

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

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

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

**[PROPOSED]  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER**

The above-entitled matter came before the Honorable John H. Guthmann, Judge of the District Court, on January 21-28, 2020, at the Ramsey County Courthouse, St. Paul, Minnesota, for an evidentiary hearing. William Z. Pentelovich, Esq., Evan A. Nelson, Esq., Margo S. Brownell, Esq., Matthew C. Murphy, Esq., and Elise L. Larson, Esq., appeared on behalf of Relators Center for Biological Diversity, Friends of the Boundary Waters Wilderness, and the Minnesota Center for Environmental Advocacy. Paula G. Maccabee, Esq., appeared on behalf of Relator WaterLegacy. Vanessa Ray-Hodge, Esq., Matthew L. Murdock, Esq., and Sean Copeland, Esq., appeared on behalf of Relator Fond du Lac Band of Lake Superior Chippewa. Richard E. Schwartz, Esq., John Martin, Esq., Bryson C. Smith, Esq., and Caryn A. Boisen, Esq., appeared on behalf of Respondent Minnesota Pollution Control Agency. Monte A. Mills, Esq., Davida S. McGhee, Esq., Kathryn K. Floyd, Esq., and Kyle W. Robisch, Esq., on behalf of Respondent Poly Met Mining, Inc. Adonis Neblett, Esq., and Benjamin J. Grillot, Esq., were also present in the courtroom.

Based upon all of the Court's prior orders, files, records, testimony, exhibits, submissions, and arguments of counsel herein, the Court issues the following:

## TABLE OF CONTENTS

FINDINGS OF FACT.....	1
I. THE PARTIES.....	1
II. THE PROCEEDINGS .....	1
III. AUTHORITIES GOVERNING MPCA ISSUANCE OF NPDES PERMITS.....	3
IV. PRIMARY INDIVIDUALS INVOLVED WITH POLYMET PERMIT ISSUANCE ...	4
A. MPCA Personnel Involved with PolyMet Permit.....	4
B. EPA Region 5 Personnel Involved with PolyMet Permit .....	5
V. REGULAR PROCEDURES FOR EPA REVIEW AND COMMENT ON MPCA NPDES PERMITS .....	6
A. NPDES Permit Issuance and EPA Review .....	6
B. EPA Region 5 Practice to Comment in Writing on Pre-Public Notice Draft Permits .....	7
C. EPA Region 5 Comments in Writing on MPCA Public Notice Draft Permits....	9
D. EPA Region 5 Objection to or Comment on MPCA Proposed Final Permits.....	10
VI. POLYMET NPDES PERMIT DEVELOPMENT BEFORE PUBLIC NOTICE .....	11
A. EPA and MPCA Interaction Prior to PolyMet Application.....	11
B. PolyMet Permit Application and EPA Deficiency Letter .....	12
C. MPCA Denied EPA the Opportunity to Review and Comment on the PolyMet Pre-Public Notice Draft Permit.....	14
VII. MPCA PROCEDURES ON THE DRAFT POLYMET PERMIT .....	16
A. MPCA Knew EPA Planned to Submit Written Comments .....	16
B. MPCA Asked EPA Program Managers Not to Submit Comments on Draft PolyMet Permit.....	16
C. MPCA Asked EPA Region 5 Appointed Officials Not to Submit Comments on Draft PolyMet permit.....	18
D. MPCA Knew How EPA Written Comments would Affect PolyMet Permitting.....	20
1. EPA Had Serious Concerns About the Draft PolyMet Permit .....	20
2. EPA Comments Would Be in the Administrative Record.....	21
3. EPA Comments Would Be Available through DPA Requests.....	22

4. MPCA Would Be Required to Respond to EPA Comments .....	22
5. EPA Comments are Different from Public Comments.....	23
E. MPCA Claimed Justifications for Requests to EPA .....	23
1. Following the MOA.....	23
2. Expectation of Similar Comments.....	24
3. Anticipated Permit Changes .....	25
4. EPA Comments and “Workload” .....	26
F. EPA Comments Withheld Due to MPCA’s Unprecedented Request .....	28
G. Agreement Between MPCA and EPA on PolyMet Comments .....	29
H. EPA Read Its Comment Letter on the Draft PolyMet Permit Aloud to MPCA ..	30
VIII. MPCA RESPONSES TO COMMENTS ON THE POLYMET DRAFT PERMIT....	33
A. MPCA’s Typical Practice for EPA Comments.....	33
B. MPCA’s Responses to Other Comments on the PolyMet Permit.....	33
C. MPCA’s Claimed Justifications for Why MPCA Did Not Attribute, Describe or Respond to EPA’s Comments on the Draft PolyMet Permit.....	34
1. MPCA Gave an “Oral Response” to EPA Comments.....	34
2. EPA Comments after Public Comment Period.....	33
3. EPA Comments “Similar” to other Comments.....	36
4. EPA’s Oral Comments on PolyMet Permit .....	38
IX. POLYMET PERMIT PROCESS AFTER APRIL 5, 2018 .....	40
X. MPCA FAILURE TO PRESERVE OR PRODUCE DOCUMENTS .....	41
A. Emails Regarding MPCA’s Request to EPA to Withhold Comments on Draft PolyMet Permit .....	41
1. MPCA Deleted March 13-15, 2018 Emails.....	41
2. MPCA Failed to Preserve March 12-15, 2018 MPCA Records .....	42
a. Failure to Comply with Official Records Act .....	42
b. Failure to Comply with MPCA Records Policies .....	43
i. Definitions of Records .....	43
ii. MPCA records preservation and retention .....	45
c. MPCA Obligation to Preserve Evidence.....	46
d. Failure to Comply with DPA .....	46

3. Limited Recovery of MPCA Documents.....	48
B. MPCA Notes of Calls and Meetings with EPA Not Produced .....	50
1. Handeland’s Notes (April 5, 2018).....	50
a. Handeland Practice Regarding Notes.....	50
b. April 5, 2018 Call with EPA.....	50
2. Schmidt’s Notes from May 19, 2016 through April 5, 2018.....	52
a. Schmidt Practice Regarding Notes.....	52
b. Schmidt’s Belief His Notes Were Not Public.....	52
c. DPA Requirements.....	53
d. WaterLegacy DPA Requests.....	53
e. Failure to Produce or Disclose Schmidt Notes .....	54
3. Schmidt Notes and Administrative Record.....	56
XI. MPCA OMISSIONS AND MISREPRESENTATIONS.....	58
A. Permit Issuance Documents .....	58
B. Communication with Media, Public and Elected Officials.....	59
C. MPCA Internal Nondisclosure .....	60
D. Communications in Court Process .....	61
XII. DOCUMENTS MISSING FROM THE ADMINISTRATIVE RECORD .....	62
CONCLUSIONS OF LAW .....	64
A. Proceedings .....	64
B. Procedural Irregularities .....	64
C. Supplementation of the Administrative Record.....	68
D. Additional Conclusions.....	69
ORDER FOR JUDGMENT.....	69

## FINDINGS OF FACT

### I. THE PARTIES

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

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

3. Respondent Minnesota Pollution Control Agency (“MPCA”) is an agency of the State of Minnesota charged with delegated authority under the federal CWA to issue National Pollutant Discharge Elimination System (“NPDES”) permits.

4. Respondent Poly Met Mining, Inc. (“PolyMet”) is an applicant for an NPDES permit for the proposed NorthMet copper-nickel mine project.

### II. THE PROCEEDINGS

5. On December 31, 2018, environmental Relators petitioned MPCA for reconsideration of MPCA’s issuance of Findings of Fact, Conclusions of Law, and Order dated December 20, 2018 (“MPCA Findings and Order”) denying Relators’ requests for a contested-case hearing and granting PolyMet’s application by issuing to PolyMet NPDES/SDS permit MN0071013 for the proposed NorthMet copper-nickel mine project, (“PolyMet permit”), citing the CWA and procedural issues.<sup>1</sup>

6. On January 18, 2019 and January 22, 2019, Relators<sup>2</sup> filed certiorari appeals to the Minnesota Court of Appeals (“COA”) from the MPCA Findings and Order.

7. MPCA submitted a preliminary list of the contents of the administrative record on March 25, 2019 and its final Itemized List of the Contents of the Administrative Record and Certification of the Administrative Record on April 12, 2019. Ex. 568 (itemized list).

8. On May 17, 2019, WaterLegacy made a motion to the COA pursuant to Minn. Stat. § 14.68 (2018) for transfer to the district court or, in the alternative for a stay, due to irregular procedure and missing documents, which the Band joined on June 6, 2019. The other environmental Relators supported WaterLegacy’s motion.

9. On June 25, 2019, the COA granted WaterLegacy’s motion and transferred Relators’ consolidated certiorari appeals to the Ramsey County District Court (“District Court”)

---

<sup>1</sup> See WaterLegacy Mot. for Transfer to District Ct. or, in the Alternative, for Stay Due to Irregular Procedure and Missing Docs. at 15 n 4 (Minn. App. May 17, 2019).

<sup>2</sup> The term “Relators” without qualification includes all parties in ¶¶ 1-2.

pursuant to Minn. Stat. § 14.68 “for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure.” *In the Matter of the Denial of Contested Case Hr’g Requests and Issuance of Nat’l Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis Cty. Hoyt Lakes and Babbitt Minn.*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 25, 2019) (“Transfer Order”).

10. The COA concluded that WaterLegacy “provided substantial evidence of procedural irregularities not shown in the administrative record, and thus that it is appropriate to transfer this matter to district court for a hearing and determination of the alleged irregularities.” Transfer Order at 4. The COA described evidence it had received of procedural irregularities as follows:

The declarations, none of which are included in the administrative record, provide undisputed evidence that (1) the MPCA and EPA departed from typical procedures in addressing the NorthMet permit, engaging in multiple telephone conferences and in-person meetings, some of which are not reflected in the administrative record; (2) the EPA prepared written comments on the draft NorthMet permit; (3) those written comments were never submitted to the MPCA and are not part of the administrative record; (4) instead the written comments were read to MPCA during an April 5, 2018 telephone call; and (5) notes taken during that call have not been included in the administrative record, and are believed to have been discarded. In addition, the declarations provide disputed evidence on the issues of whether (1) it was unusual for EPA not to submit written comments; and (2) the MPCA sought to keep the EPA’s comments out of the public record.

Transfer Order at 3-4.

11. The COA ordered that “[f]ollowing the hearing, the district court shall issue an order that includes findings of fact on the alleged irregularities,” and stayed the certiorari appeals while the matter is pending before the district court. Transfer Order at 4-5.

12. The COA ordered that the District Court’s decision determining procedural irregularities “may be appealed as in other civil cases” and that any appeal from the district court’s decision determining irregularities shall be consolidated with the certiorari appeals. Transfer Order at 4.

13. Transfer proceedings are governed by Minn. Stat. § 14.68, which provides:

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.

### III. AUTHORITIES GOVERNING MPCA ISSUANCE OF NPDES PERMITS

14. MPCA's issuance of NPDES permits is governed by the CWA, 33 U.S.C. §§ 1251-1387, and regulations adopted by the United States Environmental Protection Agency ("EPA") pursuant to the CWA, Code of Federal Regulations ch. 40, Parts 122, 123, 124 and 132.

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

16. MPCA's retention, disclosure, and production of records is governed by Minnesota Statutes ch. 13 and 15.

17. MPCA's issuance of NPDES permits is also governed by the Memorandum of Agreement between the EPA and the MPCA adopted in 1974 as amended ("MOA"), which provides "the terms and conditions for approval by the EPA" of Minnesota's NPDES program under the CWA. Ex. 328. Pertinent provisions of the MOA include the following:

- a. MOA Section 124.22 provides for the transfer of data bearing on NPDES permit determinations from EPA to the MPCA as of the effective date of the MOA on May 7, 1974, when MPCA assumed delegated authority over NPDES permits from EPA and sets forth procedural requirements for treatment of such applications. Ex. 328 at 2-4, Part II, § 124.22.
- b. MOA Section 124.23(1) states the following with respect to NPDES permit applications submitted by an applicant to MPCA:

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. Ex. 328 at 4, 5, Part II, § 124.23(1).

- c. MOA Section 124.46(1) states the following regarding a public notice draft NPDES permit:

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. Ex. 328 at 9, Part II, § 124.46(1).

- d. MOA Section 124.46(3) states that if a permit is revised 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, Attention: NPDES Permit Branch, 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. Ex. 328 at 10, Part II, § 124.46(3).

- e. MOA Section 124.46(5) states the following regarding an MPCA request for approval of a permit:

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 comments is received by the Agency from the Regional Administrator within the 15 days, the Director may assume, after verification of the receipt of the proposed permit, that the EPA has no objection to the issuance of the NPDES permit. Ex. 328 at 10-11, Part II § 124.46(5).

#### **IV. PRIMARY INDIVIDUALS INVOLVED WITH POLYMET PERMIT ISSUANCE**

##### **A. MPCA Personnel Involved with PolyMet Permit**

18. John Linc Stine (“Stine”) was MPCA Commissioner throughout the period that the PolyMet permit application was under consideration from 2016 to 2018. Evidentiary Hearing Transcript (“Tr.”) 380:15-19.

19. Rebecca Flood (“Flood”) was MPCA Assistant Commissioner for Water during the time period from the submittal of the PolyMet NPDES application until February 2018. Tr. 1185:2-9.

20. Shannon Lotthammer (“Lotthammer”) was MPCA Assistant Commissioner for Water from the latter part of February 2018 until February 2019. Tr. 542:3-7, 543:21-544:6.

21. In her prior position at MPCA, before Lotthammer became Assistant Commissioner for Water, Lotthammer was only occasionally involved in NPDES permitting, such as when her staff provided support or if monitoring questions came up. Tr. 542:15-23.



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

23. Jeff Udd (“Udd”) became Manager of the Mining Sector at MPCA in January 2018, taking the supervisory role previously held by Foss. Tr. 848:12-14.

24. Before Udd became Manager of the Mining Sector in January 2018, as MPCA’s Industrial Division Water Quality Permits Supervisor, Udd had very limited responsibilities or involvement with the PolyMet application for an NPDES permit other than to get occasional updates. Ex. 128 (title); Tr. 846:21-22, 848:12-18, 848:20-849:2.

25. MPCA staff with primary drafting responsibility on the PolyMet permit were:

a. Richard Clark (“Clark”), who worked for MPCA since 1986 and was the supervisor for the mining unit, Tr. 1259:2-9;

b. Stephanie Handeland (“Handeland”), who had been working for MPCA since May 1995 and was the permit writer, Tr. 949:20-950:2, 950:11-21; and

c. Jim Robin (“Robin”), who was a project manager, Tr. 850:8-12.

26. Clark reported to Udd, and Handeland and Robin reported to Clark. Tr. 850:17-24.

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

28. Adonis Neblett (“Neblett”) is MPCA General Counsel and was Schmidt’s supervisor. Tr. 1145:6-7, 1204:1-2.

## **B. EPA Region 5 Personnel Involved with PolyMet Permit**

29. EPA divides the United States into regions, and EPA places Minnesota into Region 5 (“EPA Region 5”). *See* Ex. 328 at 1 (EPA Region 5 authority under the MOA).

30. Kevin Pierard (“Pierard”) worked for EPA Region 5 for thirty-six years, twenty-five years of which were in programs involving implementation of the CWA. Tr. 97:3-8, 98:12-16.

31. Pierard served as chief of the EPA Region 5 NPDES program branch for nine years from 2010 through the issuance of the PolyMet permit, managing the oversight of state NPDES permitting programs in Illinois, Indiana, Ohio, Minnesota, Wisconsin, and Michigan Tr. 97:11-13, 98:17-99:3; 132:4-7.

32. Chris Korleski (“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.

33. Linda Holst (“Holst”) was the deputy Water Division Director for EPA Region 5 in the time period which included March 2018. Tr. 185:25-186:1.

34. By June 26, 2018, Korleski was no longer Water Division Director, and Holst had become the Acting Water Division Director for EPA Region 5. Ex. 2010; Tr. 316:20-22, 688:17-22.

35. Cathy Stepp (“Stepp”) was the EPA Region 5 Regional Administrator in March 2018, having been in office for less than three months. Tr. 178:18-179-5.

36. Kurt Thiede (“Thiede”) was Stepp’s Chief of Staff and in March 2018 had also been in his position for three months or less. Tr. 186:2-5, 14-16.

## **V. REGULAR PROCEDURES FOR EPA REVIEW AND COMMENT ON MPCA NPDES PERMITS**

### **A. NPDES Permit Issuance and EPA Review**

37. Pierard testified regarding both EPA’s typical and customary review and comment procedures for MPCA NPDES permits and facts pertaining to the issuance of the PolyMet permit. Pierard’s testimony was detailed, specific, and highly credible.

38. Part of Pierard’s role as NPDES program chief was to ensure that states followed the requirements for issuing an NPDES permit under their memoranda of agreement and CWA regulations. Tr. 101:20-25.

39. EPA comments issued over Pierard’s signature as NPDES program chief were drafted by staff, typically with contributions by one or two other experts, and often also with legal advice and input by an attorney assigned to the permit; they would be reviewed by a section chief as well as by Pierard. Tr. 102:21-103:11.

40. Discharge of a pollutant to navigable waters is prohibited under the CWA except under a NPDES permit that prevents violation of EPA-approved State water quality standards. 33 U.S.C. §§ 1311(a), 1342(b).

41. The CWA defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A).

42. Navigable waters or “waters of the United States” include tributaries of navigable waters and wetlands, ponds, and lakes adjacent to covered waters. 33 U.S.C. § 1362(7); 40 C.F.R. § 328.3(a).

43. Technology-based effluent limits (“TBELs”) represent the minimum level of environmental control that must be imposed in an NPDES permit. Ex. 679 at 5-1. An NPDES permit must contain water quality-based effluent limitations (“WQBELs”) whenever TBELs are insufficient to achieve State water quality standards. 40 C.F.R. §§ 122.4, 122.44(d)(1).

44. EPA’s role once delegation to a state has occurred is to oversee the state’s compliance with its delegation agreement, as well as compliance with all the applicable laws and rules that are part of the federal CWA. Tr. 497:1-7.

45. A state issuing an NPDES permit must comply with the CWA and its implementing regulations. Tr. 101:15-19.

46. A state that has a memorandum of agreement with EPA to conduct an NPDES program is required to comply with that memorandum of agreement. Tr. 101:11-14.

47. An NPDES permit is required for the PolyMet project because discharge of pollutants from the PolyMet mine project would affect “waters of the United States,” including the Partridge River, Embarrass River, wetlands adjacent to these rivers, and the St. Louis River downstream. Tr. 99:7-100:4; *see also* Findings 40-42.

#### **B. EPA Region 5 Practice to Comment in Writing on Pre-Public Notice Draft Permits**

48. The regular practice of EPA was to identify each year the permits in each state that EPA was interested in reviewing that year and to finalize the list after receiving feedback from the states. Tr. 102:6-12.

49. In the nine years that Pierard was program chief, EPA Region 5 reviewed about 700 draft permits, and generally provided written comments on every permit EPA reviewed. Tr. 111:2-9, 12-21, 129:19-25.

50. When EPA Region 5 commented on a permit, its regular practice was to comment in writing. Tr. 129:19-25.

51. Pierard testified that EPA made comments 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.

52. Another fundamental reason why EPA chose to make comments on draft NPDES permits in writing is that EPA comments are a document put in the record that reflects EPA’s role and the sequence of events for the record. Tr. 130:8-10, 14-24.

53. EPA written comments on draft NPDES permits are also important for transparency purposes, so one “could see what EPA was thinking and why and what the response was.” Tr. 131:19-23.

54. Most of the time, EPA Region 5 provided written comments earlier than the public notice draft of the permits. Tr. 111:24-112:3.

55. Pierard explained that EPA Region 5 regularly provided comments before the public notice draft because states “were interested in knowing from EPA if there were any big ticket issues they should address in advance of public noticing of the permit” so states would not have to have a second public notice period<sup>3</sup> and slow the process down if they rectified the issues. Tr. 112:2-14.

56. From EPA’s perspective, early review of permits 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.

57. For the permits on the list selected for review by EPA with state feedback, states would usually submit early versions of the permits to EPA for review. Tr. 102:10-13.

58. The regular practice of EPA Region 5 was to put comments on pre-public notice draft permits in writing even when comments were minimal and would not lead to an objection by EPA. Tr. 111:12-21, 119:11-14.

59. MPCA has an EPA Permit Review Process for NPDES permits identified for EPA review which MPCA staff follow. Ex. 83; Tr. 958:6-11.

60. MPCA’s EPA Permit Review Process states that for each permit on the review list, permit writers should send early review draft permits directly to EPA Region 5, together with the draft public notice document. Ex. 83.

61. MPCA’s EPA Permit Review Process states that for each permit on the review list, permit staff should request that EPA’s review of the early pre-public notice draft permit be completed within 30 days and that EPA needs to provide written comments or a “No objection letter” stating that MPCA can proceed to public notice. Ex. 83.

62. Typically, MPCA would send a pre-public notice draft permit to the EPA, and if there were any comments during that pre-notice period, MPCA would try to work with the EPA before public noticing a permit. Tr. 956:21-25.

63. EPA’s February 2017 comment letter to MPCA on the pre-public notice draft for the Delano wastewater plant permit explained EPA’s regular practice: “As is our practice we provide comments prior to the issuance of the proposed permit which allows for us to work with the State in addressing our concerns so there would be no need to issue an objection letter.” Ex. 264; Tr. 120:2-22.

---

<sup>3</sup> The terms “public notice period” and “public comment period” have the same meaning, and are used interchangeably in the record.

64. In an example from MPCA's Mining Sector, EPA provided a 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.

65. Similarly, EPA also provided MPCA a July 22, 2016 comment letter on the pre-public notice draft of the Northshore mining permit. Ex. 531; Tr. 127:1-6.

66. EPA's regular practice for MPCA permits selected for EPA review was to provide written comments on pre-public notice drafts of NPDES permits. Findings 48-58, 63.

67. EPA's regular practice for MPCA Mining Sector NPDES permits was to provide written comments on a pre-public notice draft. Findings 64-65.

68. MPCA's established policy for NPDES permits selected for EPA review was to provide EPA with a pre-public notice draft permit for EPA to either provide written comments or a no objection letter stating MPCA can proceed to public notice, prior to placing the draft NPDES permit on public notice. Findings 59-61.

### **C. EPA Region 5 Comments in Writing on MPCA Public Notice Draft Permits**

69. EPA's regular practice when a Minnesota NPDES permit was complex, was to conduct a formal review of the public notice draft NPDES permit consistent with the MOA. Tr. 125:11-25.

70. When EPA provides written comments at the public notice draft permit stage, EPA can work with the state to revise the permit, which streamlines the process. Tr. 126:1-16.

71. If EPA has valuable input, EPA commenting at the draft permit stage results in a better permit. Tr. 126:1-3, 17-20.

72. The MOA between the EPA and MPCA requires the MPCA Commissioner to submit a copy of the draft permit and the draft fact sheet to EPA's Region 5 NPDES program at the time when the MPCA gives public notice of the permit. Ex. 328 at 9; Tr. 105:25-107:5, 455:12-23.

73. The MOA requires submission of the draft permit to EPA in order to facilitate oversight and allow EPA an opportunity to review the draft permit. Tr. 107:11-18.

74. The MOA between EPA and MPCA does not prohibit EPA from providing comments on a draft NPDES permit during the public notice period. Ex. 328; Tr.108:4-7.

75. Regulations implementing the CWA also state that EPA must receive both notice of draft permits and a mailed copy of the fact sheet, the permit application, and the draft permit. 40 C.F.R. §§ 124.10(c)(1)(ii), (e).

76. CWA regulations also provide that “any interested person,” including EPA, may submit 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.

77. MPCA identified forty NPDES permits since the year 2000 for which EPA had provided written comments on a draft permit during the public comment period. Ex. 707; Tr. 377:9-15.

78. In MPCA’s Mining Sector, 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.

79. In MPCA’s Mining Sector, EPA also provided written comments on the public notice draft permit for the Mesabi Nugget mine in 2012. Ex. 164; Tr. 121:3-16.

80. In MPCA’s Mining Sector, EPA provided written comments on the pre-public notice draft permit for the Minntac tailings basin in 2014 and the public notice draft permit in 2016. Exs. 530, 532.

81. When a permit was complex, like the Minntac permit, EPA typically took advantage of the draft public notice permit stage to do a formal review consistent with the MOA. Ex. 530; Tr. 125:18-25.

82. EPA’s formal review process begins when MPCA puts a draft permit on public notice and sends a copy to EPA, as noted in EPA’s July 22, 2016 comment letter on the pre-public notice draft of the Northshore permit. Ex. 531 at REL\_0063466; Tr. 128:11-14.

83. EPA’s practice of submitting comments on a public notice draft NPDES permit during the public comment period is contemplated by and consistent with the MOA and EPA regulations under the CWA. Findings 72-76.

84. EPA’s regular practice for MPCA NPDES permits, including complex permits in the Mining Sector, is to provide a written comment on the public notice draft. Findings 69-71, 77-82.

#### **D. EPA Region 5 Objection to or Comment on MPCA Proposed Final Permits**

85. The MOA between EPA and MPCA allows the EPA Region 5 Regional Administrator to review a proposed final permit and potentially object to the permit if its terms are not consistent with the CWA. Ex. 328 at 10-11; Tr. 108:14-109:1, 6-8.

86. If EPA were to object to a proposed final permit, EPA would send out a general objection within fifteen days, a specific objection seventy-five days after, and if the state was not able to overcome EPA objections, authority to issue the permit would transfer to EPA. Tr. 109:2-22.

87. EPA rarely objects to NPDES permits, and in the nine years Pierard served as NPDES program chief, EPA Region 5 objected to a permit perhaps five times. Tr. 109:23-110:5.

88. In response to discovery, MPCA listed seven NPDES permits (Aitkin Agri-Peat, American Peat, Litchfield, Glencoe, Mesabi Nugget, U.S. Steel Keetac (mine) and U.S. Steel Keetac (tailings), where MPCA believed EPA commented on a final proposed permit. Ex. 706; Tr. 375:11-16.

89. For four of these permits, MPCA indicated EPA had also provided comments on the draft permit during the public notice period (Aitkin Agri-Peat, Litchfield, Glencoe, Mesabi Nugget). Ex. 707.

90. Two of the comments listed by MPCA (EPA's 2014 Litchfield wastewater comment and EPA's 2011 comments on the Keetac permits) were comments on draft permits, not on a proposed final permit. Exs. 217, 527 at REL\_0063188, 706; Tr. 114:9-19, 122:2-7.

91. For the one permit (American Peat) where it appears EPA may have commented on a proposed final permit without commenting on a prior draft permit, Udd, who was then MPCA's Industrial Division Water Quality Permits Supervisor, wrote to EPA at the time, "This gets very frustrating from a state perspective when EPA steps in at the last moment and potentially delays a permit issuance at a minor facility." Exs. 128, 706 (MN0057533).

92. There was no regular practice for EPA to delay submitting comments on a public notice draft permit in order to comment later in the permitting process. Findings 88-91.

## **VI. POLYMET NPDES PERMIT DEVELOPMENT BEFORE PUBLIC NOTICE**

### **A. EPA and MPCA Interaction Prior to PolyMet Application**

93. EPA was involved with the PolyMet project during environmental review because it was known that there would be a potential surface water discharge. Tr. 132:15-21.

94. EPA and MPCA began discussions of the PolyMet NPDES permit process even before PolyMet submitted an application for an NPDES permit. Tr. 135:11-135:20.

95. On April 7, 2015, Pierard sent an email to MPCA Metallic Mining Sector Director Foss to document EPA's understanding of MPCA's approach to address PolyMet's proposed discharges of pollutants through NPDES permitting. Ex. 370.

96. Pierard's April 7, 2015 email to Foss sought to summarize what had been done to date, to memorialize what agreements had been reached "to make sure we had a record of our decisions going forward, something we could reflect back on." Tr. 143:10-24, 144:2-7.

97. Foss responded with an email discouraging EPA from documenting concerns in writing, stating that, in the future if EPA or MPCA has an issue, "each party" would ensure the accuracy of documentation and proposing a process where writings between EPA and

MPCA would only occur “[i]f it is agreed that documentation of certain items is needed” and the participants in a conference call “agree who will draft and by when.” Exs. 288 at POLYMET\_0000155, 370 at REL\_0061909-10.

98. In Pierard’s experience as EPA Region 5 NPDES program chief, it was unusual that a state would ask EPA not to put concerns about a permit in writing. Tr. 146:4-7.

99. EPA agreed to have a lot of verbal communication with MPCA, but did not agree that discussions would take the place of ultimately putting comments in writing. Tr.147:2-9.

## **B. PolyMet Permit Application and EPA Deficiency Letter**

100. PolyMet submitted its NPDES Permit application to MPCA on July 11, 2016. Ex. 306; Tr. 151:20-24.

101. The MOA states, “The Director shall transmit to the Regional Administrator copies of completed NPDES application forms submitted by the applicant to the State.” Ex. 328 at 4, Part II, § 124.23(1).

102. In the MOA, the term “Director” means the MPCA Commissioner, and the term “Regional Administrator” is the EPA Region 5 Regional Administrator. Tr. 106:18-21, 109:6-8.

103. MPCA did not transmit the PolyMet permit application to EPA as required under the MOA. Tr. 152:3-4.

104. When MPCA informed PolyMet on August 2, 2016 that its application was complete, EPA staff member Krista McKim found PolyMet’s permit application online and then copied it from MPCA’s website. Ex. 306 at 1; Tr. 151:25-152:11.

105. Three days later, EPA informed MPCA by email that EPA would review PolyMet’s application under the MOA and provide comments on the application. Ex. 290.

106. In August, September, and October of 2016, MPCA discussed EPA’s upcoming comments on the completeness of the PolyMet application and asked that EPA give MPCA its draft letter in advance and avoid the term “deficiency,” requests which EPA declined citing the need for transparency and the MOA. Ex. 837 at 1-3.

107. On November 3, 2016, EPA sent a letter to MPCA stating that EPA had conducted a review of PolyMet’s permit application consistent with the MOA and had found deficiencies in the application. Exs. 107, 306.

108. EPA’s November 3, 2016 letter advised MPCA that the MOA precluded processing PolyMet’s NPDES application until EPA provided a letter to MPCA, quoting the MOA at Part II, § 124.23(1):



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.

Ex. 306 at REL\_0002976.

109. MPCA never asked for a letter from EPA stating that the deficiencies in PolyMet's NPDES application had been resolved, and EPA never sent MPCA a letter stating that the deficiencies in PolyMet's NPDES application had been resolved Tr. 153:9-17, 1284:11-15.

110. Yet, MPCA processed the PolyMet permit application and approved the PolyMet permit on December 20, 2019. Ex. 350 at REL\_0061749.

111. MPCA has argued PolyMet in fact filed a "new" application in October 2017, so the November 3, 2016 letter was not an outstanding deficiency letter. Tr. 44:9-11, 45:15-20.

112. PolyMet's October 2017 NPDES/SDS Permit Application submittal to MPCA is self-described as an "updated" application. Ex. 1069; Tr. 1282:6-9

113. MPCA's October 26, 2017 email providing EPA with a link to the seven volumes of PolyMet's updated application, refers to it as an "updated" permit application. Ex. 32; Tr. 1281:9-11, 1282:6-7.

114. The MPCA Findings and Order states, "The permit application was updated in November 2016 and again in October 2017." Ex. 350 at 2.

115. The final PolyMet permit states, "The proposed mine and processing facilities, known as the North Met Project (Project), are described in detail in the National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Permit Application dated July 2016 and updated in October 2017 (collectively, permit application)." Ex. 349 at 3.

116. PolyMet's October 2017 submittal was not a new application, but rather an updated application. Findings 112-15.

117. MPCA has also argued that EPA was required to send any deficiency letter within 20 days of the submittal of the application, citing the MOA, Part II, § 124.22(7). Tr. 44:10-13, 45:9-12.

118. The MOA section relied upon by MPCA counsel to claim EPA missed a deadline to send its deficiency letter explicitly applies only to "NPDES permit applications received by EPA" prior to signing of the MOA and then "transferred" from EPA to MPCA in 1974, when the MOA delegating NPDES authority to MPCA was signed. Ex. 328 at 2, Part II, § 124.22(1), (2).

119. Section 124.23 of the MOA, cited in EPA's November 3, 2016 deficiency letter, applies to any NPDES permits "submitted by the applicant to the State" and imposes no time limit

on when EPA must provide MPCA a letter on the completeness of an NPDES application. Exs. 306, 328 at 4-5, Part II, § 124.23(1).

120. There was no deadline applicable to EPA's issuance of a deficiency letter pertaining to the PolyMet permit application, and EPA also notified MPCA of its intent to review the application's completeness and discussed its deficiencies with MPCA before sending the letter. Findings 104-06, 117-19.

121. Contrary to the requirements of the MOA, MPCA processed the PolyMet application after EPA's November 3, 2016 deficiency letter without being advised in writing by EPA that deficiencies had been corrected and that the NPDES application was complete. Findings 107-120.

**C. MPCA Denied EPA the Opportunity to Review and Comment on the PolyMet Pre-Public Notice Draft Permit**

122. MPCA asked EPA to be involved in evaluating the NPDES permit for the PolyMet project from the beginning of the permitting process. Tr. 135:4-10.

123. At MPCA's request, EPA and MPCA had frequent phone conferences regarding PolyMet NPDES permitting – approximately every two weeks in 2016 and 2017. Tr. 147:10-14.

124. During their conferences from about August 2016 until August 2017, MPCA and EPA generally reviewed relevant parts of PolyMet's permit application or other documentation from PolyMet, and MPCA would share with EPA its proposed approach to address the issue and seek EPA's input. Tr. 1226:25-1227:6; 1298:19-1299:2.

125. In the calls between EPA and MPCA that took place through August 2017, EPA sometimes received and commented on supplemental information provided by MPCA, but not on specific permit language. Tr. 1299:3-7.

126. During 2016 and 2017, EPA asked MPCA for early drafts of the PolyMet permit in order to review MPCA's specific permit language "rather than kind of overall global concepts," but MPCA refused to provide EPA early drafts of the PolyMet permit. Tr. 148:8-16, 148:18-149:2.

127. On November 9, 2017, EPA asked MPCA to provide a pre-public notice draft of the PolyMet permit and to provide EPA with 60 days to review this pre-public notice draft so that EPA could provide comments to MPCA before the public notice period. Exs. 325 at REL\_0049794, 837 at 17; Tr. 155:25-156:3.

128. In requesting two months for review of a pre-public notice draft PolyMet permit, EPA told MPCA that EPA would provide a comment letter before the public notice period started. Ex. 837 at 17; Tr. 1155:14-18, 1156:8-12, 19-23.

129. MPCA denied EPA's request for time to review and write comments on a pre-public notice draft of the PolyMet permit. Tr. 156:15-18.

130. Although MPCA denied EPA's request to review and write comments on a pre-public notice draft permit, PolyMet received a pre-public notice draft permit and fact sheet and provided detailed feedback on permit language before December 10, 2017. Exs. 228 at MPCA\_018676, 230; Tr. 1328:22-1329:2.

131. EPA did not receive the Exhibit 35 public notice draft PolyMet permit ("draft PolyMet permit") and accompanying fact sheet<sup>4</sup> from MPCA until January 17, 2018 – two weeks before the public comment period for the draft PolyMet permit started on January 31, 2018. Ex. 34-36; Tr. 859:23-860:1.

132. January 2018 was EPA's first opportunity to react to the permit language; prior to that time EPA had only heard verbally what MPCA was considering. Tr. 234:16-25.

133. Pierard testified that it was unusual for MPCA to reject a request from EPA that MPCA provide EPA with a pre-public notice draft of a permit with sufficient time to comment. Tr. 306:2-6.

134. When EPA comments on a pre-public notice draft of an NPDES permit, those comments usually become part of the administrative record. Tr. 1271:24-1272:3.

135. MPCA's denial of EPA's request for a pre-public notice draft of the PolyMet permit prevented EPA from preparing written comments before the public comment period and ensured no EPA pre-public notice comments could be part of the administrative record. Findings 127-29, 131-32.

136. MPCA's failure to provide EPA a pre-public notice draft of the PolyMet permit with at least 30 days for review prior to the public comment period was inconsistent with MPCA's EPA Permit Review Policy. Ex. 83; Findings 59-61, 122, 126-32.

137. MPCA's denial of EPA request for a pre-public notice draft of the PolyMet permit to review and comment before the public comment period was a departure from regular practice and prevented EPA from preparing comments on the PolyMet permit prior to the public notice period. There is no evidence in the record that MPCA denied EPA's request for a pre-public notice draft for any other NPDES permit. Findings 48-68, 126-35.

---

<sup>4</sup> Neither the draft PolyMet permit nor fact sheet are in the administrative record. *See* Exs. 35, 36; Ct. Ex. F.

## **VII. MPCA PROCEDURES ON THE DRAFT POLYMET PERMIT**

### **A. MPCA Knew EPA Planned to Submit Written Comments**

138. On November 20, 2017, EPA Water Division Director Korleski accepted MPCA's proposal that MPCA would provide EPA with MPCA's draft PolyMet permit two weeks before the public notice date, so that EPA would be able to review the draft permit and make written comments before the public comment period ended. Ex. 372; Tr. 157:17-158:9.

139. EPA and MPCA agreed that EPA would provide written comments on the draft PolyMet permit during the public comment period. Tr. 158:19-23, 355: 5-13, 1158:14-18.

140. MPCA Assistant Commissioner Flood confirmed, "We look forward to any comments you may wish to provide." Ex. 815.

141. EPA intended to provide comments on the draft PolyMet permit by the close of the public comment period in order to put its comments in the record and to require MPCA to respond to EPA's comments. Tr. 160:7-14.

142. The public comment period on the draft PolyMet permit ran from January 31, 2018 to March 16, 2018. Ex. 326.

143. On January 17, 2018, the day EPA received the draft PolyMet permit, Pierard called and emailed MPCA to set up a phone meeting to discuss where EPA's concerns might be addressed in the draft permit. Ex. 37; Tr. 160:18-161:10.

144. EPA discussed the draft PolyMet permit with MPCA on January 31, 2018; February 13, 2018; and March 5, 2018. Ex. 324.

145. On March 5, 2018, Pierard told MPCA that EPA wanted to submit comments to make clear what EPA's concerns were, and that EPA would submit comments during the public comment period. Ex. 324 at REL\_0049791; Tr. 162:24-163:4.

146. Pierard also told MPCA on March 5, 2018 that EPA had prepared a preliminary draft of a comment letter on the draft PolyMet permit. Ex. 837 at 25; Tr. 1169:11-18.

### **B. MPCA Asked EPA Program Managers Not to Submit Comments on Draft PolyMet Permit**

147. In the March 5, 2018 phone conference with EPA, recently-appointed Mining Sector Manager Udd initiated the discussion asking whether EPA intended to submit comments during the public comment period. Tr. 1167:25-1168:11.

148. In the March 5, 2018 phone conference between EPA and MPCA, the following conversation then occurred:

- a. Pierard told Udd that EPA was going to send comments on the PolyMet permit during the public comment period. Finding 145.
- b. Udd asked if there any “wobble room” on that, to which Pierard responded there was not. Tr. 166:10-15.
- c. Udd then asked, “Would it be cleaner to raise the issues later in the process?” Pierard responded, “We recommend a comment letter.” Ex. 837 at 25.

149. It struck Pierard as odd that MPCA might ask EPA not to comment on the draft PolyMet permit. Tr. 166:16-19, 22-24.

150. Udd then told EPA that the Commissioner’s office is interested in what will happen, and Udd said he would discuss EPA’s comment plans with the MPCA Commissioner’s office because it was “something they would want to know.” Ex. 837 at 25; Tr. 873:14-18.

151. On March 5, 2018, Pierard notified his supervisor, Korleski, that MPCA staff were talking with Stine that day and that MPCA may ask EPA not to comment. Ex. 641.

152. Udd called recently-appointed Assistant Commissioner Lotthammer after the March 5, 2018 phone conference and told her that EPA was recommending sending comments. Tr. 900:2-17.

153. Lotthammer did not discuss with Udd whether MPCA had ever before asked EPA to refrain from making written comments during a public comment period, and Lotthammer did not know whether or not MPCA had ever done so. Tr. 561:11-20.

154. Udd knew that EPA had, in fact, commented on draft NPDES permits during the public comment period on some occasions. Tr. 901:9-1.

155. Lotthammer called Pierard that week and asked him if EPA would consider holding off on providing written comments until MPCA had received public comments and made changes to the draft PolyMet permit. Tr. 558:3-8, 667:18-23.

156. Pierard testified that in her first call with him, 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.

157. Pierard testified that EPA was very careful and had determined that its actions in commenting on draft permits were consistent with and aligned with the MOA’s with the states. Tr. 177:1-9.

158. It seemed odd to Pierard that 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.

159. Pierard did not accept Lotthammer's request. Tr. 668:24-669:1.

160. Pierard expressed a concern about transparency to Lotthammer and said he would discuss Lotthammer's request with Korleski, the Water Director at EPA. Tr. 559:7-560:5.

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

162. During the week of March 5, 2018, Lotthammer spoke to Stine, and Stine raised no concerns about her requesting EPA not to make written comments during the public comment period. Tr. 565:17-566:12.

163. Lotthammer then called Korleski regarding the request that EPA refrain from submitting written comments during the public comment period. Tr. 562:6-11.

164. Neither Lotthammer's call with Pierard nor her call to Korleski resulted in an agreement with EPA not to send comments on the draft PolyMet permit. Ex. 775.

165. When asked whether the point of her two phone calls was to "pitch" the idea that EPA would not file comments, Lotthammer eventually conceded that the point "was to request that they consider holding off on those written comments . . . yes." Tr. 675:2-676:1.

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

**C. MPCA Asked EPA Region 5 Appointed Officials Not to Submit Comments on Draft PolyMet Permit**

167. Stepp and her recently-appointed Chief of Staff, Thiede, spoke by phone with Stine the morning of March 12, 2018 about the timing of EPA's comments on the draft PolyMet permit. Exs. 58, 591; Tr. 417:18-23.

168. Shortly after noon, Stine sent an email thanking Stepp and 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.

169. At the time, Stine did not know if Stepp or Thiede knew what the prior practice had been between EPA and MPCA with respect to EPA filing written comments on draft NPDES permits during the public comment period. Tr. 421:15-422:5.

170. On March 13, 2018, Lotthammer sent an email following up on Stine's March 12, 2018 phone call and email to Stepp and Stine. Ex. 333.

171. Lotthammer's March 13, 2018 email explains that the agreement Stine referenced was the MOA between MPCA and EPA regarding NPDES program delegation to MPCA. Ex. 333.

172. Lotthammer's March 13, 2018 email states, "we have asked that EPA Region 5 not send a written comment letter during the public comment period." Ex. 333; Tr. 580:19-581:17.

173. Lotthammer testified that when she wrote her March 13, 2018 email she did not know if this was the first time that MPCA had ever in writing asked EPA not to make written comments during the public comment period. Ex. 333; Tr. 577:15-23.

174. Approximately an hour and a half after her initial March 13, 2018 email, Lotthammer sent a second email to Thiede stating she "would appreciate knowing that you received this message and a head's up about EPA's intention, given that the public comment period closes this Friday." Exs. 60, 333; Tr. 582:25-583:9.

175. After EPA received Lotthammer's March 13, 2018 email, Pierard was called to Thiede's office for a phone call with Lotthammer, Thiede, Korleski, and Holst. Tr. 185:7-186:1.

176. In the March 13, 2018 phone call with Thiede, Korleski, Holst and Pierard, Lotthammer repeated MPCA's request that EPA not send written comments on the draft PolyMet permit during the comment period. Tr. 186:22-187:2.

177. During the March 13, 2018 phone call with EPA, Lotthammer suggested that if 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.

178. During that March 13, 2018 phone call, Korleski did most of the talking for EPA, and he was a proponent of following EPA's standard procedures and providing comments on the draft PolyMet permit. Tr. 187:22-25.

179. Lotthammer also had two phone conversations with Thiede alone; one on March 13, 2018 and one on March 15, 2018. Exs. 61, 62; Tr. 585:18-24.

180. Lotthammer's March 13, 2018 email to Thiede and her follow up emails with Thiede on March 13 and 15, 2018 were not copied to anyone else. Exs. 60, 61, 62, 333.

181. Lotthammer testified that her call with Thiede on March 13, 2018 followed up her email sent that day, Exhibit 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

182. Lotthammer's call with Thiede on March 13, 2018 did not include anyone else, was a half hour to forty-five minutes long, and took place on her cell phone in her car. Tr. 587:21-588:4.

183. Lotthammer testified that in her phone call with Thiede on March 15, 2018, he said EPA was amenable to the idea of holding off on formal written comments until after MPCA had made changes to the draft PolyMet permit and would memorialize that in an email. Tr. 591:7-17.

184. On March 16, 2018, Thiede sent an email to Lotthammer entitled "Polymet Draft Permit Discussion," setting forth his understanding of "what EPA and MPCA have agreed to," without explicitly stating that EPA would not send comments on the draft PolyMet permit. Ex. 64.

185. In the hour and fourteen minutes between receiving Thiede's email and sending her response, Lotthammer checked in with Stine and Udd, and Stine authorized her responsive email to Thiede. Tr. 599:21-600:11.

186. Lotthammer's email stated, "We concur with your characterization below of what we have agreed to for the PolyMet draft permit next steps," without describing the impetus for the agreement. This email was copied both to EPA and MPCA staff. Ex. 64; Tr. 599:21-600:4.

187. After EPA's water program managers repeatedly rejected MPCA's requests that EPA not send written comments on the draft PolyMet permit within the public comment period, MPCA's continued its efforts with EPA's Regional Administrator and her Chief of Staff to prevent EPA from sending comments on the draft PolyMet permit, resulting in an agreement reflected in emails between Lotthammer and Thiede on March 16, 2018. Findings 147-86.

#### **D. MPCA Knew How EPA Written Comments would Affect PolyMet Permitting**

##### ***1. EPA Had Serious Concerns About the Draft PolyMet Permit***

188. Lotthammer admitted that when she first spoke with Udd about EPA comments, "I actually was also concerned about the potential for EPA sending formal written comments during the public comment period because we knew that – first of all, we had been speaking with EPA, and so we had questions and feedback from them from those conversations." Tr. 666:19-24.

189. By March 5, 2018, MPCA had an expectation of what EPA would say if EPA made comments on the draft PolyMet permit during the public comment period. Tr. 934:4-8.

190. During the January 31, 2018 phone conference with MPCA, EPA was "concerned about Hg [mercury]," "downstream users (Tribe) hg [mercury]," and the "permit shield issue;" EPA told MPCA that "EPA not comfortable with lack of WQBELs" and "EPA thinks there should be WQBEL;" and EPA raised concerns about the potential for *de facto* and unenforceable permit modifications. Exs. 324 at REL\_00498781-84, 837 at 18-20.

191. During the February 13, 2018 conference with MPCA, EPA suggested the pilot study for the plant "was not conclusive for Hg [mercury]," that the "EPA doesn't trust the RO



[reverse osmosis] reliability,” and that EPA was concerned about stormwater coverage, mercury from wetlands, and transfer of the permit for legacy pollution to PolyMet, including seepage capture. Ex. 324 at REL\_00498786-89.

192. During the February 13, 2018 conference with MPCA, EPA discussed variability and uncertainty in the data relied upon by MPCA, raised the concern that TBELs are higher than water quality standards, discussed the potential for elevated aluminum release from lime, and questioned MPCA about construction stormwater permits for mercury. Ex. 837 at 21-23.

193. During the March 5, 2018 conference with MPCA, EPA requested data on treatment of mercury and metals, questioned under what authority internal controls in the permit could be enforced, and questioned how existing legacy pollution permits would be transferred to PolyMet. Ex. 324 at REL\_0049790-91.

194. During the March 5, 2018 conference with MPCA, EPA raised detailed questions about PolyMet’s proposed treatment process, MPCA’s authority for internal operating limits, transfer of expired Cliffs Erie permits, and what action would be taken under the permit if mercury starts to be exceeded. Ex. 837 at 24-25.

195. From January 2018 through March 2018, in conference calls with MPCA during the public comment period, EPA expressed concerns about problems with the draft PolyMet permit in terms of impacts to the Band as a downstream State. Tr. 232:17-233:12.

196. By March 5, 2018, MPCA was aware that if EPA submitted its written comments on the draft PolyMet permit during the public comment period EPA would express significant concerns. Findings 188-95.

## ***2. EPA Comments Would Be in the Administrative Record***

197. It is regular procedure for state issued NPDES permits to include EPA’s comments in the administrative record. Tr. 235:10-18, 236:1-6.

198. The NPDES Permit Writers Manual applies to all NPDES permits issued by EPA or the states under an authorized program. Ex. 679; Tr. 223:4-13, 334:23-25.

199. EPA trains its own staff and staff of the states who work on NPDES permits on the NPDES Permit Writers Manual. Tr. 223:14-18.

200. All MPCA permit writers who are currently writing permits have attended EPA trainings on the NPDES Permit Writers Manual. Tr. 953:10-15.

201. The NPDES Permit Writers Manual states that the administrative record for all final NPDES permits should contain all comments received during the public comment period. Ex. 679 at 11-16.

202. Minnesota rules pertaining to final decisions on NPDES permits state that the record includes “relevant written materials submitted to the agency within an established comment period.” Minn. R. 7000.0750, subpt. 4(B).

203. Stine, Schmidt, Clark, and Handeland testified that if EPA had sent a comment letter during the public notice period, that comment letter would have been available to the public and in MPCA’s administrative record on appeal of the PolyMet permit. Tr. 419:1-5, 1040:12-17, 1182:14-18, 1269:1-4.

### ***3. EPA Comments Would Be Available through DPA Requests***

204. Comments that MPCA receives on a draft permit during a public comment period are regularly stored in the agency’s OnBase filing system. Ex. 82; Tr. 954:19-22, 955:11-14.

205. MPCA knew that if the EPA submitted a written comment on a draft permit either before or during the public comment permit, the EPA’s written comment would be provided in response to a DPA request if it was within the scope of the request. Tr. 1268:18-1269:4.

### ***4. MPCA Would Be Required to Respond to EPA Comments***

206. If EPA had submitted its written comments on the draft PolyMet permit during the public comment period MPCA would have been required to describe and respond to EPA comments in writing in order to be “available to the public.” 40 C.F.R. § 124.17(c).

207. At the time Lotthammer requested EPA not to submit written comments during the public comment period, she was aware of the fact that the Code of Federal Regulations required MPCA to respond in writing to any written comments that it received during the public notice period. Tr. 714:16-715:1.

208. The NPDES Permit Writers Manual states that the NPDES permitting agency “must respond to all significant comments that are received at the time the final permit decision is reached.” Ex. 679 at 11-12 to 11-13; Tr. 236:14-25.

209. When EPA provides a written comment letter, MPCA’s regular practice is to prepare responses to comments that specifically describe EPA’s comments and respond to them. Tr. 237:19-24, 238:4-6.

210. Lotthammer stated that one of the reasons she approached EPA regarding EPA’s written comments was the concern that if MPCA “had to respond in writing to the EPA’s written comments, that would add to the workload.” Tr. 715:25-716:10.

211. If EPA had sent a comment letter during the public notice period, MPCA’s responses to comments for the PolyMet permit would have specifically identified the EPA’s comments and responded to them. Tr. 1182:19-24.

212. If EPA submitted comments to MPCA during the public comment period, the public would be able to attribute the response to EPA's comment. Tr. 1269:23-1270:4.

### ***5. EPA Comments are Different from Public Comments***

213. Pierard testified that EPA comments are different from having a comment on the same subject by a member of the public in that EPA's practice was to identify a concern, identify the regulatory citation, and identify at least one way to rectify that issue that EPA had identified. Tr. 167:17-168:7.

214. Pierard testified that, even when a public comment is detailed, there is a difference between a comment from a member of the public and getting a comment from the EPA:

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

Tr. 168:17-169:3.

## **E. MPCA's Claimed Justifications for Requests to EPA**

### ***1. Following the MOA***

215. In the call with EPA on March 5, 2018, Udd began his discussion by asking "Is EPA expecting to submit comments, or wait for MOA?" Ex. 837 at 25.

216. When Udd called Lotthammer on March 5, 2018 about EPA's proposed comments, Udd suggested EPA comments on the draft PolyMet permit would not be following the MOA. Tr. 900:2-15.

217. On March 5, 2018, Udd sent Lotthammer a copy of the MOA, stating the "EPA review of proposed permits starts on page 26 of the permit." Exs. 804, 805.

218. Lotthammer's March 13, 2018 email to Thiede argued that for EPA to send a comment letter to the MPCA during the public comment period is inconsistent with the MOA:

As you'll note in the highlighted portions of page pp. 27-28 of the attached pdf (which are pages 10-11 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.

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.

The question is about . . . the importance of maintaining the approach laid out in the MOA.

Ex. 333 at REL\_0060910.

219. When she sent the MOA to Thiede, Lotthammer highlighted portions describing the process for review of a proposed final permit, but did not highlight the process for a public notice draft permit. Ex. 333 at REL\_0060938-40; Tr. 581:19-582:5.

220. When Lotthammer wrote her March 13, 2018 email, she did not know whether Thiede or Stepp were familiar with the MOA. Tr. 576:4-18.

221. Stine testified he does not know what Lotthammer meant when she wrote in her March 13, 2018 email to Thiede about “the importance of maintaining the approach laid out in the MOA.” Ex. 333; Tr. 464:6-10.

222. Stine agreed that nothing in the MOA says that EPA cannot comment during the public comment period and that EPA has the ability to comment during the comment period. Tr. 460:19-461:5.

223. Stine testified that he was aware during his tenure as MPCA Commissioner that EPA provided written comments on draft NPDES permits during the public notice period. Tr. 406:18-22.

224. When Lotthammer wrote her March 13, 2018 email, she knew that it was not unusual for EPA to submit written comments during the public notice period. Lotthammer acknowledged that the established practice was that EPA often did send written comments during the public notice period. Tr. 575:21-24, 577:11-14.

225. Lotthammer’s March 13, 2018 email to Thiede mischaracterizes the MOA and established practice, and neither the paragraphs cited in her email nor other text in the MOA suggest that EPA is prohibited from sending written comments to MPCA during the public comment period. Exs. 328, 333.

226. No evidence supports MPCA’s assertion that for EPA to submit comments on the draft PolyMet permit during the public comment period would violate or be inconsistent with the MOA. Findings 83,157, 215-25.

## ***2. Expectation of Similar Comments***

227. In the phone conference with EPA on March 5, 2018, Udd suggested that EPA withhold comments until later because, “We expect similar comments on these issues from the public.” Ex. 837 at 25.

228. Udd told EPA that if MPCA received many comments, “those comments are likely to be the same comments that EPA would make, so doesn’t it make sense for EPA to wait to submit comments.” Tr. 166:4-10.

229. Lotthammer also suggested that EPA should wait to comment because many of EPA’s comments would be very similar to other comments that were received. Tr. 310:8-10.

230. When asked if, on March 5, 2018, Udd expected comments from the public similar to EPA, he testified, “We expected comments from the public. I don’t know if that would be similar or not.” Tr. 878:3-7

231. As of March 5, 2018, Udd had not read any of the written comments that had been filed by anyone and, for example, no one had reported to him that there were public comments that addressed mercury or WQBELs in the way the EPA addressed these issues. Tr. 881:8-21.

232. MPCA did not know on March 5 or March 12, 2018 if EPA comments would be similar to those of the public. Findings 230-31; *see also* Finding 256.

233. There is no evidence in the record that any custom, practice, or authority supports the premise that EPA should be discouraged from sending comments if they might be similar to those of other commenters.

### ***3. Anticipated Permit Changes***

234. Lotthammer’s March 13, 2018 email to Thiede stated, “We know that we will be making some changes to the draft permit in response to public comments, and also questions raised by EPA” and later used the word “efficiency.” Ex. 333.

235. At the hearing, Lotthammer testified she had an “efficiency” concern about EPA providing comments on a version of the permit “that we already knew that we were going to be revising.” Tr. 557:10-13, 557:25-558:2.

236. Stine also claimed it is “more efficient to review something in a form that’s more current” and that “if there were provisions that EPA were concerned about, there were likely changes that were being made.” Tr. 511:23-512:3.

237. During the public comment period, the draft PolyMet permit was the current form of the permit. Exs. 34, 35, 326.

238. When Lotthammer’s March 13, 2018 email was sent to Thiede, she had not discussed with Udd any specific changes that were going to be made in the draft PolyMet permit. Tr. 716:13-17, 716:25-717:12

239. Udd does not recall if staff had started drafting changes and could not describe what changes in the draft PolyMet permit were anticipated, how many changes were anticipated, or whether they were “big or little.” Tr. 871:9-19.

240. Pierard testified that Lotthammer's suggestion that EPA wait to comment until MPCA addressed all other comments, modified the permit, and submitted it to EPA for review "just doesn't make any sense . . . You know, that's not our practice, and it wouldn't speed up the process . . . It actually slows it down." Tr. 184:1-11.

241. There is no evidence in this record that MPCA had made or anticipated any specific changes in the permit when MPCA asked EPA not to send its written comments on the draft PolyMet permit, and MPCA's assertion that it requested EPA not to send comments for "efficiency" is not credible. Findings 234-40.

#### ***4. EPA Comments and "Workload"***

242. There is no evidence in the record of any contemporaneous notes or emails suggesting that MPCA's requests to EPA not to send its comment letter on the draft PolyMet permit were due to concerns about MPCA staff workload. *See* Exs. 324, 333, 775, 837.

243. At the hearing, Stine testified that his March 12, 2018 request to EPA not to send comments during the public notice period was based on what he "knew at the time" and that staff were "were significantly burdened by responding to the comments and that the staff were working hard to prepare that revised draft." Tr. 419:22-420:3.

244. Lotthammer testified that, in March 2018, Udd had "expressed concerns about the staff load and the staffing that was available." Tr. 666:5-9.

245. Udd also testified that when he called Lotthammer on March 5, 2018 about EPA comments, he told her that staff "are maybe overwhelmed with comments because we were expecting a high volume." Tr. 900:2-17.

246. When Udd became MPCA's Mining Manager, there was a plan already in place to use the outside contractor service Shepherd Data Services ("Shepherd") to help organize comments on the PolyMet permit and group comments into themes, which would make it easier for MPCA to respond to comments. Tr. 851:2-5, 866:13-19.

247. MPCA developed contract terms with Shepherd, such as hours, costs, and other details prior to March 16, 2018. Tr. 851:13-22.

248. Shepherd's work to organize the PolyMet comments took place after March 16, 2018. Tr. 851:13-17.

249. MPCA staff working on the project – Clark, Handeland and Robin – kept time sheets for the time they worked on the PolyMet project, which time was reimbursed by PolyMet pursuant to a contract between PolyMet and MPCA. Tr. 852:1-14.

250. The contract with PolyMet placed no limit on the number of people at supervisory levels or below that MPCA could assign to the project and be able to obtain reimbursement from by PolyMet. Tr. 853:6-20.

251. No one told Udd there were any financial constraints in the contract with PolyMet that would prevent Udd from being reimbursed for having all the help he needed in responding to comments. Tr. 868:19-24.

252. Udd had the ability to use staff from other areas of the agency based on their expertise by talking with their managers. Tr. 867:20-868:11.

253. Udd actually used four or five people from other parts of the agency outside the mining group to help with the work in responding to comments on the draft PolyMet permit. Tr. 868:19- 869:7.

254. Udd testified that he got no pushback from anyone in the agency about being asked to utilize their staff to assist with PolyMet responses to comments. Tr. 868:12-18.

255. MPCA's PolyMet mining staff had extensive resources to respond to comments, including an outside contractor and the ability to recruit additional staff at no cost to MPCA. Findings 246-54.

256. MPCA typically received all of the most substantive public comments on the last day of the public comment period, and that turned out to be true also in the PolyMet case. Tr. 1230:8-16, 1335:11-13.

257. Shepherd completed their work organizing and categorizing the comments around June 2018. Tr. 870:6-11.

258. Handeland first complained to Clark about the workload during the summer in 2018, after MPCA received all the comments and Shepherd had completed its work. Tr. 1071:3-9.

259. Clark relayed Handeland's concerns about the heavy workload to Udd once MPCA had essentially digested the number and content of the comments after the close of the public comment period. Tr. 1336:22-1337:5.

260. MPCA was not doing any manpower planning or making any staffing decisions between March 13, 2018 and March 16, 2018 that required MPCA to have information as to whether EPA was going to send comments. Tr. 583:24-584:6.

261. Timing does not support MPCA's claim that staff either experienced or raised workload concerns prompting MPCA's requests to EPA not to send written comments on the draft PolyMet permit made from March 5, 2018 through March 15, 2018. Findings 256-60.

262. MPCA's regular practice when EPA submitted comments was that EPA's comments would be described and, if they were sufficiently similar to those of another commenter, they would be cross-referenced. Tr. 1217:14-19.

263. Asked if there was any savings in workload by not having a comment letter from EPA, Schmidt testified, "I don't know that it would change the workload very substantially if all we had to do was cross-reference EPA's comments to others." Tr. 1218:1-7.

264. MPCA's assertion that its request to EPA not to send comments on the draft PolyMet permit was due to staff workload is a pretextual, *post hoc* rationalization for MPCA's actions that is unsupported by the record and is not credible. Findings 242-64.

#### **F. EPA Comments Withheld Due to MPCA's Unprecedented Request**

265. EPA's written comments on the draft PolyMet permit were completed a day or two prior to the close of the public comment period. Tr. 190:25-191:6.

266. The comments were ready to go on March 14 or March 15, 2018, and Pierard would have signed EPA's comment letter on the draft PolyMet permit before the end of the public comment period. Tr. 191:2-10.

267. EPA's written comments on the draft PolyMet permit had been treated as other EPA comments on draft permits they would have been sent to MPCA prior to the close of the public comment period – on March 15, 2018 or March 16, 2018. Tr. 191:11-16.

268. During March 2018, other than MPCA's requests, EPA received no request from any other party, person or entity not to send EPA's written comments on the draft PolyMet permit. Tr. 190:20-24.

269. Neither in March 2018, or at any time since, has any other person or entity other than MPCA asked that EPA not send EPA's comments on the draft PolyMet permit. Tr. 307:13-308:1.

270. There is no evidence in the record that EPA had any reason other than MPCA's request for withholding EPA's written comments on the draft PolyMet permit instead of sending the written comments to MPCA.

271. Lotthammer knows of no other instance in which MPCA made a request to EPA not to file written comments during the public comment period. Tr. 611:5-14.

272. Stine testified that prior to his March 12, 2018 request regarding PolyMet, he does not recall ever asking the EPA to defer making written comments until after the public comment period had passed. Tr. 418:18-25.



273. In Pierard's nine years as EPA Region 5 NPDES program chief, there was no other time when MPCA asked Pierard or his program staff not to comment on a draft NPDES permit. Tr. 167:1-4.

274. To the best of Pierard's knowledge, EPA Region 5 has never had another request from a state not to comment on a draft NPDES permit. Tr. 167:13-16.

275. The evidence in the record is uncontroverted that MPCA's request to EPA not to send a written comment on the draft PolyMet permit during the public comment period was an unprecedented departure from regular procedure.

### **G. Agreement Between MPCA and EPA on PolyMet Comments**

276. The March 16, 2018 email between EPA and MPCA states that an agreement was reached in which MPCA would provide EPA with a PolyMet "pre-proposed permit" with forty-five days for review and comment. Exs. 64, 307; Tr. 312:6-15.

277. The March 16, 2018 emails between Thiede and Lotthammer imply that the EPA's comment letter on the draft PolyMet permit would not be sent. Tr. 1187:5-13.

278. Lotthammer initially denied that the agreement she reached with Thiede was that EPA would not submit written comments on the draft PolyMet permit during the public comment period and, in return, MPCA would prepare a "pre-proposed permit," to which EPA would have forty-five days to comment. Tr. 593:22-594:4.

279. Lotthammer testified, "What I disagree with is the characterization that it was a, you know, in exchange for EPA not commenting, because while I think I kind of – because that was never explicitly stated." Tr. 594:10-13

280. Lotthammer testified that "we got no promise," but that she left the conversation with Thiede with "the understanding . . . that EPA would decide not to send a comment during the public comment period as a result." Tr. 594:23-595:4.

281. When asked to describe what EPA was giving MPCA in the agreement, Lotthammer said, "the implication was that – that EPA wouldn't be sending comments during the public comment period. But that wasn't a known until – a definite known until EPA didn't send comments during the public comment period." Tr. 601:25-602:4.

282. By June 26, 2018, Korleski was no longer Region 5 Water Division Director, and Holst was serving as acting Water Division Director and as Pierard's immediate supervisor. Ex. 2010; Tr. 316:19-22; *see also* Findings 32-34.

283. Pierard's June 26, 2018 email to Holst described the March 16, 2018 agreement reached on the PolyMet permit as follows: "Recall on polymet we had agreed, in response to MPCA's request, not to submit comments on the draft permit during the public notice period and MPCA had made a commitment to provide a pre-proposed permit for EPA review." Ex. 2010.

284. In the context of MPCA's requests to EPA from March 5, 2018 through March 15, 2018 and all the evidence in the record, Lotthammer's denials that the March 16, 2018 emails reflect an agreement between MPCA and EPA that EPA would not send its written comments on the draft PolyMet permit to MPCA are unsupported by the weight of the evidence and are not credible.

285. Stine knew in March 2018 that the agreement reflected in Exhibit 64 was different from any arrangement or interaction that had taken place between MPCA and EPA during his tenure. Tr. 474:13-22.

286. The term "pre-proposed permit" to describe a permit prepared after the public notice period has been completed was "something made up for the PolyMet project" that EPA had not done before, so it was "unusual." Tr. 361:8-18.

287. Stine had never heard of such a thing as a "pre-proposed permit" before, and to his knowledge a "pre-proposed permit" had never been issued by the MPCA in connection with any permitting process prior to the PolyMet permit on March 16, 2018. Tr. 469:24-470:6, 530:4-13.

288. Stine testified that he was not aware of any similar situation in permitting either during or before his tenure when an intermediate step not provided for in the MOA was created and a time period not provided for in the MOA given to EPA. Tr. 474:23-475:11.

289. The totality of the evidence in the record demonstrates that MPCA's agreement with EPA that EPA would not submit comments on the draft PolyMet permit and MPCA would provide forty-five days of review of a "pre-proposed final permit" was unprecedented and a departure from regular procedure.

#### **H. EPA Read Its Comment Letter on the Draft PolyMet Permit Aloud to MPCA**

290. Udd forwarded the March 16, 2018 emails reflecting EPA's agreement with MPCA to Clark and Handeland a few minutes after receiving them. Ex. 307; Tr. 910:8-11.

291. Pierard called Udd before 3:00 pm on March 16, 2018 and told him that EPA would not be sending 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." Ex. 307; Tr. 193:2-6.

292. Pierard testified that EPA's written comments had a level of detail and rigor different from the conference calls with MPCA: "That is why I felt so strongly about reading the comments to MPCA to make sure that they understood exactly what we were saying and what our concerns were and how to rectify that." Tr. 235:1-9.

293. In preparation for the call with MPCA, Pierard underlined the portions of the comment letter that he was going to read. Tr. 193:15-25.

294. Pierard's handwritten notes on the top of EPA's comment letter say that the letter was conveyed verbally to MPCA on April 5, 2018 and the underlined portions were read word for word. Ex. 337; Tr. 194:7-13.

295. Although Pierard did not read verbatim the sentence stating that if EPA's concerns were not addressed to achieve compliance with the CWA, the concerns may result in an EPA objection, Pierard told the MPCA that the first set of items that he was going to read EPA considered to be likely objectionable items. Ex. 337; Tr. 204:11-205:7.

296. Other than the handwritten notes on the top of the page, Exhibit 337 is identical to the comment letter Pierard was prepared to sign and submit as EPA's written comments before the public comment period ended on March 16, 2018. Tr. 194:12-17.

297. EPA's comment letter was prepared by the EPA Region 5 team, including Krista McKim, the lead technical person; EPA staff Mark Ackerman and Rob Pepin; and overseeing attorneys Barbara Wester and Jillian Rountree. Ex. 337; Tr. 194:18-195:7.

298. On April 5, 2018, in a conference call with MPCA, Pierard read the underlined text of EPA's comment letter on the draft PolyMet permit aloud to Udd, Clark, Handeland and Schmidt, including the following:

- a. "The draft permit does not include water-quality based effluent limitations . . . or any other conditions that are as stringent as necessary to ensure compliance with the applicable water quality requirements . . . the permit includes technology based effluent limitations (TBELs) that are up to a thousand times greater than applicable water quality standards. This concern would be resolved if the permit included WQBELs for these parameters." Ex. 337 Enclosure ("Encl.") 1 of 7, first ¶ and item 1.
- b. "[R]easonable 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 . . . GLI (May 8, 2000), Minnesota committed to 'use only alternative statistical procedures for deriving PEQ that meet the standard in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2.' To resolve EPA's concern . . . ensure that its reasonable potential analysis is consistent with the procedures in 40 C.F.R. Part 132, Appendix F, Procedure 5." Ex. 337 Encl. 2 of 7, item 4.
- c. "MPCA states that its decision that WQBELs are not needed in the permit relies on the operational limits for sulfate and copper at internal outfall WS074 . . . . [T]here 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 states that the effectiveness of the treatment system to remove mercury is unknown.” Ex. 337 Encl. 2 of 7, item 5. (parenthetical references omitted).

- d. “[P]ermit 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) . . . downstream receiving waters exceed the applicable state and downstream state human health and wildlife water quality standard for mercury.” Ex. 337 Encl. 3 of 7, item 7.
- e. “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 . . . [this] 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.” Ex. 337 Encl. 4 of 7, item 3.
- f. “[T]he Permit Fact Sheet (p. 17) acknowledges continuing seep discharges from the tailing basin . . . the permit should include: (a) a list of known seeps . . . 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.’” Ex. 337 Encl. 4-5 of 7, item 3.
- g. “MPCA plans to issue general permit coverages for construction stormwater discharges prior to commencement of construction . . . 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 . . . . There is no provision in the construction stormwater general permit . . . addressing specific water quality standards issues . . . . [This appears to leave] mercury from this aspect of the project wholly unregulated . . . . If there is such reasonable potential, coverage under the stormwater general permit would not be appropriate. Rather, this discharge could be covered under the NorthMet permit.” Ex. 337 Encl. 5 of 7, item 4.

299. MPCA’s designee testified in a sworn deposition on written questions that, since the 1974 MOA, MPCA is not aware of any NPDES permit other than the PolyMet permit “for

which EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read the comments aloud to MPCA.” Tr. 374:14-24.

300. Stine does not recall during his tenure as Commissioner any other occasion in which the EPA read a comment letter to MPCA over the phone, but did not submit a copy of the letter to MPCA. Tr. 479:5-9.

301. In Clark’s 30 years of experience at MPCA, there was only one permit – the PolyMet permit – for which the EPA drafted written comments during the public comment period and then read them to MPCA over the phone instead of sending them to MPCA. Tr. 1272:4-10.

302. In Pierard’s experience at EPA, other than for the PolyMet permit, there was never another time when he had to read an EPA comment letter to MPCA staff over the phone in order for permitting staff to learn what EPA’s comments on a draft permit would have said. Tr. 306:24-307:8.

303. In Pierard’s experience at EPA, other than for the PolyMet permit, there was never another time when he had to read an EPA comment letter to permitting staff from any other state over the phone in order for state permitting staff to learn what EPA’s comments on a draft permit would have said. Tr. 307:6-12.

## **VIII. MPCA RESPONSES TO COMMENTS ON THE POLYMET DRAFT PERMIT**

### **A. MPCA’s Typical Practice for EPA Comments**

304. When EPA provides MPCA with a written comment letter on a permit, MPCA’s regular practice is to prepare responses to comments that specifically describe EPA’s comments and then respond to them. Tr. 237:19-24, 238:4-6.

305. MPCA’s responses to comments for the Mesabi Nugget NPDES permit identified and described the comments as made by EPA, and provided individual MPCA responses to each of EPA’s comments. Ex. 529 at 7-11; Tr. 240:4-21.

306. MPCA’s responses to comments for the Keetac mine and tailings basin identified and described the comments made by EPA and provided specific responses to EPA’s comments. Ex. 527 at REL\_0063196-97; Tr. 238:25-239:12.

307. MPCA’s responses to comments for the Minntac NPDES permit identified and described EPA’s comments; when the response to an EPA comment similar to that made by a member of the public MPCA cross-referenced a public comment, members of the public could discern that EPA had made the comment as well as a member of the public. Ex. 533 at REL\_0063547-53; Tr. 241:5-21, 242:10-13, 1217:6-13.

308. There is no evidence in the record that for any permit other than the PolyMet permit MPCA failed to attribute, describe, and specifically respond to EPA’s comments in its responses to comments.

## **B. MPCA's Responses to Other Comments on the PolyMet Permit**

309. MPCA staff received from its contractor Shepherd a spreadsheet of comments organized by the person or organization that submitted the comment, with each separate comment that commenter made put on the next line. Tr. 989:14-990:6, 990:13-21.

310. Handeland and Clark primarily responded to technical comments and Schmidt responded as to whether a contested case was warranted and reviewed responses by Clark and Handeland. Tr. 1001:19-25, 1335:16-23.

311. For all other commenters on the PolyMet permit, MPCA's responses to comments would place the commenter's name by each comment, attributing the comment to them. Ex. 1133; Tr. 990:24-991:6.

312. For other commenters on the PolyMet permit, even if the comments were similar or duplicates, MPCA's responses to comments would identify whoever submitted the comment and would have that comment next to their name. Ex. 1133; Tr. 991:7-15.

313. However, in MPCA's response to comments, MPCA did not identify any of the comments received as being from EPA. *See* Ex. 1133; Tr. 1001:1-4.

## **C. MPCA's Claimed Justifications for Why MPCA Did Not Attribute, Describe, or Respond to EPA's Comments on the Draft PolyMet Permit**

### ***1. MPCA Gave an "Oral Response" to EPA Comments***

314. Schmidt stated in his declaration to the COA on June 12, 2019 that MPCA's "obligations under Minnesota law" would be satisfied in the PolyMet case if MPCA provided "oral response to EPA feedback throughout the permit development process." However, Schmidt acknowledged MPCA's responses to comments on the draft PolyMet NPDES permit also had to satisfy federal CWA requirements. Tr. 1214:4-25.

315. Minnesota rules requiring MPCA to respond to comments on an NPDES draft permit state that the "response may be made either orally or in writing." Minn. R. 7001.1070, subpt. 3.

316. EPA regulations promulgated under the CWA applicable to the PolyMet NPDES permit require that responses be in writing to be available to the public. 40 C.F.R. § 124.17(c).

317. MPCA's regular practice when EPA comments on NPDES permits is to respond to those comments in writing. *See, e.g.*, Exs. 527, 529, 533.

318. MPCA responded in writing, not orally, to the comments made by other commenters on the draft PolyMet permit. Ex. 1133.

319. Neither the CWA nor MPCA's regular practice support MPCA's assertion that an oral response to EPA's comments would have met MPCA's obligations. Findings 314-18.

## ***2. EPA Comments after Public Comment Period***

320. MPCA has argued that MPCA is not obligated to respond to EPA comments provided after the public comment period. MPCA Pre-trial Br. at 17 (Jan. 10, 2020).

321. There is no evidence in the record that EPA regulations that explicitly require states to respond to all significant comment on the draft permit "raised during the public comment period, or during any hearing," 40 C.F.R. § 124.17(a)(2), anticipate or exclude the obligation to respond where a commenter withholds written comments during the public comment period on the request of a state agency.

322. EPA's comment letter on the Keetac mine permit was submitted on September 2, 2011, about two weeks after the public comment period ended on August 19, 2011. Ex. 527 at REL\_0063161, 0063183.

323. Even though EPA's comments on the Keetac mine permit were received after the public comment period ended, MPCA's responses to comments specifically identified, described and responded to EPA comments. Ex. 527 at REL\_0063196-97; Tr. 238:25-239:12.

324. For the PolyMet permit, MPCA provided specific attribution, descriptions, and responses to comments in Exhibit 1133 to comments from at least the following thirty-five commenters other than EPA received after March 16, 2018:

- a. Duluth for Clean Water, received March 19, 2019. Exs. 568 at REL\_0063794, 1133 at 291-93
- b. Kevin Malmquist, received March 19, 2018. Exs. 568 at REL\_0063794, 1133 at 281.
- c. Arnie and Cindy Whiting, received March 19, 2018. Exs. 568 at REL\_0063794, 1133 at 154-55.
- d. Anita Tillemans, received March 19, 2018. Exs. 568 at REL\_0063794, 1133 at 153-54.
- e. Carla Arneson, received March 20, 2018. Exs. 568 at REL\_0063795, 1133 at 286-89.
- f. Hand-submitted comments from Robin Raplinger, Mark Delver, Kathy Littler, Barry Lesar, Cynthia Klaras, Roxanne Wright, Thomas Gentilini, Tom Rukavina, Karl Littler, Ken Vogl, Ryan Fink, Don Guttormson, Pierce, received November 7, 2018. Exs. 568 at REL\_0063799, 1133 at 14-16; WATER\_0002167-82.

- g. Hand-submitted comments from Robert Kohzmeter, Virgil Sohm, Jason Wall, Kim Davis, Paul Christensen, Wendy Saliin, Tahera Mamdani, Joanne Isdahl, Rachel Schardenbey, Sally Downing, Mary Klausen, Eleonora Lesar, Barry Lesar, Jeffrey LeDoux, Floyd Littler, Ronald Childs, Donna Littler received November 8, 2018. Exs. 568 at REL\_0063799, 1133 at 16-18, WATER\_0002183-2201.

325. MPCA's regular practice is to specifically attribute, describe, and respond to comments on a draft permit received after the public comment period, including EPA's comments on a prior mining permit, and public comments on the draft PolyMet permit received by MPCA after the public comment period ended; MPCA's only deviation from this regular practice was when EPA made oral comments on the draft PolyMet permit after the public comment period. Findings 322-24.

### 3. EPA Comments "*Similar*" to other Comments

326. In an April 30, 2018 conference call with EPA, MPCA noted that EPA's comments "overlap" and are "similar" to those of some members of the public who had also commented on the draft PolyMet permit, and said that MPCA's responses to comments will not directly address EPA's concerns. Ex. 774; Tr. 249:11-20; *see also* Ex. 374 (emails planning for call).

327. EPA never agreed that if other commenters raised similar issues, MPCA need not describe EPA's comments so as to attribute them to EPA. Tr. 249:21-25.

328. The underlined portions of EPA's comment letter on the draft PolyMet permit, read aloud to MPCA on April 5, 2018, were not the same as comments made by the public:

- a. Asked if any public comment was the same as EPA's comment on the transfer of the expired Cliffs Erie permit to PolyMet, Handeland responded, "I don't recall a specific question like that in here." Tr. 1011:6-1012:14, 1014:9-16. *Compare* Ex. 337 Encl. at 4 of 7, item 3, *with* Ex. 1133.
- b. Asked if any public comment was the same as EPA's comment on construction stormwater discharges draining 900 acres of wetlands expected to release significant amounts of mercury, Handeland responded, "I don't remember anything specifically exactly the same as this comment." Tr. 1015:1-1016:6. *Compare* Ex. 337 Encl. at 5 of 7, item 4, *with* Ex. 1133.
- c. Asked if any public comment was the same as EPA's comment that permit provisions should show how MPCA and the permittee will determine distribution of discharge to outfalls, Handeland responded, "I



don't remember any like this." Tr. 1027:19-1028:8. *Compare* Ex. 337 Encl. 6 of 7, item 2, *with* Ex. 1133.

- d. Asked if any public comment was the same as EPA's comment on discharge from the stabilization pond, Handeland responded, "I can't recall anything exactly like this one." Tr. 1028:11-18. *Compare* Ex. 337 Encl. at 6 of 7, item 3, *with* Ex. 1133.
- e. Asked if any public comment was the same as EPA's comment on PCBs requiring certification or monitoring, Handeland responded, "I don't remember any like this." Tr. 1030:23-1031:11. *Compare* Ex. 337 Encl. 7 of 7, item 8, *with* Ex. 1133.

329. Underlined portions of EPA's comments that are different from public comments described in MPCA's responses to comments, Exhibit 1133, also include:

- a. "[R]ecord 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." *Compare* Ex. 337 Encl. 1 of 7, item 3, *with* Ex. 1133.
- b. "[M]ercury from this aspect of the project wholly unregulated . . . 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 . . . could be covered under the NorthMet permit." *Compare* Ex. 337 Encl. 5 of 7, item 4, *with* Ex. 1133.
- c. "[P]ermit 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 cases, are likely to be major modifications. . . . EPA is concerned that the permit allows both the permittee and MPCA to modify the permit without following the public process." *Compare* Ex. 337 Encl. 5 of 7, Decision Making Procedures, *with* Ex. 1133.

330. EPA comments on the draft PolyMet permit were not the same as public comments. Findings 328-29.

331. EPA regulations do not provide an exception to the requirement that states "[b]riefly describe and respond to all significant comments on the draft permit" if the significant comments are similar to those of other commenters. 40 C.F.R. § 124.17(a)(2).

332. There is no evidence in the record that MPCA ever previously failed to attribute, describe, and respond to EPA comments because they were similar to those of other commenters.

333. MPCA's regular practice for PolyMet permit comments other than comments by EPA was to attribute, describe, and respond through a cross-reference to public comments that were similar to those of other commenters. Tr. 991:7-15; *see, e.g.*, Ex. 1133 at 1133-005 (comment 22 cross-referencing a response to comment 612 on a tailings seepage issue).

334. If MPCA had received a written comment letter from EPA on the PolyMet permit, MPCA would have cross-referenced answers to the concerns EPA shared with other stakeholders as MPCA did for many other commenters. Tr. 1216:24-1217:5.

335. There is no evidence in the record that MPCA's failure to attribute, describe, or respond to EPA comments on the PolyMet permit that are "similar" to or "overlap" other comments is authorized by law or consistent with regular practice. Findings 304-08, 311-12, 331-34.

#### ***4. EPA's Oral Comments on PolyMet Permit***

336. MPCA treated oral comments at public meetings on PolyMet the same as written comments in terms of providing a response in MPCA's responses to comments. *E.g.*, Ex. 1133 at WATER\_0005547 (comments at hearing); Tr. 1362:1-6.

337. MPCA documented what was said in oral comments on the PolyMet permit through a transcription. Tr. 1362:5-11.

338. MPCA did not consider the questions and concerns raised by EPA with MPCA in phone conferences from January 31, 2018 through March 12, 2018 to be EPA oral comments on the draft PolyMet permit. Tr. 1162:23-1163:7, 1164:13-17, 1165:12-16, 1166:9-13.

339. Schmidt explained that in the January through March conferences, most of what EPA said was "questions about what is in the permit rather than commentary on the permit." Tr. 1163:8-12.

340. Schmidt testified that the call with EPA on April 5, 2018 was different in nature:

Our prior calls had been discussions with some back and forth, and, as I mentioned, it sounded like Mr. Pierard was reading something and basically read through a long document rather than having the back-and-forth discussion that we typically had on prior calls.

Tr. 1194:21-1195:1.

341. Pierard testified that EPA “provided comments. We provided comments to [M]PCA after the close of the public comment period” by reading EPA’s comment letter to MPCA on April 5, 2018. Tr. 304:20-305:4.

342. Schmidt testified that Pierard stated which comments pertained to objectionable items and which to other recommendations, but otherwise his notes were based on what Pierard read aloud from the letter itself. Ex. 837 at 27-29; Tr. 1195:14-1196:4.

343. To the best of Schmidt’s knowledge, all of the items in each column in his notes of April 5, 2018 are taken from what Pierard read to MPCA on April 5, 2018 and all of the “issues,” “solutions,” and legal “cites” in his notes on pages 27 to 29 of Exhibit 837 are based on what Pierard read to MPCA on April 5, 2018. Tr. 1196:23-1197:3, 1197:8-12.

344. Schmidt took notes in handwriting during the April 5, 2018 call with EPA. Tr. 1192:18-20.

345. Based on his standard practice, Schmidt would have prepared the Exhibit 837 typed call notes for the April 5, 2018 conference call with EPA on or about April 5, 2018. Tr. 1190:16-19, 1191:17-20.

346. Among the twenty-six issues in Schmidt’s April 5, 2018 notes of EPA’s oral comments, several are different from public comments described in MPCA’s response to comments, Exhibit 1133, including issues numbered 3, 8, 11, 12, 14, 16, 17, and 22. Exs. 837 at 27-29; 1133.

347. Schmidt’s notes of April 5, 2018 provide a highly detailed record that MPCA could have used to specifically identify, describe, and respond to EPA’s oral comments. Ex. 837.

348. Schmidt does not recall whether he or MPCA considered or discussed the possibility of using Schmidt’s notes of April 5, 2018 to specifically cite EPA’s concerns in MPCA’s response to comments. Tr. 1218:14-1219:2.

349. Clark admitted that, the way MPCA’s responses to comments were written, the public probably would not be able to know which of the comments in MPCA’s responses to comments were attributable to the EPA. Tr. 1272:19-1273:5.

350. If MPCA had identified, described, and responded to EPA’s comments using Schmidt’s notes of April 5, 2018, and cross-referencing with similar comments made by other stakeholders as MPCA did with other commenters, members of the public would have been able to discern which concerns that members of the public had were also shared by EPA. Exs. 837, 1133; Tr. 1219:3-10.

351. MPCA’s regular practice for other NPDES permit cases where EPA submitted comments and for other commenters on the draft PolyMet permit, whether comments were oral or written, similar or dissimilar to other comments, within the public comment period or received by MPCA after the public comment period closed was to specifically attribute, describe, and respond

to comments in written responses to comments. MPCA deviated from its regular practice for EPA comments on the draft PolyMet permit such that the public would not be able to tell which comments were attributable to EPA. Findings 304-08, 311-50.

## **IX. POLYMET PERMIT PROCESS AFTER APRIL 5, 2018**

352. Pierard discussed with MPCA the potential that if significant changes were made to the draft PolyMet permit, MPCA may be required to provide a second public notice for the new, revised permit. Tr. 363:6-20.

353. MPCA never discussed whether there would be another public notice period on the pre-proposed permit, although Stine was aware that if there were substantive differences in the permit there could be an additional public notice period. Tr. 532:3-20.

354. Although MPCA made changes between the draft PolyMet permit that was on public notice and the pre-proposed permit that was later provided to EPA, MPCA did not consider them to be “substantial.” Tr. 608:20-609:1.

355. On June 26, 2018, Pierard sent an email to Holst, responding to Stepp’s concerns that MPCA had told her EPA intended to object to the PolyMet permit. Ex. 2010.

356. Pierard testified that no one in the NPDES program had given any signal to anyone that EPA had intended to object, but Pierard “needed to respond to that,” “run this down,” and “put that rumor to bed so that Linda [Holst] could get back to Cathy [Stepp] that if this rumor was out there, it didn’t come from the [NPDES] program at EPA.” Tr. 316:15-317:7.

357. Pierard contacted Udd, and Udd said that he had not received any indication that anyone in the Commissioner’s office or elsewhere at MPCA had that perception. Ex. 2010; Tr. 316:25-317:4.

358. MPCA sent its pre-proposed permit to EPA on or about October 25, 2018. Tr. 317:25-318:2.

359. EPA did not comment on the pre-proposed permit. Tr. 701:1-3, 11-14.

360. On or about December 3, 2018, Pierard told Udd to proceed to the proposed permit stage. Tr. 318:6-14, 938:18-24.

361. On or about December 4, 2018, MPCA sent and EPA received the proposed final PolyMet NPDES permit, fact sheet, and response to comments. Tr. 318:19-23, 352:11-15.

362. After a proposed final permit is sent to EPA, if no written comment is received within the 15-day period, the MPCA Commissioner can assume that the EPA has no objection. Ex. 328 at 10-11, Part II, § 124.46 (5); Tr. 458:16-19.

363. Udd testified that around December 18, 2018, Pierard said EPA had finished their review and was not going to object. Tr. 939:4-6.

364. Udd made no notes of the call received from Pierard and did not send anyone an email reporting the call. Tr. 946:5-12.

365. MPCA's list of calls between EPA and MPCA contains no record of any calls between EPA and MPCA after October 22, 2018. Ex. 708.

366. MPCA did not receive a letter, email, or any other written communication from EPA confirming that EPA would not object. Tr. 946:13-15.

367. There is no evidence in this record as to why EPA decided not to object to the PolyMet permit, whether EPA made this decision before or after EPA received MPCA's "pre-proposed permit," or whether or not EPA's concerns were resolved in the final PolyMet permit.

## **X. MPCA FAILURE TO PRESERVE OR PRODUCE DOCUMENTS**

### **A. Emails Regarding MPCA's Request to EPA to Withhold Comments on Draft PolyMet Permit**

#### ***1. MPCA Deleted March 13-15, 2018 Emails***

368. Lotthammer's March 13, 2018 email to Thiede asked that EPA not send comments on the draft PolyMet permit during the public notice period and attached Stine's March 12, 2018 email, a prior email from Stepp to Stine, and a copy of the MOA highlighted by Lotthammer. Ex. 333 (email and attachments).

369. Lotthammer deleted her March 13, 2018 email, Exhibit 333, from her MPCA email account. Tr. 609:24-610:2.

370. Lotthammer testified that she did not know when she deleted Exhibit 333 from her MPCA email account, but she believed that she had deleted this March 13, 2018 email before the PolyMet permit was issued. Tr. 610:3-4, 623:16-18.

371. Exhibits 60, 61 and 62 are emails from March 13, 2018 through March 15, 2018, including MPCA's March 13, 2018 request to EPA not to send comments on the draft PolyMet permit within the public comment period and follow-up between Lotthammer and Thiede. Exs. 60, 61, 62.

372. Lotthammer deleted Exhibits 60, 61, 62 at some time before she left MPCA. Tr. 642: 6-643:2.

373. Before Lotthammer turned in her state-issued laptop in February 2019, she deleted emails and files. Tr. 544:16-20.

374. Lotthammer admitted that to the best of her knowledge at the time she deleted her March 13, 2018 email, there was no other writing in MPCA's records documenting the request from MPCA that led to the March 16, 2018 agreement between MPCA and EPA. Ex. 333; Tr. 613:1-9.

375. Lotthammer admitted, "I deleted the [Exhibit 333] email knowing that, at least to the best of my knowledge, this was the only email that contained the request." Tr. 614:1-13; *see also* Tr. 610:15-22.

376. Stine testified that he deleted files from his laptop computer before he turned it in to MPCA when he left the MPCA in early January 2019 and that he did not specifically recall what he had deleted or if he deleted any PolyMet files. Tr. 448:15-449:8; *see also* Tr. 619:15-22 (regarding date).

## **2. MPCA Failed to Preserve March 12-15, 2018 MPCA Records**

### *a. Failure to Comply with Official Records Act*

377. Minnesota Statutes § 15.17, Official Records, states as follows:

Subdivision 1. All officers and agencies of the state, counties, cities, towns, school districts, municipal subdivisions or corporations, or other public authorities or political entities within the state, hereinafter "public officer," shall make and preserve all records necessary to a full and accurate knowledge of their official activities. .

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

378. As MPCA Commissioner, Stine was responsible for creating and preserving records that adequately and properly documented the organization, functions, policies, decisions, procedures, and essential transactions of the MPCA and for delegating the responsibility to the appropriate staff. Tr. 386:19-387:3.

379. Any written communications between MPCA and EPA, whether it be emails, letters, memoranda, or sharing of technical data in writing, constitute records appropriate for preservation if they have specific application to a matter before the agency that pertained to agency business. Tr. 388:15-20.

380. As MPCA Commissioner, Stine understood that any written communications between the EPA and the MPCA relating to the PolyMet permitting process were official records of the MPCA. Ex. 77 at 13; Tr. 388:21-389:9.

381. As MPCA Commissioner, Stine specifically understood that emails between MPCA and EPA could be official records of the MPCA. Ex. 77 at 13; Tr. 391:20-23.

382. Exhibits 58, 60, 61, 62, 333, and 591, all of which are emails between MPCA and EPA regarding MPCA's request that EPA not send comments on the draft PolyMet permit, reflect on their face that they were obtained from EPA – either from the desk of Kurt Thiede or under the FOIA.

383. Neither Exhibits 58, 60, 61, 62, 333, and 591 nor any MPCA versions of these documents were produced in response to DPA requests, in discovery, or as a result of the court-ordered forensic search. *See* Ct. Ex. F; Relators' Exhibit List of Documents Received Via Forensic Search, Exhibit A (Jan. 14, 2020).

384. Exhibits 58, 60, 61, 62, 333, and 591 document MPCA's request to EPA regarding EPA's comments on the draft PolyMet permit and are "records made or received . . . in connection with the transaction of public business." *See* Finding 277.

385. Exhibits 58, 60, 61, 62, 333, and 591 document MPCA's request to EPA regarding EPA's comments on the draft PolyMet permit and are MPCA records "necessary to a full and accurate knowledge of [MPCA's] official activities," *see* Finding 377 and Exhibit 591, specifically, is the only document in evidence that proves that Stine's phone call with Stepp pertained to the PolyMet mine draft permit. *See* Exs. 58, 333, 591.

386. Exhibits 58, 60, 61, 62, 333, and 591 are government records under the Official Records Act that were not protected and preserved from loss or destruction by MPCA. Findings 377-837.

*b. Failure to Comply with MPCA Records Policies*

*i. Definition of Records*

387. Lotthammer testified that MPCA's records policy allowed her to delete documentation of her request to EPA in her March 13, 2018 email because "information that is something in 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, was something that I didn't need to keep. And that's what I felt this was." Ex. 333; Tr. 611:5-22; *see also* Tr. 693:5-16, 723:22-724:3.

388. Lotthammer claimed that, when she deleted her emails, she relied on a sentence in MPCA's Data Practices Manual "Dos and Don'ts" stating, "Keep your files neat and discard any drafts and notes when you are through using them." Ex. 1003; Tr. 719:5-14.

389. But Lotthammer did not take the position that her March 13, 2018 email was a draft. Tr. 720:18-20.

390. Lotthammer stated that she also had in mind “be familiar with the major categories of” data which she reframed as “categories of data as far as what needs to be retained and what doesn’t need to be retained.” Ex. 1003; Tr. 720:22-723:19.

391. But neither the cited phrases nor any other part of MPCA’s Data Practices “Dos and Don’ts” provides authorization to discard email correspondence. Ex. 1003.

392. MPCA’s Records and Data Management Manual, Exhibit 77, was applicable at all periods of time relevant to the PolyMet permitting process. Tr. 395:5-8, 486:17-21.

393. Lotthammer stated, “my understanding of this email was that it wasn’t a record.” Tr. 722:15-16.

394. When asked if she went through an analysis and concluded that her email to Thiede on March 13, 2018 was not an agency record, Lotthammer responded, “Yes, because if it had been an agency record, I would have retained it.” Tr. 723:11-15.

395. MPCA’s Records and Data Management Manual states both “records” and “official records”

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

Ex. 77 at 7, 8.

396. Lotthammer admitted that the March 13, 2018 email she sent to Thiede was something made by the agency in connection with the transaction of public business. Ex. 333; Tr. 729:19-25.

397. However, Lotthammer stated she did not believe the March 13, 2018 email had administrative, evidential, historical, or informational value and did not consult with anyone to determine if it had legal value. Ex. 333; Tr. 730:1-731:3.

398. MPCA’s Record and Data Management Manual states, “If the answer to any of the above-listed questions is “yes,” the document in question is a record,” and lists these questions:

✓ Does the information contain evidence of or contribute to an understanding of the agency’s activities, decision making processes, directives, functions, mission, operations, policies, procedures, programs or projects? Does it document business



actions such as what happened, when it happened, the order of events, what advice was given, what was decided, who was involved?

✓ Is the information appropriate for preservation because it has administrative, evidential, fiscal, historical informational, legal, or programmatic value?

✓ Are you or the agency the creator of the information? Did you generate or receive the information to use in conducting agency business?

Ex. 77 at 12.

399. Lotthammer admitted that she did not specifically look at the first question in the Manual asking if information contains evidence of or contributes to an understanding of an agency's activities, but just asked herself "whether or not this was something that I needed to keep or could delete" and answered in the negative. Ex. 77 at 12; Tr. 732:1-6.

400. Lotthammer admitted she did not specifically ask herself if information in her email documented business actions in deciding her email was a nonrecord. Ex. 77 at 12; Tr. 732:7-19.

401. Lotthammer admitted that she was the creator of the March 13, 2018 email and that she did "generate or receive the information to use in conducting agency business." Ex. 77 at 12; Tr. 732:20-733:6.

402. Exhibits 60, 61, 62 and 333 deleted by Lotthammer were "records" according to MPCA's policy adopted pursuant to Minnesota statutes and regulations. Ex. 77.

403. None of Lotthammer's explanations for deleting Exhibits 60, 61, 62, and 333 are in accordance with applicable MPCA policies and these exhibits were deleted and were not preserved as required by MPCA's established policies and manuals. Findings 387-402.

*ii. MPCA records preservation and retention*

404. When Stine was MPCA Commissioner, it was the rule at MPCA that "Records may be disposed of only as governed by the agency's retention schedule and applicable laws regarding records disposition." Ex. 77 at 25; Tr. 396:22-397:3.

405. A document substantially like Exhibit 76, Records Management ("Records Management policy") was on the agency's intranet page and accessible to MPCA staff during the relevant time period. Ex. 76; Tr. 397:23-398:6, 756:3-5.

406. MPCA's Records Management policy used substantially the same definition of a "record" as in the MPCA's Records and Data Management Manual. Exs. 76 at 1, 3, 77 at 7; Tr. 398:7-11.

407. MPCA's Records Management policy states that if an email meets the criteria for a record the email "must be uploaded to OnBase" and preserved. Ex. 76 at 2; Tr. 398:23-399:5.

408. MPCA's Records Retention Schedule, which was in effect when Stine was MPCA Commissioner, requires that "records generated during permit development and issuance processes" must be permanently retained. Ex. 71 at 31; Tr. 400:7-10, 897:18-23.

409. Stine's emails of March 12, 2018 and Lotthammer's emails from March 13 to March 15, 2018, regarding EPA's comments on the draft PolyMet permit (Exhibits 58, 60, 61, 62, 333, and 591) were all official records required to be uploaded and permanently retained in accordance with MPCA's written policies. Findings 385-408.

*c. MPCA Obligation to Preserve Evidence*

410. MPCA anticipated litigation as soon as PolyMet proposed its mine project. Telephone Conf. Tr. 92:2-3 (Sept. 16, 2019)

411. 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.

412. MPCA's request for approval to hire outside counsel referenced the Reserve Mining litigation, which took place in large part in United States District Court for the District of Minnesota and the United States Court of Appeals for the Eighth Circuit. Ex. 382 at 2-3; Tr. 383:11-25.

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

414. The NPDES Permit Writers Manual states 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.

415. 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.

*d. Failure to Comply with DPA*

416. Minnesota Statutes § 13.03, subd. 1 states, "The responsible authority in every government entity shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use."

417. Minnesota Statutes § 13.02, subd. 3(c) states, "The responsible authority or designee shall provide copies of public data upon request."

418. On March 26, 2018, WaterLegacy submitted a DPA request stating:

Please provide all records since January 2015 pertaining to any of the following:

1) Comments, letters, emails, memos, meeting notes, phone conversation notes or any other records a) from the U.S. EPA; or b) pertaining to written or oral communications or, phone or in-person meetings with the U.S. EPA regarding any proposed or draft NPDES/SDS permit for the PolyMet NorthMet Project . . . .

Ex. 334.

419. WaterLegacy submitted seven DPA requests to MPCA from March 26, 2018 through February 3, 2019 seeking information on comments, letters, emails, memos, meeting notes, phones or records from the EPA or pertaining to written or oral communications, phone, or in-person meetings with EPA regarding the PolyMet permit. Exs. 334, 336, 340, 341, 346, 352, 354.

420. Exhibits 60, 61, 62, and 333 are emails pertaining to MPCA's communications with EPA regarding EPA comments on the draft PolyMet permit, so they are responsive to WaterLegacy's March 26, 2018 and subsequent DPA requests. Findings 418-19.

421. Since MPCA staff responsible for responding to DPA requests knew Clark was involved with PolyMet, WaterLegacy's DPA requests were sent to Clark. Tr. 1285:7-20.

422. In responding to WaterLegacy's DPA requests for PolyMet records, Clark went to both Handeland and Udd to obtain information or ask them to provide information. Tr. 1290:12-22.

423. In March 2018, Udd knew that Lotthammer was designated as the Commissioner's office lead for the PolyMet project, so Lotthammer received WaterLegacy's DPA requests and provided other documents in response to them. Ex. 419; Tr. 933:17-19.

424. Lotthammer testified that she must have deleted Exhibits 61 and 62 between the March 16, 2018 emails and the date when a DPA request was received regarding interactions with EPA, "because I didn't produce it at that time, so I must not have had it." Tr. 643:11-18.

425. Lotthammer testimony that she "must have deleted it [Exhibit 333] sometime between when I wrote it and when we received a Data Practices Act request, because if I had had it at the time that we received the request, I would have produced it" is not credible. Tr. 623:21-25.

426. Lotthammer had no specific recollection that she had deleted Exhibits 61, 62, or 333 prior to March 26, 2018. Findings 370, 372, 424-25.

427. The Court infers that Lotthammer deleted her March 13-15, 2018 emails after MPCA received WaterLegacy's March 26, 2018 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.<sup>5</sup>

### ***3. Limited Recovery of MPCA Documents***

428. Exhibits 804, 805, and 815, which are internal MPCA records pertaining to EPA's comments on the draft PolyMet permit, were recovered as a result of the court-ordered forensic search. Relators' Exhibit List of Documents Received Via Forensic Search, Exhibit A (Jan. 14, 2020).

429. However, none of the emails from March 12 through March 15, 2018 memorializing MPCA's request to EPA not to send comments on the draft PolyMet permit were recovered or recoverable by the court-ordered forensic search. Exs. 58, 60, 61, 62, 333, 591; Relators' Exhibit List of Documents Received Via Forensic Search, Exhibit A (Jan. 14, 2020).

430. While Stine was MPCA Commissioner, he used cell phones belonging to the state – first a Samsung cell phone and then an iPhone. Tr. 447:7-16, 447:20-448:5.

431. Stine also had a PC-type laptop that was property of the state that he turned in when he left office in January 2019. Tr. 448:15-449:1.

432. Lotthammer used a state issued laptop, which she turned in to MPCA before she left. Tr. 544:10-15.

433. Lotthammer also had a state-issued Samsung cell phone when she became an Assistant Commissioner and an iPhone she used for the last eight months she was employed at the MPCA. Tr. 604:7-25

434. Lotthammer also had a personal iPhone, a personal laptop and a personal email account. Tr. 546:14-21.

435. In connection with the court-ordered search of devices that might contain data relating to the PolyMet permit application, the Minnesota IT Services ("MNIT") received one physical tablet and an image for that tablet; and one hard drive for Foss; the original PST file, which was a copy of Lotthammer's email account downloaded from the State's Microsoft Office 365 email system, which could be searched. Tr. 839:24-840:11.

436. At the time MNIT received the search request from MPCA, there was no longer a computer associated with Stine; MPCA had recycled Stine's computer, and according to usual practice, all of the data had been wiped from Stine's computer and a new operating system installed, so that data there before "would not be recoverable at that point because it would be completely overwritten." Tr. 841:7-11, 842:5-13.

---

<sup>5</sup> This inference is pursuant to the Court's Order Granting Relators' Motion for Spoliation Sanctions.

437. If MPCA had issued a legal hold, MNIT would have retrieved devices and created forensic images so that the devices could have been searched despite being recycled. Tr. at 830:1-831:8.

438. None of Lotthammer's or Stine's state-issued cell phones were provided by MPCA to MNIT for the forensic search. Tr. 840:22-841:2.

439. Data from deleted files can eventually be overwritten by new data in the normal course of operating a computer when new files are saved. Tr. 1080:18-1081:1; 1081:18-21.

440. If a deleted file has been overwritten, there is no way to recover the data. Tr. 1082:12-19.

441. Deleted files are generally only recoverable from an actual computer hard drive. Tr. 1090:17-19.

442. MNIT provided Digital Forensics for Xact Data Discovery ("Xact") with a laptop from Lotthammer and a hard drive used by Foss. Tr. 1084:13-21.

443. However three of the five sources searched by Xact could not be searched for deleted files, since they were either network data or a copy of a mailbox. Tr. 1088:24-1089:4, 1090:13-17.

444. The three sources that could not be searched for deleted files were the network folders from Lotthammer and Stine (E001); the flash drive back-up of the network folder and PST file copied from the mailbox of Lotthammer's email account (E002); and the downloaded copy of the PST file, which was identical to E002 although collected independently (E005). Tr. 1086:15-21, 1087:18-1088:1, 1088:16-23, 1090:13-19.

445. Michael Gutierrez, the director of Digital Forensics for Xact, testified that to find out when a file was deleted, one has to look for a specific file name on a specific device's operating log, and that was not done in this case. Tr. 1099:21-1100:2, 1102:18-1103:8, 1103:24-1104:19.

446. In this case, Xact did not do an investigation to search for evidence of intentional wiping of data, which is a separate, difficult, and time-consuming investigation that is not part of the standard forensic search and would not have been possible under the time constraints in this case which were, in part, attributable to MPCA's violation of a Court order regarding the neutrality of Xact. Tr. 1099:21-1100:13, 1102:18-1103:8; *see also* Tr. 441:14-21 (Court noting MPCA's violation).

447. Despite a court-ordered forensic search, it is not possible to determine whether other pertinent records were overwritten, deleted, or on devices that were recycled or not subject to search. Findings 428-44.

448. Despite the forensic search, it is not possible to determine when exhibits obtained from the EPA and under FOIA, Exhibits 58, 60, 61, 62, 333, and 591, were deleted from MPCA devices. Findings 445-46.

**B. MPCA Notes of Calls and Meetings with EPA Not Produced**

*1. Handeland's Notes (April 5, 2018)*

*a. Handeland Practice Regarding Notes*

449. Handeland has taken notes of phone meetings between MPCA and EPA related to the PolyMet permit since at least August 11, 2016. Ex. 692.

450. 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.

451. Handeland believes that her notes accurately reflect what occurred at the meetings between MPCA and EPA. Tr. 970:1-4.

452. Handeland used her notes to remind herself of what occurred at meetings when she was drafting the PolyMet permit. Tr. 971:10-13, 973:4-7.

453. Clark also referred to Handeland's notes in the PolyMet permit development process. Tr. 1310:3-6.

454. Handeland would consider her notes as constituting minutes that would sometimes be scanned into the OnBase system or included in an administrative record. Tr. 955:19-956:12, 1003:14-17; *see also* Ex. 82 at 8.

455. Handeland's notes of phone conferences with EPA other than those for April 5, 2018 were produced in response to DPA requests, and some of these other Handeland notes were made part of the administrative record. Exs. 324, 325, 568, 692; Ct. Ex. F.

*b. April 5, 2018 Call with EPA*

456. Handeland testified that she started taking notes during the April 5, 2018 call. Tr. 979:17-19.

457. Handeland testified that she stopped taking notes on April 5, 2018 because she "couldn't keep up" with what EPA was saying. Tr. 979:25-980:4.

458. Pierard testified that during the April 5, 2018 meeting, Clark asked Pierard "to either slow down or if I could repeat a comment that I had read, so that gave me the impression that they were taking notes." Tr. 195:12-20.

459. Clark's requests suggesting MPCA was taking notes continued in the middle and toward the end of the conference call, which lasted about an hour. Tr. 195:21-196:2.

460. Handeland did not ask EPA to slow down, and she does not remember if anyone else from MPCA asked EPA to slow down. Tr. 980:5-10.

461. Handeland testified that Schmidt usually took notes at meetings he attended with her on the PolyMet permit, and he was at most of the meetings that she attended with EPA. Tr. 985:3-6, 14-18.

462. Schmidt sometimes used abbreviations in his notes, like initials rather than the full names of a person, but he does not know shorthand. Tr. 1146:18-1147:8.

463. Schmidt's notes of April 5, 2018 reflect a great deal of detail regarding issues, solutions, and citations in EPA's comments read aloud to MPCA. Ex. 837 at 27-29.

464. The detail and accuracy of Schmidt's notes from April 5, 2018 renders implausible Handeland's claim that Pierard was reading EPA's comments too rapidly for her to take notes. Findings 457-63.

465. Handeland discarded and recycled her notes from the April 5, 2018 call on the same day that she took the notes. Tr. 982:16-983:6.

466. In order to discard her notes, Handeland removed them from the spiral notebook in which she was taking notes. Tr. 983:7-12.

467. Handeland does not remember that she ever stopped taking notes on any prior calls with EPA. Tr. 980:17-19.

468. Handeland does not recall discarding any other notes of meetings during the PolyMet permit process. Tr. 983:25-984:7.

469. Handeland believed that Schmidt's notes would not be available to the public or in the administrative record because "he's an attorney. If he had anything, it would be privileged." Tr. 1004:18-24, 1010:20-21.

470. Handeland never talked with anyone at MPCA about how to document the April 5, 2018 call since she discarded her notes and never discussed the April 5, 2018 call with anyone at MPCA after it occurred. Tr. 986:5-8, 17-19.

471. Handeland's cessation of notetaking on a conference call with EPA related to the PolyMet project, her tearing her notes from her spiral notebook, and her discarding of her notes were marked deviations from Handeland's regular practice. Findings 456, 465-68.

472. When she stopped taking notes on April 5, 2018, Handeland would have understood that there would be no other notes placed in the administrative record and no other document

available to the public reflecting the call when EPA read its comment letter to MPCA. Findings 454-55, 469-71.

## 2. *Schmidt's Notes from May 19, 2016 through April 5, 2018*

### a. *Schmidt Practice Regarding Notes*

473. Schmidt took notes at most meetings or calls that he participated in regarding NPDES permits. Tr. 1128:14-21.

474. On the PolyMet project, it was typical that when MPCA had phone calls with the EPA to discuss technical matters a lawyer would sit in and the lawyer would make notes of the phone call. Tr. 898:24-899:10.

475. Schmidt prepared the notes of EPA conference calls in Exhibit 837 ("EPA call notes") by taking handwritten notes during calls with EPA and typing them up after the meeting. Tr. 1145:17-1146:7

476. Schmidt's general practice was to type his handwritten notes immediately after a meeting or, if he had another meeting following the first, to type his notes right after the last of his consecutive meetings. Ex. 838; Tr. 1127:8-22.

477. After he typed his handwritten notes, Schmidt would put them in a file drawer designated for shredding. Tr. 1127:23-1128:1.

478. Schmidt did not use any notes other than his own to prepare the EPA call notes. Tr. 1147:23-2.

479. The EPA call notes were prepared as an ongoing document on Schmidt's computer, not written all at once. Tr. 1147:14-16; *see also* Ex. 837.

### b. *Schmidt's Belief His Notes Were Not Public*

480. Schmidt had his first phone call with Holland & Hart, MPCA's outside counsel, in mid-2015. Tr. 1243:1-5.

481. Schmidt's understanding, when he began taking notes at MPCA, was that any notes and other documents created by attorneys in their capacity as an attorney were not public for purposes of the DPA. Tr. 1129:10-13.

482. Schmidt testified that he is familiar with the DPA. Tr. 1128:22-24.

483. Schmidt understood at the time that the notes he took memorializing what happened at meetings would be an exemption to the DPA. Tr. 1130:23-1131:1.



484. Prior to this Court's ruling in these transfer proceedings, Schmidt did not believe that the EPA call notes would ever become a public document. Tr. 1148:1-7; *see also* Ex. 837.

*c. DPA Requirements*

485. Minnesota Statutes § 13.01, subd. 3 “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.”

486. Minnesota Statutes § 13.03, subd. 3(f) provides:

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

487. MPCA's online guide for members of the public requesting information, required by Minn. Stat. § 13.03, subd. 2, states:

If the agency does have the requested data but cannot provide these data due to the fact that they are classified as not public, the requester will be informed of this fact either orally at the time of the request or in writing as soon after that time as possible. The MPCA will cite the federal law, state statute or temporary classification upon which this determination is based (Minn. Stat. § 13.03, subd. 3(f)).

Ex. 79 at 3 of 7.

*d. WaterLegacy DPA Requests*

488. MPCA senior office administrative specialist Leonard Richards (“Richards”), sent all DPA requests and correspondence regarding DPA requests pertaining to the PolyMet permit to Clark. Tr. 752:15-20, 811:1-13.

489. When Clark received DPA requests, he forwarded them to Udd and to Schmidt, before he left, and, after Schmidt left, to MPCA General Counsel Neblett; Clark also included Schmidt on DPA emails Tr. 1285:25-1286:10, 1292:7-10.

490. By January 17, 2018, MPCA was aware of potential DPA requests and was making “an attempt to be prepared for DPA requests” for PolyMet permit documents. Ex. 275.

491. Schmidt reviewed records responsive to PolyMet DPA requests once they were placed on an MPCA hard drive that was shared among agency staff. Tr. 1138:8-1139:2.

492. For WaterLegacy's DPA requests, Schmidt "reviewed every record in the shared drive to ensure that all responsive records that were not otherwise subject to an exception were turned over." Tr. 1139:22-1140:1.

493. If Schmidt found a responsive record subject to an exception to the DPA, he would put it into a subfolder labeled "confidential" or "not public," identify the exception that the confidential material fell under, and inform the records management staff." Tr. 1140:2-12.

494. Schmidt saw WaterLegacy's first DPA request of March 26, 2018 shortly after it was made and when all the documents were put on the shared drive and a response was processed. Tr. 1141:24-1142:8.

495. Schmidt understands that a DPA request applies to documents in existence on or before the date of the request. Tr. 1144:11-16.

496. On March 26, 2018, when 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, Schmidt possessed thirty pages of EPA call notes responsive to that DPA request. Exs. 334, 335, 837 at 1-27, 838.

497. Schmidt acknowledged that by March 26, 2018, MPCA had in its records his meeting notes and call notes pertaining to phone and in-person meetings with the EPA regarding the PolyMet NPDES project. Tr.1205:17-22.

498. Schmidt is familiar with WaterLegacy's follow up DPA requests of April 5, 2018; September 20, 2018; October 4, 2018; December 12, 2018; and January 1, 2019. Exs. 336, 340, 341, 346, 352; Tr. 1142:25-1143:13.

499. On October 19, 2018, Richards forwarded to staff an email from WaterLegacy following up on prior DPA requests and specifically requesting copies of "any other staff documents currently collected in 'non-public' electronic files or sites." Ex. 403.

500. On February 3, 2019, WaterLegacy sent a DPA request asking for documents responsive to prior DPA requests stating, "If there is any assertion that these documents are exempt from disclosure, please state with specificity the asserted grounds for that exemption," along with a cover email repeating the request that MPCA specify and asserted basis for non-disclosure. Exs. 354, 419.

501. The next day, Clark sent an email to MPCA staff, copied to Lotthammer and Neblett, highlighting the following words from WaterLegacy's February 3, 2019 DPA request:

provide all data . . . not yet provided in response to WaterLegacy's September, October and December 2018 and January 2019 DPA requests, including data

involving MPCA leadership or counsel . . . If there is any assertion that these documents are exempt from disclosure, please state with specificity the asserted grounds for that exemption.

Ex. 274 at MPCA\_020355.

502. In addition to DPA requests, WaterLegacy sent MPCA specific requests for information withheld as non-public due to an exception to the DPA. Exs. 354, 403, 419; Findings 499-501.

*e. Failure to Produce or Disclose Schmidt Notes*

503. None of Schmidt's notes of meetings and phone conferences between EPA and MPCA in Exhibits 837 or 838 were produced in whole or in part in response to WaterLegacy DPA requests, and none were included in the administrative record. Ct. Ex. F; *see also* Tr. 1207:4-9.

504. MPCA did not provide any of Schmidt's notes in response to the March 26, 2018 DPA request due to a perception that an exception to the DPA allowed them to be withheld. Tr. 1206:6-16.

505. Schmidt does not recall and there is no other evidence that MPCA informed WaterLegacy in responding to the March 26, 2018 DPA request that responsive notes had been withheld due to an exception to the DPA. Tr. 1206:17-1207:3.

506. Schmidt does not know and there is no other evidence that MPCA disclosed that responsive notes had been withheld due to an exception to the DPA in response to WaterLegacy's DPA requests from April 5, 2018, through January 1, 2019. Tr. 1207:10-16.

507. Schmidt does not know if he informed records management staff that he had responsive data in his records that he believed were an exception to the DPA, and MPCA records management staff process DPA requests, they do not decide what MPCA is obligated to produce in responding to a DPA request. Tr. 760:22-761:2, 1207:17-22.

508. Schmidt never prepared a privilege log in response to WaterLegacy's DPA requests to MPCA identifying records that were non-public documents under the DPA. Tr. 1208:25-1209:6.

509. When Schmidt left MPCA, roughly a week and a half or two weeks after the appeals in this proceeding were filed, he prepared for Neblett, his supervisor, an exit memo identifying where his documents were stored and what documents he had retained in the folder with restricted access. Tr. 1203:18-1204:2.

510. Schmidt believes that this memo referenced that he had notes and the folder where those notes were located. Tr. 1204:5-16.

511. On February 5, 2019, Richards sent an email to WaterLegacy passing on what staff had told him and stating that he had solicited everybody, that "no one has anything additional that

is responsive to the newest DPA request” and “there is nothing in ‘Not Public’ involving communication with EPA, etc. Therefore, there is no need to assert that any documents are exempt from disclosure.” Ex. 419; Tr. 794:2-795:18.

512. MPCA did not disclose in response to any of WaterLegacy’s DPA requests that MPCA possessed any notes prepared by Schmidt that were responsive to the DPA requests but withheld as non-public due to an exception to the DPA, including Schmidt’s typed notes of May 19, 2016, Exhibit 838, and Schmidt’s typed notes from August 11, 2016 through April 5, 2018, Exhibit 837. Findings 503-11.

513. The Court reviewed Schmidt’s typed notes from May 19, 2016, Exhibit 838, *in camera* and made no redactions. Ex. 838.

514. The Court reviewed Schmidt’s typed notes from August 11, 2016 through April 5, 2018, and made a few redactions for mental impressions, conclusions or opinions of counsel, none of which redactions applied to notes of March 5, 2018, March 12, 2018 or April 5, 2018. Ex. 837 at 24-29; *see also* Part Two of Order Granting In Part and Denying In Part Relators’ Motion to Compel at 2 (Jan. 17, 2020).

### ***3. Schmidt Notes and Administrative Record***

515. Minnesota rules pertaining to final decisions on NPDES permits state 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).

516. Minnesota rules pertaining to final decisions on NPDES permits also state that the record of decision includes “recordings or transcripts of oral statements” made to the MPCA board making the permit decision. Minn. R. 7000.0750, subpt. 4(C).

517. When asked if his notes, to the best of his ability, would be an accurate reflection of what took place, Schmidt testified that his EPA call notes “are the best reflection of the EPA calls that I know of.” Tr. 1149:8-14.

518. Schmidt was personally involved in preparing MPCA’s responses to comment for the PolyMet permit. Tr. 1212:7-10.

519. Schmidt drafted portions of the responses to the contested case petitions and portions of other responses to comments, including the issues that raised questions such as the scope of CWA requirements. Tr. 1212:11-23.

520. Schmidt was personally involved in preparing MPCA’s fact sheet for the PolyMet permit, including drafting or editing those parts of the fact sheet that discussed the legal basis for some of the requirements in the permit. Tr. 1212:24-1213:7.

521. Schmidt played a role in drafting or reviewing the final permit proposed for the PolyMet project. Tr. 1213:8-11.

522. The draft permit language for both the Minntac permit and the PolyMet permit changed as a result of Schmidt's review and suggestions. Tr. 1124:24-1125:3.

523. Schmidt played a role in drafting or reviewing findings of fact, conclusions of law, and order regarding the final PolyMet permit. Tr. 1213:18-21.

524. In the permit development process, Clark referred to Handeland's notes of calls with EPA and also had access to Schmidt's notes through verbal consultation with Schmidt, who was a part of the permit review team. Tr. 1310:3-18.

525. Schmidt's EPA call notes from August 11, 2016 through April 5, 2018 document MPCA's conversations with EPA, EPA requests for draft permit language, EPA's efforts to prevent EPA from sending written comments on the draft PolyMet permit and EPA's reading its comment letter on the draft PolyMet permit aloud to MPCA on April 5, 2018. Ex. 837 at 1-27.

526. Schmidt may have, but does not specifically remember consulting his notes of the April 5, 2018 meeting in drafting portions of responses to comments and contested case petitions, the fact sheet, the final permit, and the MPCA Findings and Order. Tr. 1219:12-25.

527. Clark's declaration of May 28, 2019 stated that Schmidt took notes on April 5, 2018 and "[a]fter the call, MPCA reviewed the notes, and we confirmed our impression of the call." Tr. 1198:2-10.

528. Schmidt testified that, if he shared his EPA call notes, they would probably have been the typed notes from Ex. 837 and he would have made them available to staff to help them evaluate whether comments that EPA had provided on April 5, 2018 were similar to concerns EPA had previously raised in calls and meetings. Tr. 1198:17-1199:3.

529. Clark testified that Schmidt used his notes as a synopsis for the content of the April 5, 2018 call. Tr. 1326:1-3.

530. Clark testified that MPCA did not prepare a matrix confirming that EPA's April 5, 2018 comments had been communicated in previous phone calls with EPA, but "essentially checked them off of the list that Mike [Schmidt] had taken during the call." Tr. 1365:22-1366:3.

531. While he was employed by MPCA, Schmidt does not recall being aware that his EPA call notes, Exhibit 837, were the only document in MPCA's records that memorialized the content of EPA's comment letter on the draft PolyMet permit as read aloud to MPCA on April 5, 2018. Tr. 1201:13-20.

532. Schmidt never saw any other document that would have memorialized the events on April 5, 2018, when Pierard read EPA's written comments on the PolyMet permit aloud to MPCA. Tr. 1201: 21-25.

533. Schmidt's April 5 notes effectively serve as a transcript of EPA's oral comments. Ex. 837 at 27-29.

534. Schmidt's April 5, 2018 notes are the only document reflecting MPCA's receipt and comprehension of the oral comments that EPA provided to MPCA on April 5, 2018. Findings 531-32..

535. Neither Schmidt's EPA call notes, Exhibit 837, nor Schmidt's email confirming the upcoming April 5, 2018 conference call with EPA, were included in MPCA's administrative record, and MPCA denied in sworn testimony on October 15, 2019 that any notes of the April 5, 2018 conference existed. Ct. Ex. F; Exs. 43, 837; Findings 565-68.

## **XI. MPCA OMISSIONS AND MISREPRESENTATIONS**

536. Minnesota Rule 7000.0300 imposes a duty of candor on MPCA as follows:

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

### **A. Permit Issuance Documents**

537. The MPCA Findings and Order of December 20, 2018 states, "[t]he Permittee has submitted a complete application. The application has been reviewed and preliminarily approved by the MPCA staff," but does not disclose that EPA sent a letter finding deficiencies in the PolyMet permit application on November 3, 2016. Exs. 350 ¶ 265, 306.

538. The MPCA Findings and Order states that the "revised permit has been provided to EPA for review as part of the regular federal oversight of the state permitting program," without disclosing EPA's comments or MPCA's requests that EPA not comment in writing on the draft permit. Exs. 350 ¶ 257, 333, 337.

539. MPCA's responses to comments and the MPCA Findings and Order both contain a 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, including permit coverage for all pollutant discharges expected from the facility," which does not disclose that EPA's comments on the draft PolyMet permit explicitly concluded that the draft permit did not comply with the CWA. Exs. 337 at REL\_0060953, 0060956, 350 ¶ 256, 1133 at 142.

## B. Communication with Media, Public and Elected Officials

540. In reaction to WaterLegacy's press release in mid-January 2019 alleging suppression of EPA comments on the draft PolyMet permit and Congresswoman Betty McCollum's statement to the press that she would request release of EPA's comments, MPCA prepared talking points to convey information to the media, with the expectation that the media would convey the information to the public. Exs. 154, 250; Tr. 622:14-623:3.

541. MPCA's talking points stated, "EPA did not send a comment letter during the comment period, but rather chose to let the public notice process conclude and review any changes made to the permit, to make the entire process more time efficient and less duplicative." Exs. 155, 271 at REL\_020339.

542. MPCA's talking points did not disclose that EPA's comment letter was not sent at MPCA's request or that it was MPCA that concluded it would be more "efficient" if EPA did not send its comments on the PolyMet permit during the public comment period. Exs. 155, 271, 333.

543. MPCA's talking points did not disclose the fact that shortly after the comment period EPA read its comment letter on the draft PolyMet permit aloud to MPCA. Exs. 155, 271, 337.

544. MPCA's talking points also stated, "[t]here is no information in what we provided that suggests that EPA was directed to suppress comment." Exs. 155, 271.

545. Lotthammer admitted that in saying MPCA did not "direct EPA to suppress comment," MPCA did not disclose that MPCA had "made a request" to "hold off on commenting until they reviewed an updated draft" of the PolyMet public notice draft permit. Tr. 626:11-25.

546. Lotthammer's January 18, 2019 email to Laura Bishop ("Bishop"), then the new MPCA Commissioner, proposed that MPCA's talking points be communicated to the Governor's Office, Congresswoman McCollum, and to the press to "set the record straight." Ex. 154; Tr. 619:16-18, 632:1-18.

547. MPCA's January 2019 talking points for the media, the public, and elected officials were false and misleading. *See Findings 147-87, 540-45.*

548. On January 30, 2019, a *Star Tribune* reporter emailed MPCA's communications director, Dave Verhasselt ("Verhasselt"), asking to confirm that the EPA did not give the MPCA its comments on that permit "*in some other format*, say, via telephone with no notes taken, or something like that." Ex. 269 at MPCA\_020290 (emphasis in original).

549. When Verhasselt asked if "there's no written record of that meeting," Lotthammer and Udd responded they knew of no notes. Ex. 269.

550. Lotthammer testified that in January 2019, she was unaware of Schmidt's notes of the April 5, 2018 meeting and did not ask anyone who participated in the April 5, 2018 meeting if there were notes. Tr. 635:22-636:3

551. Lotthammer admitted that in MPCA's contacts with the media in January 2019 MPCA did not disclose MPCA's request to EPA not to comment or the fact that the comments had been read on the phone and that there might be notes of that call. Tr. 636:25-637:6

552. In February 2019, after a complaint was filed with the EPA's Inspector General pertaining to Region 5 comments on recent MPCA mining permits, MPCA produced another public statement. Exs. 150, 151; Tr. 686:3-12.

553. MPCA's February 2019 public statement was sent to Minnesota's congressional delegation, Iron Range delegation members, and EPA, as well as media inquiring about the PolyMet permit process. Exs. 150, 267, 268; Tr. 686:13-21.

554. MPCA's February 2019 public statement stated, "The Minnesota Pollution Control Agency did not, at any time, ask EPA to suppress or withhold comments on the PolyMet NPDES permit." Ex. 151.

555. MPCA's February 2019 public statement for the media, the public, and elected officials and was false and misleading. Ex. 333; Findings 147-87, 552-54.

556. In February 2019, Bishop included the following words in a memo updating Governor Walz's chief of staff on MPCA's public statement, "We clearly denied any suppression or that we requested that they not comment." Ex. 153; Tr. 743:10-11, 743:19-744:1.

### **C. MPCA Internal Nondisclosure**

557. Lotthammer testified that she was not sure that anyone other than Stine, Udd and she, herself, knew that MPCA had made a request of EPA not to submit written comments during the public notice period, and she did not recall discussing it with anyone else. Tr. 643:19-644:5

558. Bishop believes Lotthammer's March 13, 2018 email to Thiede, Exhibit 333, was somehow released in the media, but Bishop has never seen the email, and she has never discussed it with Lotthammer, Stine, any staff at MPCA, or anyone at EPA Region 5. Tr. 748:7-749:9.

559. On June 12, 2019, Bishop emailed Governor Walz's chief of staff, deputy chief of staff, and general counsel stating, "This is the first I have learned that EPA has written comments. Instead of submitting them to MPCA, a phone call was held with the previous Commissioner." Ex. 248; Tr. 745:19-746:13.

560. Bishop first learned that EPA had prepared written comments on the PolyMet permit from a June 12, 2019 news story in the *Timberjay*, which she attached to her email to the Governor's chief of staff. Exs. 248, 535; Tr. 746:14-24, 747:5-9.



561. Schmidt does not remember hearing that MPCA had asked that EPA Region 5 not send a written comment letter during the public comment period until he read about it in the news article when the email was released. Tr. 1181:18-24.

#### **D. Communications in Court Process**

562. The administrative record of the PolyMet permitting process at the COA contained no documents reflecting any of the following: EPA comments on a pre-public notice draft permit, EPA written or oral comments on the draft PolyMet permit, MPCA's request to EPA not to send comments on the draft PolyMet permit, the fact that EPA read its comment letter to MPCA on an April 5, 2018 conference call, or the substantive content of that April 5, 2018 call. Ct. Ex. F; Exs. 337, 568, 837; Findings 135, 203, 374, 383, 454-55, 472, 503, 535; *see also* Tr. 473:20-474:2, 479:15-20.

563. Without disclosing that MPCA leadership had in fact taken such actions, MPCA submitted to the COA a sworn declaration from Schmidt stating, "I was involved throughout the Poly Met Permit development-and-issuance process and worked closely with staff and leadership" and that he had never "participated in, or heard of, any conversation in which EPA was discouraged from submitting written comments." Ct. Ex. E ¶ 17.

564. MPCA submitted to the COA a sworn declaration from Lotthammer that stated, "I know the basis for the agreement that Mr. Thiede correctly summarized," but did not mention that the basis of that agreement stemmed from MPCA's request to EPA, led by Lotthammer, not to file written comments during the public comment period. Ex. 573 ¶ 4; Tr. 617:15-618:1.

565. In the deposition of MPCA's designee on October 15, 2019, MPCA was asked, "Has MPCA retained either Mr. Schmidt's original handwritten notes of April 5, 2018 *or his typed document* regarding the substance of that call?" MPCA's designee responded, "No." Ct. Ex. D; Ex. 702 at 12:18-13:2; Tr. 372:1-15.

566. In the deposition of MPCA's designee on October 15, 2019, MPCA was asked, "State MPCA's understanding, as of December 20, 2018, the date when the PolyMet NPDES Permit was issued, whether the following documents would be part of the administrative record provided to the Court of Appeals, should the MPCA's permit decision be appealed . . . (b) any notes from April 5, 2018, when EPA read its comments on the draft PolyMet NPDES Permit to MPCA over the phone." Ct. Ex. D; Ex. 702 at 20:17-21:8; Tr. 376:12-24.

567. In response, MPCA's designee stated under oath, "As of December 20th, 2018, MPCA did not have any notes from the April 5, 2018 phone call with EPA." Ct. Ex. D; Ex. 702 at 20:17-21:8; Tr. 376:25-377:2.

568. MPCA's testimony in its designee deposition on written questions was false. Ex. 837 at 27-29.

569. In the first hearing in these transfer proceedings, MPCA counsel represented to the Court, "MPCA never destroyed documents." Rule 16 Conf. Tr. 70:9 (Aug. 7, 2019).

570. The representation by MPCA's counsel in the Rule 16 conference that MPCA never destroyed documents was false. Findings 369-75, 424-25, 569.

571. Lotthammer testified that she did not believe she learned that the April 5, 2018 call between EPA and MPCA had happened until after the COA transferred this case to district court on June 25, 2019. Tr. 606:17-20; *see also* Finding 8.

572. However, Lotthammer's June 12, 2019 sworn declaration to the COA prior to the transfer reads, "I was involved in the discussions with EPA that resulted, in part, in the April 5, 2018, conference call in which EPA read its comments to MPCA on the public-comment draft of the Poly Met Permit." Ex. 573 ¶ 4.

573. Lotthammer's testimony that she did not learn of the April 5, 2018 call between EPA and MPCA until after June 25, 2019 is not credible. Findings 571-72.

## **XII. DOCUMENTS MISSING FROM THE ADMINISTRATIVE RECORD**

574. The parties have stipulated to hearing exhibits that were not included in the administrative record and exhibits that were not produced in response to DPA requests. Ct. Ex. F.

575. Many exhibits pertinent to Relators' allegations of procedural irregularities not in the administrative record were obtained under the DPA or court-ordered discovery.

576. Several MPCA documents in this record, including Exhibits 804, 805 and 815, were produced as a result of the court-ordered forensic search. *See* Relators' Exhibit List of Documents Received Via Forensic Search, Exhibit A (Jan. 14, 2020).

577. Two MPCA documents in this record, Exhibits 837 and 838, were disclosed by MPCA in a privilege log during court-ordered discovery and released after the court's *in camera* review.

578. Several exhibits in this record, including Exhibits 58, 60, 61 and 62, state on their face they are from the desk of "Thiede, Kurt" and were obtained by MPCA from EPA.<sup>6</sup>

579. Several other exhibits in this record, including Exhibits 333, 337, 591, 641, 774, 775, and 2010, were obtained by WaterLegacy under the FOIA and include EPA's FOIA reference numbers on the face of the documents.

580. The following exhibits admitted into evidence in these proceedings but not contained in the administrative record are relevant and probative as to EPA's comments on the draft PolyMet permit and alleged procedural irregularities in MPCA's development and issuance of the PolyMet permit:

---

<sup>6</sup> Exhibits 261 and 262, obtained in discovery, indicate that these documents were sent to MPCA Counsel by EPA Regional Counsel Barbara Wester on or about August 20, 2019.

- Ex. 35 Draft PolyMet NPDES permit (Jan. 17, 2018)
- Ex. 36 Draft Fact Sheet for PolyMet NPDES permit (Jan. 17, 2018)
- Ex. 43 Schmidt email confirming April 5, 2018 call (Mar. 19, 2018)
- Ex. 58 Stine email re call with EPA (Mar. 12, 2018) (Thiede desk)
- Ex. 60 Lotthammer second email to Thiede (Mar. 13, 2018) (Thiede desk)
- Ex. 61 Lotthammer email to Thiede (Mar. 15, 2018) (Thiede desk)
- Ex. 62 Thiede email to Lotthammer (Mar. 15, 2018) (Thiede desk)
- Ex. 64 Thiede and Lotthammer emails (Mar. 16, 2018) (Thiede desk)
- Ex. 71 MPCA's Records Retention Schedule
- Ex. 76 MPCA's Records Management
- Ex. 77 MPCA's Records and Data Management Manual
- Ex. 79 MPCA's Guide for members of the public
- Ex. 82 MPCA's Guidance for NPDES Permit Writers
- Ex. 83 MPCA's EPA Permit Review Process
- Ex. 150 Gauthier email re OIG Complaint (Feb. 1, 2019)
- Ex. 151 MPCA comment re OIG Complaint (Feb. 1, 2019)
- Ex. 153 Memo from Bishop to Governor Walz Chief of Staff
- Ex. 154 Lotthammer email re talking points (Jan. 18, 2019)
- Ex. 155 Verhasselt email re talking points (Jan. 18, 2019)
- Ex. 228 PolyMet email on pre-public notice draft (Dec. 11, 2017)
- Ex. 230 PolyMet comments on pre-public notice draft (Dec. 10, 2017)
- Ex. 250 MPCA email exchange re talking points (Jan. 31, 2019)
- Ex. 267 Lotthammer email exchange with EPA re talking points (Feb. 1, 2019)
- Ex. 268 Gauthier email to Iron Range Delegation (Feb. 1, 2019)
- Ex. 269 MPCA email exchange re *Star Tribune* inquiry (Jan. 1, 2019)
- Ex. 271 MPCA email exchange re talking points (Jan. 17, 2019)
- Ex. 275 Udd email re prepare for DPA (Jan 17, 2018)
- Ex. 288 Foss forward of April 2015 emails (Aug 11, 2016)
- Ex. 290 EPA email re plan to review application (Aug 5, 2016)
- Ex. 328 MOA between EPA and MPCA
- Ex. 333 Lotthammer/Stine/Stepp emails, MOA (March 8-13, 2018) (FOIA)
- Ex. 335 Richards email re DPA #1 (Mar. 28, 2018)
- Ex. 336 DPA #2 (Apr. 5, 2018)
- Ex. 337 EPA Comment Letter – as read aloud on April 5, 2018 (FOIA)
- Ex. 340 DPA #3 (Sept. 9, 2018)
- Ex. 341 DPA #4 (Oct. 14, 2018)
- Ex. 346 DPA #5 (Dec. 12, 2018)
- Ex. 352 DPA #6 (Jan. 1, 2019)
- Ex. 354 DPA #7 (Feb. 3, 2019)
- Ex. 370 Foss and Pierard emails (Apr. 9, 2015)
- Ex. 372 Korleski email pre-public notice and comments (Nov. 20, 2017)
- Ex. 374 Udd emails re comments (April 30, 2018)
- Ex. 382 MPCA letter re outside counsel (Sept. 24, 2015)
- Ex. 403 Richards email re DPA request withheld data (Oct. 19, 2018)
- Ex. 419 Richards email nothing non-public for DPA (Feb. 5, 2019)

- Ex. 591 Email set call Stepp and Stine re PolyMet (Mar. 12, 2018) (FOIA)
- Ex. 679 EPA's NPDES Permit Writers Manual
- Ex. 774 EPA notes of April 30, 2018 meeting (FOIA)
- Ex. 775 EPA notes of March 12, 2018 meeting (FOIA)
- Ex. 804 MOA sent by Udd to Lotthammer (Mar. 5, 2018) (forensic search)
- Ex. 805 Udd email Lotthammer with MOA (Mar. 5, 2018) (forensic search)
- Ex. 815 Flood response email Korleski (Nov. 20, 2017) (forensic search)
- Ex. 837 Schmidt Notes (Aug 11, 2016 - April 5, 2018) (in camera review)
- Ex. 838 Schmidt Notes (May 19, 2016) (in camera review)
- Ex. 1003 MPCA's Dos and Don'ts
- Ex. 2010 Holst and Pierard emails (June 26, 2018) (FOIA)

Based upon the foregoing Findings of Fact, the Court makes the following as its

## **CONCLUSIONS OF LAW**

### **A. Proceedings**

1. This Court has jurisdiction over this proceeding pursuant to Minn. Stat. § 14.68 and the Transfer Order of the COA. Findings 8-13.

2. The PolyMet mine project requires an NPDES permit issued in compliance with the CWA, its implementing regulations, and the MOA between EPA and MPCA. Findings 14, 17, 40-47.

### **B. Procedural Irregularities**

3. The plain and ordinary meaning of the phrase "irregularities in procedure" in Minn. Stat. 14.68 encompasses any agency course of conduct that is not in accordance with or contrary to statutes, rules, regulations, authorities, duties, policies, manuals, or regular or general practice.

4. Pursuant to Minn. Stat. § 14.68 and the Transfer Order of the COA, the Court concludes that MPCA's development and issuance of the PolyMet permit was subject to irregularities in procedure that are not shown in the administrative record as described in detail in the following paragraphs.

5. MPCA's failure to transmit PolyMet's permit application to the EPA in violation of the MOA between EPA and MPCA was an irregularity in procedure not shown in the administrative record. Ex. 328, Part II, § 124.23(1); Findings 100-04.

6. MPCA's processing of PolyMet's permit application after receiving a deficiency letter from EPA and without receiving a letter from EPA stating the deficiencies had been corrected violated the MOA between EPA and MPCA and was an irregularity in procedure not shown in the administrative record. Ex. 328, Part II, § 124.23(1); Findings 104-21. In connection with this Conclusion, the Court also concludes:

- a. The MOA does not impose a time limit on EPA's PolyMet permit deficiency letter, and EPA's November 3, 2016 deficiency letter was timely. Ex. 328, Part II, §§ 124.22(1)(2), 124.23(1); Findings 117-20.
- b. PolyMet's October 2017 updated application was not a new application and did not entitle MPCA to process the PolyMet application without an EPA letter stating that deficiencies had been corrected. Findings 111-16.

7. MPCA's denial of EPA's request for a pre-public notice draft of the PolyMet permit for EPA to review and provide written comments prior to the public comment period was an irregularity in procedure not shown in the administrative record. Findings 48-68, 122-37. In connection with this Conclusion, the Court also concludes:

- a. MPCA's denial of EPA's request for a pre-public notice draft permit for EPA to review and comment was a departure from regular procedure. Findings 48-68, 126-133, 137.
- b. MPCA's denial of EPA's request for a pre-public notice draft permit for EPA to review and comment failed to comply with MPCA policies. Ex. 83; Findings 59-61, 126-32, 136.
- c. MPCA's denial of EPA's request for a pre-public notice draft permit for EPA to review and comment prevented EPA from providing written comments that would become part of the administrative record. Findings 134-35, 137.

8. MPCA's request to EPA not to send EPA's written comments on the draft PolyMet permit during the public comment period was an irregularity in procedure not shown in the administrative record. Findings 69-84, 88-92, 138-303. In connection with this Conclusion, the Court also concludes:

- a. MPCA's request to EPA not to send written comments on the draft PolyMet permit was an unprecedented departure from regular procedure. Findings 69-71, 77-82, 84, 88-92, 223-25, 271-75, 299-303.
- b. EPA's submittal of written comments on the draft PolyMet permit during the public comment period was consistent with the MOA and CWA regulations. Ex. 328, Part II, § 124.46(1); 40 C.F.R. §§ 124.10, 124.11; Findings 17, 72-76, 83, 221-22, 226.
- c. Neither MPCA's contemporaneous nor *post hoc* rationalizations justify MPCA's irregular procedure in requesting EPA not to send EPA's written comments on the draft PolyMet permit. Findings 188-212, 215-64.
- d. MPCA's misrepresentations to the media, elected officials, and the public show MPCA understood that EPA comments on the draft PolyMet permit were

significant and MPCA's requests that EPA withhold those comments were irregular. Findings 540-56.

- e. MPCA's request to EPA not to send written comments on the draft PolyMet permit improperly resulted in preventing EPA's concerns from coming to light under the DPA or in MPCA's responses to comments and prevented EPA's comments from becoming part of the administrative record on certiorari review. Findings 197-212, 265-70, 298, 304, 562.

9. MPCA's agreement with EPA to provide a "pre-proposed permit" with forty-five days review in consideration for EPA not sending its comments on the draft PolyMet permit during the public comment period was a departure from regular procedure and an irregularity in procedure not shown in the administrative record. Findings 184-87, 276-89.

10. MPCA's failure to specifically attribute, describe, or respond to EPA's comments on the draft PolyMet permit in MPCA's responses to comments was an irregularity in procedure not shown in the administrative record. Exs. 337, 568, 837, 1133; Findings 291-351. In connection with this Conclusion, the Court also concludes:

- a. MPCA's failure to specifically attribute, describe, or respond to EPA's comments on the draft PolyMet permit departed from MPCA's regular procedure in responding to EPA comments. Exs. 527, 529, 533, 1133; Findings 304-08, 317, 322-23.
- b. MPCA's failure to specifically attribute, describe, or respond to EPA's comments read aloud to MPCA on April 5, 2018 departed from MPCA's regular procedure in responding to other written or oral comments on the PolyMet permit. Exs. 337, 837 at 27-29, 1133; Findings 336-351, 53.
- c. MPCA's oral feedback to EPA does not satisfy MPCA's obligation under CWA regulations to respond in writing available to the public or follow MPCA's regular procedure. 40 C.F.R. § 124.17(c); Findings 314-319.
- d. MPCA's failure to specifically attribute, describe, and respond to EPA's comments on the draft PolyMet permit received on April 5, 2018 departed from MPCA's regular procedure in responding to comments received after the public comment period. Exs. 527, 568, 1133; Findings 291, 320-25.
- e. No waiver by EPA, legal authority, or prior MPCA practice supports MPCA's failure to specifically attribute, describe, or respond to EPA comments that may have been similar to those of other commenters. 40 C.F.R. § 124.17(a)(2); Findings 327-35.
- f. MPCA failure to specifically attribute, describe, or respond to EPA's oral comments on the PolyMet permit concealed the existence and nature of

EPA's comments in MPCA's response to comments document in the administrative record. Findings 346-51.

11. MPCA's deletion, failure to preserve, and failure to produce Lotthammer's March 13-15, 2018 emails regarding MPCA's request to EPA not to send comments on the draft PolyMet permit was an irregularity in procedure not shown in the administrative record, Exhibits 60, 61, 62, 333 and Findings 5, 368-427 on the following grounds:

- a. MPCA's deletion and failure to preserve Lotthammer's March 13-15, 2018 emails regarding EPA's comments on the draft PolyMet permit violated Minn. Stat. § 15.17, subd. 1 and subd. 2. Findings 368-372, 377-86.
- b. MPCA's deletion and failure to preserve and retain Lotthammer's March 13-15, 2018 emails failed to comply with MPCA's established policies. Exs. 71, 76, 77, 1003; Findings 387-409.
- c. MPCA's deletion and failure to preserve Lotthammer's March 13-15, 2018 emails breached a common law duty to preserve evidence when litigation is anticipated. Findings 410-15.
- d. MPCA's deletion and failure to keep or produce Lotthammer's March 13-15, 2018 emails in response to DPA requests violated Minn. Stat. § 13.03, subd. 1 and subd. 3(c). Findings 416-27.
- e. MPCA's deletion and failure to preserve or produce Lotthammer's March 13-15, 2018 emails concealed MPCA's irregular procedures and prevented their documentation in the administrative record. Ct. Ex. F; Findings 5, 370, 372, 386.

12. MPCA's failure to preserve and retain the March 12, 2018 emails reflecting Stine's contacts with EPA regarding MPCA's request to EPA not to send comments on the draft PolyMet permit was an irregularity in procedure not shown in the administrative record, Exhibits 58, 591 and Findings 377-86, 396, 399, 404-09, 431, 436, on the following grounds:

- a. MPCA's failure to preserve and retain March 12, 2018 emails of Stine's contacts with EPA violated Minn. Stat. § 15.17, subds. 1; Findings 377-86.
- b. MPCA's failure to preserve and retain March 12, 2018 emails of Stine's contacts with EPA failed to comply with MPCA's established policies. Exs. 71, 76, 77; Findings 386, 396, 399, 404-09,
- c. MPCA's failure to preserve and retain Stine's March 2, 2018 emails concealed MPCA's irregular procedures and prevented their documentation in the administrative record. Ct. Ex. F; Findings 5, 386, 431, 436.

13. MPCA's conduct in stopping staff notetaking and discarding staff notes from the April 5, 2018 conference call when EPA read its comment letter aloud to MPCA was an unjustified departure from regular procedure and an irregularity in procedure not shown in the administrative record and kept documentation of EPA's comments out of the administrative record. Findings 449-72.

14. MPCA's failure to disclose the existence of and MPCA's complete withholding of staff attorney notes of EPA calls and meetings responsive to WaterLegacy's DPA requests was an irregularity in procedure not shown in the administrative record, Exhibits 837, 838 and Findings 473-535, on the following grounds:

- a. MPCA's failure to disclose that MPCA had withheld as non-public Schmidt's notes of EPA calls and meetings responsive to WaterLegacy's DPA requests and the basis for that determination violated Minn. Stat. § 13.03, subd.(f); Exs. 79, 837, 838; Findings 485-512.
- b. MPCA's withholding in their entirety of Schmidt's notes, although only redactable portions were exempt from production, violated the DPA. Exs. 837, 838; Findings 473-514, 517.
- c. MPCA's nondisclosure and complete withholding of Schmidt's notes prevented documentation of EPA's comments and MPCA's procedural irregularities in the administrative record. Findings 503-535.

15. MPCA's PolyMet permit documents do not reflect complete truthfulness, accuracy, disclosure, and candor in the PolyMet permit proceedings in violation of MPCA's duty of candor under Minn. R. 7000.0300 and fail to disclose for the administrative record either EPA's comments or MPCA's irregular procedures to keep EPA's comments out of the record. Exs. 337, 350, 837, 1133; Findings 187, 298, 313, 536-39.

16. MPCA's course of conduct to keep evidence of EPA's comments on the draft PolyMet permit and MPCA's irregular procedures from being included in and revealed by the administrative record on appeal departed from regular procedure, violated statutes, rules, policies and MPCA's obligations under common law, and constituted an irregular procedure not shown in the administrative record. Finding 562; Conclusions 7(c), 8(e), 10(f), 11(e), 12(c), 13, 14(c), 15.

### **C. Supplementation of the Administrative Record**

17. EPA had substantive concerns about the PolyMet permit that should have been in the administrative record but were not due to MPCA's procedural irregularities. Exs. 337, 837 at 27-29.

18. Absent supplementation of the administrative record, MPCA's procedural irregularities not shown in the administrative record would prevent the Court of Appeals from determining whether EPA's concerns were addressed in the final PolyMet permit.



19. Absent supplementation of the administrative record, MPCA's procedural irregularities not shown in the administrative record would prevent the Court of Appeals from determining whether the record as a whole supports MPCA's issuance of the PolyMet permit pursuant to Minn. Stat. § 14.69(b)-(f).

20. Despite a court-ordered forensic search, the Court is unable to determine whether all MPCA documents relevant and probative to EPA's comments on the draft PolyMet permit and MPCA's procedural irregularities have been recovered. Findings 428-48.

21. The Court has redacted any content in Schmidt's EPA call notes, Exhibits 837 and 838, that is appropriately withheld as attorney-client work product and none of the content of Schmidt's April 5, 2018 notes is appropriately withheld as attorney-client work product or due to attorney-client privilege.

22. Each of the exhibits identified in Finding 580 herein are relevant and probative as to EPA's comments on the draft PolyMet permit, procedural irregularities pertaining to the issuance of the PolyMet permit, and matters that will be before the Court of Appeals on certiorari review from the MPCA Findings and Order issuing the PolyMet permit and should be inserted into and deemed part of the administrative record.

#### **D. Additional Conclusions**

23. MPCA's communications to the Court of Appeals and the District Court omitted and misrepresented information regarding MPCA's procedural irregularities and the record of EPA's comments. Findings 563-73.

24. EPA's conduct, including but not limited to when or why EPA decided not to object to the final PolyMet permit, is outside the scope of these proceedings and does not affect the Court's conclusions as to MPCA's procedural irregularities in developing and issuing the PolyMet permit.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court being duly advised in the premises, makes the following as its

### **ORDER FOR JUDGMENT**

#### **IT IS HEREBY ORDERED:**

1. That the proceedings before the MPCA with respect to development and issuance of the PolyMet permit for the NorthMet copper-nickel mine shall be, and hereby are, determined to have been irregular and not in accordance with or contrary to statutes, rules, regulations, authorities, duties, policies, manuals, or general or regular practice.

2. That each of the following documents shall be inserted into and deemed part of the administrative record in the consolidated certiorari appeals now pending before the Court of Appeals, Case Nos. A19-0112, A19-0118, A19-0124:

- Ex. 35 Draft PolyMet NPDES permit (Jan. 17, 2018)
- Ex. 36 Draft Fact Sheet for PolyMet NPDES permit (Jan. 17, 2018)
- Ex. 43 Schmidt email confirming April 5, 2018 call (Mar. 19, 2018)
- Ex. 58 Stine email re call with EPA (Mar. 12, 2018) (Thiede desk)
- Ex. 60 Lotthammer second email to Thiede (Mar. 13, 2018) (Thiede desk)
- Ex. 61 Lotthammer email to Thiede (Mar. 15, 2018) (Thiede desk)
- Ex. 62 Thiede email to Lotthammer (Mar. 15, 2018) (Thiede desk)
- Ex. 64 Thiede and Lotthammer emails (Mar. 16, 2018) (Thiede desk)
- Ex. 71 MPCA's Records Retention Schedule
- Ex. 76 MPCA's Records Management
- Ex. 77 MPCA's Records and Data Management Manual
- Ex. 79 MPCA's Guide for members of the public
- Ex. 82 MPCA's Guidance for NPDES Permit Writers
- Ex. 83 MPCA's EPA Permit Review Process
- Ex. 150 Gauthier email re OIG Complaint (Feb. 1, 2019)
- Ex. 151 MPCA comment re OIG Complaint (Feb. 1, 2019)
- Ex. 153 Memo from Bishop to Governor Walz Chief of Staff
- Ex. 154 Lotthammer email re talking points (Jan. 18, 2019)
- Ex. 155 Verhasselt email re talking points (Jan. 18, 2019)
- Ex. 228 PolyMet email on pre-public notice draft (Dec. 11, 2017)
- Ex. 230 PolyMet comments on pre-public notice draft (Dec. 10, 2017)
- Ex. 250 MPCA email exchange re talking points (Jan. 31, 2019)
- Ex. 267 Lotthammer email exchange with EPA re talking points (Feb. 1, 2019)
- Ex. 268 Gauthier email to Iron Range Delegation (Feb. 1, 2019)
- Ex. 269 MPCA email exchange re *Star Tribune* inquiry (Jan. 1, 2019)
- Ex. 271 MPCA email exchange re talking points (Jan. 17, 2019)
- Ex. 275 Udd email re prepare for DPA (Jan 17, 2018)
- Ex. 288 Foss forward of April 2015 emails (Aug 11, 2016)
- Ex. 290 EPA email re plan to review application (Aug 5, 2016)
- Ex. 328 MOA between EPA and MPCA
- Ex. 333 Lotthammer/Stine/Stepp emails, MOA (March 8-13, 2018) (FOIA)
- Ex. 335 Richards email re DPA #1 (Mar. 28, 2018)
- Ex. 336 DPA #2 (Apr. 5, 2018)
- Ex. 337 EPA Comment Letter – as read aloud on April 5, 2018 (FOIA)
- Ex. 340 DPA #3 (Sept. 9, 2018)
- Ex. 341 DPA #4 (Oct. 14, 2018)
- Ex. 346 DPA #5 (Dec. 12, 2018)
- Ex. 352 DPA #6 (Jan. 1, 2019)
- Ex. 354 DPA #7 (Feb. 3, 2019)
- Ex. 370 Foss and Pierard emails (Apr. 9, 2015)
- Ex. 372 Korleski email pre-public notice and comments (Nov. 20, 2017)
- Ex. 374 Udd emails re comments (April 30, 2018)

- Ex. 382 MPCA letter re outside counsel (Sept. 24, 2015)
- Ex. 403 Richards email re DPA request withheld data (Oct. 19, 2018)
- Ex. 419 Richards email nothing non-public for DPA (Feb. 5, 2019)
- Ex. 591 Email set call Stepp and Stine re PolyMet (Mar. 12, 2018) (FOIA)
- Ex. 679 EPA's NPDES Permit Writers Manual
- Ex. 774 EPA notes of April 30, 2018 meeting (FOIA)
- Ex. 775 EPA notes of March 12, 2018 meeting (FOIA)
- Ex. 804 MOA sent by Udd to Lotthammer (Mar. 5, 2018) (forensic search)
- Ex. 805 Udd email Lotthammer with MOA (Mar. 5, 2018) (forensic search)
- Ex. 815 Flood response email Korleski (Nov. 20, 2017) (forensic search)
- Ex. 837 Schmidt Notes (Aug 11, 2016 - April 5, 2018) (in camera review)
- Ex. 838 Schmidt Notes (May 19, 2016) (in camera review)
- Ex. 1003 MPCA's Dos and Don'ts
- Ex. 2010 Holst and Pierard emails (June 26, 2018) (FOIA)

BY THE COURT:

Dated: \_\_\_\_\_

\_\_\_\_\_  
John H. Guthmann  
Judge of District Court