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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

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

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

RELATORS' PRE-TRIAL BRIEF

INTRODUCTION

The appeal underlying this proceeding deals with the merits of the National Pollutant Discharge Elimination System/State Disposal System ("NPDES") water pollution permit issued to PolyMet Mining, Inc. ("PolyMet") for the NorthMet mine project ("PolyMet Permit" or "Permit") by the Minnesota Pollution Control Agency ("MPCA"). However, this proceeding is not about the merits of that Permit; it is important for different reasons. This proceeding goes to the heart of our democratic system, which depends upon government transparency and accountability, adherence to the rule of law, and – critically -- the checks and balances which provide effective judicial review of executive branch decisions.

Louis Brandeis once wrote that "sunlight is said to be the best of disinfectants,"[1] and this proceeding is about bringing sunlight to what otherwise would be a dark and shameful chapter in the history of MPCA. The Court of Appeals has tasked this Court with determining whether there were procedural irregularities in MPCA's issuance of the PolyMet Permit that would prevent the

[1] Louis D. Brandeis, "Other People's Money And How The Bankers Use It," Chapter V: What Publicity Can Do (1915).

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Court of Appeals from properly exercising its constitutional and statutory function in the review of the Permit. If such irregularities occurred -- and upon completion of the evidentiary hearing in this case such irregularities will have been proven by a preponderance of the evidence -- the remedy will be to reopen an otherwise closed appellate record.[2]

The evidence will show that MPCA successfully and improperly lobbied the United States Environmental Protection Agency ("EPA") to deviate from established procedure and forego sending its written comments --- criticisms, really --- of the draft PolyMet Permit to MPCA. Since only documents in MPCA's possession can become part of the administrative record on appeal, MPCA's lobbying effort sabotaged the Court of Appeals' effective judicial review of MPCA's issuance of the Permit.

It was only due to the dogged persistence of Relators in submitting nine Minnesota Government Data Practices Act ("DPA") requests to MPCA, submitting nine Freedom of Information Act ("FOIA") requests to EPA, and filing two FOIA lawsuits to enforce Relators' rights, along with the emergence of EPA whistleblowers, that MPCA's effort to suppress EPA's comments were discovered. As a result of these efforts, while Relators' appeals were pending, it was revealed that EPA had drafted a detailed written comments criticizing the draft PolyMet Permit, but that document was missing from the public record. Had EPA's written comments become part of the public record, as they should have been, MPCA would have been required to address them to EPA's satisfaction, and the Court of Appeals could have properly taken both those comments and MPCA's responses to them into account in deciding Relators' appeals.

[2] Transfer Order at 3-4, Nos. A19-0112 et al., (Minn. App. June 25, 2019); Rule 16 Conf. Tr. 94:8-12 (Aug. 7, 2019).

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Perhaps even more troubling than MPCA's successful lobbying to keep EPA's comments out of the public record is MPCA's cover up of its efforts to suppress EPA's comments. MPCA documents obtained in discovery show repeated efforts to conduct a public relations campaign to "spin" the facts and continue to conceal and obfuscate what MPCA had done. MPCA's conduct is akin to a fraud on the public, a fraud on Relators, and a fraud on the Court of Appeals itself.

One can speculate as to what MPCA's motives were in engaging in such improper, irregular and likely illegal conduct, but it is not essential that this Court determine MPCA's motives or whether any individuals involved are personally culpable. All this Court need determine is that EPA's written comments on the draft PolyMet Permit were improperly withheld from the public record in which they should have appeared, and that after MPCA suppressed these comments MPCA covered up both EPA's criticisms of the draft Permit and MPCA's own improper conduct.[3] This Court's findings will ensure that Relators and the Court of Appeals have the benefit of EPA's critical comments on the PolyMet Permit and access to the actual record of MPCA's decision-making process.

I. RELATORS' EVIDENCE OF PROCEDURAL IRREGULARITIES

Relators expect to prove the facts set forth below by a preponderance of the evidence through documents, admissions, and the testimony of fact and expert witnesses. Legal authorities will be set forth in more detail in post-trial briefing.

[3] EPA's conduct or motives are not at issue or relevant to these proceedings, only the propriety of MPCA actions to prevent EPA from sending its comments. Relators understand that EPA's conduct is the subject of a separate investigation by its Inspector General.

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A. EPA Had Oversight Authority to Ensure the Permit Met Clean Water Act Requirements.

1. Discharge to waters covered by the federal Clean Water Act ("CWA") is prohibited except under a NPDES permit that prevents violation of EPA-approved State[4] water quality standards. 33 U.S.C. §§ 1311(a), 1342(b).

2. A NPDES permit must contain water quality-based effluent limitations ("WQBELs") whenever technology-based limits are insufficient to achieve State water quality standards. 40 C.F.R. §§ 122.4, 122.44(d)(1).

3. The CWA provides that the EPA or any person can bring a lawsuit for water pollution that violates state water quality standards unless a discharger is "shielded" from liability by complying with the terms of its NPDES permit. 33 U.S.C. §§ 1365, 1342(k).

4. The EPA had authority under the CWA, EPA regulations, and the Memorandum of Agreement between EPA and MPCA ("MOA") to ensure that the PolyMet Permit met the requirements of the CWA and its implementing regulations and that the Permit was enforceable.

B. PolyMet Project Environmental Review and EPA Permitting Expectations.

5. EPA's 2010 written comments on the draft environmental impact statement rated the PolyMet project "environmentally unsatisfactory" due to "unacceptable and long-term water quality impacts, which include exceeding water quality standards . . . and increasing mercury loadings into the Lake Superior watershed." (Relators Ex. 329).

[4] The Fond du Lac Band has Treatment as a State status and federally-approved water quality standards within the Fond du Lac Reservation for purposes of the CWA. *See* 33 U.S.C. § 1377(e).

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6. During environmental review of the PolyMet Project, EPA informed MPCA of its expectations that "appropriate WQBELs must be derived based on water quality standards and implemented in the permit." (Relators Ex. 331).

7. In April 2015, Kevin Pierard, NPDES Program Branch Chief in EPA Region 5 ("Pierard"), emailed Ann Foss, MPCA's Metallic Mining Sector Director ("Foss"), to document EPA's understanding with MPCA that the PolyMet Permit must include WQBELs, to which Foss responded that EPA should not put discussions in writing without MPCA's agreement. (Relators Ex. 685).

C. PolyMet's Permit Application Deficiencies and Concerns Raised by EPA before the Draft Permit was Released.

8. PolyMet submitted its application for the PolyMet Permit on July 11, 2016.

9. After PolyMet's permit application was submitted, MPCA and EPA held conference calls approximately every two weeks in 2016 and 2017 to discuss PolyMet Permit issues, consistent with EPA's significant concerns remaining after environmental review.

10. On November 3, 2016, EPA submitted written comments detailing deficiencies in the PolyMet Permit application. (Relators Ex. 306).

11. The MOA between EPA and MPCA requires that, once EPA submits a deficiency letter, no NPDES application may be processed by MPCA until EPA sends another letter saying application deficiencies are resolved. (Relators Ex. 328, § 124.22(8)).

12. EPA never sent a resolution letter on the PolyMet Permit application (Relators Ex. 572), yet MPCA processed the application.

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13. In November 2017, after EPA had received PolyMet's October 2017 update to its application (MPCA Exs. 1069-1075), EPA and MPCA had two conference calls in succession. (Relators Ex. 325).

14. In these November 2017 conference calls, EPA advised MPCA that WQBELs are appropriate to ensure the permit wouldn't be a "shield" against CWA enforcement and asked to receive the draft permit for review two months before public notice. (Relator Ex. 325). MPCA only gave EPA two weeks of early notice. (Relators Ex. 372).

15. MPCA provided PolyMet with a pre-public notice draft Permit on December 11, 2017. (Relators Exs. 228-30).

D. MPCA Lobbied EPA Not To Send Written Comments on the PolyMet Permit During the Public Notice Period.

16. EPA received a pre-public notice draft Permit on January 17, 2018 and immediately contacted MPCA to set a conference call. (Relators Exs. 34-37).

17. MPCA released the draft PolyMet Permit to the public on January 30 and announced a public comment period running until March 16, 2018. (Relators Ex. 326).

18. In conference calls on January 31, February 13 and March 5, 2018 EPA told MPCA its concerns about the draft PolyMet Permit, including: (a) the Permit lacked WQBELs; (b) mercury would be released from wetlands during construction; (c) the Cliffs Erie permit (for the old tailings basin on which PolyMet would dispose its tailings) transfer to PolyMet was unclear; (d) the lack of WQBELs could provide a "permit shield" preventing CWA enforcement. (Relators Ex. 324).

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19. On March 5, 2018, EPA told MPCA staff that EPA "will submit comments" during the public notice comment period and "make clear" EPA's concerns. (*Id.*). EPA's statements triggered a flurry of MPCA activity to suppress EPA's written comments.

20. On March 12, 2018 Commissioner John Linc Stine ("Stine"), EPA's Regional Administrator for Region 5, Cathy Stepp ("Stepp"), and Region 5's Chief of Staff, Kurt Thiede ("Thiede"), conferred regarding the draft PolyMet Permit. (Relators Exs. 57, 677).

21. Stine then sent an email to Stepp, Thiede and Assistant Commissioner Shannon Lotthammer ("Lotthammer") directing that Lotthammer follow up with Thiede "regarding the Region 5 – MPCA agreement I mentioned on our call." (Relators Ex. 333). The agreement Stine referenced was the MOA.

22. On March 13, 2018, Lotthammer sent Thiede an email asking EPA to "not send a written comment letter during the public comment period. . ." (*Id*.) Lotthammer claimed, falsely, that the "established process" under the Region 5- MPCA MOA was for EPA to wait until the comment period had closed and MPCA submitted a proposed final NPDES permit before putting anything in writing. (*Id*.)

23. Lotthammer contacted Thiede repeatedly between March 13 and March 15, 2018 to request EPA withhold its comments on the draft PolyMet Permit. (Relators Ex. 593).

24. EPA finalized extensive written comments on the draft PolyMet Permit by March 15, 2018. (Relators Ex. 615). These comments (Relators Ex. 337) were never sent to MPCA and are not contained in the Court of Appeals' administrative record.

25. EPA's privilege log of communications with lawyers from March 13 to March 15, 2018 strongly suggests that suppression of EPA's written comment letter was anything but customary. (Relators Ex. 498).

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26. Pierard is expected to testify that in his 36 years of experience, other than for the PolyMet Permit, EPA Region 5 had never withheld written comments prepared for a draft NPDES permit.

27. Pierard also is also expected to testify that to the best of his knowledge, other than for the PolyMet Permit, MPCA had never requested EPA not to send MPCA its written comments on a draft NPDES permit.

28. On March 16, 2018, emails between Thiede and Lotthammer thanked each other finding "a solution to this matter," "dialogue" and "cooperation," (Relators Ex. 307), but those emails did not reveal that EPA had prepared written comments on the PolyMet Permit, that MPCA had asked EPA not to send them, or that EPA had suppressed its written comments in response to MPCA's request.

E. EPA's Comments on the Draft PolyMet Permit Were Highly Critical.

29. On March 16, 2018, the last day of the public comment period, Pierard called MPCA and requested a conference call to orally walk through EPA's PolyMet Permit comment letter that had not been sent. (Relators Exs. 307, 616).

30. On April 5, 2018, Pierard read EPA's written comments aloud to MPCA's Mining Sector Manager, Jeff Udd ("Udd"); Metallic Mining Unit Supervisor, Richard Clark ("Clark"); Staff Attorney, Michael Schmidt ("Schmidt"); and permit writer, Stephanie Handeland ("Handeland"), (Relators Ex. 337). A true and correct copy of the document read to MPCA is attached as Exhibit A. Its comments included:

> The draft permit does not include water quality based effluent limitations (WQBELs) . . . or any other conditions that are as stringent as necessary to ensure compliance with the applicable water quality requirements of Minnesota or of all affected States. . . (RELATORS_60956)

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> EPA is concerned that the permit and supporting materials do not include sufficient information to explain how downstream water will be protected consistent with CWA Section 402(b)(5), 33 U.S.C. § 1342(b)(5). . . MPCA should ensure that its permit will ensure compliance with downstream state WQS. (RELATORS_60958)
>
> [T]he permit does not include WQBELs for key parameters and appears to authorize discharges that would exceed Minnesota's federally-approved human health and/or aquatic life water quality standards for mercury, copper, arsenic, cadmium, and zinc. (RELATORS_62485)
>
> The permit as written may preclude enforcement per CWA Section 402(k), 33 U.S.C. § 1342(k). .The permit contains "operating limits" on an internal outfall that may not be enforceable by EPA, citizens, and potentially MPCA and, thus, may be ineffective at protecting water quality under the Clean Water Act. . . (RELATORS_62488)
>
> [T]he draft permit and/or supporting documentation should clearly assign responsibility for seep discharges by specifying those applicable portions of the Cliffs Erie, LLC permit (MN0054089), the Cliffs Erie, LLC Consent Decree . . .and the draft NorthMet permit. (RELATORS_62488)
>
> [T]he stormwater general permit would authorize discharge from the draining of over 900 acres of wetlands, which are dominated by peat bogs. This activity is expected to release significant amounts of mercury into downstream navigable waters . . . There is no provision in the construction stormwater general permit for addressing specific water quality standards issues. Thus, the draft permit (and associated permitting scheme) appears to leave mercury from this aspect of the project wholly unregulated. (RELATORS_62489)

31. Since 1974, when the MOA was first adopted, the PolyMet Permit is the *only* NPDES permit known to MPCA for which EPA prepared written comments on the draft permit, did not send the written comments, and instead read the comments aloud to MPCA. (Relators Ex. 702 at 14:19-24).

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F. MPCA Concealed EPA's Comments and Its Lobbying of EPA to Suppress Them.

a . MPCA Destroyed and Failed to Produce Documents requested under the DPA.

32. Although MPCA hired outside litigation counsel in 2015 and anticipated litigation of the PolyMet permit (Relators Exs. 382-83, 683), MPCA destroyed records and computers containing data documenting the PolyMet Permit process. (Motion Hr'g Tr. 96:3-11 (Minn. Dist. Ct. Nov. 13, 2019)).

33. MPCA received seven DPA requests from Relators between March 26, 2018 and February 3, 2019 asking for records from EPA or pertaining to comments or communications with EPA regarding the PolyMet Permit. (Relators Exs. 334, 336, 340-41, 346, 352, 354).

34. Although MPCA responded to DPA requests, MPCA provided no records reflecting Stine's or Lotthammer's lobbying of EPA to suppress EPA's written comments.

35. MPCA did produce emails on March 16, 2018 between Lotthammer and Thiede thanking one another for "cooperation" (Relators Ex. 307), which emails were included in the administrative record.

36. MPCA's responses to DPA requests contained annotated agendas and handwritten notes of many conference calls between EPA and MPCA from 2016 through 2018, but contained neither notes of the March 12, 2018 conference call when EPA confirmed written comments would be sent to MPCA nor notes of the April 5, 2018 call when EPA read its written comments aloud to MPCA.

37. Record evidence shows MPCA allowed Lotthammer to "manage her emails" (Relators Ex. 702 at 11:9-10), resulting in deletion and concealment of critical communications.

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38. MPCA's DPA responses contained no records reflecting that EPA had prepared written comments on the draft PolyMet Permit or that MPCA had asked that these comments not be sent.

39. MPCA permit writer Handeland testified that while she did not discard notes from any other days, she discarded her notes from April 5, 2018, the day when EPA read its written comments to MPCA. (Relators Ex. 691 at 15:1-16:2).

40. MPCA Staff Attorney Schmidt also discarded his notes of April 5, 2018, which he summarized in a memo. (Relators Ex. 574, ¶¶ 19-20). But, despite a February 2019 DPA request to MPCA asking that any pertinent documents that had been withheld be identified, MPCA did not disclose Schmidt's April 17, 2018 memo summarizing the April 5, 2018 meeting (Relators Ex. 281) until ordered to do so by the Court.

41. MPCA's DPA responses contained no records reflecting that EPA had read its comments on the draft PolyMet Permit aloud to MPCA or the substantive content of EPA's comments on the draft Permit.

b. MPCA's Administrative Record to the Court of Appeals Was Inadequate.

42. The administrative record provided to the Court of Appeals fails to include documents related to EPA's written comments or MPCA's efforts to suppress them, including but not limited to:

- Records of Stine's communications with Stepp in March 2018 requesting that EPA's written comments on the draft PolyMet Permit not be sent;
- Records of Lotthammer's communications with Thiede in March 2018 requesting that EPA's written comments on the draft PolyMet Permit not be sent;
- Notes memorializing the conference call on April 5, 2018 when EPA read its written comments on the draft PolyMet Permit aloud to MPCA;

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- Any records of any type reflecting that EPA had prepared written comments on the draft PolyMet Permit;
- Any records of any type reflecting that MPCA had requested that EPA's written comments on the draft PolyMet Permit not be sent;
- Any records reflecting the content of the written comments that EPA read to MPCA on April 5, 2018; and
- The actual text of EPA's written comments on the draft PolyMet Permit completed on March 15, 2018 and read to MPCA on April 5, 2018.

c. MPCA Concealed EPA's Comments in PolyMet Permit Issuance Documents

43. MPCA's responses to comments and Findings of Fact, Conclusions of Law and Order ("Findings") -- primary documents prepared for PolyMet Permit issuance and submitted as part of the administrative record – failed to identify or disclose any of the comments or concerns expressed by EPA regarding the PolyMet Permit.

44. Both MPCA's responses and its Findings contain a misleading statement that MPCA "considered the previously submitted EPA comments in its development of the permit. The permit complies with Clean Water Act requirements identified by EPA." (Relators Ex. 323 at RELATORS_0045628, 350 at ¶256).

45. MPCA's public announcement in issuing the PolyMet Permit also, affirmatively claimed EPA "had no comments during the period allotted." (Relators Exs. 379, 600).

d. MPCA Covered Up its Suppression Efforts as Information Leaked to the Public.

46. When information on the PolyMet permit process began to leak to the public, MPCA attempted to cover up its role in asking EPA to suppress comments on the PolyMet Permit.

47. In reaction to January 2019 news coverage, MPCA falsely informed the press that there was "no information in what we provided that suggests that EPA was directed to suppress" comments. (Relators Exs. 269-71).

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48. In February 2019, MPCA falsely told elected officials that MPCA "did not, at any time, ask EPA to suppress or withhold comments on the PolyMet NPDES permit." (Relators Exs. 150-51, 267-68, 534). MPCA's new Commissioner Laura Bishop stated to the Governor's staff that MPCA "clearly denied. . . that we requested that they not comment." (Relators Exs. 152-53).

49. Declarations submitted by MPCA to the Court of Appeals in the transfer motion proceedings were misleading. Without disclosing to the Court that MPCA leadership had in fact taken such actions, MPCA submitted sworn declarations of declarant Schmidt stating he had never "participated in, or heard of, any conversation in which EPA was discouraged from submitting written comments" (Relators Ex. 574, ¶ 17) and of declarant Udd stating he "had no knowledge of any 'actions' anyone took to prevent EPA's criticisms from making it into the administrative record." (Relators Ex. 575, ¶ 9).

50. On June 25, 2019, the Court of Appeals transferred the PolyMet Permit appeals to district court due to substantial evidence of procedural irregularities.

G. MPCA's Suppression and Concealment of EPA Comments was Material.

51. Pierard is expected to testify why EPA comments on a draft NPDES permit are important to protect EPA's oversight role and ensure that EPA concerns are addressed in the final NPDES permit.

52. MPCA claims that its meetings with PolyMet and EPA in September 2018 resolved all of EPA's concerns. But the final PolyMet Permit did not contain WQBELs or other substantive permit terms and solutions proposed by EPA in the written comments EPA read aloud to MPCA on April 5, 2018. (Relators Exs. 281, 349 (final permit)).

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53. On December 18, 2018, EPA documented that many issues raised by EPA in its written comments were only partially addressed or completely disregarded. (Relators Ex. 525). Among the most significant of these issues were the lack of WQBELs and potential mercury discharge from construction stormwater.

54. Relators' experts are expected to testify that permit terms proposed by EPA would have mitigated sulfate and mercury impacts of the PolyMet mine project.

55. Relators' experts are expected to testify that sulfate and mercury discharge from the PolyMet mine project would result in methylmercury contamination of fish, affecting aquatic life and human health near the PolyMet project and carried downstream by the St. Louis River, which reaches the Fond du Lac Reservation and Lake Superior.

56. Relators' experts are expected to testify that methylmercury in fish harms the developing brains of fetuses and infants whose mothers eat contaminated fish, as well children and adults who eat the fish themselves.

II. APPLICABLE LAW TO DETERMINE PROCEDURAL IRREGULARITIES

1. The Administrative Record Must be Expanded to Reflect Agency Decision-making.

Appellate review is typically confined to the agency record. There is an exception under the Minnesota Administrative Procedure Act, Minn. Stat. ch. 14, in cases of alleged irregularities in procedure not shown in the record. Under such circumstances, the court of appeals may transfer an appellate case to the district court "to hear and determine the alleged irregularities in procedure." Minn. Stat. §14.68.

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"Irregularity" has multiple meanings, including "not being or acting in accord with laws, rules, or established custom" and "not following a usual or prescribed procedure."[5] The crux of the matter is that the irregularity affected decision-making or the reliability of the administrative record. *See Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 174 (Minn. App. 2001) ("[I]t is impossible to untangle these improper influences from respondent's final decision, and determine whether the evidence in the record supports the . . . decision"); *White v. Minn. Dep't of Nat. Res.*, 567 N.W.2d 724, 734-35 (Minn. App. 1997) (allegations that an agency "swept stubborn problems or serious criticism . . . under the rug" supports introduction of extra-record evidence)(quotation omitted).

In the realm of administrative procedure, "[e]ven the possibility that there is . . . one administrative record for the public and this court and another for the [agency] and those 'in the know' is intolerable." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54, (D.C. Cir. 1977). Accordingly, "the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings." *Id*.

The U.S. Supreme Court recently affirmed remand of a decision back to the agency under the federal Administrative Procedure Act based on extra-record discovery. *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (holding that reasons expressed by Secretary of Commerce for

[5] *Irregular*, Merriam-Webster (2020), *available at* https://www.merriam-webster.com/dictionary/irregular; *see also Irregularity*, Merriam-Webster (2020) ("something that is . . . improper or dishonest conduct" and something that is not usual or proper and that usually indicates dishonest behavior"), *available at* https://www.merriam-webster.com/dictionary/irregularity; *Irregularity*, Black's Law Dictionary (11th ed. 2019) ("Something irregular; esp., an act or practice that varies from the normal conduct of an action."); *Irregularity*, Cambridge Dictionary (2020) ("something that is not correct or acceptable" and "something that is not according to usual rules or what is expected, and often not acceptable"), *available at* https://dictionary.cambridge.org/us/dictionary/english/irregularity.

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adding a citizenship question to the 2020 census were contrived and the decision was properly remanded). In *Department of Commerce,* Chief Justice Roberts, speaking for the Court, explained that "[a]ltogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. . . We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process." *Id*. at 2575.

2. MPCA Failed to Make and Preserve Records of Official Activities.

MPCA is statutorily required to "make and preserve all records necessary to a full and accurate knowledge of [its] official activities." Minn. Stat. § 15.17. MPCA failed to adhere to this statutory requirement by affirmatively requesting that EPA not send its comment letter on the draft PolyMet Permit to MPCA, thus preventing it from becoming part of MPCA's permitting record. MPCA then compounded this statutory violation by destroying its records of communications with EPA that prevented EPA's comment letter from being sent. MPCA's violation of this law was irregular and contributed to the inadequacies of the administrative record in the PolyMet Permit cases.

3. MPCA Failed to Maintain and Disclose Minnesota Government Data.

MPCA is statutorily required to keep records containing government data and to insure that DPA requests are complied with "in an appropriate and prompt manner." Minn. Stat. § 13.03, subd. 1, subd. 2(a). Moreover, MPCA's internal DPA policies and procedures require the retention of government "records" even in the absence of a formal DPA request. (Relators Exs. 71, 76-77). Even data that might otherwise be shielded from view must be maintained as public data once a DPA request has been made. *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 350 (Minn. 2016).

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MPCA predicted on January 17, 2018, in an email sent to Stine and Lotthammer, that MPCA needed to be "prepared for DPA requests." Despite the law, and despite knowing that DPA requests were inevitable, MPCA neither kept nor disclosed records of Stine's and Lotthammer's lobbying of EPA in March 2018. Relators filed their first DPA request on March 26, 2018. Yet, MPCA neither kept nor disclosed written records from the important conference call that took place on April 5, 2018, when EPA read to MPCA directly from the written comments EPA had prepared and planned to submit to MPCA before MPCA's successful suppression campaign. Had these critical written records been kept and disclosed as required by statute, they, like other records disclosed to Relators, could have been placed in the administrative record for the Court of Appeals.

4. MPCA Failed to Provide Responses to EPA Comments.

Federal CWA regulations adopted by EPA require states issuing NPDES permits to "describe and respond to all significant comments on the draft permit raised during the public comment period." 40 C.F.R § 124.17(a)(2).[6] "The response to comments shall be available to the public." *Id*. § 124.17(c).

Administrative decisions applying these regulations require a meaningful response to comments, not confounded with responses to other individual commenters. *See In re Wash. Aqueduct Water Supply Sys*., NPDES Appeal No. 03-06, 11 E.A.D. 565, 589-90, 2004 WL 3214486, (EPA Envtl. App. Bd., July 29, 2004) (remand ordered when the record contained no meaningful response to comments analyzing the need for WQBELs); *In re Muskegon Dev. Co.***,** UIC Appeal No. 18-05, 17 E.A.D. 740, 749 (EPA Envtl. App. Bd., April 29, 2019) (remand to agency when omitting descriptions of individual comments "substantially impedes a

[6] Applied to state permits 40 C.F.R. § 123.25(a)(31).

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determination" that a specific comment was meaningfully responded to). In addition, a state agency issuing a NPDES permit may be "obligated to provide a response to comments by regulation, irrespective of whether the comments are received orally or in writing." *In re Sierra Pac. Indus. (Anderson Processing Facility),* PSD Appeal Nos. 13-01 *et al*., 16 E.A.D. 1, 31 n. 20 (EPA Envtl. App. Bd., July 18, 2013).

MPCA improperly circumvented the requirement to respond to EPA's written comments when it convinced EPA to suppress them. EPA also made significant oral comments to MPCA during the public comment period from January 30 through March 16, 2018. MPCA's failure to identify and specifically respond to these oral comments also violated CWA regulations

5. MPCA Breached its Duty of Candor.

MPCA's conduct preventing EPA comments on the draft PolyMet Permit from becoming part of the record and MPCA's concealment of its role in their suppression violated Minn. R. 7000.0300, which imposes a duty of candor on MPCA:

> 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.

The duty of candor is enforceable in MPCA proceedings. *In re Admin. Penalty Issued to Erickson Enterprise*, No. 7-2200-14389-2, 2001, WL 35926172, at *4-6, (Minn. OAH Sept. 28, 2001). Here, MPCA breached its duty of candor by omitting material information and misrepresenting its own conduct.

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6. MPCA Failed to Comply with Common Law Requirements to Follow Prior Practices and Develop a Record Sufficient for Judicial Review.

Minnesota Law requires MPCA to follow its prior practices and procedures and develop a record sufficient for judicial review. *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999) (reversal where a county failed to "take seriously their responsibility to develop and preserve a record that allows for meaningful review by appellate courts"); *Peoples Nat. Gas Co. v. Minn. Pub. Utilities Comm'n*, 342 N.W.2d 348, 352 (Minn. App. 1983) (applying "[t]he accepted rule regarding an agency's duty to adhere to its precedents" (citing *McHenry v. Bond*, 668 F.2d 1185 (11th Cir. 1982)).

Here, MPCA's actions contrary to prior practices prevented the creation of a public record of EPA comments on the draft PolyMet Permit. Then, MPCA made a concerted effort to deny the Court of Appeals any record of MPCA's lobbying effort to conceal EPA's comments or the substance of the comments themselves. The administrative record must be supplemented so the Court of Appeals may review both the omitted evidence and the deviation entailed by MPCA's concealment.

7. MPCA Failed to Follow Established Process for EPA Comments on Minnesota NPDES Permits.

In its lobbying effort in 2018, MPCA falsely claimed to EPA Region 5 political appointees that the "established" process under the MOA between MPCA and EPA is for EPA to comment only on the proposed final NPDES permit, not the draft permit. (Relators Ex. 333). In fact, the relationship between MPCA and the EPA is governed by the CWA and its regulations as well as by the MOA, and Minnesota's established process is for EPA to comment prior to or during the public comment period for a draft permit.

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The MOA provides that EPA may send comments or object when a final NPDES permit is proposed. (Relators Ex. 328, § 124.46(3)-(6)). However, the MOA also requires MPCA to send the draft permit and fact sheet to EPA when public notice is given, clearly contemplating that EPA can submit written comments at that time. (*Id*., §124.46(1)). Moreover, since the MOA was adopted, regulations adopted by the EPA under the CWA explicitly provide for EPA comments on draft permits. EPA must receive notice of draft permits and may make public comments, which comments are treated like all other public comments. 40 C.F.R. §§ 124.10(c),(e); 124.11, 124.17(a)(2). EPA and a state may even agree that EPA need not review a proposed permit if EPA has already reviewed the draft permit, unless EPA raises objections to the draft, the state has changed the permit, or there is significant public comment. 40 C.F.R. § 123.44(j).

EPA's regular procedure when commenting on MPCA NPDES permits, particularly major permits or ones where EPA has concerns, is for EPA to provide written comments on draft permits before or during the public comment period. EPA followed this regular procedure and commented on the draft permit for every NPDES mine permit disclosed by MPCA in these proceedings - including Cliffs Erie Northshore, Essar, Mesabi Nugget, U.S. Steel Keetac, and U.S. Steel Minntac. (*See* Relators Exs. 129, 131-32, 162, 164-66, 174, 531). Indeed, when EPA did not comment during the public comment period but only commented on a proposed final permit, MPCA actually complained the late comment was "very frustrating." (Relators Ex. 128).

On no permit other than the PolyMet Permit has MPCA lobbied EPA not to submit written comments on a draft NPDES permit during the public comment period. To do so for the PolyMet Permit, knowing EPA's level of concern and the keen public interest about this major new permit, was highly irregular, improper, and prejudicial to Relators.

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8. MPCA's Scheme to Withhold EPA's Comments Constitutes a Fraud on the Court of Appeals.

Fraud on the court occurs when conduct "impair[s] judicial machinery and prevent[s] an impartial adjudication" or when there is "an unconscionable plan or scheme to improperly influence the court in its decision." *Matter of Minnesota Pub. Utilities Com'n's Initiation of Summary Investigation*, 417 N.W.2d 274, 280 (Minn. App. 1987) (quoting 2A D. Herr & R. Haydock, *Minnesota Practice* § 60.24 (1985)). "Tampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Id.* (quoting *Hazel–Atlas Glass Co. v. Hartford–Empire Co.*, 322 U.S. 238, 246 (1944)). Where a fraud on the court is found, a matter may be reopened. *Id.* at 282 (ruling administrative proceedings can be reopened at any time based on the "fraud on the court" doctrine").

MPCA's concealment of its own conduct and EPA's comments on the draft Permit was an unconscionable scheme to improperly influence the Court of Appeals by hiding EPA concerns from judicial review. MPCA misled the Court of Appeals by sabotaging and then submitting an administrative record that did not include EPA's concerns. The administrative record must be reopened both to permit effective judicial review and to prevent MPCA from benefiting from its unconscionable scheme.

CONCLUSION

It cannot be known precisely how the PolyMet Permit would have differed if MPCA had followed customary, proper and lawful procedures and EPA's written comments criticizing the draft PolyMet Permit had been placed in the record. That they would have made a difference is highly probable. Members of the public would have seen those comments as early as March 26,

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2018, when Relators made their first DPA request to MPCA for PolyMet Permit records. MPCA would have been required to provide responses to EPA's written comments. Both EPA and MPCA would have known that, on appeal, the Court of Appeals would read EPA's comments along with the rest of the administrative record. EPA's comments would have provided a public and transparent benchmark against which to measure the final PolyMet Permit.

Without the need for a cover up, notes and emails would have been kept and disclosed by MPCA. This accountable, regular process would have had the best chance to produce a permit that protected aquatic life and human health. It would have preserved effective judicial review if any errors were made by MPCA despite a customary and lawful process.

Instead, MPCA broke the rules and deviated from its norms. When MPCA learned that EPA had prepared written comments on the draft PolyMet Permit, MPCA veered into uncharted territory and did something MPCA had never done before. MPCA lobbied EPA not to send EPA's draft comments on the draft PolyMet Permit. Then MPCA concealed its efforts to lobby EPA, concealed that EPA had prepared written comments on the draft Permit, concealed that EPA had read these written comments aloud to MPCA, and concealed the highly critical substance of the comments themselves. MPCA violated Minnesota's official records statutes and the DPA, circumvented federal CWA regulations for responses to comments, breached its duty of candor under Minnesota rules, and misrepresented EPA's oversight and MPCA's PolyMet permit process in official responses and Findings, public notices and statements, and even documents filed with the Court of Appeals. Ultimately, MPCA's actions amount to a fraud on the Court of Appeals because it subverted the administrative record.

MPCA's procedural irregularities have substantially prejudiced Relators' rights on appeal. Lacking the benefits of EPA's written comments on the PolyMet Permit, their appeals may have

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missed important claims. In Relators' cases currently pending at the Court of Appeals, the story told by the administrative record is neither complete nor accurate. It contains no evidence of MPCA's corrupt practices to prevent EPA oversight or its efforts to sweep the problems raised by EPA under the rug. EPA's comments themselves, as written and read aloud to MPCA, aren't in the record, and neither are emails or notes discarded or deleted as part of MPCA's cover up. All of this information should now be placed in the administrative record so that Relators may argue and the Court of Appeals may determine whether MPCA's issuance of the PolyMet Permit exceeded its delegated authority under the CWA, was made upon unlawful procedure, was affected by errors of law, unsupported by substantial evidence, or was arbitrary and capricious. Minn. Stat. § 14.69 (b)-(f).

Neither this Court nor the Court of Appeals can turn back the clock. But this Court can find that MPCA's PolyMet Permit process was contaminated by procedural irregularities. These departures from custom and practice, improprieties, violations of law, and attempts to defraud the Court of Appeals must, at a minimum, be addressed by allowing extra-record evidence to complete the administrative record and preventing MPCA from exploiting its procedural irregularities to preclude effective judicial review of the PolyMet Permit.

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DATED: January 10, 2020

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CERTIFICATION

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

MASLON LLP

/s/ Evan A. Nelson

JUST CHANGE LAW OFFICES

/s/ Paula Maccabee

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

/s/ Sean Copeland

EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

The information underlined in the attachment to this letter was conveyed verbally to MPCA on April 5, 2018. This was read word for word to PCA participants Richard Clark, Mike Schmidt, Jeff Udd, and Stephanie Handeland. EPA participants Mark Compton, Krista Mekkin, Barbara Wester, Candice Bauer, Mark Ackerman & Kevin Pierard. 4.5.18

REPLY TO THE ATTENTION OF:

WN-15J

Jeff Udd
Metallic Mining Director
Minnesota Pollution Control Agency
525 Lake Avenue South, Suite 400
Duluth, MN 55802

Re: U.S. Environmental Protection Agency Review of the Public Notice Draft NPDES Permit, PolyMet Mining, Inc., NorthMet Project, Permit No. MN0071013

Dear Mr. Udd:

The U.S. Environmental Protection Agency (EPA) has reviewed the Public Notice Draft National Pollutant Discharge Elimination System (NPDES) Permit, fact sheet, and supporting documents for the proposed PolyMet Mining, Inc., NorthMet Project, Permit No. MN0071013 received from the Minnesota Pollution control Agency (MPCA) on January 17, 2018.

EPA would like to recognize the progress that has been made regarding the design of the NorthMet project over the duration of the environmental review process. PolyMet is proposing advanced water treatment and project design components that include a tailings basin seepage capture system. Specifically, as part of the NorthMet project, the proposed seepage capture system, as described in the fact sheet on pages 17 and 70, is designed to capture the existing discharge from the tailings basin owned by Cliffs Erie, LLC that currently discharges to receiving waters surrounding the basin. EPA would also like to note that the proposed water capture systems for the mine site, plant site, and other associated areas is designed to be integrated into the project's overall water management system. The advanced water treatment technology is a step forward toward protecting water quality and we commend both MPCA and PolyMet for their effort to require and utilize this technology.

Enclosed for your consideration are our comments on the Public Notice Draft Permit. We hope that these will be helpful to MPCA as it works to prepare a proposed permit. EPA will continue to work with MPCA in our review of the proposed permit for this facility to ensure the permit issued by MPCA is consistent with the Clean Water Act (CWA) and implementing regulations. Please note that the comments below are abbreviated, and additional details are included in the Enclosure to this letter.

1. **Water Quality Based Effluent Limitations** – The draft permit does not include water

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quality based effluent limitations except as described in the fact sheet (p. 41) for ~~pH~~ or any other conditions that are as stringent as necessary to ensure compliance with the applicable water quality requirements of Minnesota, or of all affected States, as required of all state programs by CWA Section 402(b), 33 U.S.C. § 1342(b); and 40 C.F.R. §§ 122.4(d), 122.44, and 123.44(c)(1), (8)-(9). Furthermore, the permit includes technology based effluent limitations that are up to a thousand times greater than applicable water quality standards.

2. **Effluent Limitations Guidelines Calculation** – The draft permit does not include all the requirements of 40 C.F.R. 440, Subparts G, J, and K that apply to this proposed project, including a restriction on discharge volume that is in conformance with 40 C.F.R. § 440.104(b)(2)(i) and that is equivalent to the annual net precipitation for the site.

3. **Permit Enforceability Concerns** – Several sections of the draft permit present enforcement issues that should be revised to ensure compliance with 40 C.F.R. §§ 122.4(a) and (d) (see also 40 C.F.R. § 123.44(c)). For example, the permit as written may preclude enforcement per CWA Section 402(k), 33 U.S.C. § 1342(k), for pollutants disclosed during the application process but for which there are no limitations, or for water quality standards excursions where the limitation provided in the permit appears to be greater than the applicable state water quality criterion. Additionally, the permit contains "operating limits" on an internal outfall that may not be enforceable by EPA, citizens, and potentially MPCA and, thus, may be ineffective at protecting water quality under the Clean Water Act (see 40 C.F.R. §§ 122.4(a), (d)).

4. **Decision Making Procedures** – The draft permit states that certain plans, reports, and other actions are effective parts of the permit upon submittal by the permittee, making them de facto permit modifications that, in some instances, are likely to be major modifications subject to 40 C.F.R. § 122.62 (for example, see permit section 6.10.38). EPA is concerned that the permit allows both the permittee and MPCA to modify the permit without following the public process for major permit modifications under 40 C.F.R. § 122.62. Permit modifications that do not follow federal regulations may be unenforceable, may cause confusion for regulators and public over what is covered by the permit, and therefore would not ensure compliance with the CWA (see 40 C.F.R. § 122.4(a)).

The above concerns must be addressed to ensure that the permit will achieve compliance with all applicable requirements of the CWA, including water quality requirements of Minnesota and of all affected states. If unaddressed, the above concerns may result in an EPA objection to a proposed permit. See 40 C.F.R. §§ 123.44(c)(1), (5), (7), and (9). In addition to the issues identified above, we also recommend that you consider and address the additional comments and recommendations provided in the Enclosure.

We look forward to working with you as we conduct a formal review of the permit consistent with Section II of our Memorandum of Agreement. When the proposed permit is prepared, please forward a copy, any significant comments received during the public notice period, and MPCA's responses thereto, to r5npdes@epa.gov. Please include the EPA permit number, the facility name, and the words "Proposed Permit" in the message title. If you have any questions

EXHIBIT A

related to EPA's review, please contact Mark Ackerman at (312) 353-4145 or at ackerman.mark@epa.gov. Thank you for your cooperation during the review process and your thoughtful consideration of our comments.

Sincerely,

Kevin M. Pierard, Chief
NPDES Programs Branch

Enclosure

cc: Richard Clark, electronically
Stephanie Handeland, electronically

EXHIBIT A

bcc: Barbara Wester, ORC
Jillian Rountree, ORC
Krista McKim, NPDES

Path and File Name:
Https://Usepa.Sharepoint.Com/Sites/R5/Wd/NPDES/R5miningteam/Shared Documents/Polymet-Northmet/Draft Permit Comment Letter/MN0071013_Polymet Northmet_Draftperltr_2018_03-14.Docx

EXHIBIT A

Enclosure

U.S. Environmental Protection Agency
Public Notice Draft Permit Received January 17, 2018
PolyMet NorthMet
Permit No. MN0071013

Comments and Recommendations to Ensure Consistency with the Clean Water Act

Water Quality Based Effluent Limitations

The draft permit does not include water quality based effluent limitations (WQBELs) except as described in the fact sheet (p. 41) for pH or any other conditions that are as stringent as necessary to ensure compliance with the applicable water quality requirements of Minnesota, or of all affected States, as required of all state programs by CWA Section 402(b), 33 U.S.C. § 1342(b); and 40 C.F.R. §§ 122.4(d), 122.44, and 123.44(c)(1), (8)-(9). Furthermore, the permit includes technology based effluent limitations (TBELs) that are up to a thousand times greater than applicable water quality standards.

1. We acknowledge MPCA's consideration in the draft permit of the federal regulations at 40 C.F.R. Part 440 Subparts G, J, and K, including TBELs. See permit sections 6.10.44 and 8.1.1. However, the permit does not include WQBELs for key parameters and appears to authorize discharges that would exceed Minnesota's federally-approved human health and/or aquatic life water quality standards for mercury, copper, arsenic, cadmium, and zinc. This concern would be resolved if the permit included WQBELs for these parameters.

2. The permit lacks clear narrative effluent limitations such as an unqualified general prohibition on discharges that would cause exceedances of water quality standards (WQS). For example, at paragraph 6.16.4, the permit prohibits toxic discharges, but the condition also includes an exception for situations in which TBELs apply, as is the case with several of the parameters covered by the draft permit. EPA's concern could be resolved if MPCA establishes WQBELs for the authorized discharge and, additionally, removes the qualifying language from paragraph 6.16.4 to clearly prohibit discharges that would cause exceedances of water quality standards.

3. The permitting record does not appear to demonstrate that MPCA considered all the pollutants that were disclosed in the permit application as being present in the proposed discharge when evaluating the need for WQBELs. Thus, in the absence of WQBELs, there is no assurance that the discharge will meet applicable water quality standards. MPCA should, therefore, consider in its analysis all the pollutants that were presented in the application materials as potentially present in the proposed discharge to determine those WQBELs that are needed in the permit. Further, if MPCA considers a particular parameter to be the key to ensuring the facility will meet all applicable water quality standards, e.g., copper at monitoring station WS074 (permit section 6.10.40) or sulfate at monitoring station WS074 (permit section 6.10.31), the permit should include appropriate WQBELs at monitoring location SD001 to ensure that these internal operating limits result in meeting applicable water quality standards at the point where the discharge is sent to receiving waters (see also comment 6, below).

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U.S. Environmental Protection Agency
Public Notice Draft Permit Received January 17, 2018
PolyMet NorthMet
Permit No. MN0071013

4. The fact sheet's reasonable potential analysis relies on the assumption that data provided in the application are maximum values without taking into account the potential variability and uncertainty in the discharge from this new source. Under the Addendum to the EPA-MPCA National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement for the GLI (Great Lakes Initiative) (May 8, 2000), Minnesota committed to "use only alternative statistical procedures for deriving PEQ[1] that meet the standard in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2."[2] To resolve EPA's concern, MPCA should consider that the data provided in the application materials are estimates based on assumptions and modeling outputs and ensure that its reasonable potential analysis is consistent with the procedures in 40 C.F.R. Part 132, Appendix F, Procedure 5.

5. At pages 34-37of the fact sheet,[3] MPCA states that its decision that WQBELs are not needed in the permit relies on the operational limits for sulfate (in milligrams per liter) and copper (in micrograms per liter) at internal outfall WS074. Although these limits are set to low values, including the copper limit that is set to the water quality standard, (calculated by assuming a hardness value of 100 mg/L), there is nothing definitive in the permit or supporting information that justifies a conclusion that meeting these operational targets will result in meeting water quality standards for all the parameters in the permit application. This is especially a concern for mercury, for which the standard is specified in nanograms per liter and the pilot study[4] states that the effectiveness of the treatment system to remove mercury is unknown.

6. The permit requires that no sulfate or copper be added to the discharge after monitoring station WS074, but does not prohibit the addition of any other additives between monitoring station WS074 and the final outfalls. In fact, the permit record shows that the effluent of the water treatment system will require mineral addition prior to its discharge to surface waters to reduce the toxicity due to the low ionic strength of the treated water. This raises two concerns. First, the permitting record includes information showing that available local sources of lime contain aluminum in levels that, if used, will likely result in a discharge that exceeds the applicable water quality standard for aluminum.[5] While MPCA appears assured that higher cost lime containing lower levels of aluminum is available and will be used, to ensure that likely variability in the quality and price of available lime does not result in exceedances of the applicable water quality standard, the

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[1] "Projected Effluent Quality," (PEQ) is described in 40 C.F.R. Part 132, Appendix F, Procedure 5 Paragraph B.2.
[2] "EPA and MPCA agree that MPCA will use only alternative statistical procedures for deriving PEQ that meet the criteria in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2. EPA and MPCA further agree that EPA retains the authority to review any specific statistical procedures Minnesota intends to use for deriving PEQs and to object to permits that have been developed using statistical procedures that do not meet the requirements of Paragraph B.2. of Procedure 5."
[3] "To ensure the WWTS is operating as designed and to remain consistent with the assumptions made in the FEIS, the permit includes an internal performance monitoring point (Station WS074) where an Operating Limit of 10 mg/L sulfate applies. The Operating Limit at WS074 is an enforceable permit limit but is neither a water quality based permit limit nor a technology based permit limit because there is no Reasonable Potential." (p. 35).
[4] See page 43 of "Final Pilot-testing Report" dated June 2013.
[5] See page 31 of the "Final Pilot-testing Report" dated June 2013.

permit should include a WQBEL for aluminum at the final discharge points or an internal outfall after mineral addition. Second, in light of the potential for whole effluent toxicity to occur, the permit should include whole effluent toxicity limits at the final discharge points or an internal outfall after mineral addition.

7. EPA is concerned that the permit and supporting materials do not include sufficient information to explain how downstream water will be protected consistent with CWA Section 402(b)(5), 33 U.S.C. § 1342(b)(5), based upon the following considerations, including: (1) downstream receiving waters exceed the applicable state and downstream state human health and wildlife water quality standard for mercury, and (2) the pilot study states that the effectiveness of the treatment system to remove mercury is unknown. We note that a downstream tribe, that has "Treatment as a State" and federally approved WQS, has notified EPA that the project is likely to contribute to exceedances of its downstream WQS, including for mercury. MPCA should ensure that its permit will ensure compliance with downstream state WQS.

In summary, EPA recommends that MPCA include WQBELs in the permit for those parameters identified in the application that are expected to be in the discharge and for which Minnesota has applicable WQS. We note that as this is a new discharger, the inclusion of WQBELs for these parameters would be prudent and provide a basis for measuring the performance of the new treatment technology proposed by the applicant. We also note that in subsequent permit cycles, after the facility has achieved full operation, such limits could be modified or deleted if no reasonable potential to exceed water quality standards is demonstrated.

Effluent Limitations Guideline Calculation

The draft permit does not include all the requirements of 40 C.F.R. 440, Subparts G, J, and K that apply to this proposed project, including a restriction on discharge volume that is in conformance with 40 C.F.R. § 440.104(b)(2)(i) and that is equivalent to the annual net precipitation for the site.

Permit sections starting at 6.10.1 include a formula that retrospectively calculates the allowable discharge flow and includes a "carryover" amount defined as "the difference between the allowable annual discharge volume and the actual volume discharged" which acts as a "credit" that the permittee is allowed to apply to the following calendar year. This "carry over credit" appears to be in contradiction to the applicable regulatory definitions of "annual precipitation," "annual evaporation," and "mine drainage" at 40 C.F.R. § 440.132(b), (h). We recommend setting a numeric limit on flow, including this limit in the permit, and ensuring that it is consistent with 40 C.F.R. § 440.104(b)(2)(i).

In addition, we recommend that MPCA consider the applicability of – and inclusion of – effluent limitations contained in 40 C.F.R. § 440.12, and 40 C.F.R. Part 440, subpart A (iron ore), as the project discharge could include legacy pollutants.

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Enclosure

U.S. Environmental Protection Agency
Public Notice Draft Permit Received January 17, 2018
PolyMet NorthMet
Permit No. MN0071013

Permit Enforceability Concerns
MPCA should address the following concerns.

1. The permit as written may preclude enforcement per CWA Section 402(k), 33 U.S.C. § 1342(k), for pollutants disclosed during the application process but for which there are no limitations, or for water quality standards excursions where the limitation provided in the permit appears to be greater than the applicable state water quality criterion. (12)

2. The permit contains "operating limits" on an internal outfall that may not be enforceable by EPA, citizens, and potentially MPCA and, thus, may be ineffective at protecting water quality under the Clean Water Act (see 40 C.F.R. §§ 122.4(a), (d)). Specifically, the permit includes an internal outfall operating "target" and "limit" for sulfate based on a voluntary commitment by PolyMet to meet a 10 mg/L sulfate limit (permit sections 6.10.34-35) and an internal operating "limit" for copper that MPCA states will ensure compliance with the chronic water quality standard for copper (permit section 6.10.43). We understand that MPCA's authority to enforce such a provision may rest on state authority, outside the scope of the CWA. MPCA should revise the permit as necessary to ensure that all NPDES requirements are enforceable under the CWA. (13) (13b)

   Additionally, the internal "operating limit" for copper, at 9.3 micrograms per liter at permit section 6.10.43, is equivalent to the water quality criterion for copper. However, permit section 6.10.44 appears to authorize higher discharge concentration for copper, based on the TBEL that appears to apply at outfall SD001 (permit section 8.1.1). This creates a conflict as to which limit is applicable and enforceable against the permittee. MPCA should revise the permit to include a WQBEL for copper. XTra

3. MPCA plans to transfer the administratively continued, expired Cliffs Erie, LLC permit (and associated enforcement documents) for the existing tailings basin to an affiliated corporate entity of PolyMet. It appears that this arrangement could result in the permittee holding multiple permits covering the same discharge for some time after the effective date of the NorthMet permit. This creates confusion over which discharges are covered by each permit and may complicate or preclude enforcement of permit requirements under either permit, for example if legacy pollutants do not attenuate as predicted (permit section 6.10.45). (14)

   Additionally, the Permit Fact Sheet (p. 17) acknowledges continuing seep discharges from the tailing basin. As such, the draft permit and/or supporting documentation should clearly assign responsibility for seep discharges by specifying those applicable portions of the Cliffs Erie, LLC permit (MN0054089), the Cliffs Erie, LLC Consent Decree with MPCA, and the draft NorthMet permit. Specifically, the permit should include: (a) a list of known seeps (including coordinates and/or sections) that are authorized to discharge from the tailings basin, (b) a map identifying seeps and their relationship to the planned containment system, (c) monitoring and applicable limits for these seeps, because, as (14b)

noted in the fact sheet (p. 17), seep discharges "contributed to exceedances of permit effluent limitations established in the NPDES/SDS permit," and (d) appropriate interim authorization, limits, and requirements for tailings basin seeps until such a time as seeps are fully contained and cease to reach surface waters.

4. MPCA plans to issue general permit coverages for construction stormwater discharges prior to commencement of construction. Neither the draft individual permit, nor any supporting documentation clearly delineates what activities are excluded from coverage under a general permit. Further, the stormwater general permit would authorize discharge from the draining of over 900 acres of wetlands, which are dominated by peat bogs. This activity is expected to release significant amounts of mercury into downstream navigable waters. While MPCA has acknowledged and addressed such discharges in its peat mining permits (and in verbal comments regarding this project), nothing in the permitting record demonstrates that this issue has been addressed or even considered. There is no provision in the construction stormwater general permit for addressing specific water quality standards issues. Thus, the draft permit (and associated permitting scheme) appears to leave mercury from this aspect of the project wholly unregulated. We suggest identifying what is intended to be covered under the stormwater general permit and evaluate whether there is reasonable potential for discharges from activities covered under the stormwater general permit to cause or contribute to excursions from water quality standards. If there is such reasonable potential, coverage under the stormwater general permit would not be appropriate. Rather this discharge, with appropriate WQBELs, could be covered under the NorthMet permit or another individual permit.

5. Permit section 6.10.17 does not allow the permittee to discharge any process wastewater from the mine site to the surface waters. However, it is not clear how compliance with this condition will be evaluated. Under 40 C.F.R. § 122.44(i), NPDES permits must include monitoring requirements "to assure compliance with permit limitations," which include, among other things, "the mass (or other measurement specified in the permit) of each pollutant limited in the permit" and "the volume of effluent discharged from each outfall." We recommend that the permit include monitoring requirements and conditions against which compliance can be objectively measured. We have similar concerns with other provisions at permit sections 6.10.26, 6.10.78, 6.11.2, 6.11.9, 6.12.2, and 6.15.11.

Decision Making Procedures

The draft permit states that certain plans, reports, and other actions are effective parts of the permit upon submittal by the permittee, making them de facto permit modifications that, in some instances, are likely to be major modifications subject to 40 C.F.R. § 122.62 (for example, see permit section 6.10.38). EPA is concerned that the permit allows both the permittee and MPCA to modify the permit without following the public process for major permit modifications under 40 C.F.R. § 122.62. Permit modifications that do not follow federal regulations may be unenforceable, may cause confusion for regulators and public over what is covered by the

permit, and therefore would not ensure compliance with the CWA (see 40 C.F.R. § 122.4(a)).

Although MPCA may wish to require the permittee to undertake immediate corrective action in appropriate circumstances, EPA recommends that MPCA eliminate those permit provisions that make permittee-submitted plans, reports, and other actions immediately-effective parts of the permit. We recommend that, instead, MPCA employ appropriate enforcement responses and its authority to modify permits under Minn. R. 7001.0170 and 40 C.F.R. § 122.62, as necessary.

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6. Permit section 6.10.26 says "Direct discharge to surface waters from the FTB Seepage Containment System is prohibited." It is unclear to EPA how MPCA would implement the prohibition of "direct discharge." EPA recommends that the permit be clarified to prohibit any "discharge of pollutants to surface waters" consistent with the Clean Water Act.

7. Permit section 6.10.49 requires sampling at SW003, SW005, SW006, SW007, and SW020 to begin 18-months following initial operation of the WWTS. MPCA should ~~begin~~ require sampling upon permit issuance so that a baseline can be established at these locations. To begin

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EXHIBIT A

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Comments and Recommendations to Ensure Consistency with the Clean Water Act

Water Quality Based Effluent Limitations

The draft permit does not include water quality based effluent limitations (WQBELs) except as described in the fact sheet (p. 41) for pH or any other conditions that are as stringent as necessary to ensure compliance with the applicable water quality requirements of Minnesota, or of all affected States, as required of all state programs by CWA Section 402(b), 33 U.S.C. § 1342(b); and 40 C.F.R. §§ 122.4(d), 122.44, and 123.44(c)(1), (8)-(9). Furthermore, the permit includes technology based effluent limitations (TBELs) that are up to a thousand times greater than applicable water quality standards.

1. We acknowledge MPCA's consideration in the draft permit of the federal regulations at 40 C.F.R. Part 440 Subparts G, J, and K, including TBELs. See permit sections 6.10.44 and 8.1.1. However, the permit does not include WQBELs for key parameters and appears to authorize discharges that would exceed Minnesota's federally-approved human health and/or aquatic life water quality standards for mercury, copper, arsenic, cadmium, and zinc. This concern would be resolved if the permit included WQBELs for these parameters.

2. The permit lacks clear narrative effluent limitations such as an unqualified general prohibition on discharges that would cause exceedances of water quality standards (WQS). For example, at paragraph 6.16.4, the permit prohibits toxic discharges, but the condition also includes an exception for situations in which TBELs apply, as is the case with several of the parameters covered by the draft permit. EPA's concern could be resolved if MPCA establishes WQBELs for the authorized discharge and, additionally, removes the qualifying language from paragraph 6.16.4 to clearly prohibit discharges that would cause exceedances of water quality standards.

3. The permitting record does not appear to demonstrate that MPCA considered all the pollutants that were disclosed in the permit application as being present in the proposed discharge when evaluating the need for WQBELs. Thus, in the absence of WQBELs, there is no assurance that the discharge will meet applicable water quality standards. MPCA should, therefore, consider in its analysis all the pollutants that were presented in the application materials as potentially present in the proposed discharge to determine those WQBELs that are needed in the permit. Further, if MPCA considers a particular parameter to be the key to ensuring the facility will meet all applicable water quality standards, e.g., copper at monitoring station WS074 (permit section 6.10.40) or sulfate at monitoring station WS074 (permit section 6.10.31), the permit should include appropriate WQBELs at monitoring location SD001 to ensure that these internal operating limits result in meeting applicable water quality standards at the point where the discharge is sent to receiving waters (see also comment 6, below).

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4. The fact sheet's reasonable potential analysis relies on the assumption that data provided in the application are maximum values without taking into account the potential variability and uncertainty in the discharge from this new source. Under the Addendum to the EPA-MPCA National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement for the GLI (Great Lakes Initiative) (May 8, 2000), Minnesota committed to "use only alternative statistical procedures for deriving PEQ[1] that meet the standard in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2."[2] To resolve EPA's concern, MPCA should consider that the data provided in the application materials are estimates based on assumptions and modeling outputs and ensure that its reasonable potential analysis is consistent with the procedures in 40 C.F.R. Part 132, Appendix F, Procedure 5.

5. At pages 34-37of the fact sheet,[3] MPCA states that its decision that WQBELs are not needed in the permit relies on the operational limits for sulfate (in milligrams per liter) and copper (in micrograms per liter) at internal outfall WS074. Although these limits are set to low values, including the copper limit that is set to the water quality standard, (calculated by assuming a hardness value of 100 mg/L), there is nothing definitive in the permit or supporting information that justifies a conclusion that meeting these operational targets will result in meeting water quality standards for all the parameters in the permit application. This is especially a concern for mercury, for which the standard is specified in nanograms per liter and the pilot study[4] states that the effectiveness of the treatment system to remove mercury is unknown.

6. The permit requires that no sulfate or copper be added to the discharge after monitoring station WS074, but does not prohibit the addition of any other additives between monitoring station WS074 and the final outfalls. In fact, the permit record shows that the effluent of the water treatment system will require mineral addition prior to its discharge to surface waters to reduce the toxicity due to the low ionic strength of the treated water. This raises two concerns. First, the permitting record includes information showing that available local sources of lime contain aluminum in levels that, if used, will likely result in a discharge that exceeds the applicable water quality standard for aluminum.[5] While MPCA appears assured that higher cost lime containing lower levels of aluminum is available and will be used, to ensure that likely variability in the quality and price of available lime does not result in exceedances of the applicable water quality standard, the

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[1] "Projected Effluent Quality," (PEQ) is described in 40 C.F.R. Part 132, Appendix F, Procedure 5 Paragraph B.2.
[2] "EPA and MPCA agree that MPCA will use only alternative statistical procedures for deriving PEQ that meet the criteria in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2. EPA and MPCA further agree that EPA retains the authority to review any specific statistical procedures Minnesota intends to use for deriving PEQs and to object to permits that have been developed using statistical procedures that do not meet the requirements of Paragraph B.2. of Procedure 5."
[3] "To ensure the WWTS is operating as designed and to remain consistent with the assumptions made in the FEIS, the permit includes an internal performance monitoring point (Station WS074) where an Operating Limit of 10 mg/L sulfate applies. The Operating Limit at WS074 is an enforceable permit limit but is neither a water quality based permit limit nor a technology based permit limit because there is no Reasonable Potential." (p. 35).
[4] See page 43 of "Final Pilot-testing Report" dated June 2013.
[5] See page 31 of the "Final Pilot-testing Report" dated June 2013.

permit should include a WQBEL for aluminum at the final discharge points or an internal outfall after mineral addition. Second, in light of the potential for whole effluent toxicity to occur, the permit should include whole effluent toxicity limits at the final discharge points or an internal outfall after mineral addition.

7. EPA is concerned that the permit and supporting materials do not include sufficient information to explain how downstream water will be protected consistent with CWA Section 402(b)(5), 33 U.S.C. § 1342(b)(5), based upon the following considerations, including: (1) downstream receiving waters exceed the applicable state and downstream state human health and wildlife water quality standard for mercury, and (2) the pilot study states that the effectiveness of the treatment system to remove mercury is unknown. We note that a downstream tribe, that has "Treatment as a State" and federally approved WQS, has notified EPA that the project is likely to contribute to exceedances of its downstream WQS, including for mercury. MPCA should ensure that its permit will ensure compliance with downstream state WQS.

In summary, EPA recommends that MPCA include WQBELs in the permit for those parameters identified in the application that are expected to be in the discharge and for which Minnesota has applicable WQS. We note that as this is a new discharger, the inclusion of WQBELs for these parameters would be prudent and provide a basis for measuring the performance of the new treatment technology proposed by the applicant. We also note that in subsequent permit cycles, after the facility has achieved full operation, such limits could be modified or deleted if no reasonable potential to exceed water quality standards is demonstrated.

Effluent Limitations Guideline Calculation

The draft permit does not include all the requirements of 40 C.F.R. 440, Subparts G, J, and K that apply to this proposed project, including a restriction on discharge volume that is in conformance with 40 C.F.R. § 440.104(b)(2)(i) and that is equivalent to the annual net precipitation for the site.

Permit sections starting at 6.10.1 include a formula that retrospectively calculates the allowable discharge flow and includes a "carryover" amount defined as "the difference between the allowable annual discharge volume and the actual volume discharged" which acts as a "credit" that the permittee is allowed to apply to the following calendar year. This "carry over credit" appears to be in contradiction to the applicable regulatory definitions of "annual precipitation," "annual evaporation," and "mine drainage" at 40 C.F.R. § 440.132(b), (h). We recommend setting a numeric limit on flow, including this limit in the permit, and ensuring that it is consistent with 40 C.F.R. § 440.104(b)(2)(i).

In addition, we recommend that MPCA consider the applicability of – and inclusion of – effluent limitations contained in 40 C.F.R. § 440.12, and 40 C.F.R. Part 440, subpart A (iron ore), as the project discharge could include legacy pollutants.

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Permit Enforceability Concerns
MPCA should address the following concerns.

1. The permit as written may preclude enforcement per CWA Section 402(k), 33 U.S.C. § 1342(k), for pollutants disclosed during the application process but for which there are no limitations, or for water quality standards excursions where the limitation provided in the permit appears to be greater than the applicable state water quality criterion.

2. The permit contains "operating limits" on an internal outfall that may not be enforceable by EPA, citizens, and potentially MPCA and, thus, may be ineffective at protecting water quality under the Clean Water Act (see 40 C.F.R. §§ 122.4(a), (d)). Specifically, the permit includes an internal outfall operating "target" and "limit" for sulfate based on a voluntary commitment by PolyMet to meet a 10 mg/L sulfate limit (permit sections 6.10.34-35) and an internal operating "limit" for copper that MPCA states will ensure compliance with the chronic water quality standard for copper (permit section 6.10.43). We understand that MPCA's authority to enforce such a provision may rest on state authority, outside the scope of the CWA. MPCA should revise the permit as necessary to ensure that all NPDES requirements are enforceable under the CWA.

   Additionally, the internal "operating limit" for copper, at 9.3 micrograms per liter at permit section 6.10.43, is equivalent to the water quality criterion for copper. However, permit section 6.10.44 appears to authorize higher discharge concentration for copper, based on the TBEL that appears to apply at outfall SD001 (permit section 8.1.1). This creates a conflict as to which limit is applicable and enforceable against the permittee. MPCA should revise the permit to include a WQBEL for copper.

3. MPCA plans to transfer the administratively continued, expired Cliffs Erie, LLC permit (and associated enforcement documents) for the existing tailings basin to an affiliated corporate entity of PolyMet. It appears that this arrangement could result in the permittee holding multiple permits covering the same discharge for some time after the effective date of the NorthMet permit. This creates confusion over which discharges are covered by each permit and may complicate or preclude enforcement of permit requirements under either permit, for example if legacy pollutants do not attenuate as predicted (permit section 6.10.45).

   Additionally, the Permit Fact Sheet (p. 17) acknowledges continuing seep discharges from the tailing basin. As such, the draft permit and/or supporting documentation should clearly assign responsibility for seep discharges by specifying those applicable portions of the Cliffs Erie, LLC permit (MN0054089), the Cliffs Erie, LLC Consent Decree with MPCA, and the draft NorthMet permit. Specifically, the permit should include: (a) a list of known seeps (including coordinates and/or sections) that are authorized to discharge from the tailings basin, (b) a map identifying seeps and their relationship to the planned containment system, (c) monitoring and applicable limits for these seeps, because, as

noted in the fact sheet (p. 17), seep discharges "contributed to exceedances of permit effluent limitations established in the NPDES/SDS permit," and (d) appropriate interim authorization, limits, and requirements for tailings basin seeps until such a time as seeps are fully contained and cease to reach surface waters.

4. MPCA plans to issue general permit coverages for construction stormwater discharges prior to commencement of construction. Neither the draft individual permit, nor any supporting documentation clearly delineates what activities are excluded from coverage under a general permit. Further, the stormwater general permit would authorize discharge from the draining of over 900 acres of wetlands, which are dominated by peat bogs. This activity is expected to release significant amounts of mercury into downstream navigable waters. While MPCA has acknowledged and addressed such discharges in its peat mining permits (and in verbal comments regarding this project), nothing in the permitting record demonstrates that this issue has been addressed or even considered. There is no provision in the construction stormwater general permit for addressing specific water quality standards issues. Thus, the draft permit (and associated permitting scheme) appears to leave mercury from this aspect of the project wholly unregulated. We suggest identifying what is intended to be covered under the stormwater general permit and evaluate whether there is reasonable potential for discharges from activities covered under the stormwater general permit to cause or contribute to excursions from water quality standards. If there is such reasonable potential, coverage under the stormwater general permit would not be appropriate. Rather this discharge, with appropriate WQBELs, could be covered under the NorthMet permit or another individual permit.

5. Permit section 6.10.17 does not allow the permittee to discharge any process wastewater from the mine site to the surface waters. However, it is not clear how compliance with this condition will be evaluated. Under 40 C.F.R. § 122.44(i), NPDES permits must include monitoring requirements "to assure compliance with permit limitations," which include, among other things, "the mass (or other measurement specified in the permit) of each pollutant limited in the permit" and "the volume of effluent discharged from each outfall." We recommend that the permit include monitoring requirements and conditions against which compliance can be objectively measured. We have similar concerns with other provisions at permit sections 6.10.26, 6.10.78, 6.11.2, 6.11.9, 6.12.2, and 6.15.11.

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