed, but EPA read its comment letter aloud to MPCA on the phone a few weeks later. Instead MPCA concealed the fact that EPA had prepared a comment letter, ¶¶ 541-43, and widely distributed a public statement saying that the MPCA "did not at any time ask EPA to . . . withhold comments." ¶¶ 552-55. MPCA reported to the office of Minnesota's Governor, "We clearly denied any suppression or that we requested that they not comment." ¶ 556. MPCA's coverup permits the inference that MPCA knew that its requests to EPA to withhold comments on the draft PolyMet permit were highly irregular procedures.

D. MPCA's Agreement with EPA Not to Send EPA's Comments on the Draft PolyMet Permit in Exchange for a "Pre-Proposed Permit" was an Irregular Procedure.

MPCA's irregular and successful efforts to block EPA's comments on the draft PolyMet permit were then secured with an agreement that was contrary to any prior practice. EPA political appointees agreed not to send comments on the draft PolyMet permit in exchange for MPCA's provision of a "pre-proposed permit" with 45-days review. ¶¶ 276-84. Stine admitted he knew in March 2018 that this agreement was different from any arrangement MPCA had ever had with EPA. ¶ 285. In fact, a "pre-proposed permit" was "something made up for the PolyMet project," had never been issued by MPCA in any

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other permitting process, and no similar intermediate step or time period not mentioned in the MOA had ever been created for any other MPCA permit. ¶¶ 286-89. MPCA's agreement to provide EPA with a novel process in exchange for withholding EPA's comments on the draft PolyMet permit was also an unprecedented departure from regular practice and an irregular procedure.

E. MPCA's Failure to Attribute, Describe, or Respond to EPA's Comments on the Draft PolyMet Permit Was an Irregular Procedure.

CWA regulations require states issuing NPDES permits to "describe and respond to all significant comments on the draft permit raised during the public comment period." 40 C.F.R. §§ 124.17(a).[10] CWA regulations require a meaningful response to comments, not confounded with responses to other individual commenters. *Muskegon Dev. Co.*, 17 E.A.D. 740, 749 (EAB 2019) (remand to agency when omitting descriptions of individual comments "substantially impedes a determination" that a specific comment was meaningfully responded to); *Wash. Aqueduct Water Supply Sys*., 11 E.A.D. 565, 589-90 (EAB 2004) (remand ordered when the record contained no meaningful response to comments analyzing the need for WQBELs); *see also Minn. Envtl. Sci. & Econ. Review Bd. v. Minn. Pollution Control Agency*, 870 N.W.2d 97, 101-02 (Minn. App. 2015) (accepting the federal standard that the response to comments "must be meaningful"). MPCA failed to specifically attribute, describe, or respond to any EPA comments on the draft PolyMet permit. Ex. 1133; ¶ 313.

[10] Applicable to state-issued permits under 40 C.F.R. § 123.25(a)(31).

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1. The absence of EPA written comments resulted from MPCA's irregular requests to EPA and cannot justify atypical responses.

If EPA had submitted its written comments on the draft PolyMet permit during the public comment period, MPCA would have been required to attribute, describe, and respond to them under federal rules and MPCA's established practice. 40 C.F.R. § 124.17; ¶¶ 206-12, 304-08. MPCA's irregular requests were intended to result and did result in EPA not sending its written comments on the draft PolyMet permit. ¶ 270. In light of MPCA's conduct, MPCA cannot use the absence of EPA written comments as an excuse to deviate from MPCA's regular practice, which requires that MPCA attribute, describe, and respond to EPA's comments.

2. MPCA's failure to attribute, describe, or respond to EPA's comments was a departure from regular practice.

MPCA's regular practice for mining permits is to specifically attribute, describe, and respond to EPA's comments. ¶ 305-07. For the Minntac mining permit, MPCA used a cross-reference to do so when EPA's comments were similar to those of members of the public. ¶ 307. In *every* permit other than the PolyMet permit, MPCA's regular practice was to attribute and describe every comment made by EPA. ¶¶ 304-08. And for *every* other commenter on the PolyMet permit other than EPA, MPCA attributed each comment and response to the person or entity making the comment. ¶¶ 311-13.

The issuer of an NPDES permit is "obligated to provide a response to comments by regulation, irrespective of whether the comments are received orally or in writing." *Sierra Pac. Indus. (Anderson Processing Facility)*, 16 E.A.D. 1, 31 n.20 (EAB 2013). EPA

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provided oral comments on the draft PolyMet permit by reading its comment letter to MPCA on the phone. ¶¶ 338-41. MPCA's regular practice for other oral comments on the PolyMet permit was to make a transcript to document the substance of the comments and, then, treat oral comments the same as written comments in terms of providing a specific response to comments. ¶¶ 336-37. Schmidt's notes of April 5, 2018 were sufficiently detailed to document EPA's comments and allow MPCA to specifically respond to them. ¶¶ 341-47. MPCA's failure to specifically attribute, describe, and respond to EPA's oral comments on the PolyMet permit in its responses to comments was a departure from regular practice, hid EPA's comments from the public, ¶ 350, and was an irregular procedure.

3. MPCA's rationalizations for failure to respond to EPA's oral comments are inconsistent with law and MPCA's regular practice.

MPCA's rationalizations for failure to attribute, describe, and respond to EPA's oral comments are inconsistent with law and its own regular practice. Schmidt initially claimed that Minnesota rules only required an "oral response" to EPA, but he later admitted that MPCA's responses to comments must also comply with federal CWA regulations. ¶¶ 314-16. CWA regulations stating that responses to comments "shall be available to the public" under 40 C.F.R. §124.17(c) require *written* responses in the administrative record. Ex. 679 at 11-16. MPCA's typical practice follows this regulation. *See* Exs. 527, 529, 533, ¶ 317.

MPCA has also argued MPCA was not required to respond to EPA's oral comments since they were submitted after the public comment period. ¶ 320. Any delay in EPA's timing was the result of MPCA's improper and irregular request to EPA, and EPA

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regulations neither anticipate nor provide states with a dispensation when a state causes the delay. ¶ 321. Additionally, in similar circumstances, MPCA has attributed, described, and specifically responded to EPA comments received after the comment period ended. ¶¶ 322-23. In the PolyMet case, MPCA attributed, described, and responded to thirty-five public comments received after the comment period ended. The vast majority of these public comments were submitted in November 2018 – more than seven months after the comment period closed. ¶ 324.

MPCA also claimed it did not identify and respond to EPA's comments read to MPCA on April 5, 2018 because they were "similar" to other comments. However, CWA regulations require individuated responses to comments, regardless of whether they are similar. *See e.g. Wash. Aqueduct*, 11 E.A.D. at 589-90; *Muskegon*, 17 E.A.D. at 749. Moreover, EPA's comments differed in content from public comments, ¶¶ 328-30, and carry expertise and authority different from public comments. ¶ 214. MPCA's deviation from regular practice was unjustified and an irregularity in procedure.

4. MPCA's failure to specifically respond to EPA's comments concealed EPA's concerns and MPCA's responses.

Had MPCA not interfered, EPA's written comments on the draft PolyMet permit would have been submitted during the public comment period, and both EPA's comments and MPCA's responses would have been in the administrative record. ¶ 197-203. Had MPCA used Schmidt's detailed documentation of EPA's April 5, 2018 oral comments on the PolyMet permit to prepare typical responses, again, both EPA's comments and MPCA's responses would have been a matter of record. ¶¶ 349-51. MPCA twice chose not

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to create a record of EPA's comments and MPCA's responses to them. MPCA's responses to comments improperly kept EPA's concerns and MPCA's responses out of the public record and were an irregular procedure.

F. MPCA's Deletion and Failure to Preserve March 12-15, 2018 Emails of MPCA's Requests that EPA Withhold Comments on the Draft PolyMet Permit Were Irregular Procedures.

1. MPCA's deletion and failure to preserve March 12-15, 2018 emails with EPA violated the Official Records Act.

Minnesota's Official Records Act states 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." Minn. Stat. § 15.17, subd. 1. The Official Records Act continues,

> Subd. 2. The chief administrative officer of each public agency shall be responsible for the preservation and care of the agency's government records, which shall include written or printed books, papers, letters, contracts, documents, maps, plans, computer-based data, and other records made or received pursuant to law or in connection with the transaction of public business. It shall be the duty of each agency, and of its chief administrative officer, to carefully protect and preserve government records from deterioration, mutilation, loss, or destruction.

Stine testified that any written communications between MPCA and EPA relating to the PolyMet permitting process, including emails, were official records of the MPCA that MPCA was required to preserve under the Official Records Act. ¶¶ 379-81. Under Minn. Stat. § 15.17, subd. 1, Exhibits 58, 60, 61, 62, 333, and 591 are necessary to a full and accurate knowledge of MPCA's official activities in making irregular requests to EPA to withhold EPA's comments on the draft PolyMet permit. ¶ 386. Since Stine's March 12, 2018 email, Exhibit 58, was carefully written not to explicitly cite PolyMet as the subject

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of his conversation with Stepp, the brief appointment email, Exhibit 591, which plainly states that the conversation pertained to the "PolyMet mine draft permit" is needed for full and actual knowledge of Stine's official activities. Exs. 58, 591.

Under the Official Records Act, Lotthammer's and Stine's emails, Exhibits 58, 60, 61, 62, 333, 591, were all government records necessary for a full and accurate knowledge of MPCA's transaction of public business with EPA. ¶¶ 384-85. MPCA failed to protect these official records from loss or destruction, to such an extent that they could not be recovered even through a forensic search. ¶¶ 382-86. In addition to being highly suggestive of a coverup, MPCA's failure to preserve its March 12-15, 2018 emails with EPA violated the Official Records Act and was an irregular procedure.

2. MPCA's deletion and failure to preserve March 12-15, 2018 emails failed to comply with MPCA's established records policies.

Similarly, MPCA's deletion and failure to preserve its March 12-15, 2018 emails reflecting MPCA's requests that EPA withhold comments on the draft PolyMet permit violated MPCA's records retention policies, which implement the Official Records Act. ¶¶ 387-409. MPCA's Records and Data Management Manual (the "Manual") states that "records" and "official records"

> are broadly defined by statutes and regulation to include all recorded information, regardless of medium or format, made or received by the agency or its agents under law in connection with the transaction of public business and either preserved or appropriate for preservation because of their administrative, evidential, fiscal, historical, informational or legal value.

Ex. 77 at 7, 8; ¶ 395.

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Under the Manual, a document is a record if it meets any of the following criteria: the information contained in the document contains evidence or contributes to "an understanding of the agency's activities, decision making processes, directives, functions, mission, operations, policies, procedures, programs or projects"; the "information [is] appropriate for preservation because it has administrative, evidential, fiscal, historical informational, legal, or programmatic value"; or the MPCA generated or received the information. ¶ 398. Emails that meet the definition of a record in the Manual must be preserved. ¶ 406-07. And "records generated during permit development and issuance processes" must be permanently retained. ¶ 408-09.

Lotthammer's self-serving attempts to deny that the emails she destroyed were "records" are neither probative nor credible, ¶¶ 394-403, and MPCA's Data Practices "Dos and Don'ts" guide provides no authorization to discard emails between MPCA and EPA regarding PolyMet. ¶¶ 388-92. It is self-evident that Exhibits 58, 60, 61, 62, 333 and 591 reveal MPCA's decision making processes related to the PolyMet project, were generated during permit development, and have administrative, evidential, historical, informational and legal value as shown in the hearing process. Ct. Ex. F; ¶¶ 379-81, 398. MPCA's failure to preserve and retain these March 12-15, 2018 emails failed to comply with MPCA's written policies and manuals and was an irregular procedure.

3. MPCA's deletion and failure to preserve Lotthammer's emails of March 13-15, 2018 constituted spoliation of evidence.

Because MPCA anticipated litigation under MAPA as soon the PolyMet project was proposed, MPCA was under a duty to preserve all evidence that would relate to that

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litigation. ¶ 410; *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). When MPCA requested approval to hire outside counsel to provide "representation in the likely event of a legal challenge" on September 24, 2015, MPCA knew there could be multiple challenges to PolyMet permits. Ex. 382; ¶¶ 411-13.

MPCA breached this duty when Lotthammer selectively and intentionally deleted her March 13-15, 2018 emails with the EPA. ¶¶ 368-75. Therefore, the Court "is not only empowered, but is obligated to determine the consequences of [the] evidentiary loss" including by making necessary inferences. *Patton*, 538 N.W.2d at 119; *see also Wajda v. Kingsbury*, 652 N.W.2d 856, 860 (Minn. App. 2002). Two inferences arise from Lotthammer's admission that she selectively deleted emails. First, she deleted these emails *after* MPCA had received WaterLegacy's March 26, 2018 DPA request. Second, she deleted *more* emails and files than she admitted to deleting. These inferences are appropriate given the factors used to determine spoliation sanctions:

> (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 the 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.

Patton, 538 N.W.2d at 132.

MPCA is at fault for the destruction of its own emails and files. Lotthammer's testimony that she "didn't need to keep" email evidence of correspondence with EPA, ¶ 387, is simply wrong. The NPDES Permit Writers Manual, which applies to all MPCA NPDES permits and on which all MPCA permit staff were trained, requires that the

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administrative record include all correspondence with "regulatory agency personnel." Ex. 679; ¶¶ 198-200, 414. Further, MPCA never took the reasonable step to put in place a litigation hold once it received the PolyMet permit application. *See Paisley Park Enterprises, Inc. v. Boxill*, 330 F.R.D. 226, 233 (D. Minn. 2019) (sanctioning party for failing to put litigation hold on electronic devices after party anticipated litigation). To make matters worse, MPCA failed to place a litigation hold even when several Relators petitioned MPCA for reconsideration of the PolyMet permit on December 31, 2018, or when Relators filed certiorari appeals in January 2019. ¶¶ 5-6. Because MPCA failed to put a litigation hold in place, Stine's and Lotthammer's state-issued devices were wiped clean and recycled after each left the agency, respectively, in January 2019 and February 2019. ¶¶ 373, 376, 436-38.

Relators are prejudiced because they are unable to prove when Lotthammer deleted her March 13-15, 2018 emails or what other files she deleted. The Court-ordered forensic search did not recover Exhibits 60, 61, 62, 333 and could not determine when they had been deleted. ¶¶ 429, 448. Lotthammer had no specific recollection of when she deleted these emails. ¶¶ 370-73. If Lotthammer, in fact, deleted these exhibits after MPCA received WaterLegacy's March 26, 2018 DPA request, MPCA violated the DPA when it failed to provide the March 13-15, 2018 emails to WaterLegacy.

The fact that Relators obtained a version of some of Lotthammer's emails from EPA does not cure prejudice to Relators in proving their DPA claim. A search of EPA servers could not demonstrate when MPCA deleted Exhibits 60, 61, 62 and 333. And it implausible

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to think that Lotthammer deleted only these emails – she only admitted she deleted them because EPA's copies were plainly in front of her. Relators are also prejudiced because additional evidence was undoubtedly deleted and is not recoverable.

The inferences requested by Relators are needed to deter future destruction of evidence. MPCA and other Minnesota agencies must apply litigation holds when an application is received for a project on which the agency anticipates litigation and, certainly, following a petition for reconsideration and an appeal of an agency decision. Agencies must not permit their principals to intentionally and selectively delete emails that document agency business. There is no appropriate lesser sanction, as the requested inferences are narrowly tailored to Lotthammer's admitted destruction of evidence and MPCA's failure to place a litigation hold after it anticipated litigation.

4. MPCA's failure to keep or produce Lotthammer's March 13-15, 2018 emails violated the DPA.

Under the DPA, government data includes "all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use." Minn. Stat. § 13.02, subd. 7. MPCA was required to "keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use" and to "provide copies of public data on request." Minn. Stat. §§ 13.03, subd. 1; 13.02, subd. 3(c). On March 26, 2018, WaterLegacy submitted a DPA request for all records since January 2015 pertaining to:

> Comments, letters, emails, memos, meeting notes, phone conversation notes or any other records a) from the U.S. EPA; or b) pertaining to written or oral communications or, phone or in-person meetings with the U.S. EPA

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> regarding any proposed or draft NPDES/SDS permit for the PolyMet NorthMet Project.

Ex. 334; ¶ 418. Lotthammer's March 13-15, 2018 emails, Exhibits 60, 61, 62, 333, are responsive to WaterLegacy's March 26, 2018 DPA request, and MPCA failed to produce them. ¶¶ 419-23, Ct. Ex. F. As discussed above, the Court should infer that Lotthammer intentionally deleted them after MPCA received WaterLegacy's March 26, 2018 DPA request. *See also* ¶ 427. MPCA's failure to keep and produce Lotthammer's March 13-15, 2018 emails violated the DPA and was an irregular procedure.

G. MPCA Staff Action to Prevent Creation and Retention of Notes of the April 5, 2018 Call with EPA Was an Irregular Procedure.

Handeland has taken notes of phone meetings with EPA on the PolyMet permit since at least August 11, 2016. Ex. 692, ¶¶ 449-51. The April 5, 2018 call during which EPA read its comments on the draft PolyMet permit was the only meeting where Handeland either stopped taking notes or discarded her notes. ¶¶ 467-68. Handeland's assertion that she could not keep up to take notes on April 5, 2018 is belied by Schmidt's capacity, during the very same meeting, to take meticulous handwritten notes. ¶¶ 462-64. Handeland, singularly, elected to stop taking and discard her notes of April 5, 2018.

Handeland knew WaterLegacy had already made DPA requests, ¶ 422, believed that without her notes there would be no public document reflecting the call when EPA read its comment letter to EPA, ¶ 469-72, and knew that any notes she took on April 5, 2018 would constitute minutes, likely to be scanned into the OnBase system, produced in response to DPA requests, and placed in the administrative record. ¶¶ 454-55. On the most important

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phone conference of the PolyMet permit development process, Handeland departed from regular practice by stopping notetaking and discarding her notes; this was an irregular procedure.

H. MPCA's Failure to Disclose or Produce Staff Attorney Notes Responsive to DPA Requests Was an Irregular Procedure.

1. Failure to disclose the existence of Schmidt's notes and the basis on which they were withheld violated the DPA.

It is undisputed that Schmidt's typed notes, Exhibits 837 and 838, were responsive to multiple DPA requests made by WaterLegacy, that MPCA withheld them as "not public" data exempt from the DPA, and never disclosed either the existence of Schmidt's notes or the reasons they were withheld. ¶¶ 483-84, 496-512. MPCA also misrepresented that it had no "not public" documents responsive to WaterLegacy's DPA requests. ¶ 511.

MPCA's conduct violated the plain language of the DPA, which states,

> If the responsible authority or designee determines that the requested data is classified so as to deny the requesting person access, the responsible authority or designee shall inform the requesting person of the determination either orally at the time of the request, or in writing as soon after that time as possible, and shall cite the specific statutory section, temporary classification, or specific provision of federal law on which the determination is based. Upon the request of any person denied access to data, the responsible authority or designee shall certify in writing that the request has been denied and cite the specific statutory section, temporary classification, or specific provision of federal law upon which the denial was based.

Minn. Stat. § 13.03, subd. 3(f); *see also Cilek v. Minn. Sec'y of State*, 927 N.W.2d 327, 330 (Minn. App. 2019), *rev. granted* (June 18, 2019) (Secretary of State properly complied with section 13.03, subd. 3(f) when a specific statutory section was cited in denial of records); *Webster v. Hennepin Cty.*, 910 N.W.2d 420, 424-25, n.2 (Minn. 2018)

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(documenting ALJ finding that failure to provide authority for redactions violated section 13.03, subd. 3(f)). MPCA's own DPA policy explains what requesters can expect from MPCA under Minn. Stat. § 13.03, subd. 3(f). Ex. 79 at 3. MPCA's violation of the DPA, failure to follow its DPA policy, and improper failure to disclose the existence of Schmidt's notes or the basis on which they were withheld was an irregular procedure.

2. Failure to produce Schmidt's notes violated the DPA.

Under the DPA, it is presumed that government data is "public and available to the public for inspection and copying," and this presumption "may be overcome only by a contrary federal law, state statute, or temporary classification of data as non public." *Webster*, 910 N.W.2d at 427 (citing Minn. Stat. § 13.01, subd. 3). "Entire documents may not be withheld merely because they contain some exempt information." *Nw. Publ'ns, Inc. v. City of Bloomington*, 499 N.W.2d 509, 511 (Minn. App. 1993) (quoting *Neufeld v. Internal Revenue Serv.*, 646 F.2d 661, 665-66 (D.C. Cir. 1981)). Unless "public and nonpublic information is so inextricably intertwined that segregating the material would impose a significant financial burden and leave the remaining parts of the document with little informational value" an entire document may not be withheld. *Id*.

In its decision releasing the Schmidt notes for the hearing, this Court distinguished *Baker v. General Motors Corp.*, 209 F. 3d 1051, 1053-54 (8th Cir. 2000), and found that most of Schmidt's notes could not be properly withheld as attorney work product:

> Mr. Schmidt was basically a "mere scrivener" with rare exceptions. In other words, the document appears to have been prepared in the regular course of agency business rather than for the purpose of litigation, with only a few exceptions. *See City Pages v. State*, 655 N.W.2d 839, 846 (Minn. Ct. App.

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> 2003). Unlike *Baker*, Mr. Schmidt's note-taking is not the same as the taking of notes during a witness interview. Here, no witness was being interviewed. Mr. Schmidt was simply one of many attending a business meeting where a project was being discussed.

Part Two of Order Granting In Part and Denying In Part Relators' Motion to Compel, Memorandum at 9 (Jan. 17, 2020).

The Court redacted the few passages in Schmidt's notes that contained "mental impressions, conclusions or opinions of counsel." *Id*. at 10. The exhibits of Schmidt's notes contain few redactions, and none on critical dates such as March 5, March 12, and April 5, 2018. Exs. 837 at 24-29, 838; ¶¶ 513-14. Valuable information on EPA communications and MPCA procedures was clearly segregable and should have been provided.

The hearing record also supports the Court's conclusion that Schmidt's notes were prepared in the ordinary course of MPCA's business to create a permitting record. Schmidt took notes at most meetings or calls with EPA regarding both the PolyMet project and other NPDES permits. ¶¶ 473-74. Schmidt testified that his notes were the "best reflection of the EPA calls that I know of." ¶ 517. Schmidt played a role in preparing MPCA's responses to comments, MPCA's Findings and Order, and permit language for the PolyMet permit. ¶¶ 518-23. Other MPCA staff used Schmidt's notes as a synopsis of the April 5, 2018 meeting, and Schmidt may have consulted his notes in drafting some of the PolyMet permitting documents. ¶¶ 524, 526-30. MPCA violated the DPA by withholding Schmidt's typed notes, Exhibits 837 and 838, in their entirety, and this violation was an irregular procedure.

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I. MPCA's Lack of Candor in Final PolyMet Permitting Documents Was an Irregular Procedure.

Minnesota Rule 7000.0300 imposes a duty of candor on all MPCA employees in all communications, proceedings, or dealings related to MPCA official business, as follows:

> In all formal or informal negotiations, communications, proceedings, and other dealings between any person and any member, employee, or agent of the board or commissioner, it shall be the duty of each person and each member, employee, or agent of the board or commissioner to act in good faith and with complete truthfulness, accuracy, disclosure, and candor.

MPCA breached the duty of candor when it issued permit decision documents that did not reflect complete truthfulness, accuracy, disclosure, and candor. *See In re Admin. Penalty Issued to Erickson Enter.*, No. 7-2200-14389-2, 2001 WL 35926172, at *4-6 (Minn. OAH Sept. 28, 2001). MPCA omitted material information and misrepresented that EPA considered the PolyMet permit to comply with the CWA in final permitting documents. ¶¶ 537-39. MPCA's violation of its duty of candor under Minnesota rules was an irregular procedure.

J. MPCA's Systematic Conduct to Keep Evidence Out of the Administrative Record Was an Irregular Procedure.

MPCA's procedural irregularities described in preceding sections reflect a systematic course of conduct to keep evidence of EPA's comments and MPCA's own irregular procedures out of the administrative record. MPCA failed to give EPA an opportunity to write comments on a pre-public notice draft, requested that EPA withhold written comments when the draft PolyMet permit was released, discarded and withheld notes, and issued responses to comments and final PolyMet permit documents that

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concealed EPA's comments. Despite anticipated litigation, MPCA deleted incriminating emails and erased and recycled state-issued electronic devices, preventing recovery of evidence even after a Court-ordered forensic search. As a result of MPCA's conduct, the administrative record MPCA submitted to the Court of Appeals was inadequate. Even these transfer proceedings cannot secure for the record evidence that has been destroyed.

But for FOIA litigation, whistleblowers, and these transfer proceedings, MPCA would have succeeded in committing a fraud on the Court of Appeals. Such a fraud occurs when conduct "impair[s] judicial machinery and prevent[s] an impartial adjudication" or when there is "an unconscionable plan or scheme to improperly influence the court in its decision." *Matter of Minn. Pub. Util. Com'n's Initiation of Summary Investigation*, 417 N.W.2d 274, 280 (Minn. App. 1987). "Tampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Id.* (quoting *Hazel–Atlas Glass Co. v. Hartford–Empire Co.*, 322 U.S. 238, 246 (1944)). Judicial review relies on the integrity of an agency's administrative record, but MPCA stacked the deck. MPCA's conduct throughout the PolyMet permitting process was an unconscionable scheme to tamper with the administrative record at the Court of Appeals and an irregular procedure violating common law.

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III. THIS COURT'S ORDER DETERMINING MPCA'S PROCEDURAL IRREGULARITIES AND ADDING EVIDENCE TO THE RECORD IS CRITICAL TO THE COURT OF APPEALS' FAIR ADJUDICATION OF THE ISSUANCE OF THE POLYMET PERMIT.

MPCA's irregular procedures have had material consequences. MPCA processed PolyMet's permit with an incomplete application. ¶ 121. MPCA's denial of EPA's request for early draft permit language prevented EPA from submitting written comments for the record before the public comment period. ¶ 135. But for MPCA's concerted efforts to pressure EPA to not send its comments, EPA would have signed and sent EPA's written comments on the draft PolyMet permit during the public comment period. ¶¶ 265-75.

MPCA's irregular conduct kept essential documents out of the administrative record, including EPA's written and oral comments on the draft PolyMet permit and evidence of MPCA's many irregularities in procedure throughout the PolyMet permitting process to conceal EPA's substantive concerns. ¶ 562.

EPA's comments play a singular role in the issuance of an NPDES permit, and are likewise unique and vital to judicial review. As Pierard testified:

> We're the agency that oversees the program, and we will identify things that, from our perspective – and we've got a great deal of expertise in this area – may be inconsistent with Clean Water Act and many regulation requirements . . . . [W]e can speak more authoritatively than most commenters.

¶ 214. Had EPA's comments been sent to MPCA, identified in responses to comments, and available under the DPA, as they would have been under typical and regular procedures, Relators' appeals may have included additional claims detailed in EPA's comment letter.

In the Court of Appeals, Relators will show how MPCA's irregularities in procedure proven in these transfer proceedings relate to the merits of their claims that MPCA's

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issuance of the PolyMet permit exceeded MPCA's authority, was made on unlawful procedure, reflected errors of law, was unsupported by substantial evidence, and was arbitrary and capricious. Minn. Stat. § 14.69(b)-(f). Then, "if the substantial rights of the petitioners may have been prejudiced," the Court of Appeals may remand, modify or reverse MPCA's decision to issue the PolyMet permit. Minn. Stat. § 14.69.

The merits of Relators' claims and the harm resulting from MPCA's irregularities in procedure are matters for the Court of Appeals. Minnesota Statutes § 14.68, unlike Minn. Stat. § 14.69, includes no reference to prejudice. Under the plain language of MAPA, the district court determines if an agency's procedures were irregular and the Court of Appeals decides if substantial rights have been prejudiced as part of its ruling on the merits of petitioners' certiorari claims. It would be improper to "add words of qualification" pertaining to prejudice to Minn. Stat. § 14.68 that the Legislature "omitted." *City of Brainerd*, 827 N.W. 2d at 756.

This Court's determination of procedural irregularities and its order adding documents to the administrative record are critical to allow the Court of Appeals to adjudicate Relators' claims under Minn. Stat. § 14.69. As a result of these transfer proceedings, the Court of Appeals will now be able, in its judicial review, to prevent further prejudice to Relators and to fairly administer justice in their respective certiorari appeals.

CONCLUSION

Relators carried their burden to prove by a preponderance of the evidence that MPCA's procedures issuing the PolyMet permit were irregular in a multitude of ways. This

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Court's findings of MPCA's irregular procedures and inclusion of critical documents in the administrative record are necessary for the Court of Appeals to fairly adjudicate the issues raised by Relators on appeal from the issuance of the PolyMet permit on their merits. Therefore, based on the foregoing and all the files, records and proceedings herein, Relators respectfully request that this Court provide the following relief:

1) Issuance of Findings of Fact as stated herein and detailed in Relators' Proposed Findings of Fact ¶¶ 1-580;

2) Determination that MPCA's development and issuance of PolyMet permit was subject to procedural irregularities not found in the administrative record as stated herein as detailed in Relators' Proposed Conclusions of Law ¶¶ 3-16 and Order for Judgment ¶ 1;

3) Ordering the insertion of evidence into the administrative record, including EPA comments and evidence relevant and probative of MPCA's procedural irregularities as stated herein and detailed in Relators' Proposed Findings of Fact ¶ 580, Conclusions of Law ¶¶ 17-22 and Proposed Order for Judgment ¶ 2; and

4) Such further relief as the Court deems justified under these circumstances shown.

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DATED: April 22, 2020

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CERTIFICATION

The undersigned hereby acknowledges that sanctions may be imposed under Minn. Stat. § 549.211.

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