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STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT
Case Type: Civil Other/Misc.
Judge John H. Guthmann

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	Case No. 62-CV-19-4626 **POLY MET MINING, INC.'S POST-HEARING REPLY MEMORANDUM**

INTRODUCTION

Relators' post-hearing brief and proposed findings take liberties with the facts. Rather than citing record evidence, Relators cite to their own proposed findings—which themselves often cite to other proposed findings that span paragraphs and pages.[1] Relators thus make it doubly difficult to weed through their imprecision and reach the facts. To take but a few examples:

- Relators cite Relators' Findings ¶ 292 to assert that "Pierard read EPA's PolyMet permit comments."[2] But Relators' Findings ¶ 292 misquotes Pierard's testimony by omitting his acknowledgement that EPA "*didn't send those comments*" to MPCA.[3]

[1] *See, e.g.*, Relators' Post-Hearing Br. at 25 (citing in support solely Relators' Findings ¶ 137, which in turn cites only Relators' Findings ¶¶ 48–68, 126–35).

[2] Relators' Post-Hearing Br. at 9.

[3] *Compare* Relators' Findings ¶ 292 ("That is why I felt so strongly about reading the comments to MPCA . . . ."), *with* Tr. 235:5–9 ("That was why when we didn't send those comments I felt so strongly about reading the comments to MPCA . . . .").

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- Relators cite Exhibit 83 and Relators' Findings ¶ 59 to assert that MPCA "had a specific written policy applicable to NPDES permits" that required "send[ing] early review drafts to EPA Region 5."[4] But Relators' Findings ¶ 59 only cites back to Exhibit 83 and two sentences in the transcript. Exhibit 83 is a policy dated October 15, 2018 that applies only to permits on a specific fiscal year review list. And the testimony provides no evidence that the policy was in effect during the PolyMet permitting process or that the NorthMet NPDES Permit was on the fiscal year review list such that the policy applied.

- Relators repeatedly cite Relators' Findings ¶ 270 to assert that MPCA *prevented* EPA from sending a written comment letter.[5] But Relators' Findings ¶ 270 is a summary statement unsupported by a single record citation. In fact, the record reflects that when asked whether EPA would be sending a comment letter on March 5, Pierard responded that EPA staff would "have to run it up the line" at EPA.[6]

- Relators repeatedly assert that MPCA asked EPA *not to send* any written comments.[7] But the piece of evidence that Relators refer to as their "smoking gun" refutes their inaccurate assertion.[8] As the so-called "smoking gun" puts it—MPCA's concern was "the *timing* of EPA comments, not the ability for EPA to comment."[9]

Relators' citations to their own proposed findings—which often just cite to more proposed findings and *never* cite to the "A" exhibits already in the administrative record—are inexact and make wading through the merits of their arguments problematic.

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[4] Relators' Post-Hearing Br. at 25.

[5] *See, e.g.*, Relators' Post-Hearing Br. at 8, 32, 47.

[6] Ex. 837 at 25.

[7] *See, e.g.*, Relators' Post-Hearing Br. at 5.

[8] *See* Relators' Post-Hearing Br. at 7 (citing Ex. 333).

[9] Ex. 333 (emphasis added); *see also* Tr. 666:19–667:10. When Relators quote Ex. 333, they omit Lotthammer's statement about timing. *Compare* Relators' Findings ¶ 218 ("The question is about . . . the importance of maintaining the approach laid out in the MOA."), *with* Ex. 333 ("The question is about the *timing of that review*, and the importance of maintaining the approach laid out in the MOA . . . ." (emphasis added)).

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Even worse, Relators' arguments are attempting to create an unworkable legal standard in which unusual or unique processes can rise to the level of "irregularities in procedure" under Minn. Stat. § 14.68. But if Relators have their way, only those unusual aspects of the permitting process that Relators *do not like* would qualify as irregularities in procedure. For instance, Relators take no issue with the fact that EPA reviewed PolyMet's permit "application right after it came in," instead of as part of reviewing the draft permit, even though that "was not [EPA's] normal practice."[10] That proves the problem with Relators' unworkable test: An "unusual" procedure is only an irregularity in procedure when Relators want it to be. Similarly, EPA and MPCA had "frequent phone conferences" during the early stages of application review—"much more than [Pierard] had experienced before"—but Relators do not take issue with that unusual procedure.[11] And what about the unusual number of public hearings? Relators do not allege that a procedural irregularity occurred when MPCA held two public hearings during the public comment period, at which the agency accepted and transcribed oral comments.[12] Much of the NorthMet permit process required charting new territory, but that does not mean that new or unique processes were irregularities in procedure under Minnesota law.

In the end, Relators' arguments fall flat on both the facts and the law. MPCA and EPA agreed that EPA would review and send comments, if any, after MPCA revised the

[10] Tr. 150:24–151:6. Pierard could "only remember one other time that" EPA similarly reviewed an NPDES application immediately when it came in the door. Tr. 151:1–2.

[11] Tr. 147:10–148:7.

[12] Tr. 928:21–929:10, 1332:15–18, 1333:11–14, 1362:1–1362:10.

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draft permit. The EPA-MPCA arrangement is properly reflected in the administrative record.[13] EPA then decided not to send any comments on the permit. Relators may wish that EPA had sent the draft comment letter that Pierard prepared, but they may not use this proceeding to reverse EPA's decision not to send comments. Relators failed to carry their burden that there were irregularities in procedure during the NorthMet permit process.

ARGUMENT

1. Relators rely on Pierard's testimony as though his opinions represent the official agency position of EPA. But Pierard did not testify on behalf of EPA, and his views do not reflect those of EPA.

Relators rely heavily on Pierard's testimony.[14] But Relators repeatedly refer to Pierard as "EPA" and call actual EPA decision-makers "political appointees."[15] In so doing, Relators insinuate that Pierard's testimony represents the official position of the agency.[16] The opposite is true—Pierard was merely EPA staff. Pierard did not testify on behalf of EPA. And Pierard's testimony does not represent the official position of EPA. 40 C.F.R. § 2.401.[17] Consistent with this principle, the Court rejected Relators' attempts to introduce a document that represented Pierard's "last-minute lobbying effort to higher-ups in the agency to issue a general objection letter or document prior attempts to do the same

[13] Ex. 64A.

[14] Over 20 percent of the citations in Relators' Findings refer to Pierard's testimony.

[15] *See, e.g.*, Relators' Post Hearing Br. at 30.

[16] *See, e.g.*, Relators' Findings ¶¶ 48–121. Relators also cite Pierard's testimony as the basis for explaining statutory requirements, rather than citing the statutes themselves or explanatory case law. *See, e.g.*, *id.* ¶¶ 45–47.

[17] *See also* PolyMet's Post-Hearing Mem. at 40–41.

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that obviously were not accepted by the agency."[18] Relators failed to prove that Pierard was not "a rogue actor" and "dissenting"[19] staff member whose personal desire to submit written comments on the NPDES permit was overridden by EPA's official decision not to submit written comments.

MPCA is "not required to look beyond the official comment issued by another commenting agency" in making its permitting decision, even if that agency's staff is "divided." *Nat'l Audubon Soc'y v. Minn. Pollution Control Agency*, 569 N.W.2d 211, 216 (Minn. App. 1997). Under Minnesota law, EPA's decision is the one that counts. Pierard's internal EPA dissenting views do not have to be documented in MPCA's administrative record. MPCA need not "consider or include in the administrative record documents never submitted to or received by it." *Id.*

Relators attempt to obscure the difference between Pierard (EPA staff) and EPA (the agency) in order to suggest that the draft comment letter Pierard prepared and read to MPCA on the April 5, 2018 call was an "EPA comment."[20] But this fact remains: EPA did not submit comments.[21] Even Pierard admitted that EPA's decision was to not comment.[22] And the Court sustained objections from EPA's counsel to questions that would reveal "the

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[18] Tr. 290:7–23; *see also* Tr. 253:2–5, 272:23–273:6, 273:24–274:4, 292:6–11, 294:20–25, 299:15–300:3.

[19] Tr. 268:8–10.

[20] *See, e.g.*, Relators' Post-Hearing Br. at 6, 11, 27, 30, 33, 34.

[21] *See* PolyMet's Post-Hearing Mem. at 19–23.

[22] Tr. 164:6–9, 191:17–192:7; Ex. 641.

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reasons why EPA did not submit written comments."[23] The Court should view each reference to "EPA" and "EPA comments" in Relators' submissions with skepticism. EPA did not send comments. Relators' rhetoric may not change that EPA outcome.

2. Practices that differ from "regular or general practice" are not "irregularities in procedure" under Section 14.68.

Relators concede that it "is clear from the plain and ordinary meaning of the phrase, [that] violations of statutes, rules or regulations are 'irregularities in procedure.'"[24] Nonetheless, Relators argue that the definition of "irregularities in procedure" is broader, extending to include practices that are contrary to "regular or general practice."[25] Relators' argument is flawed in every respect.

First, Relators ignore *Mampel*, *PEER*, and *Lecy*, the seminal cases defining "irregularities in procedure" under the statute now codified at Section 14.68. In those cases, the Minnesota Supreme Court repeatedly affirmed that "irregularities in procedure" means violations of statutorily defined procedures or the agency's own rules and regulations that define the decision-making process.[26] Relators cannot erase the Supreme Court's clear holding that a district court's inquiry should be "limited" to whether there is compliance with the law. *See Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977).

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[23] Tr. 287:14–20.

[24] Relators' Post-Hearing Br. at 19.

[25] Relators' Post-Hearing Br. at 18–20.

[26] *See* PolyMet's Post-Hearing Mem. at 7–9.

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Second, the only case Relators cite in support of their interpretation of "irregularities in procedure"—*Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165 (Minn. App. 2001)—does not actually extend the phrase to include procedures that are "contrary to . . . regular or general practice."[27] Even Relators' own description of *Hard Times Cafe* concedes that the issue was whether the city council had complied with a policy manual, not whether it had followed a "regular or general practice."[28] *See Hard Times Cafe*, 625 N.W.2d at 170, 174. And the fact that the manual at issue in *Hard Times Cafe* contained "promulgated procedures," *id.* at 170, supports PolyMet's interpretation of Section 14.68.

Third, Relators incorrectly suggest that the Court of Appeals' order supports their interpretation of "irregularities in procedure"[29] Only by cherry-picking and reassembling select quotations can Relators suggest that it did so. Relators' twisted retelling first states that the Court of Appeals transferred this matter after "citing irregularities based on documents 'none of which are included in the administrative record' and irregularities 'not shown in the administrative record.'"[30] Putting aside that Relators quote the transfer order out of context[31]—and omit that the court noted only "*alleged* procedural irregularities"[32]—the implication that the Court of Appeals "cit[ed] irregularities" or made any determination

[27] Relators' Post-Hearing Br. at 18.

[28] Relators' Post-Hearing Br. at 18.

[29] Relators' Post-Hearing Br. at 18–19.

[30] Relators' Post-Hearing Br. at 16 (citing Transfer Order at 3–4).

[31] The documents described as not included in the record were MPCA declarations.

[32] Transfer Order at 1 (emphasis added).

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as to the final merits of Relators' allegations is belied by the transfer itself.[33] Had the Court of Appeals made any such determination, it would have had no need to transfer the matter for a "determination of the *alleged* irregularities" in the first place.[34]

Relators' mischaracterizations continue when they suggest that the Court of Appeals embraced their idea that "procedural irregularities" include procedures that are "contrary to . . . regular or general practice."[35] Relators provide no citation for that assertion. They appear to be quoting themselves. In any event, the plain text of the transfer order is fundamentally at odds with Relators' description of it. The order never states that "unusual" or "atypical" practices constitute procedural irregularities. And the order's mere use of the words "unusual" and "typical" to describe MPCA's declarations does not change the statutory meaning of "irregularities in procedure." Under precedent, the only conduct that rises to the level of a procedural irregularity is an action taken that is proscribed by the law or an action foregone that is prescribed by the law.

Finally, Relators' statement that "[w]ithin MAPA, Minn. Stat. §§ 14.63–.69, the word 'procedure' appears twice"[36] focuses exclusively the Act's judicial review provisions, obscuring that the Minnesota Administrative *Procedure* Act spans §§ 14.001–.69. The word procedure occurs with far greater frequency throughout the entire Act. Indeed, a key purpose of MAPA is "to ensure a uniform minimum procedure." Minn. Stat. § 14.001(3).

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[33] Aug. 7, 2019 Hr'g Tr. 26:2–16.

[34] Transfer Order at 4 (emphasis added).

[35] Relators' Post-Hearing Br. at 18–19.

[36] Relators' Post Hearing Br. at 20.

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Section 14.06 specifically mentions *procedures* and requires agencies to "adopt rules . . . setting forth the nature and requirements of formal and informal procedures." Minn. Stat. § 14.06. The phrase "irregularities in procedure" in Section 14.68 must be read in light of Section 14.06's requirement to adopt *rules* setting forth procedures. Departure from the procedures set forth in rules is the commonsense, contextual meaning of "irregularities in procedures."

3. Relators' Official Records Act and Data Practices Act arguments do not demonstrate that there were permitting-related irregularities in procedure.

As PolyMet previously explained,[37] neither the Official Records Act nor the Data Practices Act statute addresses procedures applicable to Clean Water Act permitting or enters "into the fundamental decision-making process" for NPDES permits. *Mampel*, 254 N.W.2d at 378.[38] Even considering the merits of their allegations under those Acts, Relators have failed to carry their burden.

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[37] *See* PolyMet's Post-Hearing Mem. at 30–32.

[38] The same reasoning demonstrates the flaw in Relators' argument, buried in the back of their brief, that MPCA's lack of candor was an irregular procedure. Relators' Post-Hearing Br. at 45. Minnesota Rule 7000.0300, which imposes a duty of candor on all MPCA employees, does not "enter into the fundamental decision-making process" for NPDES permits. *Mampel*, 254 N.W.2d at 378. The Minnesota Court of Appeals has even recognized the lack of authority for the idea that a violation of Rule 7000.0300's duty of candor "renders [the] agency's decision arbitrary and capricious." *Interim Permit for Planning, Constr. & Operation of an Animal Feedlot and/or Manure Storage Area*, No. C7-98-2203, 1999 WL 329664, at *3 (Minn. App. May 25, 1999). MPCA did not breach its duty of candor in this case, in any event. *See* PolyMet's Post-Hearing Mem. at 27.

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a. Relators failed to show that Lotthammer or Stine deleted emails that they were required to retain under the Official Records Act.

Relators rest their entire Official-Records-Act argument on Shannon Lotthammer's deletion of the March 12–15 emails and John Linc Stine's deletion of a single calendar appointment. Relators' brief is devoid of facts or law to support their assertion that either Lotthammer or Stine violated the Official Records Act.

Other than a passing reference to Minn. Stat. § 15.17, subd. 1, Relators offer no source of legal authority to support their broad construction of the Official Records Act. That is because none exists. Absent from Relators' brief is any reference to the leading Minnesota Supreme Court decision interpreting the Official Records Act, *Kottschade v. Lundberg*, which holds that "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." 160 N.W.2d 135, 138 (Minn. 1968) (emphasis added). The deleted emails and calendar appointment, at most, relate to the process by which MPCA and EPA agreed that EPA would defer providing comments until after the public notice period.[39]

Relators try to muster support by claiming that "Stine testified that *any* written communications between MPCA and EPA relating to the PolyMet permitting process . . . were official records of the MPCA that MPCA was required to preserve under the Official Records Act."[40] In the cited testimony, Stine was not testifying about the Official Records

[39] A calendar appointment, such as Exhibit 591, is the paradigmatic example of a document related to the process of reaching a decision; not reflecting a final decision itself.

[40] Relators' Post-Hearing Br. at 35.

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Act, but rather about MPCA's data management manual.[41] The Minnesota Supreme Court's construction of the Official Records Act governs, not a fact witness's testimony about a definition of "Official Record" in an agency manual.[42]

b. Relators have not demonstrated that any Data Practices Act violation was an irregularity in procedure.

Relators' Data Practices Act arguments—which center around Schmidt's notes and Lotthammer's deleted emails—similarly do not establish irregularities in procedure.

First, Relators assert that MPCA should have disclosed that it did not produce Schmidt's notes as part of its Data Practices Act requests, citing Minn. Stat. § 13.03, subd. 3(f). But the proper question isn't whether the attorney's notes were "classified" as nonpublic. The question is whether notes kept by an attorney are even subject to the Act. The provision governing "attorneys" working for government entities relieves them "from duties and responsibilities pursuant to [the DPA] and [the Official Records Act]." Minn. Stat. § 13.393; *see Scheffler v. City of Anoka*, 890 N.W.2d 437, 450–51 (Minn. App. 2017) (analyzing § 13.393 and agreeing that "attorneys representing a governmental entity are not subject to the MGDPA"); Advisory Opinion 12-017, Minn. Dep't of Admin. (Nov. 5, 2012) https://mn.gov/admin/data-practices/opinions/library/?id=36-267599 (stating "§ 13.393 does not classify data" but instead "provides that certain data created,

[41] Tr. 385:24–386:3, 387:25–389:9, 391:13–23.

[42] Tr. 386:1–3. Moreover, as explained in PolyMet's Post-Hearing Memorandum, MPCA's record management policy explicitly excludes from the definition of "official record" documents "that relate to preliminary, interim or ancillary activities," among other non-records. Ex. 77 at 10; *see also* PolyMet's Post-Hearing Mem. at 33–34.

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collected, maintained, and/or disseminated by a government entity's attorney are excluded from the [Data Practices Act]"). Since Schmidt was an attorney acting in a professional capacity for a government agency, he was not subject to the Data Practices Act and was not required to provide an explanation for not turning over his notes.

Second, Relators assert that the failure to *disclose* redacted versions of Schmidt's notes violated the Data Practices Act. This argument fails. Schmidt's notes weren't subject to the Data Practices Act under Minn. Stat. § 13.393. Even if they were, Schmidt had a good faith basis for believing that the notes, which contained mental impressions, conclusions, and opinions of counsel, were protected from disclosure by attorney-client privilege and the work product doctrine.[43] The privileged material, and the material that this Court ultimately ordered disclosed, were "so inextricably intertwined" that segregating and providing a redacted version of Schmidt's notes would have significantly burdened MPCA. *EOP-Nicollet Mall, L.L.C. v. Cty. of Hennepin*, No. 28457, 2004 WL 1161412, at *5 (Minn. Tax Ct. May 3, 2004) ("[E]ntire documents may be withheld under the [DPA] when the public and nonpublic information are [] inextricably intertwined . . . .").[44]

[43] *See* PolyMet's Post-Hearing Mem. at 35–36.

[44] It is worth reiterating again that Relators do not demonstrate how failing to produce Schmidt's notes under the Data Practices Act entered "into the fundamental decision-making process" for the NorthMet NPDES permit. *Mampel*, 254 N.W.2d at 378. Schmidt wasn't even sure whether he ever referred to his notes from the April 5 call during permit drafting. Tr. 1219:16–25. And Relators' assertion that "MPCA staff used Schmidt's notes as a synopsis of the April 5, 2018 meeting" stretches the record too far. Relators' Post-Hearing Br. at 44. MPCA staff testified that although Schmidt may have been looking at the notes as a guide when the team touched base after the phone call, staff did not consult

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Finally, Relators argue that the Court should "infer that Lotthammer intentionally deleted [the mid-March emails] after MPCA received WaterLegacy's March 26, 2018 DPA request,"[45] even though Lotthammer believed that she deleted the emails *before* receiving a request.[46] Relators are not entitled to such an inference. Without bootstrapping a spoliation sanction, Relators lack evidence to support this argument.

4. Relators impermissibly allege new irregularities in procedure.

Relators' allegations must be limited to those issues identified before the Court of Appeals.[47] This Court should decline to find any procedural irregularity related to the issues that Relators raised for the first time after the evidentiary hearing.

a. MPCA's transmittal of the permit application was not an irregularity in procedure.

Relators argue for the first time in their post-hearing brief that MPCA failed to properly transmit PolyMet's July 2016 NPDES permit application to EPA. Neither Relators' list of alleged procedural irregularities nor their pre-hearing memorandum alleges the permit application's transmittal as a procedural irregularity.[48]

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those notes during permit drafting. Tr. 926:1–3, 943:16–944:5, 984:18–24, 1148:19–22, 1199:9–17, 1324:12–1325:1, 1325:14–1326:7, 1342:25–1343:3.

[45] Relators' Post-Hearing Br. at 41.

[46] Tr. 623:19–25, 643:11–18.

[47] Aug. 7, 2019 Hr'g Tr. 29:16–30:11, 96:10, 96:10–15, 103:4–104:3.

[48] *See* List of Alleged Procedural Irregularities; *see also* Relators Pre-Hearing Br. at 5 ¶¶ 8–9 ("PolyMet submitted its application for the PolyMet Permit on July 11, 2016.").

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Even if Relators had timely alleged that MPCA failed to properly transmit the July 2016 application, Relators failed to meet their burden of proof. Relators' arguments rest entirely on Pierard's testimony that "I believe we [EPA staff] found it on MPCA's website" and "*I don't recall* that we [EPA staff] received it from MPCA."[49] While Pierard could not recall how EPA staff received the permit application, neither Pierard nor any other witness testified that MPCA's transmittal of the permit application failed to meet the MOA's procedural requirements. Three days after EPA supposedly "found PolyMet's permit application online," EPA emailed MPCA stating that it would review the application.[50] EPA's email did not state that MPCA had failed to properly transmit the permit application.[51] Four months later, when EPA sent MPCA a deficiency letter, EPA did not indicate that MPCA had failed to properly transmit the permit application.[52]

b. MPCA's processing of the permit was not an irregularity in procedure.

Before the evidentiary hearing, Relators argued that Section 124.22(8) of the MOA "requires that, once EPA submits a deficiency letter, no NPDES application may be processed by MPCA until EPA sends another letter saying application deficiencies are resolved."[53] That argument overlooked two facts. First, that Section 124.22(7) of the MOA states that "[MPCA] may assume" that no deficiency letter is forthcoming if it does not

[49] Tr. 151:25–152:11 (emphasis added); *see* Relators' Post-Hearing Br. at 23.

[50] Relators' Findings ¶¶ 104–05; Ex. 290.

[51] Relators' Findings ¶ 105; Ex. 290.

[52] Ex. 306 ("[EPA] obtained the Application via the MPCA's website.").

[53] Relators' Pre-Hearing Br. ¶ 11.

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receive one within 20 days of sending EPA the application.[54] Second, that EPA never sent a deficiency letter within 20 days of PolyMet's July 2016 application or within 20 days of PolyMet's October 2017 revised application.[55]

Now, for the first time, Relators argue that "[t]he MOA section applicable to the PolyMet permit" is Section 124.23(1), which "has no deadline for EPA's deficiency letter."[56] That argument is untimely. But even setting aside its untimeliness, Relators' revised argument must fail. Relators failed to elicit any testimony suggesting that either MPCA or EPA understood that PolyMet's application should not be processed under MOA Section 124.23(1). Instead, the testimony and evidence show that MPCA emailed EPA a link to the October 2017 revised application,[57] and the agencies continued to process and review the revised permit application, hold conference calls, and meet in person as late as September 2018, all without questioning the application's completeness.[58] Even Pierard did not testify that the closing memo he and EPA staff prepared the day before EPA's deadline for offering general objections to the permit, which "contain[ed] facts pertaining to the NPDES permitting process," referenced the need for a deficiency resolution letter.[59]

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[54] Ex. 328 at 4, Section 122.22(7).

[55] Tr. 1341:5–9, 15–18.

[56] Relators' Post-Hearing Br. at 24.

[57] Ex. 32; Tr. 153:9–17, 1281:9–11.

[58] Tr. 962:25–963:7, 1358:23–1359:6; Court Ex. B at 2, 4; Ex. 708.

[59] Tr. 288:2–289:2; *see also* Tr. 290:11–23.

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c. MPCA's decision not to provide EPA with an early-stage draft permit was not a procedural irregularity.

For the first time, Relators argue that "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."[60] Putting aside that Relators' argument is untimely,[61] Relators do not cite any requirement that MPCA transmit an early-stage draft permit to EPA.[62]

Relators' only testimonial support for their contention that Region 5 had a "well-established practice" comes from Pierard.[63] But even Pierard did not testify that MPCA was *required* to send EPA an early-stage draft permit. Nor did he say that EPA *always* reviewed early-stage draft permits. Instead, Pierard testified that EPA would provide early feedback "[m]ost of the time."[64] The documentary evidence also fails to support their allegations. EPA's comment letters on other permits do not state that MPCA was *required*

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[60] Relators' Post-Hearing Br. at 24.

[61] *See* Relators' Pre-Hearing Br. at 6 (failing to identify any alleged procedural irregularity related to MPCA's decision not to send EPA an early-stage draft permit); List of Alleged Procedural Irregularities (same).

[62] Relators' Post-Hearing Br. at 24–26. Relators refer to an early-stage draft permit as a "pre-public notice draft permit." Tr. 112:15–17. Relators allege that "[t]here is no evidence in the record that MPCA denied EPA's request for a pre-public notice draft for any other NPDES permit," Relators' Findings ¶ 137, but there is also no evidence that MPCA had *not* previously "denied EPA's request for a pre-public notice draft for any other NPDES permit," *see id*.

[63] Relators' Post-Hearing Br. at 24–25; *see, e.g.*, Tr. 102:12–13, 306:2–6.

[64] Tr. 112:2–3. Handeland also testified that "[t]ypically, we [MPCA] send a pre-public notice draft permit to the tribal parties and EPA" but did not testify that the practice was required or always followed. *See* Tr. 956:21–22.

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to send EPA an early-stage draft permit.[65] And the October 2018 MPCA document outlining an "EPA Permit Review Process" did not establish procedures applicable to the PolyMet NPDES Permit.[66] That document, which is dated long after the public notice period at issue here, outlined a process "for permits where EPA has identified permits they want to review during any fiscal year."[67] There was no testimony establishing that the PolyMet NPDES Permit was on the Fiscal Review List or that the document otherwise applied to the NorthMet permit.[68] Relators' new argument that MPCA's decision not to send EPA an early-stage draft permit is a procedural irregularity fails.

5. No procedural irregularities occurred in the creation of the administrative record.

Despite their bold accusations, Relators failed to carry their burden. There is no evidence that MPCA requested that EPA entirely withhold submitting written comments, thereby "prevent[ing] EPA's comments in Exhibit 337 [draft comment letter] from seeing the light of day."[69] Consistent with Lotthammer's March 13 email, MPCA witnesses testified that it would be more efficient for EPA to comment on, or object to, the permit

[65] Exs. 264, 530, 531.

[66] Ex. 83; Tr. 102:1–20, 957:21–958:11.

[67] Tr. 957:21–958:11.

[68] In any event, MPCA fulfilled the spirit of its typical practice, which was to get "big ticket issues . . . out of the way even before the public notice," Tr. 112:2–14, by remaining in constant contact with EPA throughout the early stages of the permitting process and by sending EPA the public notice draft permit two weeks before the start of the public comment period, Ex. 708; *see also* Tr. 147:10–20, 1327:2–10; Ex. 34.

[69] Relators' Post-Hearing Br. at 27.

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after MPCA revised the draft.[70] Relators cite no authority for the proposition that MPCA should have included in the administrative record a document it never received.[71] Relators also cite no authority for the proposition that MPCA was required to include in the response to comments specific responses to the oral statements of EPA staff. And the administrative record shows that EPA had prepared a draft letter it did not send.[72] The administrative record contains the information MPCA relied on when deciding to issue the permit.

Nor is there evidence of an "unconscionable scheme to tamper with the administrative record" by suppressing the contents of the April 5 call requested by Pierard.[73] Lacking any actual evidence of a conspiracy to suppress the call, Relators hang their hat on the fact that "Handeland departed from *regular practice* by stopping notetaking and discarding her notes."[74] But at least seven other calls occurred between EPA and

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[70] Tr. 418:1–17, 419:14–420:3, 511:12–21, 556:23–557:13, 578:13–21, 666:19–667:10, 710:7–18, 713:19–714:8; *see also* Ex. 333 ("[T]he concern here is not about EPA's authority for review. . . . The question is about the timing of that review . . . for the sake of clarity *and efficiency*, among other goals." (emphasis added)). Relators erroneously assert that MPCA's efficiency concerns are a "post-hoc rationalization" for the agencies' mutual agreement to delay the timing of EPA comments. Relators' Post-Hearing Br. at 29. But Ex. 333 contradicts that. And the administrative record contains a summary of the EPA-MPCA arrangement in which MPCA would submit a pre-proposed permit to EPA for review. Ex. 64A.

[71] Tr. 746:14–18; Exs. 248, 535.

[72] Ex. 307A; *see* PolyMet's Post-Hearing Mem. at 4.

[73] Relators' Post-Hearing Br. at 46; *see also id.* at 41–42.

[74] Relators' Post-Hearing Br. at 42. As explained in Section 2, *supra*, a departure from "regular practice" is not an irregularity in procedure.

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MPCA in which Handeland participated, but did not take notes.[75] And a departure from regular practice does not rise to an irregularity in procedure. Moreover, Handeland provided reasonable explanations for her actions on the April 5 call: She "couldn't keep up" with what Pierard was saying, stopped trying to take notes "about a minute or two" into the call, and recycled the notes because "there was nothing on there worth keeping."[76]

6. Relators are not entitled to spoliation sanctions.

Relators' spoliation argument confirms that Relators are not asserting that MPCA failed to preserve evidence *after* the Court of Appeals transferred this matter to this Court, or even after Relators filed their appeal or their transfer motion. Instead, Relators rest their spoliation argument on Lotthammer's deletion of emails from March 2018. There is a fundamental problem with that argument. While it is possible that in March 2018 MPCA may have anticipated a certiorari appeal after its permit decision, no evidence indicates that MPCA anticipated litigation on anything other than an administrative-record review. Relators fail to identify *any* authority that anticipated litigation on an administrative record also triggers a broader duty to preserve non-administrative-record evidence.[77] Given this absence of authority, Relators' attempt to flip their administrative-record argument into a

[75] Such calls include, in 2017: 2/22, 3/22, 4/19, 5/3, 7/26, 9/6, 11/15, and 11/29. *Compare* Ex. 708 (meeting list), *with* Ex. 568 (administrative record), *and* Ex. 692 (meeting agendas and notes); *see also* Tr. 961:2–962:1, 1045:23–1046:25.

[76] Tr. 979:25–980:4, 11–13, 982:16–24.

[77] *See* Relators' Post-Hearing Br. at 39–40. Schmidt testified that the prospect of judicial review on an administrative record did not trigger a litigation hold. *See* Tr. 1235:5–1237:18.

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spoliation argument, invoking the NPDES Permit Writers Manual. Not only is that manual not binding on MPCA,[78] it also doesn't concern when an anticipation of litigation triggers a requirement to preserve a non-administrative-record document.

7. This Court lacks jurisdiction to add documents to the administrative record.

Relators argue that this Court must determine "what additional evidence must be made part of the administrative record" and *order* that such evidence be added to the administrative record.[79] But this Court lacks the authority to grant Relators' request. The transfer order explicitly defined this Court's jurisdiction. This Court has authority to: (1) hold an evidentiary hearing; (2) determine the alleged irregularities in procedure, if any; and (3) "issue an order that includes findings of fact on the alleged irregularities."[80] If the Court of Appeals intended for this Court to order that documents be added to the administrative record, it would have done so explicitly. This Court lacks authority under Section 14.68 to amend, add to, subtract from, or alter the administrative record.

CONCLUSION

The Court should find that no irregularities in procedure under Section 14.68 occurred in connection with MPCA's decision to issue PolyMet's NPDES Permit.

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[78] *See* Ex. 679 at RELATORS_0064476; *see also* Tr. 223:20–224:2 (conceding that the manual does not have "the force of law"), 334:15–335:1.

[79] Relators' Post-Hearing Br. at 16, 21, 47–48.

[80] Transfer Order at 4–5.

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