STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Case Type: Civil Other
File No.: 62-CV-19-4626
Judge: John H. Guthmann

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, at the Ramsey County Courthouse, St. Paul, Minnesota for an evidentiary hearing on January 21-29, 2020. Appearances were as noted on the record. The matter was taken under advisement on May 13, 2020 following the filing of post-hearing memoranda. Subsequently, the parties agreed that the Court's Order would be due on September 3, 2020. Based upon all of the files, records, submissions and arguments, the court issues the following:

FINDINGS OF FACT

I. THE PARTIES AND PARTICIPANTS

1. Relators WaterLegacy, Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, and Center for Biological Diversity (collectively, "environmental Relators") are environmental non-profit organizations.

2. Relator Fond du Lac Band of Lake Superior Chippewa ("the Band") is a federally recognized Indian tribe and has the status of a state under the federal Clean Water Act ("CWA"), 33 U.S.C. § 1377(e).

3. The Minnesota Pollution Control Agency ("MPCA") is an executive-branch department of the State of Minnesota that has authority to issue federal Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permits in Minnesota, subject to

oversight and NPDES permit veto authority of the U.S. Environmental Protection Agency ("EPA"). The following MPCA staff members played in important role in the review and approval of PolyMet's NorthMet NPDES permit application and/or the hearing before this Court:

a. John Linc Stine was the Commissioner of the MPCA from May 2012 through January 2019. (Tr. 379:10-17.)

b. Laura Bishop is the current Commissioner of the MPCA and has served in that role since January 2019. (Tr. 736:1-6.)

c. Shannon Lotthammer was the MPCA Assistant Commissioner for Water Policy from February 2018 until February 2019. (Tr. 452:3-7.)

d. Ann Foss was the MPCA Metallic Mining Sector Director overseeing the PolyMet project prior to and during PolyMet permitting until January 2018. (Ex. **306**[1]; Tr. 135:18-136:8, 848:12-14.)

e. Jeff Udd began working for the MPCA in 2002. (Tr. 847:22-24.) He is the Manager of the Mining Sector at MPCA, he has held this position since January 2018. (Tr. 846:21-847:2.) His position was previously held by Ms. Foss. (Tr. 848:12-14.) Starting in January 2018, Mr. Udd supervised MPCA's staff team working on the NorthMet project. (Tr. 849:8-15.) Prior to taking on his current position, Mr. Udd had "very limited" involvement with PolyMet's application for a NPDES permit. (Tr. 848:12-18.)

f. Richard Clark started working for the MPCA in 1986. (Tr. 1258:23-1259:17.) He was promoted in 2015 to his current position as supervisor in the Mining Sector. (Tr. 1259:2-21.) He reported to Ms. Foss and then to Mr. Udd. (Tr. 850:17-24.)

[1] Court Exhibit F is the parties' post-hearing stipulation as to which exhibits are in the administrative record and whether the exhibits were produced in response to Relators' requests under the Minnesota Data Practices Act. (Tr. 1375-1376.) When the court cites exhibits in its Findings of Fact, numbers in bold face reference exhibits in the administrative record and italicized numbers reference exhibits that are not in the administrative record.

g. Stephanie Handeland began working for the MPCA in 1995. (Tr. 949:9-14, 22-24.) Ms. Handeland was the lead permit writer for PolyMet's NorthMet NPDES permit. (Tr. 927:20.) Starting in 2015, she reported to Mr. Clark. (Tr. 850:17-24.)

h. Jim Robin was the project manager of the mining group at MPCA. (Tr. 927:21.) He reported to Mr. Clark. (Tr. 850:17-24.) He also assisted in drafting the subject permit.

i. Rebecca Flood was MPCA Assistant Commissioner for Water during the time period from submission of the PolyMet NPDES application to the EPA until February 2018. (Tr. 1185:2-9.)

j. Michael Schmidt worked as a staff attorney for the MPCA from March 2015 through February 1, 2019. (Tr. 1120:21-25.) Mr. Schmidt focused primarily on water issues related to rulemaking, permitting, enforcement, and general advice to the agency. (Tr. 1120:21-1121:7.)

k. Adonis Neblett is MPCA General Counsel and was Mr. Schmidt's supervisor. (Tr. 1145:6-7, 1204:1-2.)

4. Poly Met Mining, Inc. ("PolyMet") is a mine development company and the applicant for the NPDES permit at issue in this case for the NorthMet copper-nickel mine project ("NorthMet Project").

II. STATEMENT OF THE CASE — EVENTS LEADING TO CASE TRANSFER

5. On December 20, 2018, the MPCA issued PolyMet a final NPDES permit for the NorthMet Project and its Findings of Fact, Conclusions of Law, and Order ("MPCA Findings and Order"). (Exs. **349** (the permit); **350** (MPCA Findings and Order).)

6. On January 18, 2019 and January 22, 2019, Relators' filed certiorari appeals to the Minnesota Court of Appeals from the MPCA Findings and Order.

7. The administrative record was certified to the Court of Appeals by the MPCA by April 12, 2019. (*See* Ex. *568*.)

8. On May 17, 2019, Relator WaterLegacy moved the Court of Appeals for transfer to the district court per Minn. Stat. § 14.68 (2018), based on alleged irregularities in procedure not shown in the record. The motion was ultimately joined by the other Relators.

9. On June 25, 2019, the Minnesota Court of Appeals issued an order transferring the above captioned matter to the Second Judicial District pursuant to Minn. Stat. § 14.68 (2018). *In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System, Permit No. MN0071013 for the Proposed NorthMet Project, St. Louis County, Hoyt Lakes, Babbitt, Minnesota*, Nos. A19-0112, A19-0118, A19-0124 at 4-5 (Minn. Ct. App. Jun. 25, 2019) ("Transfer Order").

10. In the Transfer Order, the Court of Appeals ruled that the threshold showing for a referral under section 14.68 was "substantial evidence of irregularities." *Id*. at 2 (quoting *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 173-74 (Minn. Ct. App. 2001)).

11. Concluding that WaterLegacy made the threshold showing by providing "substantial evidence of procedural irregularities not shown in the administrative record", the matter was referred to Ramsey County District Court with an order to conduct proceedings "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure." *Id*. at 4. The Court of Appeals directed that the hearing "be scheduled as soon as practicable." *Id*.

12. The Court of Appeals offered no definition of the phrase "irregularities in procedure" and it directed the district court to make "findings of fact on the alleged irregularities." *Id*. at 5.

13. Consistent with the Transfer Order, Relators agreed at the Court's initial hearing that the Court of Appeals did not decide that there were procedural irregularities. (Tr. 8/7/19 at 26.)

Rather, it is for the district court to make Findings of Fact and, from those findings, determine whether there were any irregularities in procedure not shown in the administrative record. (*Id*.)

14. After authorizing limited discovery and hearing related motions, the Court convened the evidentiary hearing on January 21, 2020. Relators' pre-hearing motion for sanctions based upon alleged spoliation of evidence was deferred for consideration following the hearing.

15. The hearing record closed on May 13, 2020 following the submission of simultaneous reply briefs by the parties.

III. THE PROPOSED NORTHMET MINE

16. The NorthMet Project is a proposed copper-nickel mine with associated processing facilities. It is the first copper-nickel mine to go through the permitting process in Minnesota history. (*E.g.*, Tr. 931:18-20 (Udd testimony).)

17. The NorthMet Project consists of the Mine Site, the Plant Site, and the Transportation and Utility Corridors that connect them. The Mine Site is an area that will be developed into an open pit mine. It is located approximately six miles south of the City of Babbitt and two miles south of the Northshore Mining Company's active, open taconite mine. The Plant Site ore processing area is located at the former LTV Steel Mining Company/Cliffs Erie L.L.C. taconite processing facility and will include refurbished and new ore processing and waste disposal facilities. (Ex. **350** at ¶¶ 1, 4-5 (MPCA Findings and Order).)

18. The NorthMet Project also has several different wastewater streams and several seepage collection areas. (Ex. **350** at ¶¶ 6-7.)

19. The NorthMet Project's NPDES permit authorizes the discharge of pollutants to the Partridge and Embarrass Rivers and adjacent wetlands in Minnesota. (Tr. 99:12-24 (Pierard testimony).)

20. Developing the NPDES permit for the NorthMet Project was an especially complex task and "much more extensive in many ways compared to the typical discharge permit." (Tr. 660:11-13 (Lotthammer testimony; *see* Tr. 496:11-20 (Stine testimony).) "There's not really anything to compare it to for prior projects." (Tr. 945:17-18 (Udd testimony).)

IV. THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITTING PROCESS

21. The NPDES permit program is part of the CWA. (Tr. 496:24-497:1, 519:24-520:1 (Stine testimony).) An NPDES permit authorizes the discharge of pollutants to waters of the United States from a point source. (Tr. 99:7-11 (Pierard testimony); *see* 33 U.S.C. §§ 1311(a), 1342.)

22. The EPA is responsible for oversight and enforcement of the CWA. (Tr. 100:5-9; 33 U.S.C. § 1342 (b).)

23. The EPA divides the United States into regions, and it places Minnesota into Region 5 ("EPA Region 5"). (*See* Ex. *328* at 1 (EPA Region 5 authority under the MOA).)

24. The following EPA staff personnel played a role in the development of the issues transferred to this Court:

a. During the permitting process, Kevin Pierard was the chief of the NPDES programs branch in EPA Region 5. (Tr. 97:8-13, 98:17-21.) The states in EPA Region 5 are: Illinois, Indiana, Ohio, Minnesota, Wisconsin, and Michigan. (Tr. 98:25-99:3.)[2]

b. Chris Korleski was the Water Division Director and most senior program staff for water at EPA Region 5, as well as Pierard's direct supervisor in the period including November 2017 through March 2018. (Exs. *641*, *815*; Tr. 157:10-16.)

[2] At the time of the hearing, Mr. Pierard was retired from the EPA and an employee of the New Mexico Environment Department. (Tr. 96:12-14.) He spoke for himself and not on behalf of the EPA. The MPCA and PolyMet raised questions about Mr. Pierard's credibility in their post-hearing submissions. The resolution of credibility issues involving Mr. Pierard and every other hearing witness is reflected in the Court's resolution of each disputed fact issue.

c. Linda Holst became the Acting Water Division Director of EPA Region 5 when Mr. Koreleski moved out of the EPA Region 5 Water Division Director position. (Tr. 316:19-22; 688:17-22.) Ms. Holst was Acting Water Division Director of EPA Region 5 by June 2018. (Tr. 316:19-22, 688:17-22; Ex. *2010*.) Mr. Pierard then reported directly to Ms. Holst. (Tr. 316:19-22.)

d. Cathy Stepp was the Regional Administrator for EPA Region 5 during the NorthMet Project's NPDES permitting process. (Tr. 178:4-11 (Pierard testimony).)

e. Kurt Thiede was Ms. Stepp's Chief of Staff during the NorthMet Project's NPDES permitting process. (Tr. 567:17-20.)

25. Under 40 C.F.R. Part 123, the United States Environmental Protection Agency ("EPA") may delegate its authority to issue NPDES permits to a state. (Tr. 100:5–9 (Pierard testimony).)

26. Once delegation to a state occurs, the EPA's role is to oversee the state's compliance with its delegation agreement, as well as compliance with all applicable laws and rules that are part of the federal CWA. (Tr. 497:1-7 (Stine testimony).)

27. A state issuing an NPDES permit must comply with the CWA and its implementing regulations. (Tr. 101:15-19 (Pierard testimony).) MPCA's issuance of NPDES permits is governed by the CWA, 33 U.S.C. §§ 1251-1387, and regulations adopted by the EPA pursuant to the CWA. Code of Federal Regulations ch. 40, Parts 122, 123, 124 and 132.

28. The MPCA's issuance of NPDES permits is also governed by Minnesota Statutes, ch.115 and 116 and Minnesota Rules, chapters 7000, 7001, 7050 and 7052.

29. The MPCA's retention, disclosure, and production of records is governed by Minnesota Statutes, chapters 13 and 15.

30. A state seeking authority to issue NPDES permits must execute a Memorandum of Agreement ("MOA") with the EPA. 40 C.F.R. § 123.24(a). A state that has a MOA with the EPA to conduct an NPDES program is required to comply with that MOA. (Tr. 101:11-14 (Pierard testimony).)

31. A MOA must contain, among other things, "[p]rovisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the [EPA] Regional Administrator for review, comment and, where applicable, objection." 40 C.F.R. § 123.24(b)(2). In addition, "[t]he Memorandum of Agreement shall also specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits under section 402(d)(3), (e) or (f) of CWA." *Id*. § 123.24(d). No waiver of review is permitted for certain discharge categories. *Id*.

32. In 1974, the MPCA and the EPA entered into a MOA specifying their interaction regarding operation of the Minnesota's NPDES program. (Tr. 101:5-10 (Pierard testimony); Ex. *328* (Minnesota's MOA with the EPA).) It was amended on several occasions thereafter. (*Id*.)

33. The MPCA's permitting process typically begins when it receives an NPDES application, which the MPCA reviews for completeness. It also submits copies of the complete application to the EPA for its own completeness review. Once the MPCA determines the application is complete, it assembles a permitting team to develop a draft permit that is subject to public notice for a minimum of 30 days. MPCA then receives and responds to comments received during the public notice period and makes appropriate adjustments to the draft permit. A proposed final permit is then submitted to the EPA for review. Following EPA review and absent any objection from the EPA, the MPCA then issues the NPDES permit. (Tr. 1262:8-17 (Clark testimony); Ex *328* at 9-10.)

34. The NPDES Permit Writers' Manual is a general reference for permitting authorities and provides non-binding guidance explaining the core elements of an NPDES permit. (Tr. 231:14-232:1; 333:10-335:1 (Pierard testimony); Ex. *679* at RELATORS_0064476 ("Recommendations in this guidance are not binding; the permitting authority may consider other approaches consistent with the CWA and EPA regulations.")[3]

V. PERTINENT PROVISIONS IN THE MOA BETWEEN MPCA AND EPA

35. The MOA between the EPA and MPCA sets forth the process the MPCA must use with the EPA, from processing a NPDES permit application through completion and final approval of the NPDES permit. (Ex. *328*.) The following provisions of the MOA are pertinent to the procedural irregularities alleged by Relators:

a. MOA sections 124.22 and 124.23 control the "Acquisition of Data." (Ex. *328* (MOA at 2-5).) Section 124.22 controls the transmission of data from the EPA to the MPCA:

> (1) The purposes of this section are: (a) to provide for the transfer of data bearing on NPDES permit determinations from the EPA to the Agency, and (b) to insure that any deficiencies in the transferred NPDES forms shall be corrected prior to issuance of a NPDES permit.
>
> (2) Commencing immediately after the effective date of this Agreement the Regional Administrator shall transmit to the Director a list of all NPDES permit applications received by EPA. This list shall include the name of each discharger, SIC Code, application number, and indicate that the EPA has determined which applications are complete.
>
> (3) After receipt of the list, the Director shall identify the priority order to be used by the EPA to transmit the application files to him. The application file shall include the NPDES permit and any other pertinent data collected by the EPA. The application files shall be transmitted to the Director according to the priority order identified, and the EPA shall retain one copy of each file transmitted to the Director.
>
> (4) For an application identified as incomplete or otherwise deficient by the EPA, the Director shall obtain from the discharger's the information identified

[3] Relators make no claim that the NPDES Permit Writers' Manual, has the force and effect of law—only that its contents reflect MPCA's customary and usual way of drafting NPDES permits. (Tr. 223:20-224:2.)

by the EPA as being necessary to complete the application. The Director, at his discretion, may also obtain additional information for those applications identified by the EPA as complete or incomplete to update or process the application.

(5) Once the Director determines that an application is complete, he shall transmit two copies of the completed application and a cover letter indicating that the application has been determined to be complete to the Regional Administrator, Attention: Permit Branch. If the EPA concurs that the application is complete, one copy shall be routed to the Regional Data Management. Section, Surveillance Division, through the Compliance Section, Enforcement Division, for processing into the National Data Bank and the other copy shall be placed into the NPDES Permit Branch file.

(6) The Director shall be timely advised by letter that the Regional Permit Branch concurs with his determination and that a copy of the application has been transmitted to the Data Management Section. If the EPA determines that the application is not complete, the Regional NPDES Permit Branch shall identify the deficiencies by letter to the Director. The Director shall attempt to review all deficiencies within 20 days of date of receipt of notification.

(7) The Regional Administrator shall provide written comment on an application for a NPDES permit no later than 20 days from the date of receipt of application from the Agency. The Regional Administrator may within this 20 day period request additional time not to exceed a total of 40 days. The Director may assume, after verification of receipt of the application, that no comment is forthcoming if he has received no response from the Regional Administrator at the end of 20 days.

(8) No NPDES application shall be processed by the Agency until all deficiencies identified by the EPA are corrected and the Director receives a letter from the EPA concurring with the Director that the application is complete.

(*Id*. (MOA § 124.22, at 2-4).)

b. MOA Section 124.23 controls the transmission of data from the MPCA to the EPA Regional Administrator. Subdivision 1 of the section covers permit applications:

(1) The Director shall transmit to the Regional Administrator copies of completed NPDES application forms submitted by the applicant to the State. When the State determines that the NPDES application forms received from the discharger are complete, two copies of the forms with a cover letter indicating that the forms are complete shall be transmitted to the Regional Administrator, Attention: Permit Branch . . . . If the EPA determines that the NPDES application form is not complete, the deficiencies shall be identified by letter to the Director. No NPDES application shall be processed by the Agency until the deficiencies are

corrected and it has been advised in writing by the EPA that the NPDES application form is complete.

(*Id.* (MOA § 124.23(1), at 4-5).)

c. Section 124.46 of the MOA sets forth the NPDES permit processing steps that must take place from public notice to final approval. It states:

> (1) At the time a public notice required by Section 124.32 of the Guidelines is issued, the Director shall transmit one copy of the NPDES public notice, fact sheets, proposed NPDES permit and a list of all persons receiving the public notice, fact sheets and proposed NPDES permit, together with a description of any other procedure used to circulate the public notice to the Regional Administrator, Attention: NPDES Permit Branch.
>
> (2) After a public notice period has expired, the Agency shall consider all comments received as a result of the public notice and may modify the proposed NPDES permit as it considers appropriate. Public hearings may be held as provided for in Section 124.36 of the Guidelines. If a public hearing is held, the agency shall consider all comments and may modify the proposed NPDES permit as it considers appropriate.
>
> (3) If a proposed NPDES permit issued with a public notice is modified as a result of the public notice or public hearing, a revised copy of the proposed NPDES permit shall be transmitted to the Regional Administrator . . . together with a copy of all statements received from the public notice, and where a public hearing is held, a summary of all objections, with a request for approval to issue the NPDES permit.
>
> (4) If a proposed NPDES permit is not revised after a public notice or where held, a public hearing, the Director shall notify the Regional Administrator . . . by letter that the proposed NPDES permit issued with the public notice has not been revised and request approval to issue the NPDES permit. The request for approval shall include a copy of all written statements received from the public.
>
> (5) The Regional Administrator shall respond within 15 days from the date of receipt of the letter requesting final approval to issue or deny the proposed permit. The Regional Administrator pursuant to any right to object provided in Section 402(d)(2) of the Act, may comment upon, object to or make recommendations with respect to the proposed NPDES permit. If no written comment is received by the Agency from the Regional Administrator within 15 days, the Director may assume, after verification of receipt of the proposed permit, that the EPA has no objection to the issuance of the NPDES permit.

(*Id.* (MOA § 124.46, at 9-11).)

VI. RELEVANT MPCA AND EPA EXPERIENCE INVOLVING OTHER PERMITS

36. The permit development process between the EPA and the states is designed to work out issues at the earliest and lowest level possible to produce a permit that is acceptable to the EPA and thus avoid an EPA objection. (Tr. 110:9-17 (Pierard testimony).)

37. MPCA interaction with the EPA regarding NPDES permits most often occurs through phone calls from MPCA to EPA technical staff. (Tr. 1265:20-25 (Schmidt testimony).)

38. The EPA often submits written comments on pending permits and it does so at any time regardless of whether it is inside or outside a comment period. (Tr. 177:12-13; 325:19-326:10 (Pierard testimony).)

39. The MOA is silent on the subject of whether the EPA may comment before, during, or after the public comment period and it does not preclude the EPA from doing so. (Tr. 108:4-7; 320:20-321:21 (Pierard testimony).)

40. Nothing in the MOA, the CWA, or the federal regulations purports to empower the MPCA to limit or prevent the EPA from commenting on a permit at any time, orally or in writing. (Tr. 497:17-498:10 (Stine testimony); *see* Tr. 322:10-13 (Pierard testimony); 579:1-7 (Lotthammer testimony).)

41. It is not possible for the MPCA to prevent the EPA from commenting on a NPDES permit. (Tr. 497:19-20 (Stine testimony).)

42. In the nine years that Mr. Pierard was program chief, EPA Region 5 reviewed about 700 draft permits and the EPA provided written comments by letter or email on a majority of the permits. (Tr. 111:2-9, 12-21 (likely more than 500 of the 700 before or after public notice), 129:19-25 (Pierard testimony); Ex. *706* (listing the seven NPDES final proposed permits that were the subject of a written comment or objection by the EPA from 1974 to date).) Sometimes the written

comment only referenced typographical errors. (Tr. 111:14-21 (Pierard testimony).) The EPA did not comment on every draft permit.

43. If EPA Region 5 commented on a permit, it usually commented in writing. (Tr. 129:19-25 (Pierard testimony).)

44. The EPA preferred to comment on draft NPDES permits in writing "so that our communication is clear, we can't be misconstrued, people understand what our comment is and why we're making it." (Tr. 130:8-14 (Pierard testimony).)

45. The EPA also put comments on draft NPDES permits in writing so its comments are in a public record that reflects its role and the sequence of events. (Tr. 130:8-10, 14-24 (Pierard testimony).)

46. If the EPA submitted written comments on a draft NPDES permit, the MPCA knew that the comments would become part of the administrative record and the MPCA knew that it would have to describe and respond in writing to the EPA comments. (Tr. 715:25-716:10 (Lotthammer testimony), 1182:14-24 (Schmidt testimony), 1268-1272 (Clark testimony); *see* 40 C.F.R. § 124.17(c).) The MPCA did not have to describe and respond in writing to unwritten EPA comments. Minn. R. 7100.0110, subp. 1; 7100.1070, subp. 3.

47. With complicated permits like the PolyMet Permit, the EPA's preference was to procure the draft permit before public notice so the EPA could review it and make any major comments at that time. (Tr. 123:24-124:3 (Pierard testimony).) These comments allow states to address any "big-ticket issues" in advance of public notice. (Tr. 111:22-112:17 (Pierard testimony); 956:21-25 (Udd testimony).)

48. With regard to the pre-public notice stage, the MOA is silent on EPA review of a pre-public notice draft of the permit and there was no adopted statute, rule, policy, or procedure

requiring EPA review draft permits at the pre-public notice stage. The MOA only requires the MPCA Commissioner to submit a copy of the draft permit and the draft fact sheet to EPA's Region 5 NPDES program when the MPCA gives public notice of the permit. (Ex. *328* at 9; Tr. 105:25-107:5 (Pierard testimony), 455:12-25-456:1-2 (Stine testimony).)

49. Nevertheless, some draft permits were provided to the EPA at the pre-public notice draft stage, which, according to Mr. Pierard, helped the process "move expeditiously" and ensured that the permit "would be acceptable in terms of its compliance with the Clean Water Act and its regulations." (Tr. 110:9-17 (Pierard testimony).) Examples are the EPA's February 2017 comment letter to the MPCA on the pre-public notice draft for the Delano wastewater plant permit, (Ex. *264*; Tr. 120:2-22 (Pierard testimony)), the December 19, 2014 comment letter on the pre-public notice draft of the Minntac mine tailings basin permit, (Ex. *530*; Tr. 122:19-22, 123:20-23), and the July 22, 2016 comment letter on the pre-public notice draft of the Northshore mining permit. (Ex. *531*; Tr. 127:1-6.)

50. The EPA's formal review process begins when the MPCA puts a draft permit on public notice and sends a copy to EPA. (Ex. *531* at REL_0063466; Tr. 128:11-14 (Pierard testimony).)

51. The MOA is also silent regarding EPA comments on draft NPDES permits during the public notice period. (Ex. *328*; Tr.108:4-7 (Pierard testimony).)

52. CWA regulations provide that "any interested person may submit *written* comments on the draft permit" during the public comment period provided in 40 C.F.R § 124.10, and "[a]ll comments shall be considered in making the final decision and shall be answered as provided in § 124.17." 40 C.F.R. § 124.11 (emphasis added). Federal regulations permit the EPA to submit written comments as an "interested person." *Accord*, Minn. R. Minn. Rules 7100.0110, subp. 1.

53. The MPCA identified forty NPDES draft permits since the year 2000 on which the EPA issued written comments during the public comment period. (Ex. *707*; Tr. 377:9-15.) In the MPCA's Mining Sector, the EPA provided written comments on the public notice draft permits for the U.S. Steel Keetac mine and tailings basin in 2011, (Ex. *174*; Tr. 121:17-122:7), the Mesabi Nugget mine in 2012, (Ex. *164*; Tr. 121:3-16), and the Minntac tailings basin in 2014 and in 2016. (Exs. *530, 532*.)

54. For complex permits, like the Minntac permit, the EPA often took advantage of the draft public notice permit stage to do a formal review consistent with the MOA. (Ex. *530*; Tr. 125:18-25 (Pierard testimony).)

VII. MPCA AND EPA INTERACTION DURING NORTHMET PERMIT REVIEW

55. The MPCA asked the EPA to be involved early in the NorthMet permit review process, to streamline the review process. (Tr. 135:4-10 (Pierard testimony).)

56. The EPA discussed with the MPCA the process for an anticipated PolyMet NPDES permit for the NorthMet Project before the NPDES application was submitted. (Tr. 135:11-15 (Pierard testimony).) The EPA's goal in meeting with permitting agencies was to avoid later EPA objections to issuance of the final proposed permit. (Tr. 330:11-16 (Pierard testimony).)

57. At the MPCA's request, the EPA and the MPCA had frequent phone conferences regarding PolyMet NPDES permitting – approximately every two weeks in 2016 and 2017. (Tr. 961:21-962:1, 1041-1042 (Handeland testimony); Tr. 147:5-14 (Pierard testimony); *see also* Ex. *708*; Tr. 461:21-462:1, 504:25-505:5 (Stine testimony), 664:19-22 (Lotthammer testimony.) The calls usually lasted an hour and a half and reviewed topics identified by the MPCA to discuss with the EPA, although the EPA expressed concerns on different subjects regarding the permit development process, as well. (Tr. 1042:22-1043:20 (Handeland testimony).)

58. The bi-monthly calls resulted in significantly more interaction between the EPA and the MPCA than with the usual NPDES permit. (Tr. 147:21-148:7 (Pierard testimony); 1041:8-14 (Handeland testimony).)

59. MPCA permit writer Handeland, explained the reasons for the conference calls: "It was just a very complex project, proposed project, and we wanted – there were a number of issues that we had talked with EPA prior to the application coming in that we wanted to work with them on and get their opinions on, get their feedback on." (Tr. 962:18-22; *see also* Tr. 1041:14-19.)

60. Although the EPA engaged in regular calls with the MPCA, it never agreed that verbal discussions would take the place of written comments. (Tr.147:2-9 (Pierard testimony).)

VIII. DOCUMENTATION OF MPCA/EPA MEETINGS

61. When the EPA and the MPCA discussed permit issues, Mr. Pierard documented some of the discussions by email. (Tr. 149:11-23 (Pierard testimony).)

62. Ms. Handeland's general practice was to take notes at meetings she attended with the EPA on the development of the PolyMet permit. (Tr. 969:15-18 (Handeland testimony); Exs. **324**, **324A**, **325**, **325A** (Handeland meeting notes).)

63. Mr. Clark sometimes took shorthand notes for memory retention purposes during his calls with EPA, (Tr. 1300:1-14 (Clark testimony)), but he discarded the notes shortly after each meeting because they were not substantive and he did not intend to rely on them. (Tr. 1300:19-1301:7; 1304:12-15; 1306:14-20.) The purpose of Mr. Clark's notetaking related solely to the meeting at hand. (Tr. 1307:13-22.)

64. Mr. Schmidt's general practice was to take notes at most meetings he attended if there was something that he "thought was worth keeping track of for the future." (Tr. 1128:14-21 (Schmidt testimony).) Consistent with this practice, Mr. Schmidt took handwritten notes at the

MPCA/EPA meetings he attended. (*E.g.*, Exs. *837, 838*.) Shortly after each meeting, Mr. Schmidt typed up his handwritten notes, sometimes highlighting certain items or adding more information, and then he disposed of the handwritten notes. (Tr. 1127:4-22; 1145:17-1146:7; Exs. *837, 838*.)

65. Mr. Schmidt's practice was to label documents he created as "attorney client privileged" and protected under the Minnesota Government Data Practices Act ("MGDPA") if he believed them to be protected under the MGDPA. (Tr. 1129:14-1130:6; Exs. *837, 838*.) However, if documents did not include his mental impressions or other information he thought was protected under the MGDPA, he did not include the "attorney client privileged" header. (Tr. 1130:4-8.)

66. Mr. Schmidt believed that the notes he took in meetings while at the MPCA were not public for purposes of the MGDPA. (Tr. 1129:4-13; 1148:1-12.) He did not share these notes with any MPCA staff and does not recall sharing them with anyone else. (Tr. 1148:13-22.)

IX. NPDES PERMIT APPLICATION FOR THE NORTHMET PROJECT

67. PolyMet submitted its application for a NPDES permit for the NorthMet Project on July 11, 2016. (Court Ex. B (Stipulation No. 1[4]); Tr. 151:20-24; Ex. **1069** (updated application).)

68. On August 2, 2016, the MPCA informed PolyMet that its application was complete. (Ex. **306** at 1; Tr. 151:25-152:3-11 (Pierard testimony).)

69. NPDES permit applications are addressed by the MOA. *See* Findings of Fact ¶ 35. The MOA requires the MPCA to "transmit" a NPDES permit application after it determines the permit is complete. (Ex. *328* (MOA § 124.22(b)).) At some point between July 11, 2016 and August 5, 2016, EPA, staff member Krista McKim found PolyMet's permit application online and

[4] The Court asked the parties to stipulate to whatever facts if they could. As a result, they provided a thirty-paragraph stipulation on the first day of the hearing. The stipulated facts and exhibits are contained in Court Exhibit B. The stipulation is cited throughout this Order as dictated by the Court's organization of the Findings of Fact. However, not all of the stipulated facts became part of the final hearing record. Not all of the documents listed in the stipulations were offered into evidence or even provided to the Court, thereby making those particular stipulation irrelevant. Thus, the following document-related stipulations were not considered by the court: 4, 14, 16, 20, 22, & 25.

copied it from the MPCA's website. (Tr. 151:25-152:3-11 (Pierard testimony); *see* Ex. **306** at 1.) However, there is no evidence in the hearing record that the MPCA either did or did not separately transmit the application to the EPA. (Tr. 152:1-11 (Pierard testimony).)

70. On August 5, 2016, the EPA acknowledged receipt of the permit application, informed the MPCA that it planned to review the permit application, and stated that the MOA would guide the EPA's oversight of the permitting process. (Ex. *290*; Tr. 150:17-20 (Pierard testimony), 1275:15-22 (Clark testimony).)

71. It was not the EPA's normal practice to review NPDES permit applications during the time that Mr. Pierard was NPDES program manager. He can only remember one other time that the EPA did so. (Tr. 150:19-151:6.)

72. The EPA did not send the MPCA a deficiency letter or an extension request regarding the application within twenty days of submission. (Tr. 1340:18-1341:14 (Clark testimony).)

73. The parties dispute the applicability of MOA § 124.22, which the MPCA argues allows it to assume that the EPA has no objection to the application if it does not submit a deficiency letter or extension request within twenty days of receiving a copy of the permit from the MPCA. (Ex. *328,* § 124.22, at 4.)

74. On November 3, 2016, the EPA sent a deficiency letter to the MPCA in which it identified issues with PolyMet's NorthMet Project NPDES permit application. (Exs. *107*, *303,* **303A**[5], **306**; Tr. 1275:23-1276:12 (Clark testimony).) The letter advised the MPCA that the MOA precluded processing the NPDES permit application until the EPA provided a letter to the MPCA indicating the deficiencies are resolved. (Ex. **306** at REL_0002976.)

[5] At the conclusion of the hearing, it was not clear whether exhibit 303A was received into evidence. Yet, it appeared on Court Exhibit F as being in the administrative record. On August 10, 2020, the parties advised the Court that exhibit 303A could be received into evidence by stipulation. It was therefore added to the hearing record.

75. The MPCA never received a letter from the EPA stating that the deficiencies in PolyMet's NPDES application were resolved. (Tr. 1284:11-15 (Clark testimony); *see* Tr. 153:9-17 (Pierard testimony) (no such letter was ever sent).)

76. PolyMet submitted to the MPCA what it described as an "updated" NPDES permit application in October 2017. (Ex. **1069**; Tr. 1282:6-9 (Clark testimony).) The Court finds that this document was not a "new" application and that the updated application was part of a single application process. (Exs. **350** and **1069**.)

77. On October 26, 2017, the MPCA's Richard Clark advised EPA staff member Krista McKim that it received an updated NPDES permit application from PolyMet. (Ex. **32**.)

78. In October 2017, the MPCA informed the EPA that PolyMet submitted an updated permit. (Tr. 153:18-24 (Pierard testimony); Ex. **32**.)

79. After submission of the updated permit, the EPA never submitted a deficiency letter regarding the updated permit nor did it ever advise the MPCA that the revised application was complete. (Tr. 153:9-12 (Pierard testimony.) In addition, at no time did the EPA inform the MPCA that the PolyMet NPDES permit application, in any form, was complete and could be processed. (Tr. 1341:15-18 (Clark testimony).)

80. Regardless of any technical compliance issue with the MOA in connection with the original and updated applications, the MPCA continued to process the application with input from the EPA and at no time did either agency question compliance with MOA. With regard to the PolyMet's NorthMet NPDES permit application and revised application, the Court finds that the EPA and the MPCA regarded the MOA to have been complied with.

81. No evidence outside of the administrative record is necessary to determine whether the MPCA complied with the MOA regarding the NorthMet Project's NPDES permit application.

X. EPA REQUST FOR A PRE-PUBLIC NOTICE DRAFT OF THE PERMIT

82. The EPA and the MPCA participated in a conference call regarding the PolyMet Project on November 1, 2017. (Court Ex. B (Stipulation No. 2).)

83. The EPA and the MPCA participated in a conference call regarding permitting the PolyMet Project on November 9, 2017. (Court Ex. B (Stipulation No. 3).)

84. During the November 9, 2017 conference call, Mr. Pierard asked the MPCA for a pre-public notice draft of the PolyMet permit sixty days in advance of the public notice period so it could offer comments to the MPCA before the public notice period. (Exs. **325** at REL-0049794 (Handleland meeting notes), Tr. 155:25-156:3 (Pierard testimony); *see* Ex. *837* at 17 (Schmidt meeting notes); *see* Tr. 1155:14-18, 1156:8-12, 19-23 (Schmidt testimony).)

85. The MPCA was opposed to supplying the draft permit sixty days in advance of the public notice period and sought to negotiate a different arrangement with the EPA.

86. The MPCA did not "refuse" to provide a pre-public notice draft of the PolyMet permit sixty days in advance of the public notice release. Rather, following the EPA's initial request, the MPCA and the EPA negotiated and reached an agreement as to when the MPCA would provide a pre-public notice draft to the EPA.

87. On or about November 20, 2017, the EPA and the MPCA entered into an agreement that the MPCA would provide a pre-public notice draft permit to the EPA at the same time that the MPCA provided it to the affected tribes, approximately two weeks before the public notice release of the draft permit. (Tr. 157:17-158:1 (Pierard testimony); 1157:4-7 (Schmidt testimony); Exs. *372, 815*.) The EPA also agreed that it would not make any written comments until after receiving the draft permit. (Exs. *372, 815*.) The agreement did not include a waiver of the EPA's right to comment. (40 C.F.R. § 123.24(d); *see* Finding of Fact ¶ 31).

88. On January 17, 2018, two weeks before the draft proposed permit was released for public comment, the MPCA provided the EPA and the tribes a copy of the draft proposed permit. (Court Ex. B (Stipulation No. 5).) Thus, the MPCA complied with the agreement.

89. On January 17, 2018, Mr. Pierard emailed and called the MPCA to set up a phone meeting to enable the MPCA to address EPA concerns about the draft permit that were not addressed in previous conference calls. (Ex. **37**; Tr. 160:18-161:10 (Pierard testimony).)

90. The MOA requires the MPCA to provide a draft of the permit to the EPA at the time of public notice and it contains no provision for a pre-public notice draft.[6] (Ex. *328* (MOA § 124.46).) Thus, through the EPA/MPCA agreement, the MPCA exceeded the requirements of the MOA without violating the MOA.

XI. PUBLIC RESPONSE DURING THE PUBLIC COMMENT PERIOD

91. The public comment period was January 31, 2018 through March 16, 2018. (Court Ex. B (Stipulation No. 6); Tr. 667:13-15 (Lotthammer testimony), 928:7-8 (Udd testimony); Ex. **326**.)

92. Due to the complexity of the NorthMet NPDES permit and high public interest in the project, the MPCA took a number of extra steps during the public notice period that departed from its regular and customary practice:

[6] Relators suggest that the MPCA's EPA Permit Review Policy, (Ex. *83*), required the MPCA to provide a pre-public notice draft of NPDES permits to the EPA at least thirty days in advance of public notice. (Relators' Post-Trial Brief at 26 (citing Ex. *83*).) However, the policy is not relevant to the Court's task under the Transfer Order for two reasons. First, the document is dated October 15, 2018 so it post-dates all pre-public notice events and cannot form the basis of an alleged procedural irregularity. Relators offered no evidence that an earlier version of the policy or a similar policy existed before October 15, 2018. Second, by its own terms, the policy only applies to permits on an annual review list. Relators supplied no evidence establishing that PolyMet's NorthMet NPDES permit application was on the annual review list for either 2017 or 2018 so as to trigger application of the policy even if the policy was in effect during the relevant time frame. No review list was offered into evidence at the hearing and Mr. Pierard's testimony does not support an assertion that the NorthMet permit was on the review list, if there was a list for the years in question. Thus, the factual predicate necessary for the Court to consider Exhibit 83 is not present.

a. The MPCA extended the public notice period from the mandatory 30 days to 45 days. (Tr. 1332:10-12 (Clark testimony).)

b. The MPCA and the Minnesota Department of Natural Resources ("DNR") co-hosted two public hearings and open houses during the public notice period—in early February. (Tr. 928:21–929:2, 929:8–10 (Udd testimony); Ex. **326**.) One public hearing occurred in Aurora and was attended by four hundred people. (Tr. 929:5–6.) The second occurred in Duluth and was attended by roughly one thousand people. (Tr. 929:6–7.)

c. The MPCA created a public web portal for the NorthMet Project—the first time such a step was ever taken for an NPDES permit in Minnesota—and established a dedicated phone number and email address for questions or comments from the public. (Ex. **350** at ¶¶ 16, 19; Tr. 1058:20-25 (Handeland testimony).)

93. The MPCA is not required to, and it does not usually, hold public hearings for NPDES permits. (Tr. 1332:17–18 (Clark testimony).)

94. It was unusual for MPCA to hold two public hearings for a NPDES permit. (Tr. 1332:15–18 (Clark testimony).)

95. Mr. Udd, Mr. Clark, Ms. Handeland, Mr. Robin, and Mr. Schmidt all attended the public hearings and open houses. (Tr. 929:21–930:1 (Udd testimony).)

96. MPCA had a meeting with a number of tribes during the public comment period in early March, including Relator Fond du Lac. (Tr. 930:2–19 (Udd testimony).) During the meeting, members of the tribes provided detailed information on their concerns. (*Id*.)

97. The public filed extensive comments on the draft NorthMet Permit, which included 686 comment submittals made up of approximately 1600 individual comments. (Ex. **350** at ¶ 23.)

XII. MPCA AND EPA COMMUNICATIONS DURING THE PUBLIC COMMENT PERIOD AND THE MPCA'S DECISION TO ASK THE EPA TO DELAY ISSUING WRITTEN COMMENTS

98. The EPA discussed the draft PolyMet permit with the MPCA in conference calls on January 31, 2018; February 13, 2018; and March 5, 2018. (Tr. 161:13-16 (Pierard testimony); Exs. **324**, *708*; Court Ex. B (Stipulation Nos. 7, 8, 9).)

99. During a February 13, 2018 conference call, the MPCA and the EPA discussed the public meetings on the NorthMet NPDES permit, including how many people attended. (Tr. 863:1-7, 863:22-864:3 (Udd testimony).)

100. During a telephone conference that was held on March 5, 2018 between EPA and MPCA, the following conversation occurred:

a. Mr. Pierard told Mr. Udd that EPA was going to send comments on the PolyMet permit during the public comment period. (Ex. **324** at REL_0049791; Tr. 162:24-163:4.)

b. Mr. Udd asked if there was any "wiggle room" on the decision to which Mr. Pierard responded there was not. (Tr. 166:10-15 (Pierard testimony).)

c. Mr. Udd then asked, "Would it be cleaner to raise the issues later in the process?" Mr. Pierard responded, "We recommend a comment letter. . . . The MOA doesn't address the pre-permit process." (Ex. *837* at 25 (Schmidt meeting notes).)

101. Thereafter, Mr. Udd told the EPA that the MPCA Commissioner's office is interested in what will happen, and he would discuss the EPA's plan to comment with the Commissioner's office because it was "something they would want to know." (Ex. *837* at 25; Tr. 873:14-18.)

102. On March 5, 2018, Mr. Pierard notified his supervisor, Mr. Korleski, that MPCA staff were talking with Commissioner Stine that day and that MPCA may ask EPA not to comment during the public comment period. (Ex. *641*.)

103. Mr. Udd called Ms. Lotthammer after the March 5, 2018 phone conference and told her that EPA recommended sending comments. (Tr. 900:2-17 (Udd testimony).) He indicated to Ms. Lotthammer that the EPA was following the MOA[7] and that the MPCA would be "overwhelmed" with comments due the high level of public interest in the project. (Tr. 900-901 (Udd testimony).)

104. Ms. Lotthammer called Mr. Pierard that week and asked him if the EPA would consider holding off on providing written comments until the MPCA completed its review of public comments and made changes to the draft PolyMet permit. (Tr. 558:3-8, 667:18-23.)

105. In her first call with Mr. Pierard, Ms. Lotthammer asserted that she thought it was "inappropriate" for EPA to comment at the same time as everyone else during the public comment period. (Tr. 176:11-19 (Pierard testimony).)

106. It seemed odd to Mr. Pierard that Ms. Lotthammer "would suggest that it was somehow inappropriate for us to comment during the public comment period. EPA makes comments all the time, inside and outside the comment period." (Tr. 177:8-14.)

107. Mr. Pierard expressed concern about transparency to Ms. Lotthammer and said he would discuss Ms. Lotthammer's request with Mr. Korleski, the Water Director at EPA. (Tr. 559:7-560:5, 668:24-669:1 (Lotthammer testimony).)

108. On March 9, 2018, Mr. Pierard and Mr. Korleski briefed EPA Regional Administrator Stepp about their recommendation to send comments on the draft PolyMet permit. (Tr. 177:18-178:6, 180:3-7.)

[7] Mr. Udd clearly testified at the hearing that he told Ms. Lotthammer that the EPA was following the MOA, although it is possible he misspoke in light of Ms. Lotthammer's latter assertion to the EPA that commenting at the end of the permitting process was most consistent with the MOA. (*Compare* Tr. 900-901 (Udd testimony) *with* Ex. *62* (Lotthammer email) *and* Tr. 680:17-25-681:1-9 (Lotthammer testimony).)

109. During the week of March 5, 2018, Ms. Lotthammer spoke to Comm'r Stine, and Comm'r Stine raised no concerns about her asking the EPA not to make written comments during the public comment period. (Tr. 565:17-566:12.)

110. Ms. Lotthammer followed up with Mr. Korleski. (Tr. 562:6-11 (Lotthammer testimony).) She explained that she understood the EPA could comment whenever it wanted, but in this instance, it made more sense for EPA to wait to comment until after MPCA had the opportunity to change the permit in response to public comments. (Tr. 562:15-18; 673:4-11.) Mr. Korleski expressed concern about the timing of receiving the subsequent draft permit to ensure that the EPA would have sufficient time for meaningful review. Ms. Lotthammer responded, saying that the MPCA also wanted to ensure that the EPA had plenty of time to review and comment on the updated permit. (Tr. 564:4-25; 673:12-25, 674:11-21.) Ms. Lotthammer does not recall Mr. Korleski raising any concerns regarding the MOA. (Tr. 674:1-10.)

111. Neither Ms. Lotthammer's call with Mr. Pierard nor her call to Mr. Korleski resulted in an immediate agreement with the EPA not to send comments on the draft PolyMet permit during the public notice period. (Ex. *775*.)

112. Ms. Lotthammer's goal was to procure an agreement from the EPA to forego sending written comments during the public notice period. (Tr. 675:2-676:1 (Lotthammer testimony).)

113. Comm'r Stine and Ms. Lotthammer discussed the timing of the EPA's comments on the draft PolyMet permit, and she kept Comm'r Stine apprised of her conversations with the EPA. (Tr. 408:18-409:1, 566:16-21.)

114. The Court finds that Comm'r Stine approved Ms. Lotthammer's decision to seek an agreement from the EPA to forego sending written comments during the public notice period. The rationale for his decision is contained in exhibit 333. (Ex. *333*.)

XIII. NEGOTIATIONS LEADING TO MPCA/EPA AGREEMENT

115. On the morning of March 12, 2018, Ms. Stepp and her Chief of Staff, Mr. Thiede, spoke by phone with Comm'r Stine about the timing of the EPA's comments on the draft PolyMet permit. (Exs. *58, 591*; Tr. 417:18-23.) Comm'r Stine suggested that the EPA not comment in writing until after the MPCA revised the draft Permit. He said the postponement would promote MPCA staff efficiency and ease the burden on MPCA staff. (Tr. 418:1-17; 511:12-512:10 (Stine testimony).) Comm'r Stine told Ms. Stepp that the permit could be more efficiently reviewed by the EPA team if it used a new draft that would be prepared with public comments incorporated into the permit. (Tr. 511:15-21.)

116. Shortly after noon on March 12, 2018, Comm'r Stine sent an email thanking Ms. Stepp and Mr. Thiede for the phone conversation that morning and stating he was "looping in Shannon Lotthammer" to "follow up directly with Kurt [Thiede] regarding the Region 5 – MPCA agreement I mentioned on our call." (Ex. *58*.)

117. On March 13, 2018, Ms. Lotthammer sent an email following up on Comm'r Stine's March 12, 2018 phone call and email to Ms. Stepp and Commissioner Stine. (Ex. *333*.) The email proposes that the EPA delay submitting written comments to the MPCA until after the MPCA reviews and responds to public comments and updates the draft permit. (Ex. *333*, ¶ 4 at 1; Tr. 572:11-14.) She also conveyed the MPCA's offer to give the EPA more time to comment on the next draft of the permit than the 15-day period provided in the MOA. (Ex. *333*.) In the email, Ms. Lotthammer explained her view that the MPCA's proposal was consistent with the MOA:

> As you'll note, in the highlighted portions of pages 27 to 28 of the attached PDF, which are pages 10 to 11 of the actual MOA, the established process is for MPCA to place the draft permit on public notice, consider and respond to public comments, and make any resulting changes that are necessary, and then to submit the proposed permit to EPA for review and comment (which could include objection) prior to final issuance.

(Ex. *333*; *see* Tr. 573:25-574:8 (Lotthammer testimony).)

118. Ms. Lotthammer continued:

> We know that we will be making some changes to the draft permit in response to public comments, and also questions raised by EPA. We have asked that EPA Region 5 not send a written comment letter during the public comment period and instead follow the steps outlined in the MOA and wait until we have reviewed and responded to public comments and made associated changes before sending comments from EPA.

(Ex. *333*; *see* Tr. 577:1-10.)

119. Ms. Lotthammer concluded her email with a discussion that conceded the EPA's authority to review and comment on the draft permit:

> Again, I wish to stress – as I have with Chris Korleski and Kevin Pierard – that the concern here is not about EPA's authority for review. We recognize and respect that authority. The question is about the timing of that review, and the importance of maintaining the approach laid out in the MOA for the sake of clarity and efficiency, among other goals.

(Ex. *333*.)

120. Ms. Lotthammer deleted her March 13, 2018 email to Mr. Thiede, (Ex. *333*; *see* Exs. *60-62*[8]), before leaving the MPCA. (Tr. 609:24-610:2.) Ms. Lotthammer did not believe she needed to retain this email because it was a developmental conversation, not a final decision, and her subsequent email with Mr. Thiede, (*see* Ex. **64A**), documented the approach that the MPCA and EPA decided upon. (Tr. 693:1-694:2.) Exhibit 64A is in the administrative record. (***Id***.)

121. After the EPA received Ms. Lotthammer's March 13, 2018 email, Mr. Pierard called Mr. Thiede's office to arrange a call with Ms. Lotthammer, Mr. Thiede, Mr. Korleski,

[8] Exhibits 58, 333, 60, 61, and 62 (listed in chronological order) are part of the same email string and each repeats messages from earlier in the string. In exhibit 58, Comm'r Stine informs Ms. Stepp and Mr. Thiede that Ms. Lotthammer will "follow up" regarding the "MPCA agreement" he mentioned on the telephone. (Ex. *58*.) In exhibit 333, Ms. Lotthammer sets out the MPCA proposal. (Ex. *333*.) Exhibit 60 includes the content of exhibit 333 and adds an email from later the same afternoon seeking confirmation that Mr. Thiede received the email now known as exhibit 333. (Ex. *60*.) Exhibits 61 and 62 discuss the scheduling of phone calls. (Exs. *61*, *62*.)

and Mr. Holst. (Tr. 185:7-186:1 (Pierard testimony).) During the phone call, Ms. Lotthammer repeated MPCA's request that the EPA not send written comments on the draft PolyMet permit during the comment period. (Tr. 186:22-187:2.) In addition, Ms. Lotthammer suggested that if the EPA sent its comments on the draft PolyMet permit during the comment period "it would confuse the public" and "create a good deal of press." (Tr. 186:18-187:7.)

122. During the March 13, 2018 phone call, Mr. Korleski did most of the talking for EPA, and he favored the EPA submitting written comments on the draft permit. (Tr. 187:22-25.)

123. Ms. Lotthammer had two phone conversations with Mr. Thiede alone; one on March 13, 2018 and one on March 15, 2018. (Tr. 585:18-24 (Lotthammer testimony); *see* Exs. *61*, *62*.)

124. Ms. Lotthammer's March 13, 2018 call to Mr. Thiede was made in follow-up to her email earlier that day, (Ex. *333*), and "explained the request that we were making, which was to request that EPA consider waiting to send their written comments until after we had made the changes that we were anticipating for the permit." (Tr. 586:3-13 (Lotthammer testimony).)

125. Ms. Lotthammer's call with Mr. Thiede on March 13, 2018 did not include anyone else, it lasted a half hour to forty-five minutes, and, during the call, she was in her car speaking on her cell phone. (Tr. 587:21-588:4 (Lotthammer testimony).)

126. Ms. Lotthammer's March 13, 2018 email to Mr. Thiede and her March 13 and 15 follow up emails with Mr. Thiede were not copied to anyone else. (Exs. *60*, *61*, *62*, *333*.)

127. While the MPCA and EPA discussion about written comments during the public notice period were taking place, EPA staff continued drafting a comment letter. On March 12, 2018, Mr. Pierard and Ms. Bauer of the EPA informed Mr. Korleski that March 16, 2018 was the deadline to provide written comments during the public comment period for the PolyMet permit

and that EPA staff drafted a comment letter to discuss with him. (Tr. 164:2-9; 181:15-18 (Pierard testimony); Exs. *616, 649*.)

128. During the March 15, 2018 phone call with Ms. Lotthammer, Mr. Thiede described his internal discussions about MPCA's request that the EPA delay submitting comment until after MPCA prepared a revised draft of the permit and the proposal to give the EPA additional time to review the revised draft. Mr. Thiede stated that EPA was amenable to this approach and that he would memorialize the agreement in a subsequent email. (Tr. 591:7-20 (Lotthammer testimony).)

129. On March 16, 2018, Mr. Thiede emailed to Ms. Lotthammer a summary of the MPCA/EPA agreement, which included the EPA receiving an additional 45 days to comment on what he described as a "pre-proposed permit" prior to submission of the proposed final permit. (Ex. **64A**.) However, the summary did not mention whether the EPA decided not to send written comments during the public comment period. (*Id*.) Mr. Thiede wrote:

> Once MPCA completes their response to public comments, it will develop a pre-proposed permit and provide the PPP to EPA Region 5. Region 5 EPA will have up to 45 days to review the PPP and MPCA's responses to public comments and provide written comments on the PPP to MPCA. This would occur prior to MPCA submitting a proposed permit to EPA, which, according to the current MOA, would continue to give EPA 15 days to comment upon, generally object to, or make recommendations with respect to the proposed permit.

(Ex. **64A**; *see also* Tr. 312:1-313:1-23 (Pierard testimony); Exs. *307*; **307A**.) In her reply, Ms. Lotthammer stated that the email correctly described their understanding. (Ex. **64A**.) She copied Comm'r Stine, Jeff Udd, and Jeff Smith from the MPCA. (**Id.**)

130. Mr. Pierard learned that the EPA would not be sending written comments on March 15 or early on March 16, 2018. (Tr. 191:17-192:7 (Pierard testimony).)

131. Mr. Pierard spoke to Jeff Udd on March 16 and informed him that EPA would not be sending written comments during the public comment period. (Tr. 192:12-193:10.) However, Mr.

Pierard indicated that he planned to walk the MPCA through what the comments would have been. (Ex. **307A**.) That same day, Mr. Udd emailed Ms. Lotthammer and confirmed both the EPA's decision not to comment and Mr. Pierard's plan to walk the MPCA through what the comments would have been. (**Id**.)

132. The Court finds that the MPCA and the EPA negotiated an agreement whereby the EPA would not comment during the public notice period if the MPCA provided for EPA review a revised draft of the permit 45 days before submitting the proposed final permit. Per the MOA, the EPA would still have an additional 15 days to comment upon its receipt of the proposed final permit. (*See* Exs. **64A, 307A**, *674*, *2010*, *2014*.)

133. The MPCA/EPA agreement to add a "pre-proposed permit" step to the EPA review process—that is a permit prepared after the public notice period but before the proposed final permit—was unique to the PolyMet project. (Tr. 361:8-18 (Pierard testimony).)

134. Neither Comm'r Stine nor Ms. Lotthammer were aware of any prior MPCA request that the EPA not comment on a public notice draft of a NPDES permit. (Tr. 418:18-25-419:14-18 (Stine testimony), 577:15-23 (Lotthammer testimony)).)

135. Mr. Pierard is not aware of any statute, regulation, or provision in the MOA that prohibits the MPCA and the EPA from agreeing that the EPA would not submit written comments on the draft permit during the public notice period. (Tr. 337:14-338:15 (Pierard testimony).)

136. The MOA does not prohibit the MPCA from submitting a "pre-proposed permit" to the EPA. In fact, Mr. Pierard suggested a similar arrangement for the Minntac permit application in a May 15, 2018 email to Mr. Udd. (Ex. *2009*; Tr. 332:12-333:7, 342:9-343:13 (Pierard testimony).) By providing a pre-proposed permit 45 days prior to submission of the proposed final permit, the MPCA exceeded the requirements of the MOA without violating the MOA.

137. The MPCA decision to seek an agreement with the EPA was based primarily on the intense public interest in the project and the potential impact of public criticism depending on the contents of an EPA written comment letter.

138. With the agreement, the MPCA hoped to resolve as many public and EPA issues as possible before the EPA issued any comments on a draft or final permit. The MPCA's perspective was analogous to the EPA's desire to resolve "big-ticket" items before a draft permit is released to the public. (*See* Findings of Fact ¶ 47 (citing (Tr. 111:22-112:17 (Pierard testimony))).)

139. To a lesser extent, the decision was also linked to the heavy workload created by the volume of public responses and the need to respond publically to each.

140. The established and adopted procedures for permit review did not preclude the negotiations and resulting agreement that took place. The MPCA had no control over the EPA's decision to issue written comments on a NPDES permit and could, at most, make a request.

141. There is no statute, rule, written policy, or other adopted procedure applicable to the NPDES permitting process making it procedurally improper or irregular for the MPCA to request the EPA to delay its written comments until later in the permit review process or for the EPA to agree to such a request. The agreement did not include a waiver of the EPA's right to comment so the MOA regulation was not implicated. (*See* 40 C.F.R. § 123.24(d); Finding of Fact ¶ 31.)

142. The request to delay written comments until later in the permit review process was not an effort to avoid written comments altogether or skirt a regular procedure or requirement. Rather, the request was made knowing what the required procedures were so the MPCA could benefit from those procedures. The Court finds no evidence that the MPCA attempted to suppress all EPA comments.

XIV. MR. PIERARD READS DRAFT EPA COMMENT LETTER TO MPCA STAFF DURING APRIL 5, 2018 PHONE CALL

143. Mr. Pierard called Mr. Udd on March 16, 2018 and told him that the EPA would not be submitting written comments on the PolyMet permit and that he would like to have a phone conference with MPCA the first week of April to "walk through what the comment letter would have said had it been sent." (Exs. *307*, **307A**; *see* Tr. 193:2-6 (Pierard testimony), 924:14-17 (Udd testimony).) Mr. Pierard "felt so strongly" reviewing the letter contents with the MPCA so it "understood exactly what we were saying and what our concerns were and how to rectify" the concerns. (Tr. 235:5–9; *see id*. 193:17-25).)

144. Mr. Pierard originally planned to review notes made from the draft EPA comment letter during the conference call but he ultimately decided to undertake a word-for-word reading of those portions of the draft comment letter that he underlined. (Tr. 193:11-194:6-24; *see* Ex. *337* (draft comment letter marked up by Mr. Pierard).)

145. No one at the EPA instructed Mr. Pierard to read the letter to MPCA staff.

146. The EPA and the MPCA participated in a conference call regarding the PolyMet Project on April 5, 2018. (Court Ex. B (Stipulation No. 12); Tr. 978:22-979:16; Ex. **2039** (Handeland notification to MPCA staff of upcoming April 5, 2018 conference call.)

147. During the conference call, MPCA staff noticed that Mr. Pierard seemed to be reading from a document. (Tr. 924:14-17 (Udd testimony); 980:23-981:1 (Handeland testimony); 1192:3-12, 1194:17-1195:1 (Schmidt testimony); 1342:12-15 (Clark testimony); Ex. *575*, ¶ 11 (Udd declaration to the Court of Appeals).) Ms. Handeland was unsure whether he was reading from a comment letter or notes. (Tr. 979:20-24).) Mr. Udd expected the "walking through" to be conversational rather than reading from a document. (Tr. 924:14-17.)

148. Ms. Handeland sometimes took handwritten notes during calls with the EPA for her personal use. (Tr. 971:5-9, 971:15-20 (Handeland testimony); *see* Exs. **324**, **324A**, **325**, **325A** (Handeland's notes); Court Ex. B (Stipulation No. 10[9]).) She started taking notes during the April 5, 2018 call, but stopped after a "minute or two" because she could not keep up. (Tr. 979:17-980:4, 980:11-16.) Ms. Handeland also saw Mr. Schmidt taking notes. (Tr. 984:8-10.) She recycled her notes that same day because "there was nothing on there worth keeping." (Tr. 982:16-983:2.)

149. Ms. Handeland did not consider the concerns expressed by Mr. Pierard over the phone to be formal EPA comments because they were not in writing. (Tr. 986:24-25-987:1-10.)

150. Mr. Schmidt took notes during the April 5, 2018 call according to his usual practice, which involved taking notes in long-hand, typing the notes after the meeting, and putting the handwritten notes in a file designated for shredding. (Tr. 1127:19–1128:1, 1147:14–22, 1191:13–20; 1225:8–12.) No one suggested that Mr. Schmidt should take notes or instructed him to take notes. (Tr. 1128:10–13, 1224:19-21.) Mr. Schmidt labeled his notes privileged because he believed his notes contained his mental impressions and were privileged. (Tr. 1129:4-18, 1130:1-8; *see* Ex. *837* at 27-29 (Schmidt typed notes from April 5, 2018).) Mr. Schmidt was never advised to take notes or label his notes as privileged in order to protect them from disclosure. (Tr. 1130:9-22.)

151. Shortly after the April 5, 2018 call, Ms. Handeland, Mr. Clark, Mr. Udd, and Mr. Schmidt met to discuss what happened during the call. Mr. Schmidt used his handwritten notes as the "core" of the discussion but he did not share the notes with anyone. (Tr. 1324-1326 (Clark testimony).)

[9] According to Stipulation No. 10, Ex. 324 is an authentic and genuine copy of handwritten notes taken during calls between MPCA and EPA for the dates indicated in the notes. (Court Ex. B (Stipulation No. 10).)

152. Ms. Handeland, Mr. Clark, and Mr. Udd were never given a copy of Mr. Schmidt's notes after the call or while drafting the permit. (Tr. 943:16-944:5 (Udd testimony); 984:18-24 (Handeland testimony); 1148:19-22, 1199:9-17 (Schmidt testimony); 1324:12-1325:1, 1325:6-1326:7, 1342:25-1343:3 (Clark testimony).)

153. Generally, Mr. Schmidt did not share his notes with other members of the permit team, and his notes were not accessible electronically to members of the permit team because they were saved in a restricted access folder. (Tr. 1197:16-17, 1200:6-9, 1216:13-14.) Mr. Schmidt did not recall consulting his notes from the April 5 call when working on the permit, although it is possible that he did. (Tr. 1219:16-21.)

154. Many of the topics covered in what Mr. Pierard read during the April 5 conference call were brought up by the EPA during prior calls with the MPCA. (Tr. 233:13-22 (Pierard testimony); 986:17-23 (Handeland testimony); 1342:20-24 (Clark testimony).) However, the MPCA's response to public comments did not identify any of the comments has having also come from the EPA. (Tr. 1001:1-4 (Handeland testimony); *see* Ex. **1133**.)

155. Neither Comm'r Stine, Mr. Clark, nor Mr. Pierard could recall another instance when the EPA drafted written comments during the public comment period and then read them to the MPCA over the phone instead of sending them to the MPCA. (Tr. 479:5-9 (Stine testimony); Tr. 1272:4-10 (Clark testimony); Tr. 306:24-307:8 (Pierard testimony).)

156. What Mr. Pierard read to the MPCA during the April 5, 2018 conference call were not EPA "comments" within the meaning of the CWA and federal regulations because nothing was submitted in writing. 40 C.F.R. §§ 124.10-.11. Oral statements made from prepared notes are still oral statements.

XV. THE MPCA PREPARES ITS RESPONSE TO PUBLIC COMMENTS

157. MPCA hired an outside contractor, Shepherd Data Services, to help it organize the public comments before January 2018 because it was expecting a large number of comments. (Tr. 850:25-851:18; 865:2-7 (Udd testimony).)

158. Shepherd completed its work around June 2018. (Tr. 870:10-11.)

159. In the first quarter of 2018, Mr. Udd spoke with managers of other staff who were experts in certain areas to get approval to use them for the PolyMet permit responses to comments. (Tr. 867:22-868:11.) Ultimately, Mr. Udd used four or five subject-matter experts from other parts of the MPCA. (Tr. 868:25-869:7.)

160. The MPCA received 686 comments on the draft permit, which were made up of approximately 1600 individual comments. (Ex. **350** at ¶ 23.) The volume was "significantly quite a bit more than" any other NPDES permit Ms. Lotthammer has seen in her decades at MPCA. (Tr. 663:19-23 (Lotthammer testimony).) It took the MPCA almost eight months to consider and respond to the comments—a process that took only about a month for less complicated permits. (Tr. 1061:24-1062:25 (Handeland testimony (she had never before seen more than 15 comments on a permit)); 934:16-25 (Udd testimony); *see* Ex. **1133** (MPCA Resp. to Comments).)

161. Three MPCA employees—Stephanie Handeland, Richard Clark, and Michael Schmidt—prepared MPCA's responses to comments. (Tr. 988:3-8; 990:7-12.)

162. According to Ms. Handeland, a lot of the public comments the MPCA received and responded to, (Ex. **1133**), were similar to what Mr. Pierard read to the MPCA during the April 5, 2018 conference call. (Tr. 995:3-5; 1039:10-18.)

163. The workload in responding to public comments was much larger for the PolyMet permit than for other permits. (Tr. 664:10-18; 1336:3-11.)

164. Ms. Handeland complained to her supervisor, Richard Clark, about the workload resulting from the high volume of comments. (Tr. 1001:5-11, 1062:6-12 (Handeland testimony).)

165. The MPCA revised the draft permit in response to the public comments and specified the reasons for the revisions. (Tr. 495:25-496:10 (Stine testimony); *see* Ex. **350** at ¶ 262.)

166. The EPA did not submit any written comments on the draft permit either during the public comment period or after the public comment period. (Tr. 337:6-13, 317:25-319:4; 701:1-14; 938:25-939:6.)

XVI. THE "PRE-PROPOSED PERMIT" AND FINAL PROPOSED PERMIT

167. The MPCA spent months revising the PolyMet NPDES draft proposed permit after the public notice period and before submitting the revised "pre-proposed permit" to the EPA. (Tr. 317:25-318:2, 701:1-7, 938:7-10.)

168. EPA and MPCA participated in a conference call regarding permitting of the PolyMet Project on April 30, 2018. (Court Ex. B (Stipulation No. 13).)

169. EPA and MPCA participated in a conference call regarding permitting of the PolyMet Project on June 11, 2018. (Court Ex. B (Stipulation No. 15).)

170. The EPA, the MPCA, and PolyMet participated in an in-person meeting regarding permitting of the PolyMet Project on September 25, 2018. (Court Ex. B (Stipulation No. 18).)

171. The EPA and the MPCA participated in an in-person meeting regarding permitting of the PolyMet Project on September 26, 2018. (Court Ex. B (Stipulation No. 19).)

172. The MPCA and the PolyMet participated in a meeting regarding permitting of the PolyMet Project on October 1, 2018. (Court Ex. B (Stipulation No. 21).)

173. The EPA and the MPCA participated in a conference call regarding permitting of the PolyMet Project on October 22, 2018. (Court Ex. B (Stipulation No. 24).)

174. The MPCA sent the pre-proposed PolyMet NPDES permit to the EPA for review on October 25, 2018 (Court Ex. B (Stipulation No. 26); Tr. 317:25-318:2, 701:1-7, 938:7-10.) Pursuant to the MPCA/EPA agreement, the EPA then had 45-days to review the pre-proposed permit and provide comments. (Ex. **64A**.)

175. The MPCA did not receive written comments from the EPA during the comment period, which ended on December 9, 2018. (Tr. 701:8-14, 317:25-318:5.) In addition, the EPA did not recommend that the MPCA conduct a "pre-public notice", or a second public comment period, based on "substantial" revisions to the permit following the original public comment period. (Tr. 367:11-25 (Pierard testimony); 532:11-25-533:1-2 (Stine testimony).)

176. On or about December 3, 2018, Mr. Pierard called Mr. Udd and "told [Udd] to proceed to the proposed permit stage." (Tr. 318 (Pierard testimony); 938:20-24 (Udd testimony).)

177. On December 4, 2018, the MPCA sent the final proposed permit to the EPA, which triggered the 15-day comment period under the MOA. (Tr. 318:19-319:1, 351:17-25, 352:8-15 (Pierard testimony); Exs. *2020*, *2021*.)

178. On December 18, 2018, Mr. Pierard called Mr. Udd and told him that the EPA finished its review of the NorthMet NPDES permit, the EPA would not be objecting, and the MPCA should go ahead and make its final decision. (Tr. 938:25-939:9 (Udd testimony).) Mr. Udd made no notes of the call. (Tr. 946:8-12.)

179. The EPA did not submit written comments to the MPCA on the PolyMet NPDES permit at any point, including on the final proposed permit. Accordingly, as provided in the MOA, the MPCA could assume that the EPA had no objection to issuance of the final permit. (Tr. 458:16-19 (Stine testimony); Ex. *328*, § 124.46 (5) (MOA).) The EPA's decision not to comment in

writing or object "has the legal force and effect of allowing that permit to be final." (Tr. 260:7-10 (Court's summary agreed to by Relator's counsel).)

180. MPCA issued PolyMet a final NPDES Permit for the NorthMet Project on December 20, 2018. (Court Ex. B (Stipulation No. 28); Exs. **348**-**349**.)

181. It was the EPA's decision whether to submit written comments on the pre-proposed permit or the final proposed permit. At no time did the MPCA try to discourage or prevent the EPA from submitting written comments on either the pre-proposed permit or the final permit.

XVII. COMPILATION OF THE ADMINISTRATIVE RECORD

182. The MPCA's duty "to compile and preserve the administrative record [is] guided by the Minnesota Administrative Procedure Act, Minn. Rule 7000.0750, subp. 4, and MPCA's Records and Data Management Manual (which was adopted to comply with the Official Records Act." (MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶ 5 (Jan. 10, 2020 Decl. of Adonis Neblett)[10].)

183. The applicable Minnesota rule defining the administrative record for final MPCA decisions on NPDES permits states that the record of decision includes "written documents containing relevant information, data, or materials referenced and relied upon by agency staff in recommending a proposed action or decision." Minn. R. 7000.0750, subpt. 4(D).

184. Rule 7000.0750 also states that the record of decision includes "relevant written materials submitted to the agency within an established comment period" and "recordings or transcripts of oral statements" made to the MPCA board making the permit decision. (*Id*. 7000.0750, subpt. 4(C).)

[10] The Court acts upon Relators' May 11, 2020 motion to strike the Neblett declaration and two other declarations in its Conclusions of Law. *See* Conclusions of Law ¶ 68, *infra*. The three declarations were filed eleven days prior to the hearing as part of the MPCA's response to Relators' December 27, 2019 pre-hearing motion *in limine* for spoliation of evidence sanctions.

185. Ms. Handeland has developed hundreds of administrative records. (Tr. 1003:18-20 (Handeland testimony).) She compiled the record for the PolyMet permit after the permit was issued in January 2019. (Tr. 1004:5-9.)

186. During the permitting process, in anticipation of compiling an administrative record, Ms. Handeland manages the file, develops the permit and fact sheet, keeps track of all of the documentation, and files the record. (Tr. 1003:1-8.)

187. Ms. Handeland usually includes in the administrative record all documentation used to develop the permit, any responses to comments, comment letters and, sometimes, emails or notes documenting or discussing the agency's decision. (Tr. 1003:9-17.)

188. To compile the administrative record for the PolyMet permit, Ms. Handeland asked Mr. Clark for documents, but she did not ask Mr. Schmidt for any documents because he is an attorney and his documents are privileged. (Tr. 1004:14-1005:6; 1010:15-25.)

189. Mr. Udd also provided documents for the administrative record. (Tr. 925:19–25.)

190. Ms. Handeland did not ask Comm'r Stine or Ms. Lotthammer for documents because she had not spoken to them about the PolyMet NPDES permit. (Tr. 1004:25-1005:3, 1062:13-23.)

191. It was not Ms. Handeland's usual practice to include handwritten notes in the administrative record other than notes used to develop the permit and respond to comments. (Tr. 1003:9-17, 1071:24-1072:3.)

192. Had the MPCA received written comments from the EPA before, during, or after the public notice period, she would have included them in the administrative record. (Tr. 1040:05-1041:1) In addition, had the EPA made written comments, the MPCA would have responded to the EPA's comments in writing. (Tr. 1232:8-15 (Schmidt testimony).).

XVIII. THE OFFICIAL RECORDS ACT, THE MINNESOTA DATA PRACTICES ACT, THE MPCA'S HANDLING OF DATA REQUESTS, AND THE MPCA'S HANDLING OF ITS OWN RECORDS

A. Laws, Regulations, and Policies Applicable to MPCA Data and Records

193. The Official Records Act ("ORA") specifies the records that must be maintained by state agencies. Under the ORA, "[a]ll officers and agencies of the state" must "make and preserve all records necessary to a full and accurate knowledge of their official activities." Minn. Stat. § 15.17, subd. 1.

194. The Minnesota Government Data Practices Act ("MGDPA"), "governs the storage of government data and public access to that data." *Webster v. Hennepin Cty.*, 910 N.W.2d 420, 427 (Minn. 2018); Minn. Stat. § 15.17, subd. 4 (2018) (providing that "[a]ccess to records containing government data is governed by sections 13.03 and 138.17"). The MGDPA "establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public." Minn. Stat. § 13.01, subd. 3 (2018).

195. The MGDPA's requirements are contained in Minnesota Statutes, chapter 13. At its core, the MGDPA provides that, upon request, persons "shall be permitted to inspect and copy public government data," or be "provide[d] copies of public data" upon payment of the cost to do so. Minn. Stat. § 13.03, subd. 3 (2018).

196. Responsible authorities under the MGDPA must "prepare a written data access policy and update it no later than August 1 of each year." *Id.* § 13.025, subd. 2. Responsible authorities must also "keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use," and "insure that requests for government data are received and complied with in an appropriate and prompt manner." *Id.* § 13.03, subds. 1, 2.

197. The following hearing exhibits related to MPCA's compliance with the MGDPA are part of the Transfer Hearing record, including: MPCA's Records and Data Management Manual (Ex. *77*); an intranet page regarding "Records Management" (Ex. *76*); an intranet page regarding "Guide for members of the public requesting information" (Ex. *79*); and an MPCA Records Retention Schedule. (Ex. *71*.)

198. The MPCA adopted a Records and Data Management Manual ("RDMM") to manage its compliance with the ORA and the MGDPA. (Ex. *77*.) According to the RDMM, "all agency employees are responsible for following . . . the requirements described in this manual. (Records and Data Management Manual at 4.)

199. According to the RDMM Comm'r Stine was "responsible for creating and preserving records that adequately and properly document the organization, functions, policies, decisions, procedures and essential transactions of the MPCA" and to "delegate[]" that responsibility "to the Data Services Section Manager." (Ex. *77* at 4; Tr. 386:22-387:3 (Stine testimony).)

200. According to the RDMM, "records" and "official records" are:

> [B]roadly 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; Tr. 388:4-14, 389:17-390:3.) "Records are considered to be 'created' when they are written by or received at the agency." (Ex. *77* at 24; Tr. 391:24-392:8, 488:11-24.)

201. According to the RDMM, an "official record" also:

> includes any final product related to the agency's activities. Some examples may include: enforcement actions, letters, models, permits, reports etc.
>
> An official record also includes supporting materials and data that document and explain the agency's decision-making processes connected with the transaction of

> its business – such as annotations, drafts, meeting minutes, raw data, reports, telephone logs etc.

(Ex. *77* at 8.)

202. The RDMM defines each of the terms in the definition of "records." Thus, a document is a record because of its *administrative value* if it supports "the ongoing, day-to-day administrative affairs of the agency and are used in conducting routine business and they assist the agency in performing its current and future work." (Ex. *77* at 7.)

203. A document is a record because of its *evidential value* if it "document[s], in the historical sense, the existence and achievements of the agency and are useful for ensuring accountability and for writing organizational administrative histories." (*Id*.)

204. A document is a record because of its *informational value* if it "pertain[s] . . . to the external activities in which the agency has been engaged and are useful for researching people, significant historical events and social developments." (*Id.* at 8.)

205. A document is a record because of its *legal value* if it "deal[s] with matters related to law. They often demonstrate compliance with legal, statutory and regulatory requirements." (*Id*.)

206. Unlike "records", "nonrecords" need not be retained. (Ex. *77* at 11; Tr. 489:25-490:14; *see also* Ex. *76* at 3.) A "nonrecord" is:

> a document created or received by the agency that does not meet the definitions of any of the other listed record types. It does not contribute to an understanding of the agency's activities, business or decision-making processes.
>
> Some examples may include: documents received that provide information but are not connected to the transaction of agency business (such as an e-mail from a listserv, a flyer regarding an upcoming training), library materials, technical materials maintained for the purpose of reference etc.

(Ex. *77* at 11.)

207. The RDMM permitted the deletion of notes that do not qualify as personal papers:

> Unless otherwise specified, notes that do not qualify as personal papers can be destroyed/deleted once they are incorporated into a final product. Examples include notes used to prepare meeting minutes, records of telephone conversations, decision memoranda or other documents when the gist of the discussion, conversation, direction or other activity is embodied in a document that states the official agency decision, position or outcome.

(Tr. 487:14-488:10 (Stine testimony); Ex. *77* at 11; *see also* Tr. 726:18-727:15 (Lotthammer testimony).)

208. The RDMM also permitted the deletion of nonrecords, including materials used when preparing documents for official agency action that have been incorporated or summarized in a final product. (Tr. 488:25-490:14 (Stine testimony).)

209. The RDMM states that "[r]ecords may be disposed of only as governed by the agency's retention schedule and applicable laws regarding records disposition." (Ex. *77* at 25; Tr. 396:20-397:3 (Stine testimony).)

210. If the answer to any one of eight questions in page 12 of the RDMM is "yes", the document in question is a record. Conversely if the answer to any one of six questions on page 12 of the RDMM is "yes", the document in question is a nonrecord. (Ex. *77* at 12.)

211. MPCA maintained an intranet page devoted to "records management." That page specifically addressed how to handle emails and advised MPCA employees to "[d]elete messages that are not records when no longer needed." (Ex. *76* at 1; Tr. 398:3-6 (Stine testimony).) The intranet page stated that an email may constitute a record if it "[p]rovides key substantive comments on a draft action memorandum"; "[p]rovides documentation of significant MPCA decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) and not otherwise documented in MPCA files"; or "[c]onveys information of value on important MPCA activities." (Ex. *76* at 2.)

212. MPCA provided staff with a list of "Data Practices Dos and Don'ts." (Ex. *1003*.) The first "Do" on the list is to "Keep your files neat and discard any drafts and notes when you are through using them." (Ex. *1003*; Tr. 492:7-17 (Stine testimony).)

213. The NPDES Permit Writers Manual recommends that the administrative record for the final NPDES permit should include all correspondence with regulatory agency personnel. Ex. *679* at 11-8, 11-16; Tr. 230:15-231:4 (Pierard testimony).)

B. Data Management Related to PolyMet's Application for a NPDES Permit

214. Mr. Schmidt advised Mr. Udd, Mr. Clark, Ms. Handeland, and Ms. Foss on records retention policies. (Tr. 1134:21-1135:5 (Schmidt testimony).) Mr. Schmidt did not refer staff to the records retention schedule or the guide for members of the public. (Tr. 1136:12-17; Exs. *71*, *79*.) He generally referred staff to the MPCA's RDMM. (Tr. 1137:11-16; Ex. *77*.)

215. MPCA staff understood that written comments received from the public or the EPA constituted official records. (Tr. 390:14-391:12 (Stine testimony).)

216. MPCA staff also understood that written communications, including emails, between EPA and MPCA could constitute official records. (Ex. *77* at 13; Tr. 390:10-13, 391:20-23 (Stine testimony).) "An e-mail is a record if it documents the agency mission or provides evidence of a business transaction or staff would need to retrieve the message to find out what had been done or to use it in other official actions." (Ex. *77* at 21; Tr. 395:10-24 (Stine testimony).)

217. The RDMM required Assistant Commissioner Lotthammer to "ensur[e] records and other types of required documentary materials are not unlawfully removed from the agency by current or departing officials. Employees or agents." (Ex. *77* at 5; Tr. 387:4-24 (Stine testimony).)

218. Emails that include anything substantively discussing an NPDES permit or its development are generally scanned into MPCA's OnBase system, and may be included in the administrative record. (Tr. 957:6-20; 1003:9-17 (Handeland testimony).)

C. MPCA's Anticipation of Litigation and its Litigation Hold Policy

219. The MPCA anticipated litigation as soon as PolyMet proposed the NorthMet mine project. (Tr. Sept. 16, 2019 at 92:2-3 (telephone conference with the court).)

220. The MPCA wrote to Minnesota's Attorney General on September 24, 2015 requesting approval to hire outside counsel to provide "effective representation in the likely event of a legal challenge" of agency decisions related to the PolyMet project. (Ex. *382* at 1; Tr. 381:21-25, 382:8-17 (Stine testimony).)

221. The MPCA's request for approval to hire outside counsel referenced the Reserve Mining litigation. (Ex. *382* at 2-3; Tr. 383:11-25.)

222. When he signed the September 2015 letter requesting approval to hire outside PolyMet counsel, Comm'r Stine understood that there could be multiple challenges in various jurisdictions. (Ex. *382*; Tr. 384:18-24.)

223. MPCA does not customarily implement a litigation hold when the anticipated litigation involves an administrative process that produces an administrative record for certiorari review. (Tr. 1235:5-12 (Schmidt testimony); MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶¶ 3-4 (Jan. 10, 2020 Decl. of Adonis Neblett).)

224. According to the MPCA, implementing a litigation hold in a case involving review of an administrative decision would consume a large amount of the MPCA's limited resources. (Tr. 1235:13-21 (Schmidt testimony); MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶ 7 (Jan. 10, 2020 Decl. of Adonis Neblett).) In addition, there is no discovery in cases involving

review of an administrative record and the ORA requires preservation of documents that should be in the administrative record. (MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶¶ 3-6 (Jan. 10, 2020 Decl. of Adonis Neblett).)

225. The MPCA's practice is consistent with the customary practices of federal agencies fifteen or more years ago. (MPCA's Response to Motion for Spoliation Sanctions, Ex. 11 at ¶¶ 7-8 (Jan. 9, 2020 Decl. of Andrew Emrich); MPCA's Response to Motion for Spoliation Sanctions, Ex. 12 at ¶¶ 3, 7 (Jan. 9, 2020 Decl. of Thomas Sansonetti).)

226. According to the MPCA's RDMM:

> A legal hold is placed on agency records when they are needed for pending litigation, an audit or a court order directive. Directions are given on the handling [sic] the records to maintain their integrity for the duration of the hold. A release of the hold will eventually be given and the record lifecycle and status will resume.

(Ex. *77* at 27.) The RDMM also provides a hot link to the agency's "Guidelines for Legal Hold and Trigger Events." (*Id*.) However, the linked document was not offered into evidence.

227. When Ms. Lotthammer left the MPCA, there was not a legal hold in place related to the NorthMet NPDES permit, although there were legal hold matters other than the PolyMet project. (Tr. 551:9-17 (Lotthammer testimony).) Regarding those other matters, Ms. Lotthammer "made sure to alert the office staff" that she had "data that was subject to a legal hold and that that needed to be preserved." (Tr. 551:4-17 (Lotthammer testimony); *see* Ex. *839* at 1.)

228. A legal hold was not placed when four requests for a contested case hearing were made during the public notice period, (ex. 350 at 1 of 43), when Relators filed a petition for writ of certiorari on January 18, 2019, or on May 17, 2019 when Relators moved for a transfer hearing under section 14.68. MPCA first implemented a legal hold in connection with the NorthMet NPDES permit on June 25, 2019, the day of the Transfer Order. (MPCA's Response to Motion for Spoliation Sanctions, Ex. 2 at ¶ 8 (Jan. 10, 2020 Decl. of Adonis Neblett); Tr. 76:22-78.)

D. Data Requests Related to the PolyMet NPDES Permit

229. MPCA's guide for members of the public requesting information under the MGDPA provides that "MPCA is not required to create data that do not already exist at the entity." (Ex. *79*.) It also provides that "[b]efore requested data can be accessed by a requester, they may need to be reviewed by agency staff to ensure they do not contain any data that are classified by federal law, Minnesota statute, or temporary classification as not public." (Ex. *79*.)

230. It is MPCA's general practice when responding to data practices act ("DPA") requests from the public was to exclude from the response documents created after the date of the request. (Tr. 1338:20-1339:4 (Schmidt testimony).)

231. On March 26, 2018, WaterLegacy made its first DPA request for "memos, meeting notes, phone conversation notes or any other records" pertaining to phone or in person meetings with EPA regarding the PolyMet permit. (Ex. **334**; Court Ex. B (Stipulation No. 11[11]); Tr. 773:12-777:4 (Richards testimony).)

232. Lenny Richards, a senior office administrative specialist with MPCA involved in processing data practice requests, forwarded WaterLegacy's request to MPCA's mining sector. (Ex. *335*; Tr. 752:15-18 (Richards testimony).) This was his practice with respect to all data requests that identified the NorthMet Project as the site/facility of concern. (*See, e.g.*, Tr. 761:3-11, 778:11-779:2 (Richards testimony).)

233. WaterLegacy submitted follow up DPA requests on March 26, 2018, April 5, 2018; September 20, 2018; October 14, 2018; December 12, 2018; and January 1, 2019. (Exs. *334*, *336*,

[11] According to Stipulation No. 11, Exhibits *334* and *336* are authentic and genuine copies of WaterLegacy's Minnesota Government Data Practices Act ("DPA") requests submitted on March 26, 2018 and April 5, 2018, respectively.

340, *341*, *346*, *352*; Tr. 1142:25-1143:13 (Schmidt testimony); *see* Court Ex. B (Stipulation Nos. 11, 17, 23, 27, 29 (stipulating to the authenticity of exhibits *334*, *336*, *340*, *341*, *346*, *352*)).)

234. On April 16, 2018, Mr. Richards informed WaterLegacy that the March 26, 2018 requested information was available via an ftp link. (Ex. *391*.)

235. None of WaterLegacy's DPA requests specified that they were continuing requests or that the requester wanted a monthly update, as other requesters occasionally did. (Tr. 785:23-786:18 (Richards testimony).) It was MPCA's policy that a records request applied only to documents in existence on or before the date of the request. (Tr. 1144:6-16 (Schmidt testimony).)

236. On February 3, 2019, Ms. Maccabee, counsel for WaterLegacy, emailed Mr. Richards, asserting that she had received information "suggesting that there may be some additional data in the possession of the MPCA that would be responsive to my prior requests for information." (Ex. *419*.)

237. That same day, Ms. Maccabee filed a new DPA request on behalf of WaterLegacy, requesting data not yet provided in response to WaterLegacy's September, October, December, and January requests, "including data involving MPCA leadership or counsel," relating to, among other things, "[a]ny comments or feedback provided by the U.S. EPA on the draft or pre-publication NPDES/SDS permit for the PolyMet NorthMet Project, specifically including but not limited to those read or shown by screen shot to MPCA in April 2018 or in the 45-day pre-publication review period." (Exs. *419*, *354*; *see* Court Ex. B (Stipulation No. 30 (stipulating to the authenticity of exhibit 354)).)

238. Mr. Richards responded to Ms. Maccabee's February 3, 2019 email, by copying and pasting responses from staff. (Ex. *419*; Tr. 794:2–795:18 (Richards testimony).)

239. On March 18, 2019, Mr. Richards emailed Ms. Maccabee, informing her that "a staff person happened to be going through some of their files and discovered a set of documents that *should* have been provided in response to your 9-20-18 DPA request, but accidentally were not," and attaching the documents to the email. (Ex. *421*.) It was not unusual for staff to provide Mr. Richards with responsive documents after he had already responded to the DPA request, but it was unusual for that to occur months later. (Tr. 782:19-785; 798:2-5, 12-18.) Mr. Richards did not recall which staff person found the documents. (Tr. 798:19-23.)

240. On June 19, 2019, Kevin Reuthers filed a DPA request on behalf of Minnesota Center for Environmental Advocacy, requesting "any and all email communications sent and/or received by former Assistant Commissioner Shannon Lothammer [sic], as well as any and all associated or underlying emails from or to other recipients, during the period from March 1, 2018, to April 6, 2018." (Ex. *356*.) Mr. Richards is not sure to whom he forwarded this request. (Tr. 800:1-801:10.)

241. On November 14, 2019, Eric Lindberg filed a DPA request on behalf of Minnesota Center for Environmental Advocacy, requesting "any and all litigation hold notices and subsequent documents . . . related to the PolyMet NorthMet project." (Ex. *766*.) On December 17, 2019, Mr. Richards sent Mr. Reuther an email with responsive documents. (Ex. *765*.)

242. Mr. Richards processed all of the above-referenced DPA requests related to the NorthMet Project following his standard, general practice, which included providing additional documents found after initially responding to the requests, something that "occasionally happens." (Tr. 822:6-13; *see* Tr. 782:19-785 (Richards testimony); Ex. *400*.)

243. It is MPCA's general practice for the records management staff or the staff attorney to send an email to everyone who may have responsive records about preservation requests and create a folder on an MPCA shared drive where everyone can deposit responsive records for

compilation. (Court Ex. E ((redacted Schmidt Declaration)) ¶ 23; Tr. 759:9-763:17, 1138:2-19.) The staff attorney would then review the records in the shared drive. (Court Ex. E ((redacted Schmidt Declaration)) ¶ 23; Tr. 1138:20-23 (Schmidt testimony).)

244. Mr. Schmidt reviewed the documents on the shared drive when MPCA responded to WaterLegacy's DPA requests. (Court Ex. E (redacted Schmidt Declaration) ¶ 23; Tr. 1139:19-1140:1 (Schmidt testimony).) Mr. Schmidt's notes were not included in the DPA request responses based on Mr. Schmidt's understanding that they were privileged and constituted an exception to the MGDPA. (Tr. 1206:12-1207:9 (Schmidt testimony).) The MPCA did not provide privilege logs in its responses to DPA requests. (Tr. 1233:5-12.)

245. Mr. Clark is unaware of any failures by the MPCA to produce responsive public data in response to DPA requests regarding the NorthMet Project, although in one instance responsive documents were produced after they were later discovered. (Tr. 1339:5-16 (Clark testimony).)

E. Deletion of MPCA Files

246. Comm'r Stine deleted some files from his computer when he left office in January 2019. He did not delete anything related to PolyMet. (Tr. 448:21-449:8; *see id.* 379:15-17.)

247. Before leaving the MPCA in February 2019, Ms. Lotthammer returned her state-issued laptop and cell phone. (Tr. 544:11-15, 546:1-10.) She went through her laptop and deleted emails and files that she "didn't believe were records that needed to be preserved." (Tr. 544:11-545:1.) She did not delete anything from her phone. (Tr. 546:1-13.)

248. Ms. Lotthammer deleted her March 13, 2018 email to Mr. Thiede, (Ex. *333*), along with certain follow-up emails. (Tr. 371:6–14, 609:24–610:2, 642:8–643:2, 693:1–3; *see* Exs. *60*, *61* and *62*.) She does not recall the date she deleted the March 13 email. (Tr. 371:15–23, 610:3–4, 623:19–25.) She believes that she deleted it before the NorthMet NPDES permit issued in

December 2018, (Tr. 623:16-18), sometime after Mr. Thiede summarized the approach they had agreed to, and before MPCA received Relators' MGDPA requests. (Tr. 623:19-25, 643:11-18.)

249. At some point before Ms. Lotthammer left MPCA in February 2019, MPCA put a litigation hold in place for all documents received or sent by Ms. Lotthammer. The archived PST of Ms. Lotthammer's email from the litigation hold did not contain exhibits 60, 61, or 333, meaning they were deleted before the litigation hold went into effect. (Ex. *839* at 1 (forensic search report); Pre-Hearing Conference Tr. 11/13/19 at 95–96.)

250. Ms. Lotthammer believed that she could delete the email to Mr. Thiede because it was not something that in her "understanding of our data practices and records policies, that [she] needed to keep." (Tr. 610:6-11.) She believed it fell in the category of a "kind of a correspondence nature that isn't a decision of the agency, it doesn't document a decision or a practice or a final document of the agency." (Tr. 611:16-22.) Rather, "it was a conversation." (Tr. 693:16-19.)

251. Mr. Thiede's responsive email on March 15, 2018 summarized what the EPA and MPCA "agreed to" and was, to Ms. Lotthammer, "the final action or the decision." (Tr. 693:20-23.) That email is in the administrative record, and it was also produced in response to Relators' MGDPA requests. (Ex. **64A**; *see* Court Ex. F).)

252. Ms. Lotthammer did not consult any specific document before deleting the email to Mr. Thiede, but she was generally familiar with the agency's data practices policies, including the "Dos and Don'ts." She considered the email to be a "draft or note" that could be discarded. (Tr. 545:9-18, 717:20-21, 719:2-4, 719:12-14, 720:8-16 ("Things like works in progress that were superseded or finalized in a decision . . . that is within the context of drafts.").)

253. To the best of Ms. Lotthammer's knowledge, the deleted March 13 email was the only document that reflected MPCA's request that EPA not send a written comment letter during the public comment period. (Tr. 613:1-9 (referring to Ex. 333).)

F. Forensic Search for Deleted Documents

254. On August 7, 2019 (and in the Court's follow up order dated September 9, 2019), the Court authorized limited discovery, including up to 25 requests for documents by Relators to the MPCA. Relators served document requests on the MPCA, including requests for "electronically stored information" defined as "all documents of any kind, without limitations, stored at any time in a computer or other electronic means, including metadata, erased, fragmented or damaged data." (Pre-hearing Conference Tr. (Nov. 13, 2019) at 97.)

255. The MPCA searched for documents but did not hire a third-party to conduct a forensic search. (*Id*. at 97-98.)

256. On November 13, the Court granted Relator's motion to conduct a forensic search of certain MPCA desktop hard drives and servers. (*Id*. at 107-109; Amended Order Setting Evidentiary Hearing at 2 (Nov. 19, 2019).)

257. In November 2019, Andre Champagne of the State of Minnesota IT department ("MNIT") began working with Michael Gutierrez, the director of digital forensics for XACT Data Discovery. (Tr. 838:1-22 (Champagne testimony).) XACT was retained to perform a forensic search of the computers and devices of Comm'r Stine, Ms. Foss, and Ms. Lotthammer. (Tr. 1082:20-1083:3 (Gutierrez testimony), *see* 840:2-11 (Champagne testimony).)

258. Comm'r Stine's computer was recycled as part of the State's annual recycling of old computers. (Tr. 841:3-11 (Champagne testimony), 1086:3-7 (Gutierrez testimony); Ex. *839* at 1

(forensic search report).) Usually, when a user leaves the agency, data will be wiped and the machine will be re-imaged. (Tr. 842:5-10 (Champagne testimony).)

259. MNIT had a PST file with Ms. Lotthammer's emails from the unrelated litigation hold that was in effect before she left the MPCA in February 2019. (Tr. 842:22–24 (Champagne testimony); Ex. *839* at 1.) MNIT received the PST file in August 2019. (Tr. 843:13-18 (Champagne testimony).)

260. MNIT also had Ms. Foss's computer. (Tr. 843:3-9; Ex. *839* at 1.)

261. MNIT gave the files and devices that they had to an XACT representative. (Tr. 843:24-844:10, 845:10-13 (Champagne testimony); Ex. *839*.)

262. MNIT used its standard practices for imaging devices—there was nothing unusual about this particular case. (Tr. 845:3-9 (Champagne testimony).)

263. Mr. Gutierrez evaluated a forensic copy of the network folders of Ms. Lotthammer and Comm'r Stine, a copy of Ms. Lotthammer's emails, Ms. Foss's hard drive, and Ms. Lotthammer's Surface Pro. (Tr. 1086:12-1089:4 (Gutierrez testimony); Ex. *839*.)

264. Mr. Gutierrez retrieved and processed approximately 107,500 files for search terms to be applied. (Tr. 1097:20-1098:24 (Gutierrez testimony); Ex. *839* at 4.)

265. Mr. Gutierrez did not uncover any evidence of intentional wiping of data in the forensic search he conducted and he was not asked to assess intentional wiping. (Tr. 1100:3-13 (Gutierrez testimony).) He also reached no determination as to when certain documents were deleted or by whom, which would have required the parties to identify specific recovered files for Mr. Gutierrez to analyze further. (Tr. 1100:16-19 (Gutierrez testimony).)

266. A forensic search does not necessarily capture one hundred percent of documents or data that may have been deleted or damaged. (Tr. 828:14-23 (Champagne testimony).)

267. Files are sometimes overwritten on a hard drive during of ordinary device operations. If a file is overwritten, there is no way to recover that data. (Tr. 1082:16-19 (Gutierrez testimony).)

268. Once a device is no longer used, its files can no longer be overwritten. (Tr. 1100:20-23 (Gutierrez testimony).)

269. Relators concede that there is no "conclusive evidence that MPCA directed the deletion of certain evidence outside a normal retention policy." (Relators' Mot. for Spoliation Sanctions at 13 n.11; *see* Tr. 65:14-25-66:1-2 (arguing that there is "substantial evidence" of such).) The Court finds that that Relators failed to meet their burden of proving that the MPCA directed the deletion of documents outside what it considered to be its normal retention policy.

270. The Court finds that Relators failed to satisfy their burden of proving that the MPCA or its employees intentionally deleted documents the MPCA was required to preserve under the ORA outside a normal retention policy.

271. Relators and the MPCA received copies of MPCA-deleted emails between MPCA and EPA personnel through Freedom of Information Act ("FOIA") requests to the federal government. (Tr. 77:3-20*; see also* Relators' Letter to Judge Guthmann requesting leave to file motion for reconsideration at 1 (Oct. 28, 2019); Pre-Hearing Conference Tr. 11/13/19 at 31:21-32:19, 34:16-19; Relators' Motion in Limine for Spoliation Sanctions at 5 (Dec. 27, 2019); Exs. *58*, *60*, *61*, *62*, and *333*.) Obviously, the emails were not been deleted by the federal government.

272. Several exhibits in the Transfer Hearing record, including Exhibits 58, 60, 61 and 62, state on their face they are from the desk of "Thiede, Kurt" and were obtained by the MPCA from the EPA. Several other exhibits in the Transfer Hearing record, including Exhibits 333, 337, 591, 641, 774, 775, and 2010, were obtained by WaterLegacy under the FOIA and include the EPA's FOIA reference numbers on the face of the documents.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I. GENERAL CONCLUSIONS

1. The Minnesota Court of Appeals transferred the above-captioned matter to this Court pursuant to Minn. Stat. § 14.68 "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure" regarding the MPCA's issuance of the NPDES permit for PolyMet's NorthMet Project.

2. The Court of Appeals found "substantial evidence of procedural irregularities not shown in the administrative record" and directed the district court to conduct proceedings "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure." Transfer Order at 4; *see* Minn. Stat. § 14.68 (2018). However, "alleged irregularities in procedure before the agency" *that are* "shown in the record" are beyond the scope of the instant proceeding. Accordingly, the Court views the Transfer Order as directing only a determination of procedural irregularities for which there is either no evidence in the administrative record or partial or incomplete evidence in the administrative record.

3. The environmental review process for the NorthMet project prior to July 11, 2016, is irrelevant to this proceeding, except to establish a record or a baseline as to what procedural processes are regular in the context of an NPDES permit application generally. (Tr. 51:8-14.)

4. Judicial review of the NorthMet Project's environmental impact statement is complete and represents the law of the case. (Tr. 51:20-21.)

5. The Minnesota Rules of Evidence apply to the Transfer Hearing. (Tr. 34:25-35:1.)

6. PolyMet's conduct is beyond the scope of the instant proceeding and is not at issue. (*See* Tr. 81:7-8 (Mr. Nelson on behalf of several of the Relators).)

7. The EPA's conduct is beyond the scope of the instant proceeding and is not at issue. (Tr. 259:4-6.) Thus, EPA conduct cannot constitute an irregularity in procedure. In fact, one of the Relators is presently maintaining a separate action against the EPA arising out of its alleged conduct during the permitting process. (Tr. 77-78; Relators' Post-Trial Response Brief at 15 n.13.)

8. Relators' post-hearing submissions included a request to add certain documents to the administrative record. Relators seek a result that both exceeds the Court's statutory authority and the scope of the Transfer Order. In the case of a certiorari appeal to the Court of Appeals, the Court of Appeals "may require or permit subsequent corrections or additions to the record when deemed desirable." Minn. Stat. § 14.66 (2018). If the Court of Appeals grants an application to require the administrative agency to take additional evidence, the agency may add to the administrative record. *Id*. § 14.67. However, no similar statutory authority exists when there is a referral to the district court to determine alleged irregularities in procedure. *Id*. § 14.68. Moreover, the Transfer Order contains no such authorization. If Relators believe that this court's Findings of Fact, Conclusions of Law, or the hearing record support a section 14.66 motion to expand the administrative record, they should make the appropriate motion to the Minnesota Court of Appeals.

9. Following the August 7, 2019 Rule 16 Conference, the Court ordered Relators to file a list of alleged procedural irregularities so the MPCA and PolyMet would have notice of the alleged procedural irregularities being litigated. Relators filed their list on August 14, 2019. The Court made it clear to the parties that only alleged procedural irregularities on the list would be considered at the hearing and that discovery would be limited to documents and witness testimony related to the alleged procedural irregularities on the list. (Tr. 8/7/19 at 103-04.)

Relators' Pre-Hearing Brief presented argument concerning the alleged procedural irregularities Relators intended to litigate. Following the hearing, Relators submitted a post-

hearing brief that presented argument in connection with most, but not all, of the previously alleged procedural irregularities. To the extent Relators did not include an alleged procedural irregularity from the August 14, 2019 list in their post-hearing submissions, the Court holds that the alleged procedural irregularity was waived.

PolyMet asserts that Relators impermissibly raised three new procedural irregularities for the first time in their post-hearing brief. (PolyMet Mining, Inc.'s Post-Hearing Mem. at 13-17.) First, they argue that Relators argued for the first time in post-hearing briefing an irregularity in the MPCA's transmission of the permit application to the EPA in July 2016. Second, PolyMet alleges that Relators never before challenged the MPCA's continued processing of the application through to permit approval after receiving a deficiency letter in connection with the application without ever receiving a deficiency resolution letter. Finally, PolyMet argues that Relators improperly alleged for the first time post-hearing that the MPCA's failure to provide the EPA with a pre-public notice draft of the permit 60-days prior to public notice was a procedural irregularity.

PolyMet is only partially correct. Relators raised the MPCA's continued processing of the permit application in the absence of a deficiency resolution letter from the very beginning. It is listed as procedural irregularity number 6 in their August 14, 2019 submission and it is also discussed in Relators' pre-hearing brief. (Relators' Pre-Hearing Brief at 5.)

With regard to the other two alleged irregularities, PolyMet is correct. Relators neither raised the alleged procedural irregularities in their August 14, 2019 list nor did they raise them in their pre-hearing brief. Accordingly, the two newly-raised procedural irregularities are dismissed on procedural grounds due to Relators' violation of the Court's pre-hearing ruling.[12]

[12] Notwithstanding its ruling in connection with Relators' procedural violation, the Court also considered and rejected these alleged procedural irregularities on their merits. *See* Conclusions of Law ¶¶ 31 & 35, *infra*.

In light of the above discussion, the Court's focus is on the alleged procedural irregularities Relators claim are supported by the hearing record in their post-hearing submissions. The alleged procedural irregularities determined by the Court in section III(A)-(J) below correspond with the alleged procedural irregularities discussed in section II(A)-(J) of Relators' Post Trial Brief.

II. WHAT DOES THE PHRASE "IRREGULARITIES IN PROCEDURE" MEAN?

10. The instant proceedings were conducted in accordance with an exception to the statutory provision that certiorari review of administrative decisions under sections 14.63-.68 is limited to the administrative record:

> 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. Appeal from the district court determination may be taken to the court of appeals as in other civil cases.

Minn. Stat. § 14.68 (2018).

11. The Minnesota Administrative Procedure Act ("MAPA") creates a quasi-judical approach to administrative decision making, including the procedural-fairness elements of transparency, public involvement, fact-finding, and the right to appeal. *See* Minn. Stat. § 14.06 (2018) ("Each agency shall adopt rules, in the form prescribed by the revisor of statutes, setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public."). The latter element (right to appeal) insures adherence to the former elements. This Court's role in applying section 14.68 is to assure that the record is sufficient for the appellate role to function effectively. Accordingly, this Court has a defined and limited task—a task that does not include a determination of the merits. The Court rejected any

attempts to expand the scope of its inquiry to include the merits of the MPCA's decision to issue the NorthMet NPDES permit both prior to and during the hearing.

12. Relators bear the burden of proving that the MPCA engaged in "irregularities in procedure, not shown in the record." *See MN Ctr. For Envtl. Advocacy v. MN Pollution Control Agency*, 660 N.W.2d 427, 438 (Minn. Ct. App. 2003) (relator failed to provide a basis for reversing agency decision). "Parties to an administrative proceeding are entitled to a decision by an unbiased decisionmaker [sic]. There is a presumption of administrative regularity, and the party claiming otherwise has the burden of proving a decision was reached improperly." *Buchwald v. Univ. of MN*, 573 N.W.2d 723, 727 (Minn. Ct. App.) (citations omitted), *rev. denied* (Minn. Apr. 14, 1998); *accord, Larson v. Comm'r of Pub. Safety*, 405 N.W.2d 442, 443 (Minn. Ct. App. 2010) ("[t]here is a presumption of regularity to the administrative acts of the Commissioner.").[13]

13. The parties agree that it is this Court's task to determine from its Findings of Fact whether there were "irregularities in procedure, not shown in the record." To distinguish "alleged irregularities in procedure" from actual "irregularities in procedure", the court must first decide what the operative statutory phrase means. One certainly cannot determine what procedures are

[13] In citing *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) and *In re Koochiching Cty.*, No. A09-381, 2010 WL 273919, at *7 (Minn. Ct. App. Jan. 26, 2010), the MPCA conflated two different concepts—the presumption of correctness (a substantive concept) and the presumption of regularity (a procedural fairness concept). Moreover, the MPCA's brief misquotes *Herbst*. The court said nothing about a "presumption of regularity", which was placed in quotes attributed to *Herbst*. (Minnesota Pollution Control Agency's Post-Hearing Brief at 15 (purporting to quote *Herbst*, 256 N.W.2d at 824).) Rather, the *Herbst* court spoke of the "presumption of correctness", which the MPCA's brief quoted accurately later on the same page. (*Id*. (quoting *Herbst*, 256 N.W.2d at 824).) A decision might be substantively correct even if it was the product of procedural irregularities.

The conflation continued when the MPCA asserted that section 14.68 should be interpreted in light of section 14.69. The latter statute states the six grounds upon which an administrative decision may be reversed, one of which is if the decision is "made upon an unlawful procedure" and another if the decision is "affected by other error of law." (Minnesota Pollution Control Agency's Post-Hearing Brief at 16 (quoting Minn. Stat. § 14.69(c), (d) (2018).) The court finds no basis for the suggestion that the concept of procedural fairness is unconnected to the other grounds for affirming, reversing, or modifying an administrative decision. Moreover, the statutes have a different purpose. Section 14.69 sets forth the grounds for affirming, reversing, or modifying an administrative decision while section 14.68 creates a process for gathering information to help inform the Court of Appeals when applying all of section 14.69.

irregular without understanding the converse—what procedures are "regular"? Not surprisingly, the parties cannot agree. The MPCA and PolyMet argue that "irregularities in procedure" are limited to agency violations of a "statute, regulation, rule, or an agency's own policies or manual." (MPCA's Post-Hearing Reply at 4; PolyMet Mining, Inc.'s Post-Hearing Reply Mem. at 6-9.) Relators assert that the phrase "irregularities in procedure" must be read "broadly", including not only "violations of statutes, rules, or regulations" but also any departure from the agency's unwritten or un-adopted "regular or general practice." (Relator's Post-Trial Brief at 17; *see id*. at 17-20.) To resolve the parties' dispute, the Court must determine the meaning of the operative phrase in section 14.68.[14]

14. Relatively few appellate decisions have applied the operative statutory phrase—"irregularities in procedure, not shown in the record"—and no decision expressly offers a definition of the operative phrase.[15] The parties cite the same Minnesota appellate decisions as either supporting different outcomes or as not inconsistent with their preferred outcome.

15. When interpreting a statute, the court first determines "'whether the statute's language, on its face, is ambiguous.'" *T.G.G. v. H.E.S.*, No. A18-1616, 2020 WL 3261161, slip op. at *4 (Minn. June 17, 2020) (quoting *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn.

[14] In their reply, Relators reversed course from their original position and argued that the Court of Appeals already decided that the operative phrase includes any departure from the MPCA's regular or general process and its decision now represents the "law of the case." (Relators' Post-Trial Response Brief at 8-9.) The Court disagrees. The Court of Appeals avoided any analysis or pre-determination of the issues being referred. The Transfer Order is most analogous to a finding of probable cause in a criminal case or denying a civil motion for summary judgment based upon genuine issues of material fact. The Transfer Order directs the court to conduct an evidentiary hearing followed by a "determination of the alleged irregularities." (Transfer Order at 4.) The dictionary definition of the word "determination" is "a judicial decision settling and ending a controversy." *Determination*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1995), https://www.merriam-webster.com/dictionary/determination. If the issue was already decided, there would be no need for a determination by the court nor would it be necessary to preserve a right of appeal. Transfer Order at 5; Minn. Stat. § 14.68 (2018). For the same reason, the Transfer Order did not eliminate the presumption of regularity, as Relators argue in their reply brief. (Relators' Post-Trial Response Brief at 8 n.6). Rebutting the presumption is a component of Relators' burden of proof.

[15] The Court could locate only one appellate decision that followed a section 14.68 transfer and it does not provide any particular assistance at the transfer hearing stage. *In re Hutchinson*, 440 N.W.2d 171 (Minn. Ct. App.), *rev. denied* (Minn. Aug. 9, 1989).

2017)). Language within a statute "'is ambiguous only if it is susceptible to more than one reasonable interpretation.'" *Id.* (quoting *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013)). The unambiguous language of a statute must be given its "'plain meaning.'" *Id.* (quoting *500, LLC*, 837 N.W.2d at 290); *Brua v. Minn. Joint Underwriting Ass'n*, 778 N.W.2d 294, 300 (Minn. 2010) (citing *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004)).

When statutory language is undefined, the court "may look to dictionary definitions to determine its common and ordinary meaning." *T.G.G.*, 2020 WL 3261161, slip op. at *4 (citations omitted). The "court is prohibited from adding words to a statute and cannot supply what the legislature either purposely omitted or inadvertently overlooked." *Tracy State Bank v. Tracy-Garvin Coop.*, 573 N.W.2d 393, 395 (Minn. Ct. App. 1998) (citation omitted); *see* Minn. Stat. § 645.16 (2012) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

In addition, "[e]very law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16 (2012); *see, e.g., Am. Fam. Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). "[N]o word, phrase, or sentence [of a statute] should be deemed superfluous, void, or insignificant." *Christianson v. Henke*, 831 N.W.2d 532, 538 (Minn. 2013) (citing *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)). Accordingly, "[p]rovisos shall be construed to limit rather than to extend the operation of the clauses to which they refer. Exceptions expressed in a law shall be construed to exclude all others." Minn. Stat. § 645.19 (2012).

16. All of the hearing participants agree that the operative phrase in section 14.68 is unambiguous and subject to the ordinary meaning given words within the phrase. (*Compare* MPCA's Post-Hearing Brief at 14-18, *and* PolyMet Mining, Inc.'s Post-Hearing Reply Mem. at

6-9, *with* Relator's Post-Trial Brief at 17-20.) The Court also agrees. Based on the Minnesota appellate cases applying the operative phrase to legal disputes since 1977, the Court concludes that it has been applied by our appellate courts in a manner consistent with the ordinary m eaning given words within the phrase.

17. One might suggest that the dispute over the meaning of the words in section 14.68 is an indicia of ambiguity. There are two primary reasons why the parties' disagreement does not lead to a conclusion that the operative phrase in section 14.68 is ambiguous. First is the manner in which the parties parse dictionary definitions. They cited different dictionaries and paid varying degrees of attention to words within the definition entries.

To arrive at the common and ordinary meaning of "irregular" and "procedure", the Court consulted the Merriam-Webster's Collegiate Dictionary, which is the on-line version of the lay dictionary used most recently by the Minnesota Supreme Court. *T.G.G. v. H.E.S.*, 2020 WL 3261161, slip op. at *4 (Minn. June 17, 2020) (quoting the Merriam-Webster's Collegiate Dictionary)). The dictionary defines "irregular" as "not being or acting in accord with laws, rules, or established custom."[16] *Irregular*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1995.), https://www.merriam-webster.com/dictionary/irregular.[17] The same dictionary entry notes that the word "irregular" "implies not conforming to a law or regulation imposed for the sake of uniformity in method, practice, or conduct." *Id.*

[16] Section 14.68 uses the word "irregularity" which means "something that is irregular." *Irregularity*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1995), https://www.merriam-webster.com/dictionary/irregular. Therefore, the court focused on the definition of "irregular."

[17] The Court found that the definitions in the print and online versions of Merriam-Webster were the same. The other lay dictionary quoted by *T.G.G.* was The American Heritage Dictionary of the English Language. No. A18-1616, 2020 WL 3261161, slip op. at *4. The American Heritage Dictionary defines irregular as "[c]ontrary to rule, accepted order, or general practice." *Irregular*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016), https://www.ahdictionary.com/word/search.html?q=irregular.

A "procedure" is "a particular way of accomplishing something or of acting." *Procedure*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1995.), https://www.merriam-webster.com/dictionary/procedure. Or, when the term is used in the sense of a protocol, it means "a traditional or established way of doing things." *Id*.

The hallmark of these definitions is the concept that, to be a regular procedure, the procedure must be "established", "imposed", or formally adopted. As discussed below, the same concept is the guiding principle of Minnesota appellate cases applying the operative phrase in section 14.68.

18. The second reason the parties' disagreement does not mean that the operative phrase is ambiguous is the manner in which the parties approach Minnesota appellate cases applying the operative phrase. Relators argue that cases interpreting the phrase are irrelevant if decided prior to enactment of the current version of section 14.68 in 1983.

The operative phrase first found its way into Minnesota administrative law in 1963 when the legislature provided for judicial review of contested administrative cases by the district court. The statute stated in pertinent part:

> Subd. 6. Procedure on review. The review shall be conducted by the court without a jury and shall be confined to the record, *except that in cases of alleged irregularities in procedure before the agency, not shown in the record*, testimony thereon may be taken in the court.

Act of May 22, 1963, ch. 809, § 1, 1963 Minn. Laws 1432 (emphasis added) (codified as Minn. Stat. § 15.0424, subd. 6).

The words "before the agency" were removed in 1980. Act of May 22, 1980, ch. 615, § 21, 1980 Minn. Laws 1552. These words relate to where irregularities in procedure occur and not to what irregularities in procedure are. The Revisor of Statutes was authorized to place the MAPA

in a chapter of its own in 1982, resulting in placement of the statute in Minnesota Statutes, chapter 14. Act of March 18, 1982, ch. 424, § 130, 1982 Minn. Laws 368.

Finally, the present version of the statute was enacted in 1983. Judicial review of contested administrative cases was transferred from the district court to the newly created Minnesota Court of Appeals. Act of June 1, 1983, ch. 247, § 10, 1983 Minn. Laws (codified as Minn. Stat. § 14.63). Judicial review remained limited to consideration of the administrative record except, "in cases of alleged irregularities in procedure, not shown in the record", the Court of Appeals was authorized to transfer the case to district court for an evidentiary hearing. *Id*., ch. 247, § 14, 1983 Minn. Laws (codified as Minn. Stat. § 14.68).

The legislative history of the operative phrase demonstrates that the legislature made no substantive changes to the operative phrase and it left responsibility to determine the existence of "irregularities in procedure, not shown in the record" with the district court. Only the path to district court changed. Accordingly, there is no legal support for Relators' assertion that pre-1983 cases interpreting the meaning of the phrase "irregularities in procedure, not shown in the record" should be disregarded when interpreting the current the statute.

19. Turning to Minnesota appellate case law, the earliest case cited by the parties is *Mampel v. E. Heights State Bank*, 254 N.W.2d 375 (Minn. 1977). The case reached the Supreme Court on a petition for writ of prohibition to prevent enforcement of certain discovery orders issued by the district court judge conducting judicial review of an administrative decision. *Id*. at 376. Discovery was requested in connection with the contention that "a majority of the commissioners did not hear or read the evidence as is required by the statute, and that respondents were not provided the opportunity to file exceptions and present argument to the commission on their decision." *Id*. at 377. Noting that district court review is limited to the administrative record

except "in cases of alleged irregularity in procedure not shown in the record", the court defined the permissible scope of discovery when procedural irregularities are alleged. *Id*. at 377 (citing Minn. Stat. § 15.0424, subd. 6, the predecessor to section 14.68). The court permitted "limited" discovery "upon procedural matters", not to include "the mental processes by which an administrative decision is made." *Id*. at 378. The parties could only inquire into "whether the agency adhered to *statutorily defined procedures or the rules and regulations promulgated by the agency itself* which enter into the fundamental decision-making process", including inquiry into "whether any materials, communications or other information outside the record were relied upon in reaching the commission's decision." *Id.* (emphasis added). The court's decision balanced the burden on public officials with the need to "insure meaningful review to persons aggrieved by administrative action by allowing them inquire into *those procedures* which comprise the fundamental decision-making process." *Id*. (emphasis added).

The reference to "those procedures" in *Mampel* are synonymous with what this Court described earlier as "regular procedure." Under *Mampel*, "regular procedure" requires adherence to laws and agency-adopted and rules and regulations governing the basic decision-making process. Conversely, irregular procedures depart from these laws, rules, and regulations.

20. The Supreme Court "reaffirmed" *Mampel* in *People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. MN Envtl. Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978) ("the discovery we sanction is limited to information concerning the procedural steps that may be required by law . . .")[18] If discovery on the existence of procedural irregularities is limited to

[18] MPCA's citation of *Matter of Dakota Cnty. Mixed Mun. Solid Waste Incinerator*, 483 N.W.2d 105 (Minn. Ct. App. 1992), is inapposite. The Court of Appeals denied a request to transfer under section 14.68 because relators failed to develop the record of alleged procedural irregularities before the agency, which appears inconsistent with the purpose of the statute. *Id*. at 106. Moreover, the case is not helpful because the decision contains no description of the alleged irregularities.

procedural steps that may be required by law, it stands to reason that the Supreme Court considered the phrase "irregularity in procedure" as limited to legally required procedures.

21. The Minnesota Supreme Court further limited the permissible scope of discovery when procedural irregularities are alleged in *In re Application of Lecy*, 304 N.W.2d 894, 899-900 (Minn. 1981) (following *Mampel*; listing the questions that may be asked in discovery).

22. In *Hard Times Café, Inc. v. City of Minneapolis*, the relator appealed a business-license decision by the Minneapolis City Council "because [it] utilized unlawful procedures in making its decision." 625 N.W.2d 165, 173 (Minn. Ct. App. 2001). Relator alleged that the city council adopted a procedural manual and then failed to follow the manual despite explicit instructions to do so by the city attorney. *Id*. at 174. Relator presented evidence that the city council permitted ex parte contacts, considered material outside the record, and formed an opinion before the hearing closed—all in violation of the city's adopted procedural manual. *Id*.

Finding the MAPA applicable to the city council proceeding, the court transferred the case to the district court for a determination of "irregularities in procedure, not shown in the record" pursuant to section 14.68. *Id*. at 173-74. If limited only to the administrative record, the court felt unable to determine whether the allegations of unlawful procedures were true. *Id*. at 174.

Contrary to the suggestion made by PolyMet, *Hard Times Café, Inc.* does not stand for the proposition that only procedures set forth in a statute or regulation fall within the scope of section 14.68. The court accepted the proposition that the failure to follow a set of procedures formally adopted by the fact-finder meets the statutory standard. *Id*. at 173-74. The procedural manual was neither a statute nor a rule. But, consistent with *Mampel*, the manual was "promulgated" by the city council and, therefore, became part of the "fundamental decision-making process." *Id*. at 170 (the manual was "promulgated"); *see Mampel*, 254 N.W.2d 378.

23. Two subsequent Court of Appeals decisions cite *Hard Times Café, Inc.* In *In re Koochiching Cnty*., relator argued there was a procedural irregularity in the process of determining the location of a proposed road because email communications between the state agency and county commissioners where the road was to be located "reflect [the agency's] preference for the county's proposed route." No. A09-381, 2010 WL 273919, slip op. at *9 (Minn. Ct. App. Jan. 26, 2010) (unpublished). The court found no analogy to *Hard Times Café, Inc.* because the relator could point to no statute, rule, or procedural manual that was violated by the agency. *Id*.

In re North Metro Harness, Inc., involved judicial review of the issuance of a racetrack license. 711 N.W.2d 129, 129 (Minn. Ct. App.), *rev. denied* (Minn. June 20, 2006). Relator sought a transfer to district court to determine alleged procedural irregularities consisting of "ex parte" communications outside of the record related to a request to reconsider that was granted after initial denial of the proposed license. *Id*. at 129, 138-39. The court found the MAPA, and thus, *Hard Times Café, Inc.*, inapplicable because the case at bar did not involve a contested case hearing. *Id.* at 135 (citing section 14.63-.68). However, in dicta, the Court of Appeals also noted that the parties failed to produce a manual or "similar guidelines that the commission is required to use in making its decisions." *Id*. at 139 (citing *Hard Times Café, Inc.*).

24. In the context of both the applicable dictionary definitions and over forty years of Minnesota appellate case law, the Court holds that procedural regularity means "a formally adopted process used to arrive at an administration decision." Conversely, procedural irregularity as used in section 14.68 means "a deviation from a formally adopted process used to arrive at an administrative decision." The term "formally adopted" references a statute, rule, regulation, or any other manual or procedure that has been formally adopted in writing by the agency at issue. It does

not include an un-adopted, unwritten, or informal custom or practice that was previously used in all, nearly all, or even a majority of similar circumstances.

25. Regularity in procedure is important because a flaw or deficiency in process or procedure may produce a substantive outcome that is flawed or deficient, which is why due process is valued as a protection against arbitrary and unreasonable action and as an indicia of fundamental fairness in our country.[19] The regularity of the process leading to an administrative outcome cannot be confused with the outcome itself, for if there is procedural irregularity, it cannot be known with certainty what course the process might have taken had the applicable procedural requirements been observed.

26. The court rejects Relators' position that every unwritten or un-adopted custom, habit, or general practice rises to the level of procedural regularity and becomes part of the "fundamental decision-making process." *Mampel*, 254 N.W.2d 378. The broad interpretation advocated by Relators takes license with and removes the context from both the dictionary and Minnesota appellate cases applying the operative phrase. In addition, Relators' view of the operative phrase lacks a limiting principle and is inconsistent with the MAPA mandate that "all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public" be adopted by the agency. Minn. Stat. § 14.06 (2018). Finally, Relators' view of the operative phrase crosses the procedural fairness line by transforming the fundamental decision-making process into a substantive restriction. Defining "procedural irregularities" to include any unwritten or un-adopted custom, habit or general practice strips agencies of their ability to respond to the complexities presented by each

[19] To illustrate the principle, Black's Law Dictionary defines the colloquial term "kangaroo court" as "[a] court or tribunal characterized by unauthorized or irregular procedures, esp. so as to render a fair proceeding impossible." *Kangaroo Court*, Black's Law Dictionary (11th ed. 2019).

project or issue and conflicts with the deference courts must give to the expertise of administrative agency decisions. As stated in *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*:

> deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience. . . . The agency decision-maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority, and judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with *administering* and enforcing.

624 N.W.2d 264, 278 (Minn. 2001) (emphasis added) (citation and footnote omitted)); *accord*, *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 512 (Minn. 2007) (quoting the same language from *In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota*). Thus, as long as the agency conforms to the formally adopted process used to arrive at an administrative decision, it may deviate from an informal practice used on a previous occasion based upon the then-extant circumstances.[20]

III. DETERMINATION OF ALLEGED PROCEDURAL IRREGULARITIES

27. With the definition of the phrase "irregularities in procedure, not shown in the record" in mind, the Court turns to a determination of the alleged procedural irregularities set forth in Relators' post-hearing brief.

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

28. Relators argue that the MPCA failed to transmit PolyMet's draft permit application upon receipt as required by the MOA.[21] (Relators' Post-Trial Brief at 23.) Further, they argue that

[20] If Relators' definition of the operative phrase were adopted, many extra procedures the MPCA put in place to deal with the unique complexity of the NorthMet Project would have to be considered "irregularities in procedure." Yet, Relators make no argument that any of these steps are suspect. *See, e.g.*, Findings of Fact ¶ 92-94. Or, for a document like the NPDES Permit Writers' Manual, which is expressly optional, Relators' definition of the operative phrase could turn a recommendation into a requirement. (Ex. *679* at Relators_0064476 ("Recommendations in this guidance are not binding").)

[21] The MOA is a hearing exhibit, it is not part of the administrative record. (Court Ex. F.) However, the MOA is required by federal regulations and it has the force and effect of law. 40 C.F.R. § 123.24(a) (2018). Accordingly, like a statute or regulation, the MOA need not be part of the administrative record for it to be considered and any court

the MOA was violated when the MPCA processed the draft permit to completion despite receiving a deficiency letter and despite never receiving deficiency resolution letter. (*Id*. at 23-24.) They assert that both alleged violations constitute irregular procedures because MOA section 124.23 was violated. (*Id*.)

29. The MPCA and PolyMet argue that MOA section 124.22(6)-(8) places time limits on the EPA's consideration of a permit application. (MPCA's Post-Hearing Brief at 34-35; Post-Hearing Mem. by PolyMet Mining, Inc. at 15-19.) Because the deficiency letter was untimely, they assert that the MPCA could assume no comment was forthcoming as set forth in the MOA.

30. The applicable provisions of the MOA are quoted in Findings of Fact ¶ 35(a) (quoting Ex. *328* (MOA § 124.22)) and ¶ 35(b) (quoting Ex. *328* (MOA § 124.23)).

1. <u>The MPCA's Transmittal to the EPA of PolyMet's Application for a NPDES Permit</u>

31. Under MOA section 124.23, the MPCA did not need to "transmit" PolyMet's NPDES permit application for the NorthMet Project to the EPA until it determined that the application was complete. (Ex. *328* (MOA § 124.23).) PolyMet submitted its application on July 11, 2016, the MPCA determined that the application was complete on August 2, 2016, and the MPCA posted the application on its website.[22] Findings of Fact ¶¶ 67-69. The EPA copied the application off of the MPCA website. *Id.* The EPA provided a written acknowledgement that it received the application on August 5, 2016. Findings of Fact ¶ 70.

When the MOA was approved in 1974, the Internet did not exist. The MOA requires the MPCA to "transmit" the application to the EPA. The term "transmit" is undefined and the MOA

may take judicial notice of the MOA. Minn. R. Evid. 201; *see* Tr. 34-35 (the Minnesota Rules of Evidence are applicable to these proceedings). For this reason, while violations of the MOA are procedural irregularities, any such violations are not necessarily "irregularities in procedure, *not shown in the record*." Minn. Stat. § 14.68 (2018) (emphasis added).

[22] The exact day the MPCA posted the application on its website was not established at the hearing.

does not specify the mode of transmission. The Court concludes that the MPCA transmitted the completed application to the EPA through the Internet, which complies with the MOA. Besides, there is no evidence in the hearing record that the MPCA either did or did not separately transmit the application to the EPA. Findings of Fact ¶ 69. The EPA's acknowledgment of receipt compels a conclusion that the application was transmitted properly. The Court holds that there was no irregularity in procedure with regard to the MPCA's transmission of the draft permit to the EPA.

2. The MPCA's Continued Processing of the NPDES Permit Application After Receiving a Deficiency Letter From the EPA

32. Although sections 124.22 and 124.23 could benefit from tighter drafting, the Court interprets MOA section 124.22(1)-(5) as governing data transferred from the EPA to the MPCA immediately following the MOA effective date in 1974. The Court interprets MOA section 124.22(6)-(8) as controlling all permits deemed complete by the MPCA Director, both those transferred from the EPA to the MPCA upon the MOA effective date and all permits submitted by the MPCA to the EPA thereafter. Section 124.22(6)-(8) must be read together with section 124.23.

Unless read together, the procedures controlling permit applications would change depending upon whether the applicant sends the application to the EPA or the MPCA. In addition, there are no time limits in section 124.23. Under Relators' interpretation of the MOA, the EPA would have no time limit for sending a deficiency letter. Relators' interpretation would permit the absurd result of allowing the EPA to send a deficiency letter regarding a permit application even after a final NPDES permit on the same application was issued.

The EPA acknowledged receipt of PolyMet's permit application on August 5, 2016. Findings of Fact ¶ 70. The EPA issued its deficiency letter 90-days later, on November 3, 2016. Findings of Fact ¶ 74. Under the timing requirements of the MOA, the EPA had to issue its deficiency letter no later than 20 days after August 5, 2016, or 40 days after August 5, 2016 with

a timely extension. (Ex. *328* (MOA § 124.22(7)).) There was no extension request, but even if the EPA made a timely request for an extension, the EPA's deficiency letter was untimely. Accordingly, the Court holds that there was no irregularity in procedure with regard to the MPCA's continued processing of the application.

33. The Court's interpretation of the MOA is consistent with the MPCA's continued processing and final approval of the NorthMet NPDES permit and the EPA's choice not to exercise its right to object to the final proposed permit. *See* Findings of Fact ¶¶ 80, 177-181.

34. The Court already found that evidence outside the administrative record is not necessary to determine whether there were "irregularities in procedure" in connection with processing of the NorthMet NPDES permit. Findings of Fact ¶ 81. The untimely deficiency letter, the updated application, the absence of a deficiency letter following the updated application, and the lack of a "writing by the EPA that the NPDES application form is complete", (Ex. *328* (MOA § 124.23(1)), are all established in the administrative record.[23] (Exs. **306**, **350**, **1069**.) Accordingly, even if the Court agreed with Relators' interpretation of the MOA, it would still conclude that there were no "irregularities in procedure, *not shown in the record*." Minn. Stat. § 14.68 (2018) (emphasis added).

B. MPCA's Failure to Provide a Pre-Public Notice Draft Permit to the EPA

35. According to Relators, the MPCA departed from its "regular practice and express policy" when it failed to provide a pre-public notice draft of the PolyMet permit to the EPA for review as and when requested. (Relators' Post-Trial Brief at 24-26.) With one exception, Relators make no claim that providing a pre-public notice draft of a NPDES permit to the EPA was required by any formally adopted process used to arrive at an administration decision. They rely solely on

[23] No one offered the July 11, 2016 permit application into evidence or otherwise established that it is or is not in the administrative record.

a "regular" practice that was followed with some but not all NPDES permits. The only express policy cited by Relators in support of their position was adopted long after the fact and it is not relevant to these proceedings. *See* note 6, *supra*.

There is no statute, rule, written agreement, or formally adopted written policy mentioning an MPCA obligation to transmit a draft permit to the EPA prior to public notice. The MOA expressly requires the MPCA to provide its draft permit to the EPA no earlier than when it releases the draft permit for public comment. Findings of Fact ¶ 35 (quoting Ex. *328* (MOA § 124.46(c)). After Mr. Pierard of the EPA requested a pre-public notice draft of the permit 60 days in advance of public notice, the MPCA objected, the parties negotiated, and the two agencies agreed that the MPCA would send the EPA a pre-public notice draft permit when the "affected tribes" got their copy two weeks before public notice. (Tr. 157:21-25-158:1 (Pierard testimony)); *see* Findings of Fact ¶¶ 82-90.

In the absence of a formally adopted process for transmission of a draft permit before the date required by the MOA, the parties were free arrive at an agreement that exceeded the requirements of the MOA without violating the MOA. That is exactly what happened. Contrary to Relators' argument, the MPCA never refused to provide a pre-public notice draft of the permit. The opposite occurred. Findings of Fact ¶¶ 86-87. Moreover, the record demonstrates that the EPA often did not request a pre-public notice draft of NPDES permits. So, Relators' assertion that there was an unwritten "regular practice" meeting their definition of "irregularities in procedure" lacks factual support. The Court determines that there was no irregularity in procedure in connection with the events leading to the MPCA's transmission of a pre-public notice draft of the permit to the EPA.

C. MPCA Efforts to Convince the EPA Not to Send Comments on the Draft Permit During the Public Comment Period

36. The central focus of the hearing was Relators' contention the MPCA engaged in a "systematic campaign" to prevent the EPA from publically commenting on the draft PolyMet permit during the public-comment period. (Relators' Post-Trial Brief at 26-30.) Relators' contend that these efforts had the effect of "robbing the Court of Appeals of a complete record to review." (*Id*. at 26.) The remaining alleged procedural irregularities are connected to this core contention by Relators.

The evidence submitted at the hearing demonstrates that the MPCA did not want the EPA to submit a comment letter during the public comment period. Findings of Fact ¶¶ 112-113, 137-142. The MPCA knew it was required to respond to all written EPA comments[24], its responses would be public, and the public would find out what the EPA's specific concerns about the permit were from the comments and responses. Findings of Fact ¶¶ 44-46. The MPCA had other legitimate reasons for seeking an EPA delay in submitting comments. However, the MPCA's primary motivation was its belief that there would be less negative press about the NorthMet Project if EPA comments were delayed until after public comments and verbally expressed EPA concerns were incorporated into the draft permit. *See* Findings of Fact ¶ 121.

Nevertheless, the MPCA effort to convince the EPA to delay issuing written comments about the NorthMet NPDES draft permit was not an irregularity in procedure. There is no statute, rule, regulation, or other formally adopted policy or procedure that prohibits the MPCA from asking the EPA to delay an optional course of action. The EPA may choose to issue comments—or not—and all of the parties agree that the MPCA had no authority or standing to prevent the EPA

[24] The federal regulation cited by Relators indicates that "[s]tates are only required to issue a response to comments when a final permit is issued." 40 C.F.R. § 124.17(a).

from exercising its right to comment at any point in time. The EPA had no obligation to negotiate with the MPCA and it had every right to issue a written comments notwithstanding the MPCA's preference. The fact that the MPCA never before asked the EPA to delay issuing written comments regarding an NPDES draft permit during the public comment period does not make the request an irregularity in procedure. Moreover, the EPA did not always submit written comments at the public notice draft permit stage. Findings of Fact ¶ 42. A choice by the EPA cannot be deemed a procedural irregularity by the MPCA. Finding a way to produce a desired outcome by working within the rules is not an irregularity in procedure. Findings of Fact ¶ 142. Accordingly, the Court determines that the MPCA's efforts to convince the EPA not to send comments on the draft permit during the public comment period was not an irregularity in procedure.

D. The Agreement between the MPCA and the EPA Not to Send Comments on the Draft Permit During the Public Comment Period in Exchange for a "Pre-Proposed Permit" and a Longer Review Period

37. Relators argue that the MPCA "secured" its efforts to "block" EPA comments on the draft PolyMet permit by agreeing with the EPA to provide a "pre-proposed" permit incorporating all of the public comments with an accompanying review period in addition to the separate review period for the final proposed permit. (Relators' Post-Trial Brief at 30-31.) According to Relators, "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." (*Id*. at 31.)

38. For the following reasons, the Court's view of the actual agreement is no different than its view of the MPCA effort to reach an agreement. First, there is no statute, rule, regulation, or other formally adopted policy or procedure that prohibited the MPCA from asking the EPA to delay an optional course of action or for the EPA to agree to such a request.

Second, written confirmation of the agreement is in the administrative record so the agreement and its terms are public and available to the Court of Appeals. (Exs. **64A**; **307A**.) Although the EPA confirmation email is silent regarding the EPA's agreement not to comment during the public notice period, Mr. Udd's March 16 email to Ms. Lotthammer mentions both the EPA's decision not to comment and Mr. Pierard's plan to walk the MPCA through what the comments would have been. (Ex. **307A**.) Mr. Udd's email is in the administrative record. (Ex. **307A**.) Accordingly, even if the agreement was considered a procedural irregularity, Relators failed to satisfy their burden of proving that the agreement was "not shown" in the administrative record. Minn. Stat. § 14.68 (2018).

Third, the terms of the agreement do not conflict with a statute, rule, regulation, or other formally adopted policy or procedure. By providing a pre-proposed permit 45 days prior to submission of the proposed final permit, the MPCA exceeded the requirements of the MOA without violating the MOA. *See* Findings of Fact ¶¶ 135-142.

Finally, the decision to accept an agreement was the EPA's and not the MPCA's. EPA decision making falls outside the purview of the Transfer Order.[25] The Court determines that the MPCA/EPA agreement did not involve "irregularities in procedure, not shown in the record." Minn. Stat. § 14.68 (2018).

E. MPCA's Failure to Respond in Writing to the EPA's Oral Comments on the Draft PolyMet Permit

39. After the EPA agreed to delay any written comments on the draft PolyMet permit, its Regional Director, Kevin Pierard, read portions of the unsent draft comment letter over the phone during a conference call with the MPCA on April 5, 2018. The draft comment letter is not part of

[25] The EPA and the MPCA also concluded that changes in the public notice draft permit were not substantial enough to warrant second public notice. *See* Findings of Fact ¶ 175.

the administrative record. (Ex. *337*; *see* Relators' Post-Trial Brief at 30-34.) Relators' argue that the MPCA would have been obligated by law to "attribute, describe, or respond" to the EPA's comments in writing but for its procedural irregularities, thereby constituting a separate procedural irregularity. (*Id*. at 31 (citing 40 C.F.R. § 124.17(a).) In other words, the wording of Relators' third alleged procedural irregularity is nothing more than a different way of looking at the previous two alleged procedural irregularities. The Court's determination remains the same.

40. It is important to note what Relators do not argue. There is no claim that the MPCA should have attributed and responded to the EPA's oral comments. The parties, including Relators, agree with the well-established legal principle that the applicable statutes, rules, regulations, and formally adopted policies or procedures required a MPCA written response only if the EPA commented in writing. Findings of Fact ¶¶ 46, 52; Relators' Post-Trial Brief at 32 (citing Relators' Proposed Finding of Fact ¶ 206) (MPCA need only respond to written EPA comments)); *see Minn. Envtl. Sci. & Econ. Review Bd. v. Minn. Pollution Control Agency*, 870 N.W.2d 97, 101-02 (Minn. Ct. App. 2015) (MPCA provided a "sufficient and meaningful response" to "all of the written comments received after each public hearing"); *cf. Nat'l Audubon Soc. v. Minn. Pollution Control Agency*, 569 N.W.2d 211, 216 (Minn. Ct. App. 1997) ("A reviewing agency . . . is not required to consider or include in the administrative record documents never submitted to or received by it.")

41. Relators offer no instance of a state responding to oral comments by the EPA involving a NPDES permit.[26] Relators' examples each involved MPCA responses to the EPA's written comments. (Relators' Post-Trial Brief at 32 (citing Relators' Proposed Findings of Fact).)

[26] The MPCA did attribute, describe, and respond to oral comments by the public. However, those comments were still "written" because they were transcribed by a stenographer and available to the public. (Tr. 1059 (Handeland testimony); 1362 (Clark testimony).); *see* Minn. R. 7000.0750, subp. 4(C) (recordings or transcripts of oral statements are part of the administrative record). Moreover, "significant" oral comments by the public at a hearing, unlike conversations during an inter-agency telephone call, require a response by the MPCA. 40 C.F.R. § 124.17(a)(2).

If anything, a state commenting on an oral EPA comment falls within Relators' definition of a procedural irregularity.

42. In any event, the MPCA's obligation to describe and respond to EPA comments applies only to comments received "during the public comment period, or during any hearing." 40 C.F.R. § 124.17(a)(2); Minn. R. 7001.1070, subp. 3. The April 5, 2018 telephone call occurred after the public comment period and it was not a hearing.

43. A prime motivation for the MPCA's agreement with the EPA was to find a procedurally regular way of deferring EPA comments to avoid what would otherwise be the MPCA's mandate under federal and state regulations. As already discussed, it did so.

44. The MPCA had no obligation to attribute, describe, or respond to the EPA's oral comments regardless of which definition of procedural irregularity is used. Therefore, the failure to respond to the EPA's oral comments was not an irregularity in procedure just because the comments would have been written had the EPA decided to submit written comments.

F. MPCA's Deletion and Failure to Preserve March 12-15 Emails Regarding Negotiations Leading to Agreement with the EPA

45. Citing the Official Records Act ("ORA"), the Minnesota Government Data Practices Act ("MGDPA"), and the MPCA's Records and Data Management Manual ("RDMM"), Relators argue that the MPCA was legally obligated to preserve and produce to them a series of emails and a calendar invitation documenting the negotiations that led to the agreement with the EPA. (Relators' Post-Trial Brief at 35-41 (referencing exhibits 58, 60, 62, 62, 333, and 591).) Relators also contend that the failure to preserve the subject documents constituted prejudicial spoliation of evidence for which they are entitled to a favorable evidentiary inference. (*Id*. at 37-40.)

46. Comm'r Stine spoke with Ms. Stepp and Mr. Thiede on the morning of March 12, 2018. (Ex. *591* (calendar invite).) During the conversation, Comm'r Stine suggested that the

EPA not comment in writing until after the MPCA revised the draft permit. (Findings of Fact ¶ 115.) He assigned the task of negotiating an agreement with the EPA to Ms. Lotthammer. (Ex. *58*.) Over the next three days, Ms. Lotthammer negotiated with Mr. Thiede in a series of phone calls documented in part by emails. (Exs. *60*, *62*, *62*, *333*.[27])

47. The outcome of these conversations was the EPA's agreement to delay its comments on the proposed permit in exchange for a 45-day period to review a "pre-proposed permit" before the 15 days to review the final proposed permit was triggered. (Exs. **64A**, **307A**; *see* Findings of Fact ¶¶ 98-142.) At some point before the final permit was issued, exhibits 58, 60, 61, 62, 333, and 591 were deleted from all MPCA devices. (*See* Findings of Fact ¶¶ 240-247.) Exhibits 58, 60, 61, 62, 333, and 591 exist today and are in the Transfer Hearing record because Relators obtained them from the EPA or through FOIA requests. (*Id*. ¶¶ 271-272.)

1. Was the MPCA Obliged to Preserve Exhibits 58, 60, 61, 62, 333, and 591 Under the ORA and the MPCA Records and Data Management Manual?

48. Relators argue that the MPCA's destruction of exhibits 58, 60, 61, 62, 333, and 591 warrants the imposition of sanctions for spoliation of evidence. (Relators' Post-Trial Brief at 35-41.) Before reaching the question of spoliation or sanctions, the Court must first address whether there was an obligation to preserve any of the documents or place any of the documents in the administrative record.

a. The ORA

49. The Official Records Act ("ORA") specifies the records that must be maintained by state agencies. Under the ORA, "[a]ll officers and agencies of the state" must "make and preserve

[27] As already noted, these emails were generated at various stages of the ongoing conversation and are part of the same chain. *See* Findings of Fact ¶ 27 n. 8, *supra*.

all records necessary to a full and accurate knowledge of their official activities." Minn. Stat. § 15.17, subd. 1 (2018).

50. The extraordinary breadth of the statute did not escape the attention of the Minnesota Supreme Court when it was asked to interpret the ORA in *Kottschade v. Lundberg*:

> Read literally, it [the ORA] seems to place no bounds on the information which must be made a public record. Any casual jotting, any tear-sheet observation, which discloses the promptings of official action, is to some extent "necessary to a full and accurate knowledge of . . . official activities." But it appears to us that the legislature did not intend anything that sweeping. Such a broad definition of public records would fill official archives to overflowing.

280 Minn. 501, 504, 160 N.W.2d 135, 137-38 (1968). The Supreme Court found a limiting principle using "an analysis of what constitutes 'official activities.'" *Id*. The court concluded that "official activities" are:

> limited to official actions as distinguished from thought processes. If so, 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. Unless such a construction is adopted, public officials will constantly be required to articulate, and reduce to permanent record, the bases for their actions. In those instances in which action is dictated mainly by consideration of judgment, such articulation would be virtually impossible. In any case, it would seriously impede the expeditious transaction of public business.

Id. at 504-05, 160 N.W.2d at 138.

51. Regarding the ORA, PolyMet argues: "[w]hether MPCA *recorded* all necessary information under the [ORA], or properly *released* information to Relators under the Data Practices Act *does not* fundamentally impact MPCA's decision to issue an NPDES permit." (Post-Hearing Mem. by PolyMet Mining, Inc. at 32 (emphasis in original) (citing Mampel).) While its observation is essentially accurate, PolyMet's scope is too narrow, it begs the question, and it misses the point of the ORA and the intersection between the ORA, the MAPA, MPCA rules defining the administrative record, and the MPCA's adopted internal policy manual.

PolyMet begs the question because, absent adequate document preservation, there is no way to determine whether a document *does* (or did) preserve a record of MPCA's "fundamental decision-making process." *Mampel*, 254 N.W.2d at 378. Said differently, the Court cannot determine whether there were irregularities in procedure not shown in the record if documentation of what occurred outside of the administrative record prepared by the agency is destroyed.

PolyMet's focus is too narrow because, the MPCA's final decision to issue the PolyMet NPDES permit is not the only official decision made by the MPCA during the permit-development process. Examples include the decision to hold multiple public hearings, establish a dedicated web portal to gather public comments, and give the EPA an additional forty-five days to review a "pre-proposed permit" in exchange for the EPA's agreement to postpone issuing any written comments until after the public comment period. *See* Findings of Fact ¶ 92. All of these events impacted the MPCA's fundamental decision-making process for the permit. *Kottschade* must be read in light of the MPCA's independent obligation to make and preserve the administrative record. Under the MAPA, preserving the record of how a decision got made and whether the rules governing the fundamental decision-making process were followed is the means by which the right of effective judicial review is insured. The point is well-illustrated by Minnesota Rules 7000.0750, which was governs the MPCA's obligation to preserve the administrative record for appellate review. *See* Minn. Stat. § 14.66 (2018). The rule defines the "record of decision" to include "written documents containing relevant information, data, or materials referenced and relied upon by agency staff *in recommending a proposed action or decision*." Minn. R. 7000.0750, subpt. 4(D) (emphasis added).[28]

[28] Rule 7000.0750 was promulgated on April 20, 2004 using authority delegated to the MPCA by the legislature only one year before *Kottschade* was decided. Minn. R. 7000.0750; *see* Act of May 25, 1967, ch. 882, § 7, 1967 Minn. Laws 1850 (now codified at Minn. Stat. § 116.07, subd. 4 (2018)).

Exhibits 64A and 307A are in the administrative record, presumably because the MPCA concluded they document what agency staff referenced and relied upon when recommending and deciding to make an agreement with the EPA. Exhibits 64A and 307A tell a reviewing court that the MPCA entered into an agreement with the EPA, that the agreement terms called for the MPCA to give the EPA an extra 45 days to review a "pre-proposed permit", and the EPA agreed not to issue written comments during the public comment period. However, there is nothing in the administrative record establishing which agency suggested the agreement, why it was suggested, or the basis for recommending it. Exhibit 333 is the only document containing this information. (*See* Tr. 613:1–9 (Lotthammer testimony).) Exhibit 58 documents when an agreement was discussed, confirms that the MPCA Commissioner personally approved and recommended making an agreement, and it identifies the MPCA staff Comm'r Stine designated to negotiate with the EPA. *See* Findings of Fact ¶ 114.

52. Exhibits 58 and 333 document the information that Comm'r Stine relied upon when he decided to authorize making an agreement with the EPA that would postpone the EPA's written comments on the draft NPDES permit. There is no legal basis to place exhibits 64A and 307A in the administrative record while excluding exhibits 58 and 333. Accordingly, along with exhibits 64A and 307A, exhibits 58 and 333 should have been preserved under either or both the ORA and Rule 7000.0750, subpt. 4(D). If the emails had not been destroyed, the MPCA would have had to disclose them as public records in response to Relators' DPA requests.[29] The act of destroying exhibits 58 and 333 was an irregularity in procedure not shown in the record.

[29] The question of whether Relators have a separate cause of action for violation of the MGDPA is beyond the scope of the Transfer Order. Minn. Stat. § 13.08 (2018). The Court agrees with PolyMet's observation that the MGDPA does not "prescribe or proscribe any procedures for permit approval that enter 'into the [MPCA's] fundamental decision-making process.'" (PolyMet's Proposed Conclusions of Law ¶ 24) (citing *Mampel*, 254 N.W.2d at 378).)

53. The Court reaches a different conclusion with regard to exhibits 60, 61, 62, and 591. Exhibit 591 is a calendar alert, exhibit 60 simply seeks confirmation that the EPA received exhibit 333, and exhibits 61 and 62 are nothing more than communications to set up one or more telephone conversations. Findings of Fact ¶ 27 n.8. The exhibits shed no meaningful light on the substance of the agreement between the agencies or how the agreement was reached. The MPCA's deletion of exhibits 60, 61, 62, and 591 was not an irregularity in procedure.

b. The MPCA Records and Data Management Manual ("RDMM")

54. Even if one could conclude that exhibits 58 and 333 need not have been preserved under the ORA and Minn. Rules 7000.0750, subpt. 4(D), the Court determines that they should have been preserved under the broader requirements of the MPCA's RDMM.

55. Notwithstanding the limitations placed on the ORA by *Kottschade*, the MPCA separately established procedures for the conduct of the agency, the preservation of agency records, and compliance with the rules it promulgated through the RDMM.

56. The RDMM was adopted by the MPCA and the agency was bound to follow its provisions. Findings of Fact ¶¶ 182, 198. *See generally* Findings of Fact ¶¶ 198-210. Accordingly, violation of the RDMM by the MPCA is an irregularity in procedure within the meaning of *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165 (Minn. Ct. App. 2001); *see* Conclusions of Law ¶¶ 10-26.

57. According to the RDMM, "records" and "official records" are:

> [B]roadly 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.)

58. The RDMM definition of an "official record" also "includes supporting materials and data that document and explain the agency's decision-making processes connected with the transaction of its business – such as annotations, drafts, meeting minutes, raw data, reports, telephone logs etc." (Ex. *77* at 8.)

59. The RDMM provides a definition for the terms administrative, evidential, fiscal, historical, informational, and legal value. (*Id*. at 7.) Exhibits 58 and 333 have "evidential value" because they document the achievements of the agency and are useful for ensuring accountability. (*Id*.) They have "informational value" because they pertain to the agency's external activities with the EPA. (*Id*.) Finally, exhibits 58 and 333 have "legal value" because they are significant to an understanding of the MPCA's compliance with statutory and regulatory requirements. (*Id*.)

60. Further support for a conclusion that exhibits 58 and 333 are "records" that must be preserved pursuant to the RDMM is found in the "Is it a Record or a Nonrecord" section of the manual. (*Id*. at 12.) "Yes" answers are warranted when answering the RDMM "Is it a Record" questions and "no" answers follow from the "Is it a Nonrecord" questions. Exhibits 58 and 333 "contain evidence of or contribute to an understanding of the agency's activities, decision making processes . . . functions . . . operations . . . or projects." (*Id*.) Moreover, the information in exhibits 58 and 333 is contained in "an original document related to agency business that does not exist elsewhere." (*Id*.; *see* Findings of Fact ¶ 253 (Ms. Lothhammer's admission).)

61. The RDMM required preservation of exhibits 58 and 333 along with exhibits 64A and 307A. If the emails had not been destroyed, the MPCA would have been required to disclose them as public records in response to Relators' DPA requests. The MPCA's destruction of exhibits

58 and 333 was an irregularity in procedure not shown in the record due to applicability of the RDMM even if it was not under the ORA or Minn. Rules 7000.0750, subpt. 4.[30]

2. Should the MPCA Have Instituted a Litigation Hold to Protect Against the Potential Premature Destruction of Evidence?

62. One way for an agency to preserve evidence it is legally obligated to preserve is to put a litigation hold in place when litigation is foreseen or commenced. Relators argue that the MPCA should have instituted a litigation hold once PolyMet filed its NPDES permit application. (Relators' Post-Trial Brief at 39.) They note the MPCA's concession that it anticipated litigation related to NorthMet permitting when it hired outside counsel in 2015. (*Id.*; *see* Findings of Fact ¶¶ 219-222.) Indeed, the record demonstrates that MPCA staff made extra efforts to preserve agency records when a litigation hold was instituted in other cases. *See* Findings of Fact ¶ 227.

63. A legal hold was not placed when the MPCA anticipated litigation and engaged outside counsel in 2015. A legal hold was not placed when the PolyMet submitted its NorthMet NPDES permit request in July 2016. A legal hold was not placed when four requests for a contested case hearing were made during the public notice period in 2018. A legal hold was not placed when Relators filed a petition for writ of certiorari on January 18, 2019 and a legal hold was not placed on May 17, 2019 when Relators moved for a transfer hearing under section 14.68. Instead, MPCA first implemented a litigation hold in connection with the NorthMet NPDES permit on June 25, 2019, the day the Minnesota Court of Appeals issued the Transfer Order. Findings of Fact ¶ 228.

64. The MPCA asserts that the concept of a litigation hold is foreign to administrative decision making because statutes and regulations tell the agencies what documents they must preserve to create the administrative record—a sort of built-in hold system. (MPCA's Post-Hearing

[30] Although the Court holds that the RDMM places broader document retention obligations on the MPCA than the ORA as interpreted by *Kottschade*, the agency nevertheless had no obligation to retain exhibits 60, 61, 62, and 591 using standards established in the RDMM for the same reasons set forth in the Conclusions of Law ¶ 53.

Brief at 45-48.) There are a number problems with the argument. First, if the statutes, rules, and agency policies were adequate, exhibits 58 and 333 would not have been destroyed.

Second, if the built-in system of statutes, regulations, and policies are the only needed protections, why did the MPCA impose a litigation hold immediately following the Court of Appeals' Transfer Order? On the first day of the hearing, MPCA's counsel conceded the Court's suggestion that section 14.68 "requires steps to preserve records over and above the steps you would ordinarily take to preserve an administrative record." (Tr. 63.) Again, a litigation hold should not have been necessary if all of the needed documents were already subject to preservation.

Third, the contents of the administrative record were not certified until April 12, 2019, nearly three months after Relators filed their appeals. Findings of Fact ¶ 7. However, some documents were destroyed during permit development and during the first months following Relators' appeal before the MPCA finalized what would be or should be in the administrative record. Findings of Fact ¶¶ 246-253. The fluid process of developing a complex permit implies a broader obligation to preserve documents than might be appropriate for the administrative record even if some documents may be discarded once the anticipated litigation is concluded.

Fourth, the MPCA's and PolyMet's position is squarely at odds with the range of litigation it anticipated or should have anticipated, including a contested case hearing, a section 14.67 motion to the Court of Appeals for the taking of additional evidence by the agency, a section 14.68 transfer motion, or a section 14.69 motion to remand for a contested case hearing.[31] The MPCA and its legal counsel knew for years that a legal battle was on the horizon in connection with the NorthMet project. Relators submitted comments on the draft permit during the public notice period, there was intense public interest as evidenced by the public hearings, a contested case hearing was

[31] While outside the realm of litigation arising out of the administrative permit-approval process, the MPCA also arguably could anticipate a citizen lawsuit under the Minnesota Environmental Rights Act ("MERA"). (Tr. 71.)

requested by four respondents during the public notice period and remained an open issue at the agency level until issuance of the final permit, Relators made multiple DPA requests starting nine months before the final permit was issued, and, as already determined by the Court, the MPCA made decisions motivated by how the public might react. Each of the proceedings listed earlier in this paragraph bring with them the potential for some discovery and they are not limited to the extant administrative record—unless all of the additional relevant records were destroyed.

Finally, the MPCA's and PolyMet's position is inconsistent with the RDMM. There are no Minnesota appellate cases addressing the MPCA's and PolyMet's position that the MAPA and Rule 7000.0750, subpt. 4 (defining the administrative record) obviate the need for a litigation hold when an administrative agency anticipates litigation in connection with a permitting process. To support its proposition, the MPCA cites several cases from other jurisdictions and two declarations by lawyers from its outside law firm attesting to their experience that federal administrative agencies customarily do not institute litigation holds for administrative matters in which review is limited to a defined administrative record. Relators moved to exclude the declarations following the hearing. In its argument opposing Relators' motion to exclude the Neblett, Sansonetti and Emrich declarations, the MPCA asserts that Relators' spoliation motion "is rooted in common-law, not a Minnesota statutory or regulatory requirement." (MPCA's Resp. in Opp. To Relators' Mot. to Strike the Declarations of Adonis Neblett, Andrew Emrich, and Thomas Sansonetti and Statements Made in Reliance on Them From MPCA's Post-Hearing Brief and Proposed Findings at 5.) The declarations were submitted to support the MPCA's argument that a litigation hold is not required or necessary when the matter involves an administrative process controlled by an administrative record. Any merit the MPCA position might have had ends with the RDMM. Through the RDMM, the MPCA adopted an agency "legal hold" process. (Ex. *77* at 27; *see*

Findings of Fact ¶ 226.) Accordingly, the MPCA cannot credibly argue that legal holds are solely a creature of the common law and foreign to its quasi-judicial administrative decision making process. To the extent the Court concludes that the MPCA should have instituted a legal hold, the violation of the agency's own manual is a procedural irregularity.[32]

65. In response to the suggestion that it could anticipate numerous litigation types implicating the need to preserve more than an administrative record, the MPCA argues that proceedings, such as transfers to district court under section 14.68, are rare. (MPCA's Post-Hearing Brief at 46; Tr. 60-64.) The MPCA's assertion is unconvincing in light of the unique nature of Minnesota's first proposed copper-nickel mine, the early retention of outside counsel due to anticipated litigation, the intense public interest in the NorthMet Project, and the very public building of a foundation for future litigation by Relators during permit development.

66. The Court concludes that the MPCA was obligated to put a litigation hold in place no later than the date of Relators' January 12, 2019 appeal. Based on the events and the known litigation avenues discussed in Conclusions of Law ¶ 64, the MPCA knew that the relief potentially available to Relators on appeal included evidence going beyond the administrative record. The RDMM expressly provided for placement of a legal hold when there is "pending litigation." (Ex. *77* at 27.) Once an appeal got filed, there was pending litigation and it meaningfully changed the likelihood the MPCA would be exposed to one of the panoply of available remedies.

67. Key computers that the MPCA wiped were not wiped when Relators filed their appeal. Findings of Fact ¶ 246-253. The Court determines that failure to place a litigation hold was a procedural irregularity. However, for reasons discussed in a following section, the Court

[32] In light of the RDMM, the Court gives the Emrich, and Sansonetti declarations no weight whatsoever. Their experience is not analogous to the obligations placed on the MPCA by Minnesota statutes and rules—or the obligations the MPCA placed on itself. Moreover, their experience is too remote in time to be meaningful.

also concludes that Relators' failed to meet their burden of demonstrating any harm or prejudice resulting from the failure to impose a litigation hold. Conclusions of Law ¶¶ 77-79.

3. Ruling on Relators' Motion to Strike the Neblett, Emrich, and Sansonetti Declarations

68. Relators filed their motion for spoliation sanctions on December 27, 2019. The motion included Relators' later-modified contention that the MPCA should have instituted a litigation hold as early as 2015 when it retained outside counsel. (*Compare* Relators' Mot. *In Limine* for Spoliation Sanctions at 10-13 *with* Conclusions of Law ¶ 62.) The MPCA filed an opposition on January 10, 2020. Its opposition attached January 9, 2020 declarations from Thomas Sansonetti and Andrew Emrich and a January 10, 2020 declaration from MPCA General Counsel Adonis Neblett. The Court heard arguments on the motion at the outset of the Transfer Hearing on January 21, 2020. (Tr. 53-85.) The declarations were referenced and relied upon by the MPCA during the motion arguments. (Tr. 61-62.) At the time, Relators did not object to the MPCA's filing of the declarations. Ultimately, the Court chose to defer the spoliation motion so it could consider the entire record and all of the arguments before ruling on the motion. (Tr. 84-85.)

The parties reiterated their spoliation positions post-hearing. The MPCA's post-hearing brief reiterated its reliance on the same three declarations it filed on January 10, 2020. Thereafter, on May 11, 2020, Relators moved to strike the three declarations on the basis that they constituted the submission of post-hearing testimony in violation of the Court's January 21 deferral ruling. According to Relators, the declarations have "no place in a post-hearing brief." (Relators' Post-Trial Response Brief at 17 n.14.) They argue that the affidavits were improperly filed, they deprived them of the opportunity to cross examine the declarants, and the MPCA should have called the declarants as witnesses. (Relators' Mot. to Strike the Declarations of Adonis Neblett, Andrew Emrich, and Thomas Sansonetti and Statements Made in Reliance on them From MPCA's

Post-Hearing Brief and Proposed Findings of Fact (May 11, 2020).) Relators also asserted that the Sansonetti and Emrich declarations constitute irrelevant, hearsay, and opinion testimony lacking in foundation from lawyers at the law firm currently representing the MPCA. (*Id*. at 4-6.) The latter argument more accurately goes to the weight that should be given the declarations.

Relators' motion to strike is based on an inaccurate premise, it was untimely, and it is denied for several reasons. First, the declarations were filed prior to the hearing in response to Relators' original motion. Affidavits are customarily included in motion responses and, when the Civil Rules apply, they are required. Minn. Gen. R. Prac. 115.04(b). When the declarations were filed, the MPCA had no way of knowing that the Court would defer ruling and it was entirely proper to include supporting affidavits.

Second, Relators take the Court's statement about "using the record as it was admitted by the Court" out of context. (Tr. 85:22-24.) The Court deferred the motion so it would have more information, not less information. At no time did the Court indicate it was undoing or rejecting the already-submitted motion record when it deferred its ruling.

Third, all affidavits submitted in support of a motion are technically hearsay. However, if they are otherwise admissible, they may be considered. Other than providing reasons why the declarations should be given no weight, Relators do not seriously question admissibility of the declarations for the purpose of opposing a pre-hearing motion *in limine*.

Finally, because the declarations were filed prior to the hearing, they were well known to Relators on January 21. Relators' timed their spoliation motion to be filed following the deadline to designate hearing witnesses. If Relators wished to call any of the declarants as witnesses, they could have moved to do so and they did not. At the time the Court deferred the motion on January 21, the declarations were already part of the motion record and Relators did not object. Relators'

motion to strike four months after the declarations were filed in opposition to Relators' pre-hearing motion is untimely and misplaced.

4. Should the MPCA be Sanctioned for the Spoliation of Evidence?

69. Having determined that the MPCA had a legal obligation to preserve and retain exhibits 58 and 333, but not exhibits 60, 61, 62, and 591, the Court turns to the spoliation question.

70. In a pre-hearing motion, Relators moved for a court order sanctioning the MPCA for spoliation of evidence. The Court elected to defer its ruling pending completion of the hearing and a review of the post-hearing submissions. (Tr. 84-85.)

71. Spoliation of evidence is the "failure to preserve property for another's use as evidence in pending or future litigation." *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990) (quotation omitted). Custodial parties have a duty to preserve evidence for litigation. *Miller v. Lankow,* 801 N.W.2d 120, 129 (Minn. 2011). "The duty to preserve evidence exists not only after the formal commencement of litigation, but whenever a party knows or should know that litigation is reasonably foreseeable." *Id*. at 128-29 (citation omitted). "[R]egardless of whether a party acted in good or bad faith, 'the affirmative destruction of evidence has not been condoned.'" *Id*. at 127 (quoting *Patton v. Newmar Corp*., 538 N.W.2d 116, 119 (Minn. 1995)).

72. A trial court's authority to impose sanctions for the spoliation of evidence is a function of its "considerable inherent judicial authority necessary to [its] 'vital function.'" *Patton v. Newmar Corp*., 538 N.W.2d 116, 118 (Minn. 1995) (quoting *Clerk of Court's Compensation for Lyon County v. Lyon County Commissioners*, 308 Minn. 172, 177, 241 N.W.2d 781, 784 (1976)).

73. Trial courts have broad authority to determine sanctions, if any, for the spoliation of evidence. *Willis v. Indiana Harbor Steamship Co., L.L.C.*, 790 N.W.2d 177, 184 (Minn. Ct. App. 2010) (citation omitted). If spoliation of evidence occurs, trial courts should weigh the three *Miller v. Lankow* factors adopted by the Minnesota Supreme Court to guide trial courts tasked with determining whether spoliation sanctions are appropriate:

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

Miller, 801 N.W.2d at 132 (quoting *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994)). The impact of spoliation is measured by the extent of "prejudice to the opposing party," which requires an examination of "the nature of the item lost in the context of the claims asserted and the potential for remediation of the prejudice." *Patton*, 538 N.W.2d at 119.

74. Minnesota "'permits 'an unfavorable inference to be drawn from failure to produce evidence in the possession and under the control of a party to litigation.'" *Willis*, 790 N.W.2d at 184 (quoting *Federated Mut. Ins. Co.*, 456 N.W.2d at 436-37 (quoting *Kmetz v. Johnson*, 261 Minn. 395, 401, 113 N.W.2d 96, 100 (1962)). "The jury then may infer 'the evidence, if produced, would have been unfavorable to that party.'" *Id*. at 437 (quoting the then-current civil Jury Instruction Guide).

75. Relators cite no authority authorizing the imposition of spoliation sanctions in the context of an administrative proceeding under the MAPA. A MAPA administrative permitting process is not litigation, it has no discovery, and appellate review is limited to an administrative record that is defined by rule, with certain already-discussed exceptions. Nevertheless, for

purposes of its ruling, the Court assumes applicability of common-law precepts governing the spoliation of evidence in civil litigation.

76. In their post-hearing proposed order, Relators limited their request for an adverse spoliation inference to the following: "To redress Respondent Minnesota Pollution Control Agency's ("MPCA") destruction of relevant evidence, the Court will infer that Shannon Lotthammer deleted her March 13-15, 2018 emails [exhibits 58, 60, 61, 62, and 333] after MPCA received WaterLegacy's March 26, 2018 Data Practices Act ("DPA") request, and that Lotthammer deleted additional emails or other records pertaining to the PolyMet permit after MPCA had received WaterLegacy DPA requests made between March 26, 2018 and February 3, 2019." (Relators' Proposed Order Granting Spoliation Sanctions (Apr. 22, 2020).)

77. The spoliation order sought by Relators focuses on two categories of documents. In connection with the first category, Relators allege that documents relevant to PolyMet's NorthMet NPDES permit application were destroyed. The reported appellate cases approving the imposition of spoliation sanctions in civil litigation all involve the destruction of evidence that was known and available at some point. Here, Relators failed to prove that any allegedly spoliated evidence in the first category ever existed. Based on the evidence produced at the hearing, it is simply not known whether any of the documents Relators believe were spoliated ever existed. The sanction sought by Relators recognizes their failure of proof. Relators do not ask for an adverse inference as a consequence of the proven spoliation of relevant evidence, they ask for an inference that the MPCA spoliated evidence never shown to exist, even after a forensic search. Accordingly, the motion for a spoliation sanction regarding the first category of documents must be denied because it is based wholly on speculation. *See, e.g., Federated Mut. Ins. Co.*, 456 N.W.2d at 438 ("Speculation is a prime concern in the context of a spoliation claim"); *Yath v. Fairview Clinics,*

N.P., 767 N.W.2d 34, 38, 41-42 (Minn. Ct. App. 2009) (suspicion that computer wipe destroyed relevant evidence is insufficient to support a finding that evidence was knowingly destroyed).

78. Relators also seek sanctions for the MPCA's destruction of a second category of documents—exhibits 58, 60, 61, 62, 333, and 591. Since Relators possess exhibits 58, 60, 61, 62, 333, and 591, Relators do not seek a sanction tied to the contents of the documents at issue. They cannot demonstrate prejudice related to the document contents. Instead, they seek a timing inference—that MPCA personnel intended to destroy exhibits 58, 60, 61, 62, 333, and 591 to prevent them from becoming public and to avoid Relators' various DPA requests. In other words, they seek an inference of fault and prejudice to replace their obligation to prove fault and prejudice. Yet, Relators offer no authority supporting their circular argument that spoliation sanctions may be imposed in order to establish an entitlement to spoliation sanctions under the *Miller* factors.[33]

79. Although the Court cannot condone what was at best poor training and careless management of the potential administrative record of the instant permit process, Relators failed to prove prejudice or harm primarily because of their successful recovery of the key known documents through other channels. There is no spoliation when the documents at issue were not actually destroyed. Spoliation sanctions are not designed to punish failed attempts to destroy evidence, whether accidental or intentional.[34] The motion for spoliation sanctions is denied.

G. Alleged MPCA Staff Action to Prevent Creation and Retention of Notes of April 5, 2018 EPA Call

80. Ms. Handeland started taking notes during the April 5, 2018 phone call with the EPA. Stating that she could not keep up with Mr. Pierard, Ms. Handeland testified that she stopped

[33] The *Miller* court also cautioned that "a custodial party's duty to preserve evidence is not boundless. . . . [T]he duty to preserve evidence must be tempered by allowing custodial parties to dispose of or remediate evidence when the situation reasonably requires it." *Miller*, 801 N.W.2d at 128. For purposes of the instant permitting process, the most reasonable time for the duty to end is when the anticipated or actual litigation process ends.

[34] Other remedies, if any, for the MPCA's conduct are beyond the scope of the Court's Transfer Order assignment.

taking notes and discarded "a minute or two" of notes she took. (Tr. 980; *see id*. at 979-83.) Relators' argue that Ms. Handeland's decision to stop taking notes and the discarding of her notes were both procedural irregularities because she knew that Relators made a DPA request. (Relators' Post-Trial Brief at 41-42.)

81. Relators cite no statute, rule, regulation, and formally adopted policy or procedure requiring any agency employee to take notes of a telephone conversation. Moreover, there is no basis in the record for the Court to conclude that any MPCA staff encouraged anyone to avoid taking or retaining notes of meetings with the EPA. Thus, Ms. Handeland's decision not to take notes or to stop taking notes cannot be considered an irregularity in procedure. The sole issue, then, is whether Ms. Handleland should have preserved the notes she took.

82. Ms. Handleland's notes of other EPA meetings were both preserved and included in the administrative record. (Exs. **324**, **324A**, **325**, **325A**.) Without seeing the discarded notes, the Court cannot distinguish between the notes that were saved and the note that was discarded. However, discussion of whether the MPCA should have preserved Ms. Handleland's notes of the April 5, 2018 call for placement in the administrative record is academic. The document from which Mr. Pierard read that day exists and is in Relators' possession. It is a Transfer Hearing exhibit. (Ex. *337*.) The Minnesota Court of Appeals denied without prejudice a motion to add exhibit 337 to the administrative record pending the outcome of the instant hearing. *In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System, Permit No. MN0071013 for the Proposed NorthMet Project, St. Louis County, Hoyt Lakes, Babbitt, Minnesota*, Nos. A19-0112, A19-0118, A19-0124 at 2 (Minn. Ct. App. Aug. 20, 2019) (order denying MPCA's motion to supplement the administrative record); *see* Motion to Supplement the Administrative Record with EPA Letter,

Case Nos. A19-0112, A19-0118, and A19-0124 (Minn. Ct. App. Jul. 26, 2019). If the Court of Appeals considers the document important to its consideration of the merits, it has the ability to add it to the administrative record. Minn. Stat. § 14.66 (2018).

83. Although the Court concludes that the MPCA was legally obligated to preserve Ms. Handleland's notes of the April 5, 2018 EPA conference call, the MPCA committed a procedural irregularity without a prejudicial consequence. Having the actual document read by Mr. Pierard in the administrative record would be far superior to partial notes of what Mr. Pierard said.

H. MPCA Failure to Disclose or Produce Staff Attorney Schmidt's Notes of the April 5, 2018 EPA Call in Response to Relators' DPA Requests

84. After taking detailed notes during the April 5, 2018 phone call with the EPA, MPCA staff attorney Schmidt prepared typed notes and discarded his original notes. (Ex. *837* (includes notes of the April 5, 2018 phone call plus notes of other calls with the EPA[35]); *see* Ex. *838* (other Schmidt notes).) His notes are not part of the administrative record and their existence was not disclosed to Relators when the MPCA responded to their requests under the MGDPA. Relators argue that the failure to disclose or produce the typed notes violated the MGDPA and, therefore, constituted a procedural irregularity. (Relators' Post-Trial Brief at 42-44.)

85. The ORA establishes a government agency's obligation to preserve records. The MGDPA establishes how government data may be accessed by and disseminated to the public.

[35] Mr. Schmidt's typed notes typically included notes from multiple meetings. Exhibit 837 is no different. It contains his notes from a number of conference calls with the EPA, including the April 5, 2018 call. (Ex. *837*.) Prior to the hearing, Relators moved for production of the notes, arguing that they either are not work product or, if they are, production was warranted on the basis of substantial need and undue hardship. The Court held that Mr. Schmidt was, for the most part, a "mere scrivener" but that portions of the notes were entitled to work product protection. After redacting true work product, the Court granted Relators motion as to the remainder of the document, which is exhibit 837 in the Transfer Hearing record. *Part Two of Order Granting in Part and Denying in Part Relators' Motion to Compel Documents Identified in MPCA's Privilege Logs*, No. 62-CV-19-4626 at 6-7, 9-10 (Minn. Dist. Ct. Jan. 17, 2020) (as redacted by the Court, the document referred to as document number 301 in the January 17, 2020 Order was received into evidence at the hearing as exhibit 837).

86. As to Mr. Schmidt's typed notes[36], it is undisputed that they were prepared by legal counsel employed by the MPCA working in his professional capacity. Mr. Schmidt treated his notes as protected attorney work product and exempt from the MGDPA. Findings of Fact ¶ 66. Although the Court ruled that a majority of the notes do not qualify as attorney work product[37], the Court concludes that the MPCA acted in good faith when it labeled the document as such.

However, Relators failed to establish that Mr. Schmidt's notes are covered by the MGDPA. The "use, collection, storage, and dissemination of data" by an attorney working for a Minnesota government entity is expressly excluded from the both the MGDPA and the ORA:

> Notwithstanding the provisions of this chapter and section 15.17 [the ORA], the use, collection, storage, and dissemination of data by an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility; provided that this section shall not be construed to affect the applicability of any statute, other than this chapter and section 15.17, which specifically requires or prohibits disclosure of specific information by the attorney, nor shall this section be construed to relieve any responsible authority, other than the attorney, from duties and responsibilities pursuant to this chapter and section 15.17.

Minn. Stat. § 13.393 (2018). Applying section 13.393, the Court concludes that the MGDPA does not apply to attorney Schmidt's notes. Again, the Court's pre-hearing ruling that a majority of the notes do not qualify for work-product protection does not affect applicability of the statute. The statute expressly applies to the "use, collection, storage, and dissemination of" ALL "data by an attorney acting in a professional capacity for a government entity" regardless of the protected or

[36] Consistent with his customary practice, Mr. Schmidt discarded his hand-written notes shortly after the April 5, 2018 conference call once he prepared his typed notes from the written notes. Findings of Fact ¶ 64. There is no evidence that the hand-written notes existed at the time of Relators' DPA requests. By making an issue only of the typed notes, Relators' apparently concluded that they failed to satisfy their burden of proving that the hand-written notes existed at the time of a DPA request or that Mr. Schmidt had an obligation to preserve his hand-written notes under the ORA once the typed version of the notes was prepared. Guided by the ORA and the RDMM, the Court reaches the same conclusion. (*See* Ex. *77* (RDMM) at 12 (documents incorporated into a final product are nonrecords).)

[37] *See* note 35, *supra*.

unprotected status of the data in realms outside of the MGDPA. (*Id*.) As such, the MPCA had no obligation to produce the notes in response to Relators' DPA requests nor was there an obligation to disclose existence of the notes in a privilege log despite the fact that the notes were later ordered disclosed by this Court in the context of the instant section 14.68 proceeding.[38] The MPCA's failure to produce or disclose Mr. Schmidt's notes in response to Relators' DPA requests was not a procedural irregularity.

I. MPCA's Alleged Lack of Candor in the Permitting Process

87. Relators allege that the MPCA breached its duty of candor by issuing "permit decision documents that did not reflect complete truthfulness, accuracy, disclosure, and candor." (Relators' Post-Trial Brief at 45.) The duty of candor referenced by Relators is found in an administrative rule that the MPCA itself promulgated:

> 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.

Minn. R. 7000.300.

88. Relators contend that duty of candor violations occurred when the MPCA "omitted material information and misrepresented that EPA considered the PolyMet permit to comply with the CWA in final permitting documents." (*Id*. (citing Relators' Proposed Findings of Fact ¶¶ 537-539).) The three proposed findings of fact referenced by Relators' Post-Trial Brief are addressed in turn as they comprise the totality of Relators lack of candor allegation.[39]

[38] Relators did not reference section 13.393 in either of their post-hearing submissions.

[39] Relators' Post-Trial Brief does not reference certain of their proposed findings of fact, which detail alleged misleading statements to the public following approval of the permit. (Relators' Proposed Findings of Fact ¶¶ 540-556.) Because these events post-date issuance of the permit, they are irrelevant to any alleged procedural irregularities involving the permitting process. The described events go beyond the scope of the Transfer Order.

1. **Paragraph 537** of Relators' proposed findings of fact references paragraph 265 of the MPCA's December 20, 2018 Findings and Order. (Relator's Proposed Findings of Fact ¶ 537.) In its paragraph 265, the MPCA found that "[t]he Permittee has submitted a complete application. The application has been reviewed and preliminarily approved by the MPCA staff. The MPCA has determined that the application demonstrates that all environmental protection standards will be satisfied." (Ex. **350** ¶ 265.) Relators seek a finding and determination from the Court that the MPCA violated its duty of candor by failing to disclose the EPA's November 3, 2016 deficiency letter in this paragraph. (Relator's Proposed Findings of Fact ¶ 537.)

The NorthMet NPDES permit application processed to permit by the MPCA was the updated version it received in October 2017, nearly one year after the EPA issued its deficiency letter in connection with the original July 11, 2016 permit application. Findings of Fact ¶¶ 67, 74, 76. The EPA never sent a deficiency letter in connection with the October 2017 updated application and the Court already ruled that the EPA's November 3, 2016 deficiency letter was untimely per the MOA. Conclusions of Law ¶¶ 32-34. The Court determines that there was no lack of candor in paragraph 265 of the MPCA's Findings of Fact.

2. **Paragraph 538** of Relators' proposed findings of fact references paragraph 257 of the MPCA's December 20, 2018 Findings and Order. (Relator's Proposed Findings of Fact ¶ 538.) In its paragraph 257, the MPCA found that the "revised permit has been provided to EPA for review as part of the regular federal oversight of the state permitting program." (Ex. **350** ¶ 257.) Relators allege that this paragraph violates the duty of candor because the MPCA did not disclose the EPA's verbal comments during the April 5, 2018 telephone call or the MPCA's requests that the EPA not comment in writing on the draft permit. (Relator's Proposed Findings of Fact ¶ 538.)

As already discussed, the MPCA had no obligation to respond to what Mr. Pierard said during the April 5, 2018 telephone conference call with the EPA. Conclusions of Law ¶¶ 39-44. Moreover, paragraph 257 also references the MPCA's written responses to public comments which, in turn specifically references EPA written comments. (Ex. **350** ¶ 257 (citing Ex. 1133 ¶ Water-741 at 133).) MPCA paragraph 257 demonstrates compliance with the required procedures and it is entirely accurate. Finally, MPCA paragraph 257 references the revised permit, not the public notice draft of the permit. Both the March 2018 agreement with the EPA and the April 5, 2018 telephone conference between the MPCA and the EPA involved the earlier public notice draft of the permit so there was no reason for mentioning either in a paragraph discussing a later revised version of the permit. The MPCA did not breach its duty of candor.

3. **Paragraph 539** of Relators' proposed findings of fact references paragraph 256 of the MPCA's December 20, 2018 Findings and Order and paragraph Water-142 of the MPCA's responses to comments. (Relator's Proposed Findings of Fact ¶ 539.) In its paragraph 256, the MPCA found that it "adequately considered the previously submitted EPA comments in MPCA's development of the permit. The permit complies with Clean Water Act requirements identified by EPA, including permit coverage for all pollutant discharges expected from the facility." (Exs. **350** ¶ 256.) The same statement appears in the MPCA's responses to public comments. (Ex. **1133** ¶ Water-741 at 142.) Relators seek a finding of fact from the Court that the MPCA's duty of candor required it to disclose "that EPA's comments on the draft PolyMet permit explicitly concluded that the draft permit did not comply with the CWA." (Relator's Proposed Findings of Fact ¶ 539.)

The Court previously determined that the EPA made no comments regarding the public notice draft permit per its agreement with the MPCA, nor did it have a legal obligation to respond to Mr. Pierard's informal oral comments during the April 5, 2018 telephone call. Conclusions of

Law ¶¶ 39-44. Moreover, MPCA paragraphs 256 and Water-741 reference the final proposed permit, not the public notice draft of the permit. There was no lack of candor by the MPCA.

J. MPCA's Alleged Efforts to Keep Evidence out of the Administrative Record

89. Relators characterize the totality of alleged procedural irregularities as a "systematic course of conduct to keep evidence of EPA's comments and MPCA's own irregular procedures out of the administrative record." (Relators' Post-Trial Brief at 45-46.)

90. With the exception of exhibit 58, exhibit 333, and the partial April 5, 2018 meeting notes taken by Ms. Handeland, the Court concludes that Relators failed to satisfy their burden of proving that there is anything missing from the administrative record due to procedural irregularities by the MPCA.

91. Relators also failed to satisfy their burden of proving that there was some sort of broad effort by the MPCA to keep evidence out of the administrative record or to prevent the EPA from submitting written comments. Findings of Fact ¶ 142. For example, the MPCA/EPA agreement not to submit written comments during the public notice period is in the administrative record. (Ex. **64A**, **307A.**) If there was a general strategy by the MPCA to suppress public knowledge of the March 2018 agreement with the EPA, it did not do a very good job.

92. The Court already addressed each alleged procedural irregularity, most of which were determined to represent regular procedures. The Court finds no overarching effort by the MPCA to keep evidence out of the administrative record and it rejects Relators' assertion of an additional procedural irregularity grounded on other alleged procedural irregularities.

Based on its Findings of Fact and Conclusions of Law, the Court issues the following:

FINAL DETERMINATIONS AND ORDER

1. Relators violated the Court's pre-hearing Order by claiming for the first time in their post-hearing brief that the MPCA improperly transmitted PolyMet's NorthMet Project NPDES permit application. Therefore, the alleged procedural irregularity is dismissed on procedural grounds.

2. Even if Relators' contention is considered on the merits, the Court determines that the MPCA did not engage in any procedural irregularities in connection with the transmittal of PolyMet's NorthMet Project NPDES permit application.

3. The MPCA did not engage in any procedural irregularities in connection with the processing of PolyMet's NorthMet Project NPDES permit application.

4. Relators violated the Court's pre-hearing Order by claiming for the first time in their post-hearing brief that the MPCA's failure to provide the EPA with a pre-public notice draft of the PolyMet permit 60 days before public notice was a procedural irregularity. Therefore, the alleged procedural irregularity is dismissed on procedural grounds.

5. Even if Relators' contention is considered on the merits, the Court determines that the MPCA did not engage in any procedural irregularities regarding the EPA's request for a pre-public notice draft of the PolyMet permit.

6. The MPCA's effort to reach an agreement with the EPA to delay making written comments on a draft NorthMet NPDES permit until sometime after the public notice period did not constitute a procedural irregularity.

7. The agreement between the MPCA and the EPA to delay the EPA's written comments on a draft NorthMet NPDES permit until sometime after the public notice period in exchange for the MPCA's agreement to provide the EPA with an extra 45 days to review and

comment upon an updated "pre-proposed" draft of the NorthMet NPDES permit did not constitute a procedural irregularity not shown in the record.

8. The MPCA's failure to respond to the EPA's informal oral comments during the April 5, 2018 conference call was not an irregularity in procedure not shown in the record.

9. The MPCA's failure to implement a litigation hold no later than the date of Relator's appeal to the Court of Appeals was an irregularity in procedure not shown in the record. Relators failed to demonstrate that the lack of a litigation hold resulted in the destruction of documents that impacted the MPCA's "fundamental decision-making process" with regard to permit approval or the permitting process. *Mampel*, 254 N.W.2d at 378.

10. Relators' Motion to Strike the Neblett, Emrich, and Sansonetti Declarations is denied.

11. The MPCA's failure to preserve exhibits 60, 61, 62, and 591 was not an irregularity in procedure not shown in the record.

12. The MPCA's failure to preserve exhibits 58 and 333 was an irregularity in procedure not shown in the record. However, the documents were located elsewhere, they are available for inclusion in the administrative record, and they are part of the Transfer Hearing record.

13. The MPCA's failure to preserve Ms. Handleland's partial notes of the April 5, 2018 EPA conference call was an irregularity in procedure not shown in the record. However, the failure resulted in no prejudice to Relators because the document that was the subject of her notes is preserved, available for inclusion in the administrative record, and part of the Transfer Hearing record.

14. Relators' motion for spoliation sanctions is denied.

15. The MPCA's failure to produce or disclose Mr. Schmidt's notes in response to Relators' DPA requests was not a procedural irregularity not shown in the record. In addition, the

document that was the subject of his notes is preserved, available for inclusion in the administrative record, and part of the Transfer Hearing record.

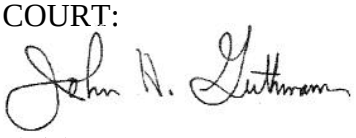
16. The MPCA did not violate its duty of candor.

17. The MPCA did not engage in a systematic effort to keep evidence out of the administrative record and, with the exception of exhibits 58, 330, and Ms. Handeland's April 5, 2018 notes, Relators failed to satisfy their burden of proving that the agency destroyed documents or other evidence that should have been placed in the administrative record or should have been available for inclusion in the Transfer Hearing record.

18. Having completed the tasks required by the Transfer Order, the matter is ordered returned to the Minnesota Court of Appeals.

Dated: September 3, 2020

BY THE COURT:



Guthmann, John (Judge)
Sep 3 2020 3:09 PM

John H. Guthmann
Judge of District Court