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EXHIBIT 1

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STATE OF MINNESOTA
IN COURT OF APPEALS

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/ State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis County Hoyt Lakes and Babbitt Minnesota.	Case Nos. A19-0112, A19-0118, A19-0124

WATERLEGACY MOTION FOR TRANSFER TO THE DISTRICT COURT OR, IN THE ALTERNATIVE, FOR STAY DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS

INTRODUCTION

Pursuant to Minn. Stat. § 14.68, Relator Water Legacy respectfully requests that this Court transfer this matter to the District Court for the County of Ramsey, where the Minnesota Pollution Control Agency ("MPCA") has its principal office, due to irregularities in procedure pertaining to the PolyMet NorthMet NPDES/SDS permit ("NorthMet permit") not shown in the record. In the alternative, WaterLegacy requests a stay of this appeal and the NorthMet permit pursuant to Minn. Stat. § 14.65.[1]

Critical documents are missing from the record as a result of procedural irregularities. Credible evidence suggests MPCA's Commissioner and political leaders at the United States Environmental Protection Agency ("EPA") developed a plan to keep

[1] Relator Fond du Lac Band of Lake Superior Chippewa ("Fond du Lac") and Minnesota Center for Environmental Advocacy support this motion, and Respondents oppose it.

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EPA criticism of the NorthMet permit out of the public record and the record for judicial review. This is contrary to applicable law and EPA's Clean Water Act oversight role.

EPA written comments on the draft NorthMet permit and MPCA notes when these comments were read over the phone to MPCA are missing from the record. Documents obtained under the Minnesota Government Data Practices Act ("Data Practices Act") show that EPA had substantive concerns about the NorthMet permit's compliance with the Clean Water Act ("CWA"). Presumably, MPCA will argue that EPA's concerns were resolved. But, due to procedural irregularities, there are no documents in the record reflecting how, or even if, MPCA resolved the concerns raised by EPA in its oversight role. That is fundamentally unfair to Relators, who will be severely prejudiced by the incomplete record and the inability to evaluate or respond to MPCA's assertions.

WaterLegacy filed a lawsuit in the United States District Court for the District of Columbia to compel production of EPA comments under the Freedom of Information Act ("FOIA"). Formal complaints have also been filed with the EPA Office of Inspector General.

MPCA's procedural irregularities are substantial and material to Relators' claims that the NorthMet permit violated the CWA. Relief is needed due to address gaps in the administrative record, avoid prejudice to Relators, serve the public interest, and protect the appellate court's jurisdiction. WaterLegacy respectfully requests that this Court transfer these cases to Ramsey County District Court to resolve procedural irregularities or, in the alternative, stay the appeal and permit pending FOIA litigation to obtain EPA comments.

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BACKGROUND

A. EPA Oversight of MPCA NorthMet NPDES Permit

MPCA is authorized to issue NPDES permits pursuant to the CWA, subject to EPA oversight. 33 U.S.C. §1342. During environmental review of the NorthMet project, EPA Region 5 staff provided written comments detailing expectations for the future NorthMet NPDES permit. Exh. A. On November 3, 2016, EPA staff wrote to MPCA citing deficiencies in PolyMet's NorthMet NPDES permit application, highlighting EPA's oversight role and emphasizing that "it is important that the content of the application be fully documented and the record before the permitting Agency be complete and transparent." Exh. A at 7.

B. MPCA and EPA Developed an Irregular Process for the NorthMet NPDES Permit to Prevent a Written Record of EPA Concerns

Shortly after the public comment period for the draft NorthMet permit ended on March 16, 2018, WaterLegacy first learned that there might be something unusual about EPA's comment process related to the permit. On March 26, 2018, WaterLegacy filed the first of five Data Practices Act requests to MPCA seeking all documents, including handwritten notes, pertaining to written or oral communications or phone or in-person meetings with EPA regarding the NorthMet permit.[2] Maccabee Decl., ¶ 3. Documents were received in response to these requests. *Id.*, ¶ 4, Exh. C.

WaterLegacy also made a broad Freedom of Information Act ("FOIA") request to

[2] Additional Data Practices Act requests were made on September 20, 2018; December 12, 2018; January 1, 2019 and February 3, 2019. Exh. B.

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EPA in March 2018. *Id.*, ¶ 6. In follow-up discussions with counsel for EPA Region 5 about this unfulfilled FOIA request, WaterLegacy was told that EPA staff had prepared final written comments on the draft NorthMet permit that were not sent to MPCA, and that a simple FOIA request would produce this document. *Id.*, ¶ 7. WaterLegacy made a FOIA request for EPA draft NorthMet permit comments on October 19, 2018. *Id.*. When EPA failed to produce the comments or respond, WaterLegacy filed a FOIA lawsuit in federal court on January 31, 2019 to secure EPA Region 5 written comments on the draft NorthMet permit. *Id.*, ¶ 11.

Since January 2019, WaterLegacy has also sought assistance from Congressional leadership to secure a copy of EPA's comments on the NorthMet NPDES permit. *Id.*, ¶ 8; Exh. D. Congresswoman Betty McCollum sent two letters to EPA's Administrator requesting EPA's comments on the NorthMet NPDES permit and made inquiries in committee hearings, but the Congresswoman has been unable to obtain EPA's comments. *Id.*, ¶ 9; Exh. E.

MPCA handwritten notes WaterLegacy obtained under the Data Practices Act reveal that EPA Region 5 staff repeatedly told MPCA that staff had substantive concerns about the draft NorthMet permit before, during and after the public comment period. Exh. C, at 1-3, 5-14, 18-25. EPA repeatedly expressed concerns that the NorthMet permit should have water quality based effluent limits ("WQBELs") to limit metals and other pollutants discharged from the project. *Id.*, at 2-3, 5-6, 9, 14, 22, 25. Effluent limitations serve as the primary mechanism in NPDES permits to control discharge exceeding water quality standards. Maccabee Decl., ¶ 13.

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EPA Region 5 staff intended to provide written comments to MPCA prior to release of the draft NorthMet permit, in response to the draft NorthMet permit and, later, in response to the final permit in its pre-proposal stage, but was blocked each time. MPCA notes during November 2017, show that EPA wanted to make sure the record was transparent. MPCA handwritten notes reflect, "EPA wants to make sure all things considered are available to the public." Exh. C at 2. (emphasis in original notes). EPA wanted to send a letter before the draft permit was noticed, but EPA accepted the "proposal of MPCA" not to provide comments until the draft permit. *Id.* at 3, 4. During the March 2018 comment period on the draft permit, MPCA's notes state, "EPA wants to submit comments – Make clear what EPA concerns are. Clarify permit conditions. EPA will submit comments during PN [public notice] period." *Id.* at 14. Even after the draft comment period, EPA staff still intended to provide written comments on the permit before it was finalized. *Id.*, at 16, 23.

The notes and emails received by WaterLegacy and placed in the record indicate that no written comments on the NorthMet permit were ever transmitted by EPA to MPCA, but they fail to explain why or if EPA concerns about the permit were resolved.

Some answers to the question of why EPA comments are missing from this record are provided in a January 31, 2019 complaint filed by retired EPA attorney Jeffry Fowley with the EPA Office of Inspector General ("OIG") alleging "Possible Waste, Fraud or Abuse in EPA Region V: Suppression of Comments on the Poly Met Mining Company State Water Permit and other Permit Actions by Minnesota, and the Region Making Comments Off the Record in a Way that Hides Them From the Public." Exh. F at 1. Based

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on credible information from sources within EPA, Mr. Fowley stated that "planned EPA staff written comments on the permit were suppressed by the Region V Regional Administrator Cathy Stepp," *Id.* Mr. Fowley explained that

> after [Cathy Stepp] reportedly was called by the State Commissioner, John Linc Stine, who reportedly complained about the planned comments, I have been told that the EPA Regional Administrator for Region V, Cathy Stepp, directed in March 2018, that the EPA staff not send any written comments to the State.

Id., at 2.

Mr. Fowley's OIG complaint stated that Region 5 staff written comments prepared for transmittal to MPCA raised serious issues about whether the State was complying with basic CWA requirements. The complaint stated:

> [W]hile significant EPA concerns about the permit reportedly were instead communicated to the State by telephone, I also have been advised that the Region cooperated with the State in helping to keep such comments off the state record, in ways that seem designed to hide the concerns from the public and even from the Minnesota state appeals court that is expected to review the permit.

Id., at 1.

Emails obtained from MPCA under the Data Practices Act confirm that MPCA had a "plan" with EPA to avoid creating a written record of EPA's comments, including a meeting "the first week of April to walk through what the comment letter would have said if it were sent." Exh. C at 15. MPCA's Assistant Commissioner and Ms. Stepp's chief of staff thanked each other for "dialogue and cooperation" and for working "to find a solution to this matter." *Id.*, at 15-16.

Mr. Fowley's OIG complaint asserted that, "state personnel then agreed to have

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EPA staff read key parts of their written comments to the state personnel over the telephone" in April 2018, just after the close of the public comment process. Exh. F at 4. His assertion was confirmed by EPA's Answer to WaterLegacy's FOIA Complaint in April 2019. EPA admitted that staff prepared written comments on the draft NorthMet permit, that they were read on the phone to MPCA staff, and that EPA has retained a copy reflecting which parts of the comments were read to MPCA staff. EPA's Answer states:

> 22. . . .Defendant avers that EPA staff drafted a written document concerning the draft NorthMet permit that was not finalized by Region 5.
>
> 23. Defendant admits that EPA staff verbally shared portions of a draft document concerning the NorthMet permit with MPCA staff during a phone call in April 2018. Defendant admits that it has retained a copy of the draft document that memorializes what was shared verbally with MPCA staff.

Exh. G at 17.

WaterLegacy has not yet secured EPA's comments on the draft NorthMet permit. Maccabee Decl. ¶ 11. But, the federal court has scheduled summary judgment motions in WaterLegacy's FOIA case, with the final reply brief due on August 5, 2019. *Id.*, ¶ 10.

WaterLegacy has been advised that MPCA took notes when EPA read its comments on the draft NorthMet permit over the phone in April 2018. On information and belief, at one point MPCA staff requested that EPA read more slowly because MPCA staff were taking notes. *Id.* ¶ 12. Handwritten notes from this important April 2018 conference call between MPCA and EPA have not been produced by MPCA either under the Data Practices Act nor in the administrative record provided to Relators. *Id.* Notes from phone or in-person meetings with EPA after MPCA transmitted the pre-proposal permit to EPA may also be missing. *Id.*

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C. MPCA Findings and Responses Excluded Reference to EPA Comments

Notably, MPCA's December 20, 2018 Finding of Fact, Conclusions of Law, and Order ("Findings") on the NorthMet permit made no mention of *any* comments provided by EPA to MPCA during the permitting process. (R.6163-6206). The 304-page spreadsheet of MPCA's responses to comments provided with the Findings neither identified nor responded to any of the comments EPA made to MPCA over the phone either during the public comment period or in April 2018. (R.5380-5683).

In fact, by omission and in direct statements, MPCA conveyed the impression that EPA had raised no concerns during the NorthMet permitting process. MPCA's public statement on the NorthMet permit stated that "EPA will be reviewing the permits in the coming weeks," but did not mention any prior review by EPA, let alone comments critical of the permit. Exh. C at 26. In responding to comments by Relator Fond du Lac on discrepancies between EPA's views and the draft permit, MPCA implied that EPA had no concerns, stating, "The 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." (R. 5512-13, 5521-22).

In response to an email from Relator Minnesota Center for Environmental Advocacy asking if MPCA had heard anything on the NorthMet permit, MPCA made a categorical denial: "We did not get any feedback from EPA on the PolyMet permit." Exh. C at 28.

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ARGUMENT

I. Transfer to the District Court is Needed to Address Substantial Evidence of Irregularities in Procedure.

Minnesota Statutes §14.68 provides for transfer to the district court when this Court is confronted with procedural irregularities not fully reflected in the record:

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

In determining whether transfer to the district court is appropriate for a certiorari case under Minn. Stat. § 14.68, the Court "examine[s] the extra-record materials to determine whether there is substantial evidence of irregularities." *Hard Times Café, Inc. v. City of Minneapolis,* 625 N.W.2d 165, 174 (Minn. App. 2001). Although most of the notes and emails obtained by WaterLegacy under the Data Practices Act and provided in Exhibit C have been placed in the administrative record, Exhibits D to G attached to this motion, including Mr. Fowley's OIG Complaint, letters to and from Congresswoman McCollum and EPA's admissions in FOIA litigation that substantiate procedural irregularities are all extra-record evidence. *See* Maccabee Decl., ¶¶ 4, 7-10.

In *Hard Times Café*, where evidence suggested the city's licensing decision considered information not in the record, the Court found it impossible "to entangle these improper influences from respondent's final decision, and determine whether the evidence in the record support the [respondent's] decision." 625 N.W.2d at 174. The Court admonished, "Governmental bodies must take seriously their responsibility to develop and

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preserve a record that allows for meaningful review by appellate courts." *Id., citing In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999). *See also Mampel v. E. Heights State Bank*, 254 N.W.2d 375, 378 (Minn. 1977) (providing limited discovery in review of agency decision to "insure meaningful review to persons aggrieved by administrative action by allowing them to inquire into those procedures which comprise the fundamental decision-making process").

Procedural irregularities preventing a written record either of EPA's comments on the NorthMet permit, MPCA's notes on hearing these comments, or of MPCA's response to those comments require transfer to district court. These irregularities are substantial and material to the merits of Relators' claims.

A. MPCA's procedures in the NorthMet permit decision-making process were inconsistent with CWA regulations and state statutes and rules.

1. CWA regulations require a public response to comments.

Regulations implementing the CWA require MPCA to "describe and respond to all significant comments on the draft permit . . . raised during the public comment period." 40 C.F.R § 124.17(a)(2). Under federal law, "[t]he response to comments shall be available to the public." *Id.* § 124.17(c).[3] MPCA's "plan" with EPA circumvented this federal regulation.

[3] Minnesota Rules 7001.1070, subpart 3 arguably allows responses to public comments to be made either orally or in writing.

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Handwritten notes obtained through the Data Practices Act reveal that, from January 31, 2018 through March 5, 2018, EPA made significant comments to MPCA criticizing the lack of effluent limits (WQBELs) in the draft NorthMet permit, the permit's unenforceability, and effects of mercury on the downstream Fond du Lac Band. Exh. C at 5-6, 9, 11, 13-14. None of these comments made *during* the public comment period were mentioned in MPCA's publicly available responses to comments. (R.5380-5683)

Federal precedent indicates a failure to respond to comments is a serious infirmity. Where an EPA Region issued an NPDES permit without responding to comments on the need for WQBELs, the EPA Appeals Board remanded the case to the permitting authority. *In re Wash. Aqueduct Water Supply Sys.,* NPDES Appeal No. 03-06, 2004 WL 3214486, at *2-3, 2004 EPA App. LEXIS 28 (EPA Envtl. App. Bd., July 29, 2004). The Board emphasized that, though the commenter had "attempted in a variety of ways" to persuade the permitting authority of the inadequacy of its analysis regarding effluent limits, *id.* at *11, documents in the record contained no meaningful response. *Id.* at *18-20. The Region's failure to comply with 40 C.F.R. §124.17(a)(2) required remand. *Id.* at *20.

WaterLegacy respectfully requests that this Court transfer this matter to the district court to hear and determine irregularities related to the absence of EPA's comments or MPCA's responses in this record.

2. MPCA failed to provide critical notes of EPA comments.

Although MPCA produced other documents, MPCA failed to comply with WaterLegacy's requests for critical data – including handwritten notes from the April 2018 phone call with EPA during which EPA read its draft NorthMet permit comments to MPCA

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and notes from conversations on the final NorthMet pre-proposal permit. Maccabee Decl., ¶ 12. Failure to provide these notes was irregular and leaves a critical gap in the record.

The Data Practices Act, Minn. Stat. ch. 13, requires that responsible authorities "insure 'requests for government data are received and complied with in an appropriate and prompt manner.'" *Webster v. Hennepin Cnty.*, 910 N.W.2d 420, 427 (Minn. 2018). The Court held that use of the word "insure" means that the statute "should result in appropriate and prompt responses *in all* cases," and a government entity acts improperly even if it "does not commit multiple violations." *Id.* at 431 (emphasis in original).

WaterLegacy respectfully requests that this Court transfer this matter to the district court to determine irregularities and secure missing MPCA notes and documents for the record.

3. Minnesota rules impose a duty of candor on MPCA.

Minnesota Rule 7000.0300 establishes a duty of truthfulness, accuracy, disclosure and candor on the MPCA as well as on persons dealing with the Agency:

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

MPCA has imposed a financial penalty, and this Court has upheld enforcement when a permittee omitted material information and failed to provide notification of its activities. *In re Admin. Penalty Issued to Erickson Enterprise,* No. 7-2200-14389-2, 2001 WL 35926172, at *4-6, 2001 Minn. ENV LEXIS 12, *13-14 (Minn. OAH Sept. 28, 2011). Similarly, in this case, MPCA's reported efforts to keep EPA's comments on the NorthMet

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permit out of the written record, MPCA's public failure to disclose the existence of EPA comments, as well as MPCA's flat denial that it had received feedback on the permit from EPA (*supra* at 8) fail to meet the duty of candor required by Rule.

However, MPCA's violation of due candor alone may not be sufficient to render an agency's decision arbitrary and capricious. *Interim Permit for the Planning, Construction and Operation of an Animal Feedlot and/or Manure Storage Area*, C7-98-2203, 1999 Minn. App. LEXIS 584 *; 1999 WL 329664 (Minn. Ct. App. May 25, 1999). As such, transfer to district court may be the only way to address procedural irregularities and secure the information that would have been available in the administrative record had MPCA acted with complete truthfulness, disclosure and candor.

B. Procedural irregularities preventing a written record of EPA's comments or MPCA's responses are material to Relators' claims.

EPA's comments on the draft NorthMet permit are critical to Relators' claims that MPCA's issuance of the permit violated the CWA. Maccabee Decl. ¶¶ 13-14. State interpretations of standards under the CWA have a federal character, and "EPA's reasonable, consistently held interpretation of those standards is entitled to substantial deference." *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992); *see also In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance ("Annandale"),* 731 N.W.2d 502, 525 (Minn. 2007) ("EPA's interpretation of the state's standard is entitled to deference."). For example, in *Annandale*, the Court supported MPCA's use of offsets for pollution relying, in part, on EPA's similar interpretation in an analogous permitting situation. *Id.* at

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520-521. The Court stressed that "the position advanced by EPA is compelling evidence" of reasonable interpretations of CWA regulations. 731 N.W.2d at 521.

MPCA's Findings and responses to comments dismiss Relators' interpretations of CWA regulations, including Relators' claims that MPCA was obligated to impose WQBELs to limit NorthMet discharge. *See e.g.* Findings 19-20 (R.6181-82), Responses 254 (R.5633). EPA's comments on the draft NorthMet permit are material to Relators' claims that the NorthMet permit violated the CWA and federal regulations. Gaps in the administrative record prejudice Relators in presenting their claims and deprive them of compelling evidence that could rebut MPCA's claims supporting the permit. Maccabee Decl. ¶14. Because EPA's comments, MPCA's notes when the comments were read on the phone, and MPCA responses to comments are not in the record, it is impossible to evaluate whether MPCA would have reached a different decision on the NorthMet permit if regular procedures had been followed and this evidence made public.

The procedural irregularities in the NorthMet permit cases are substantial and go to the heart of Relators' ability to pursue claims that the NorthMet permit is inadequate to protect Minnesota water quality. WaterLegacy respectfully requests that these cases be transferred to district court pursuant to Minn. Stat. §14.68.

II. Stay of this Appeal and the NorthMet Permit is Needed to Prevent Prejudice to Relators, Serve the Public Interest, and Protect the Court's Jurisdiction.

In the alternative, if the Court declines to transfer these appeals to the district court, Relator WaterLegacy respectfully requests a stay of these appeals and the NorthMet

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permit[4] to allow its FOIA litigation to proceed. This relief pursuant to Minn. Stat. §14.65 would protect Relators from prejudice, serve the public interest and protect this Court's jurisdiction, while allowing WaterLegacy to secure release of documents from EPA that are missing from the administrative record.

In deciding on a stay request, the court must consider "the public interest, which includes the effective administration of justice." *Webster v. Hennepin Cnty.,* 891 N.W.2d 290, 293 (Minn. 2017), *citing State v. N. Pac. Ry. Co.*, 22 N.W.2d 569, 574-75 (Minn. 1946). The Court must balance "the appealing party's interest in preserving the status quo, so that effective relief will be available if the appeal succeeds" with the interests of the prevailing party in the decision. *Webster,* 891 N.W.2d at 291-92, *citing DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 144 (Minn. App. 2007). In evaluating whether a stay should be granted, "the most important factor to consider" is whether "issuing a stay would preserve the court of appeals' jurisdiction by preventing a significant legal issue from becoming moot during appeal." *Webster,* 891 N.W.2d at 293. Each of these factors support WaterLegacy's request for stay in this matter.

A. Relators would be prejudiced absent a stay.

Relators would be severely prejudiced if this appeal proceeded without critical EPA comments missing from the administrative record. Maccabee Decl. ¶14. Based on MPCA's handwritten notes, EPA written comments on the draft NorthMet permit likely asserted

[4] WaterLegacy petitioned for reconsideration and a stay of the NorthMet permit on December 31, 2018, alleging CWA violations and various procedural irregularities. MPCA denied its petition on March 11, 2019.

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that the permit must include effluent limits. Exh. C at 2-3, 5-6, 9, 14, 22, 25. They may also have recommended permit changes to reduce mercury or make the permit enforceable, reflecting other issues mentioned in MPCA notes. *Id.*, at 5-6, 9, 11, 13, 19-22, 24. Since EPA positions may be compelling evidence of how CWA regulations should be interpreted, *Annandale*, 731 N.W.2d at 521, the absence of EPA comments undermines Relators' ability to prosecute the claims they have raised in their certiorari appeals.

Relators would also be prejudiced by the failure to stay the NorthMet permit pending the FOIA litigation and resolution of these certiorari appeals. Maccabee Decl., ¶¶ 15-16. NorthMet construction is scheduled to begin this summer, and construction of the tailings basin seepage containment system authorized in the NorthMet permit would harm 140 acres of wetlands. *Id.*, ¶15 Should the NorthMet permit be reversed and remanded pending this appeal, this substantial wetlands destruction would be for naught. *Id.,* ¶ 16.

B. Harm to Respondents is outweighed and results from their conduct.

Litigation under the FOIA to secure EPA comments on the NorthMet permit is proceeding on an aggressive schedule, and briefing will be complete by early August. Maccabee Decl., ¶ 10. Any harm to Respondents will be short in duration and should not weigh heavily in this Court's decision. *See Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs,* 826 F. 3d 1030, 1039 (8th Cir. 2016)(affirming district court finding that "the balance of harms favored granting the preliminary injunction," based in part on "its finding that the injunction would likely be short in duration").

In these cases, any prejudice to MPCA results from its own conduct and the procedural irregularities created by efforts to avoid disclosure of EPA's criticism of

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NorthMet permit terms favorable to the Respondent-Intervenor. As with other court orders, the intent of the stay of the NorthMet permit would not be punitive, but the stay would remove any incentive to continue withholding of information routinely and appropriately contained in the administrative record for a CWA permit decision.

C. The public interest supports a stay.

The public interest supports a stay of this appeal and the NorthMet permit to ensure agencies "take seriously their responsibilities to develop and preserve the administrative record." *Hard Times Café,* 625 N.W.2d at 174. Mr. Fowley's OIG complaint not only suggests that the "cooperation" between MPCA and EPA management to keep EPA's comments off the state record seemed designed to hide the concerns from the public and this Court, Exh. F at 1, but that the EPA and MPCA have reportedly "engaged in conversations about ways to continue to have EPA make comments on future permits off the record, such as sending EPA comments to the state only by screen shot." *Id.*

If MPCA can hide EPA oversight from the public and the courts until appeals are concluded and sulfide mining activities are underway despite federal regulations, the Data Practices Act, and Minnesota's rule establishing a duty of candor, oversight to protect Minnesota's natural resources will be ineffectual. The integrity of the permit process is necessary to Minnesota's declared "policy to create and maintain within the state conditions . . .in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed." Minn. Stat. §116B.01. Stay of the NorthMet permit and appeal will serve the public interest in the integrity of MPCA permitting.

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D. A stay is necessary to preserve the *status quo* and this court's jurisdiction.

Finally, a stay is needed to protect water quality in the Partridge River, Embarrass River and St. Louis River, Maccabee Decl., ¶ 1, and the efficacy of this court's review. Should this case be heard on appeal without knowing the extent and nature of EPA's concerns about the NorthMet permit, a decision could be made that conflicts with the most reasonable and long-standing interpretation of CWA regulations. *See Annandale*, 731 N.W.2d at 521.

Environmental injuries create a particular need to preserve the *status quo*. *See e.g. Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."). If the NorthMet permit is not stayed pending resolution of this appeal, wetlands and downstream water quality may be irreparably harmed due to the laxity of a permit adopted through irregular procedures that concealed critical oversight.

For these reasons, WaterLegacy respectfully requests the Court stay the NorthMet permit and the pending appeals regarding the NorthMet permit until the resolution of the FOIA litigation.

CONCLUSION

WaterLegacy has shown compelling grounds for a transfer of this matter to district court pursuant to Minn. Stat. § 14.68 or, in the alternative, a stay of this appeal and of the NorthMet permit pursuant to Minn. Stat. § 14.65. Substantial and material irregularities in

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procedure have concealed from Relators, the public, and this Court critical comments of the EPA in its oversight of the draft NorthMet permit under the CWA. The balance of harms to the parties, the public interest and protection of the Court's jurisdiction would also support a stay of this appeal and of the NorthMet permit. WaterLegacy respectfully requests the Court's relief in this matter.

Dated: May 17, 2019

Respectfully submitted,

/s/ Paula G. Maccabee
Paula G. Maccabee (#129550)
JUST CHANGE LAW OFFICES
1961 Selby Avenue
St. Paul, Minnesota 55104
(651) 646-8890
pmaccabee@justchangelaw.com

Attorney for Relator WaterLegacy

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EXHIBIT 2

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IN COURT OF APPEALS

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/ State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis County Hoyt Lakes and Babbitt Minnesota.	Case Nos. A19-0112, A19-0118, A19-0124

WATERLEGACY REPLY MEMORANDUM IN SUPPORT OF MOTION FOR TRANSFER TO DISTRICT COURT OR, IN THE ALTERNATIVE, FOR STAY DUE TO IRREGULAR PROCEDURE AND MISSING DOCUMENTS

INTRODUCTION

The PolyMet NorthMet NPDES/SDS permit ("NorthMet permit") is Minnesota's first water pollution permit for a new and potentially toxic form of mining. The U. S. Environmental Protection Agency ("EPA") had serious concerns that the NorthMet permit failed to comply with the Clean Water Act ("CWA"). Yet, evidence suggests that when the Minnesota Pollution Control Agency ("MPCA") complained to EPA's Regional Administrator about EPA's written comments on the draft NorthMet permit, these comments were suppressed. MPCA now admits that EPA staff read their comments to MPCA over the phone. Yet, MPCA "did not retain" the notes MPCA staff took during this critical phone call, even though a Minnesota Government Data Practices Act ("Data Practices Act" request had already been made explicitly requesting any notes of phone conversations with EPA. MPCA also failed to provide any written responses disclosing or answering EPA's concerns about the NorthMet permit.

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Were it not for confidential sources within EPA, inquiries by a retired EPA attorney, and documents revealed through Data Practices Act requests, MPCA would have succeeded in completely concealing EPA's criticisms of the NorthMet permit from the public and the Court. There is evidence of irregular procedures in documents filed with this motion. But, most of the evidence of MPCA's irregular procedure and EPA's permit analysis remains outside the administrative record. Thus, the remedy of transfer to the district court pursuant to Minn. Stat. § 14.68 is requested to safeguard the integrity of the permitting process and ensure that judicial review of the NorthMet permit is based on a full and complete record of EPA oversight under the CWA.[1]

BACKGROUND

MPCA's response memorandum confirms, rather than refutes the irregularities in procedure that have plagued the NorthMet permit process and resulted in omissions of critical documents from the administrative record for the permit. In context, these irregularities reflect EPA's longstanding concerns about the NorthMet mine project and MPCA's less rigorous approach to permitting.

EPA's degree of involvement in the development of the PolyMet NorthMet NPDES/SDS permit since the summer of 2016 is not surprising. For years, EPA had a

[1] Minnesota Center for Environmental Advocacy continues to support WaterLegacy's Motion to Transfer or, in the alternative, to Stay. This reply is respectfully submitted according to the original schedule pursuant to Minn. R. Civ. App. P. 127, as explained in the Reply Declaration of Paula G. Maccabee ("Maccabee Reply Decl.") ¶ 2.

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high level of concern about the water quality threats posed by the NorthMet copper-nickel mine and the lack of rigor in MPCA's approach to NPDES permitting.

In February 18, 2010, the EPA found the draft environmental impact statement for the NorthMet copper-nickel mine "environmentally unsatisfactory." EPA's written comments explained,

> EPA has assigned the EU rating because our review of the DEIS determined that the proposed action will result in environmentally unsatisfactory water quality impacts. . .
>
> EPA determined that the project will result in unacceptable and long-term water quality impacts, which include exceeding water quality standards, releasing unmitigated discharges to water bodies (during operation and in the post-closure period), and increasing mercury loadings into the Lake Superior watershed.

Exh. H at 2-3.[2]

As the NorthMet project continued, EPA cautioned that analysis used for environmental review was insufficient for NPDES permitting. In 2013, EPA stressed that modeling used in environmental review to evaluate water quality impacts "is not equivalent to how water quality based effluent limits (WQBELs) will be developed for NPDES permitting" and that "appropriate WQBELs must be derived based on water quality standards and implemented in the permit." Exh. H at 12.

In April 2015, despite MPCA's request that EPA defer NPDES comments until permitting, EPA sent an email to memorialize "our understanding of MPCA's anticipated approach to address proposed discharges of pollutants to waters of the United States

[2] WaterLegacy ("WL") Exhibits A-G were attached with the Declaration of Paula Maccabee ("Maccabee Decl.") filed with the initial motion. Exhibits H and I are attached with the Reply Declaration of Paula Maccabee.

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through NPDE permitting." Exh. A at 1. EPA summarized its requirements for an NPDES permit under the CWA and the importance of a "complete application" from PolyMet to support its request for a permit. *Id.* at 3-4. MPCA Metallic Mining Sector Director Ann Foss countered with an email admonishing that EPA should communicate with MPCA through "conversations," to which EPA responded that documentation was needed since "there was never any written acknowledgement of agreement, positions or rationale." Exh. H at 16.

MPCA's permitting process did not begin well. PolyMet applied for its NPDES permit on July 11, 2016, and MPCA informed PolyMet that its application was approved for processing prior to EPA's review. Exh. A at 6. In a November 3, 2016 letter, EPA identified serious deficiencies in PolyMet's NPDES permit application. *Id.* at 6-12. Despite an explicit requirement in the Memorandum of Agreement between EPA and MPCA that "no NPDES application shall be processed" by MPCA until "all deficiencies identified by the EPA are corrected" and MPCA "receives a letter from EPA concurring that the application is complete," MPCA's administrative record contains no such letter from EPA. Exh. H at 29.[3] By summer 2016, when EPA became "closely involved" with MPCA's NorthMet permit, the process was already irregular.

MPCA has not disputed the central facts pertaining to MPCA's irregular conduct set forth in Jeffry Fowley's complaint to the EPA Office of Inspector General and in WaterLegacy's motion papers:

[3] MOA sections attached with MPCA's response to this motion do not include this page.

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1. MPCA has provided no evidence disputing that MPCA Commissioner John Linc Stine called EPA Regional Administrator Cathy Stepp to complain about EPA's planned EPA staff written comments on the NorthMet permit.[4] *See* Exh. F at 2.

2. MPCA has not disputed that EPA's appointed Regional Administrator then directed that EPA professional staff not send any written comments to MPCA after this call by MPCA's Commissioner. *See Id.*

3. MPCA has not disputed that EPA staff stated during the public comment period for the draft NorthMet permit that they intended to submit written comments to make clear EPA concerns, which included the lack of effluent limits to meet water quality standards (WQBELs). Exh. C at 13-14.

4. MPCA has admitted that EPA read its prepared written comments aloud to MPCA staff over the phone on April 5, 2018 and that this call from EPA provided a "compendium of all of all of its previous concerns about the Public Comment draft permit." (MPCA Response ("Resp.)) 5; Declaration of Richard Clark ("Clark Decl.") ¶ 15.

5. MPCA has admitted that two MPCA employees, staff attorney Mike Schmidt and an unnamed member of the Water Permit team, took written notes of the April 5, 2018 call when EPA read its written comments. *Id.*

[4] Outside counsel states in MPCA's memorandum states generally that MPCA "did not take efforts to keep EPA's written comments out of the administrative record" (MPCA Resp. 17), but no declarations support this assertion.

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6. MPCA has not disputed that neither set of MPCA's written notes taken during the April 5, 2018 call (when EPA read its written comments) have been provided to WaterLegacy or placed in the administrative record.

7. MPCA has not disputed that WaterLegacy's first Data Practices Act request for documents, including "meeting notes" and "phone conversation notes" pertaining to "written or oral communications" with EPA, was made on March 26, 2018, before the April 5, 2018 call and notetaking. *See* Maccabee Decl. ¶¶ 3,12, Exh. B at 1.

8. MPCA has admitted that, as of April 5, 2018, issues raised by EPA had not been resolved. Declaration of Jeff Udd (Udd Decl.) ¶ 5; Clark Decl. ¶ 15. In fact, MPCA admits that EPA and MPCA met in September 2018 in an effort to resolve outstanding issues raised by EPA regarding the NorthMet permit. *Id*., ¶17.

9. MPCA has admitted that neither EPA's written comments on the draft NPDES permit nor the content of those comments read aloud to MPCA on April 5, 2018 are contained in the administrative record. MPCA Resp. 11.

10. MPCA has admitted "the only way that WaterLegacy was aware of those documents - and of the existence of the non-record document it seeks - is because of MPCA's disclosures under the Data Practices Act." *Id*. at 16.

MPCA's practices and the resulting deficiencies in the record are a marked divergence from other Minnesota NPDES permitting cases, where EPA's comments and MPCA's responses to those comments are part of the public record. Maccabee Reply Decl.

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¶ 5. For example, MPCA reissued the NPDES/SDS permit for the United States Steel Corp. Minntac tailings basin ("Minntac permit") just three weeks before MPCA approved the NorthMet permit. *Id*. EPA's comments on the draft Minntac permit were provided in writing to MPCA, discussed in MPCA's Findings of Fact on the Minntac permit, and included in the administrative record for the public and this Court to review, along with MPCA's detailed responses to the substance of EPA's comments. *Id.*, Exh. I. MPCA's practices in the NorthMet permit case also diverge sharply from proper procedures in NPDES permitting matters across the country.

MPCA's irregular practices and the resulting deficiencies in the record are anomalous and improper. Jeffry Fowley is a retired EPA attorney and an expert in NPDES permitting matters. Declaration of Jeffry Fowley ("Fowley Decl.") at ¶¶ 2-4. Mr. Fowley was employed by the EPA Office of Regional Counsel that serves New England for 37 years, headed that Office's water section for 13 of those years, and has extensive experience with legal and technical requirements for NPDES permits as well as interactions with states under EPA oversight. *Id*.

Mr. Fowley explains that in his 37 years of experience at EPA, he never heard of any situation where EPA professional staff prepared written comments on an NPDES permit and then read them over the phone. *Id*., ¶ 11. Even where EPA and a state have phone conversations regarding NPDES permit provisions, when EPA professional staff have comments about a draft permit, EPA sends those comments in writing to the state agency during the public comment period for the permit. *Id*. ¶ 9. Mr. Fowley explains,

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> [I]t actually is not unusual for an EPA Region and a State to have a series of meetings on complex permit or other complex matters. What is highly unusual is that no written comment in this highly significant and complex matter were ever sent. When the EPA reviews state permits, there can be telephone calls and meetings between federal and state personnel. However, for significant and complicated permits like the Poly Met permit, it has been the consistent EPA practice to send written comments (in cases where it has initiated a permit review). The sending of such comments is necessary to fully communicate EPA concerns, which is hard to do on complex matters in a meeting or over the phone, unaided by a written document. In any event, the sending of written comments is essential in order to carry out the EPA's oversight responsibilities, if in phone calls and meetings, important issues are not resolved. *Id*. ¶ 9.

Based on his expertise, Mr. Fowley stated,

> In my opinion, it was improper for the MPCA to in effect receive written comments from the EPA by having them read over the phone. In all of my years of experience, I have never heard of a situation where EPA personnel have read written comments on a permit to State personnel over the phone. There is no legitimate reason why written comments which could be sent would instead be read over the phone. This clearly is a less effective way to communicate complicated matters than sending the written comments. The apparent purpose for only receiving such comments over the phone would be to obtain them off the record - to avoid the MPCA receiving written comments which it would then need to be put into the administrative record for the permit and to which it would then need to respond. *Id*. ¶ 11.

In addition to confirming procedural irregularities in the NorthMet permitting process, MPCA's response to WaterLegacy's motion raised new factual issues supporting transfer of these cases to the district court. In MPCA's memorandum, counsel alleged that attorney Mike Schmidt and the other unidentified member of the Water Permit team who took notes on April 5, 2018 "did not retain" the notes from this call because there was nothing new or surprising in EPA's comments. MPCA Resp. 5. However, MPCA provided no sworn declarations from any person stating why the records were discarded or destroyed, at whose direction, or even that the records were, in fact, not retained in MPCA's possession. Many handwritten notes of meetings and phone calls with EPA both before

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and after April 5, 2018 were retained by MPCA, provided in response to Data Practices Act requests, and later placed in the administrative record. *See* Maccabee Decl. ¶ 4, Exh. C at 1-3, 5-14, 18-25.

Mr. Fowley emphasizes that even if MPCA staff thought there was nothing new or surprising in the EPA comments read in the April 5 call, "this is not a legitimate reason to destroy official government records." Fowley Decl. ¶ 13. Mr. Fowley opined,

> It clearly was improper for the MPCA to not retain these records. In my experience, when there have been meetings or phone calls between the EPA and States on permit or other similar matters, it has been the routine practice across the country to take notes of such meetings or calls. Certainly, when such notes have been taken, it is generally understood that it is improper to destroy them – rather, they must be retained. Such notes are considered to be official government records. When there is a permit or other proceeding, they must then also be included in the administrative record. But, in any event, they must always be retained. *Id*. ¶ 12.
>
> The combination of the MPCA receiving written comments in an off the record manner over the phone, and then not even retaining notes of the comments, together clearly presents very serious ethical violations. During my more than 40 years of legal practice, I never before have come across a situation where a government agency has behaved in this manner. In my opinion, this combination of facts alone would justify this Court finding that there have been "irregularities in procedure" even if this was the only problem with the permit proceeding. *Id*.¶ 16

MPCA's response also alleges new extra-record factual issues. MPCA asserts that in the April 5 call, EPA raised a new concern about domestic wastewater and "restated all of the major concerns that EPA had raised throughout the process, all of which MPCA had already heard and taken into consideration." Declaration of Stephanie Handeland ("Handeland Decl.") ¶ 7. This statement highlights the deficiency of the administrative record created by MPCA's irregular procedure. Neither EPA's concerns about domestic wastewater nor *any* of the "major concerns that EPA had raised throughout the process"

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are identified as EPA concerns or responded to as EPA concerns in MPCA's Fact Sheet, Findings, or Responses to Comments. R.5163-5683, 6163-6206. In a marked divergence from normal and proper practice, the public, relators in these case and the Court are left completely in the dark as to both EPA's concerns and MPCA's responses to EPA.

Finally, MPCA's response to this motion claims that after a meeting in late September 2018 between EPA and MPCA on the NorthMet permit, "MPCA and EPA were in fundamental agreement on the required contents of the permit." MPCA Resp. 7; Clark Decl. ¶ 20. But this new claim by MPCA is alleged purely on extra-record declarations with no support in the documentary record. Notes and emails obtained by WaterLegacy under the Data Practices Act confirm that, prior to the September 2018 meeting, at least the following issues with EPA remained unresolved: treatment technology design and operation, the need for WQBELs, permit enforceability and, more generally, "How to move forward on issues raised by EPA?" Exh. H at 30-32.

The record suggests that no agreement was reached between MPCA and EPA after the September 2018 meeting. Confidential sources within EPA dispute MPCA's assertion that EPA's concerns were adequately addressed, and the permit on its face fails to address either the need for WQBELs or the permit enforceability issues on the agenda in September 2018. Fowley Decl., ¶¶ 17, 20-23. Mr. Fowley explains, "In my experience, if the EPA had agreed that all issues were resolved, it would have sent MPCA an email or letter confirming such a key fact." *Id*. ¶ 17. MPCA's new assertions do not appear credible.

Finally, MPCA suggests that the absence of an EPA objection in this record somehow vitiates a need for documentation throughout the oversight process. (MPCA

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Resp. 2, 8-9). Mr. Fowley explains why this inference is incorrect. Although the Clean Water Act gives EPA "veto" power over NPDES permits, "EPA seldom goes so far as to start this formal process." Fowley Decl. ¶ 26. Rather, EPA provides written comments to the state expressing its concerns, and "[t]ypically, this results in the EPA and State reaching agreement on the issues of concern, without the need for any formal EPA objection." *Id*. Mr. Fowley explains that written EPA comments and responses are critical to this process:

> However, this kind of process only works if the EPA concerns are included by the State in the permit's administrative record and responded to by the State. In that way, the public and a reviewing court (if the permit is appealed) can see if and how the EPA concerns were resolved. As happened here, a state sometimes can proceed to issue a permit with which the EPA is not in agreement, but which the EPA has chosen not to block by issuing a formal objection. In that circumstance, people count on the fact that the EPA comments – and the state's response – are in the state's administrative record and can be reviewed by a state court. It is left to the reviewing court to determine whether the EPA's unresolved concerns mean that a permit is defective, or if the State has produced an adequate explanation showing why it did not need to follow the EPA's views. *Id*., ¶ 27.

Mr. Fowley states that during 2018, in his role as a consultant to a national environmental group reviewing EPA's new proposal to reduce state permit oversight, he interviewed people around the country regarding experiences with recent state permits. Although Mr. Fowley uncovered concerns regarding other permit reviews under the current federal administration, "the Poly Met permit appeared to present by far the most serious set of improper practices of all of the cases that I studied." *Id.*, ¶ 5.

ARGUMENT

If a presumption of regularity applies in connection with a motion to transfer pursuant to Minn. Stat. § 14.68, the evidence in this record and the extra-record evidence

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brought forward in this motion have long rebutted it. Even where a presumption of regularity applies to an official's decision, "that presumption is not to shield his action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (citations omitted). *See also White v. Minnesota Dep't of Natural Resources*, 567 N.W.2d 724, 735 (Minn. Ct. App. 1997) (allegations that an agency "swept 'stubborn problems or serious criticism. . .under the rug,' raise issues sufficiently important to permit the introduction of new evidence in the District Court, including expert testimony with respect to technical matters").

The Court in *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 173-74 (Minn. App. 2001) did not cite a "presumption of regularity" before determining that transfer to the district court pursuant to Minn. Stat. § 14.68 was required on review of the evidence. In this case, as in *Hard Times Café*, the extra-record materials presented to this Court demonstrate that there is "extensive documentation of alleged irregularities in procedures" and that transfer of the NorthMet NPDES cases to the district court is necessary to "untangle these improper influences from respondent's final decision." *Id*.

I. MPCA's procedures in developing and documenting the NorthMet permit were highly irregular, improper and inconsistent with applicable law.

Rather than rebut evidence that NorthMet permit procedures were irregular and improper, MPCA's responses strengthened this evidence. MPCA supplied no declaration disputing that MPCA's leadership sought to keep EPA's written comments out of the administrative record. In fact, MPCA's motion response, rather than demonstrating the

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absence of irregularity,[5] provided new evidence that staff violated Minnesota law either by destroying official records or failing to release them despite Data Practices Act requests. And MPCA still fails to act with complete truthfulness, accuracy, disclosure, and candor in connection with the NorthMet permit.

A. MPCA affirmatively sought to exclude from the administrative record EPA comments on the draft NorthMet permit and MPCA responses to EPA concerns.

WaterLegacy's initial motion papers cited reports in Mr. Fowley's complaint to the EPA Office of Inspector General that MPCA Commissioner John Linc Stine's call to EPA's Regional Administrator Cathy Stepp complaining about EPA comments on the draft NorthMet permit had resulted in her direction to staff not to send these comments. (WL Motion ("Mot.") 6). MPCA has submitted no contrary declarations.

Emails between Assistant Commissioner Shannon Lotthammer and staff to Regional Administrator Stepp in March 2018 confirm that MPCA had been working with EPA to "find a solution," which resulted in the oral reading of EPA's prepared written comments on the draft permit. *Id.*, Exh. C at 15-16. MPCA's long-standing effort to block EPA written comments, in favor of extra-record "conversations" is also documented in the April 9, 2015 email from Metallic Mining Sector Director Foss to EPA. Exh. H at 16-17.

In addition, although it is undisputed that EPA expressed concerns about deficiencies in the draft NorthMet permit during and after the public comment process and

[5] The plain meaning of "irregularity" in Minn. Stat. § 14.68 is "an act or practice that varies from the normal conduct of an action." Black's Law Dictionary (10th ed. 2014). It does not require a violation of law.

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read to MPCA on April 5, 2018 a detailed compendium of criticisms of the permit, MPCA provided no responses to EPA's comments. (*supra* 10).

MPCA is well aware how an NPDES permitting record should be created and preserved. In the recent Minntac tailings basin permit case, for example, MPCA included EPA's written comments on the draft permit and MPCA's responses to these comments in the administrative record. Exh. I. Minnesota precedent takes the creation of a complete administrative record for granted. *See White v. Minnesota Dep't of Natural Resources*, 567 N.W.2d at 734 ("Had concerns been raised during the comment period, they would have become part of the administrative record)."

Federal regulations require states issuing NPDES permits to provide written responses to comments accessible to the public. 40 C.F.R. §§ 124.17(a)(2),(c); 123.25(a)(31) (applying this specific regulation to states issuing NPDES permits). In concluding that this provision need not be followed by MPCA,[6] respondents may have misread *In re Wash. Aqueduct Water Supply Sys.*, NPDES Appeal No. 03-06, 2004 WL 3214486, 2004 EPA App. LEXIS 28 *57-58 (EPA Envtl. App. Bd., July 29, 2004). In that case, where the EPA Environmental Appeals Board remanded an NPDES permit due to failure to respond to comments, EPA Region 3 was the permitting authority and an environmental group made comments critical of the analysis denying the need for WQBELs. EPA Region 3 stood in the same position as the MPCA does today.

[6] MPCA Resp. 14-15, PolyMet Response ("Resp.") 7.

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MPCA not only sought to keep EPA criticisms of the draft NorthMet permit out of the administrative record, but failed to comply with CWA regulations requiring public written responses to comments on NPDES permits. As a result, but for confidential sources and WaterLegacy Data Practices Act requests, the fact that EPA had any concerns at all about the NorthMet permit would have remained secret.

B. MPCA either destroyed official records already requested pursuant to the Minnesota Data Practices Act or failed to disclose them in violation of Minnesota law.

WaterLegacy's initial motion papers suggested that MPCA took notes when EPA read its comments aloud on the phone. MPCA's responses provide troubling new admissions related to this procedural irregularity. An MPCA attorney and an unnamed member of the permitting staff took notes when EPA read its comments on April 5, 2018. Clark Decl. ¶ 5. Outside counsel represents that MPCA "did not retain" these notes, MPCA Resp. 5, but provides no declaration attesting to the fate of these critical records.

Whether MPCA destroyed the records from EPA's reading of its comments or failed to release them despite Data Practices Requests, MPCA's actions were highly irregular. It is a violation of state law to destroy official records or government data, and it is a violation of state law to refuse to release such records if they, in fact, still exist.

All state agencies are required to "make and preserve all records necessary to a full and accurate knowledge of their official activities" pursuant to Minn. Stat. §15.17:

> Subdivision 1. **Must be kept. —** 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. (emphasis in original)

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See Westrom v. Minn. DOL & Indus. 686 N.W.2d 27, 32 (Minn. 2004)

All government data must also be preserved under Minnesota's Data Practices Act, which defines "government data" as "all data *collected, created, received*, [*or*] *maintained* . . . by any government entity," Minn. Stat. § 13.02, subd. 7 (emphasis added) and requires that such data must "keep records containing government data in such an arrangement and condition as to make them easily accessible." Minn. Stat. § 13.03, subd. 1.

The Data Practices Act also imposes affirmative obligations upon the government to disclose this data. "The responsible authority or designee shall provide copies of public data upon request." Minn. Stat. § 13.03, subd. 3 (c). *See Webster v. Hennepin Cnty.,* 910 N.W.2d 420, 431 (Minn. 2018). While agencies may discard records after a final action is taken according to a records retention schedule, it is highly improper to do so here when a major action is still pending. Moreover, it is always improper to discard records after they have been specifically requested under the Data Practices Act. The Minnesota Supreme Court recently held that even data that might otherwise be shielded from view must be maintained as public data once a Data Practices Act request has been made. *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 349-50 (Minn. 2016).

Whether MPCA destroyed its April 5, 2018 notes or retained and failed to release them despite Data Practices Act requests beginning before these notes were taken, MPCA violated Minnesota law and assured the secrecy of the NorthMet permit process. As Mr. Fowley explained in his declaration, when notes have been taken of meetings or phone calls between the EPA and States on permit matters "it is generally understood that it is

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improper to destroy them. . Such notes are considered official government records. . they must always be retained. Fowley Decl. ¶ 12. In his opinion, MPCA's handling of the notes from its key phone call with EPA on April 5, 2018 "would justify this Court finding that there have been 'irregularities in procedure' even if this was the only problem with the permit proceeding." *Id*. ¶ 16.

C. MPCA breached its duty to act in good faith and with complete truthfulness, accuracy, disclosure, and candor.

Minnesota rules require that MPCA act "in good faith and with complete truthfulness, accuracy, disclosure, and candor" in all communications, proceedings, and other dealings. Minn. R. 7000.0300. Rather than cure the defects in this record, MPCA's responses to WaterLegacy's motion perpetuate them.

The *post hoc* characterization by MPCA's counsel of the email (MPCA Resp. 9) to relator Minnesota Center for Environmental Advocacy denying that any "feedback" had been received by EPA on the permit as relating only the permit's October 25, 2018 version is neither supported by evidence nor demonstrative of MPCA's candor.

MPCA hasn't even attempted to explain away its misleading responses to comments made by the Fond du Lac Band of Lake Superior Chippewa, where MPCA implied that the NorthMet permit complied with all CWA requirements identified by EPA. (R.5512-13, 5521-22). In fact, MPCA has argued that it is sufficient in responses to comments to make general statements on issues without disclosing that EPA had criticisms and concerns similar to those of relators and other members of the public. (MPCA Resp. 13). The failure to disclose EPA's involvement and concerns about an NPDES permit is "misleading" both

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because "EPA has special expertise" other commenters lack and because it can't be determined whether MPCA's responses address the specific concerns raised by EPA. Fowley Decl. ¶ 25.

Finally, the assertion by MPCA counsel that MPCA "did not retain" its April 5, 2018 notes documenting EPA's comments on the draft NorthMet permit, "because" MPCA found nothing new or surprising in these comments (MPCA Resp. 5) is troubling. Even in these legal proceedings, where the duty of complete truthfulness is at its highest, MPCA has failed to disclose what evidence, if any, supports its claims.

II. Transfer to the district court is the appropriate remedy to discover whether MPCA's NorthMet permit decision was tainted by improprieties and to preserve the integrity of the permitting process.

Based on the new admissions and extra-record evidence contained in MPCA's response to this motion, WaterLegacy believes that transfer of these NorthMet permit cases to district court pursuant to Minn. Stat. § 14.68 would be the most effective remedy to investigate and cure the harm done as a result of the procedural irregularities demonstrated on this record.

A. District court inquiry is needed to determine facts pertaining to the irregular procedures in which MPCA engaged and the content of the comments provided by EPA regarding the NorthMet permit.

Transfer to the district court is needed to determine at least the following facts pertaining to MPCA's irregular procedures and the content of the EPA comments that would have been in the administrative record but for MPCA's improper conduct:

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1. What actions did MPCA take to request, encourage or otherwise affect the decision of EPA Regional Administrator Stepp to prevent EPA Region 5 professional staff from sending the written comments they had prepared on the draft NorthMet permit in March 2018?

2. Was the purpose of these actions to prevent the creation of a written record disclosing EPA's criticism of the NorthMet permit and the legal and policy basis for EPA's concerns?

3. What was the content of the EPA's comments on the draft NorthMet permit read over the phone to MPCA on April 5, 2018? What were EPA's concerns about the NorthMet permit? What were the legal and policy bases for these concerns?

4. What happened to the notes from April 5, 2018 created by MPCA attorney Mike Schmidt and the unnamed member of MPCA's water permitting team? Were they actually destroyed? If so, when, by whom, at whose direction, and for what reasons?

5. If the April 5, 2018 notes were not destroyed, where are they being kept, and why have they not been released?

6. Are there other MPCA notes of phone conversations or meetings with EPA regarding the NorthMet permit that were created but not retained? If so, on what dates were the notes taken, by whom, when were they destroyed, at whose direction, and for what reasons?

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7. Were MPCA staff directed at any time not to create or retain notes of phone conversations or meetings with EPA regarding the NorthMet permit? If so, on what dates, by whom, and for what reasons?

8. Did MPCA at any time after November 3, 2016 prepare or receive from EPA draft or final emails or letters memorializing conversations or meetings and describing the resolution or failure to resolve EPA's concerns regarding the NorthMet permit? If so, were these drafts or final documents destroyed or retained but not disclosed?

9. Did MPCA receive at any time a letter from EPA stating that the deficiencies in PolyMet's NPDES permit application identified by EPA on November 3, 2016 had been cured so that the application was complete?

10. Did MPCA discuss internally what its obligations were in terms of responding to the comments received orally from EPA on the draft NorthMet permit in writing accessible to the public? What were the nature of these discussions?

Transfer to the district court would allow discovery, including depositions, to disclose the nature of the NorthMet permit process, the content of documents not contained in the administrative record, and the degree to which the desire to protect the NorthMet permit from public and judicial scrutiny and ensure the project would move forward may have affected the nature of the administrative record and MPCA's final decision.

The absence of a formal EPA objection to the permit after October 2018 is not material to determine nature of EPA's concerns and how MPCA failed to document any

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response to those concerns. EPA objections are rarely used, and the written comment process and creation of an administrative record is vital to ensure that this process works. Fowley Decl. ¶ 27. The extraordinary failure to preserve a record of EPA's comments in this case interferes with court review of whether "unlawful factors have tainted the agency's exercise of its discretion" not to veto a permit. *Save the Bay, Inc. v. Administrator of Environmental Protection Agency***,** 556 F.2d 1282, 1296 (5th Cir. 1977).

Transfer of these NorthMet permit cases for district court proceedings could also allow EPA employees to come forward and place evidence on the record. Although the Clean Water Act provides whistle-blower protection from retaliation, this protection is limited to the situation where an employee has filed a proceeding under this Act or "has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act." 33 U.S.C. § 1367(a). Absent a legal proceeding, EPA employees with critical information as to EPA's comments on the NorthMet permit and the reasons why these comments were not sent to MPCA in written form would be at risk of termination or discrimination if they were to publicly disclose this information.

Transfer to the district court pursuant to Minn. Stat. § 14.68 is necessary to provide the factual evidence that would already be in the written administrative record in this case but for MPCA's irregular conduct.

B. This Court's transfer of the NorthMet cases to district court for a factual inquiry is necessary to preserve the integrity of the permitting process in these and future cases.

It is a fluke that relators and this Court know anything at all about EPA's comments and criticisms of the NorthMet permit. WaterLegacy doesn't routinely make Data Practices

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Act requests after issuance of every draft permit. Requests were made in the NorthMet permit case based on confidential sources informing counsel in March 2018 that there was something irregular about the EPA comment process. Maccabee Decl. ¶ 3. Without these Data Practices Act requests, there would be no evidence of EPA's non-record comments or even of EPA's concerns.

In addition, neither the public nor the Court can count on the presence of a retired EPA Regional Counsel who conducted an independent national investigation of EPA oversight practices, earned the trust of EPA professional staff, and then documented his findings in a citizen complaint to the EPA Office of Inspector General. Similarly, it could not be anticipated either that EPA counsel would tell WaterLegacy to request the final written comments on the draft NorthMet permit prepared by EPA or that EPA professionals would care enough about CWA protections and trust Mr. Fowley enough to confidentially disclose the irregularities and suppression of information related to the NorthMet permit.

Without any one of these unique occurrences, relators and this Court would remain in the dark. The relief requested from this Court is critical to ensure that MPCA or other state agencies don't again take the gamble that they will not get caught if they prevent the creation of a complete and accurate administrative record.

"Even the possibility that there is here one administrative record for the public and [the] court and another for the [agency] and those 'in the know' is intolerable." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54, (D.C. Cir. 1977). It is the court's obligation to test administrative actions for "arbitrariness or inconsistency with delegated authority. . . agency secrecy stands between [the court] and fulfillment of [its] obligation." *Id*.

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Accordingly "the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings." *Id.*; *see also Bar MK Ranches v. Yuetter*, 994 F. 2d 735, 739 (10th Cir. 1993) ("An agency may not unilaterally determine what constitutes the Administrative Record."). While a party must prove "actual" bad faith in order to prevail on a claim that a decision was arbitrary, "a preliminary showing of 'bad faith' can entitle a plaintiff to discovery on the question." *New York v. U. S. Dep't of Commerce*, 351 F. Supp. 3d 502, 634-635 (S.D.N.Y. 2019).

WaterLegacy respectfully requests that this Court transfer these NorthMet permit cases to district court to find the truth and protect the integrity of the permitting process in these important cases pertaining to Minnesota's first proposed copper-nickel mine and in any future cases where an agency might find it inconvenient to allow the creation of a complete written record.

III. WaterLegacy and other relators would be severely prejudiced in presenting their claims that the NorthMet permit violates the Clean Water Act absent this Court's relief.

The Court's stay of these appeals would not reveal the nature and extent of irregular conduct, but it would at least prevent respondents from benefitting from the suppression of EPA's written comments on the draft NorthMet appeal.[7] It is troubling that, despite the admission that EPA's written comments were read aloud to MPCA staff, and the fact that

[7] WaterLegacy is also pursuing litigation to secure EPA's written comments on the draft NorthMet permit. Maccabee Decl. ¶ 10.

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the document in EPA's possession actually memorializes what was shared orally with MPCA, Exh. G at 17, respondents still argue that these comments cannot be admitted as part of the record in these NorthMet cases. (MPCA Resp. 23, PolyMet Resp. 13). If MPCA destroyed its notes from the April 5, 2018 call, EPA's marked up document may be the only record of comments that were actually made to the State. Mr. Fowley opines that "such a document – if and when obtained from the EPA – should be included in the administrative record for this permit. This would at least partially rectify the ethical violations that have occurred and enable this Court to fully consider the EPA's concerns." Fowley Decl. ¶ 31.

WaterLegacy's certiorari appeal and those of other relators would be severely prejudiced if neither EPA's written comments, MPCA's notes, nor other evidence reflecting the content of these comments are produced for this record. WaterLegacy's claims state that MPCA erred by issuing the NorthMet permit without WQBELs, concluding there was no reasonable potential for the NorthMet discharge to cause or contribute to exceedance of water quality standards, and issuing an unenforceable permit that would serve as a "permit shield" for PolyMet. Maccabee Reply Decl. ¶ 6. The few pages of handwritten notes obtained from MPCA through the Data Practices Act suggest that EPA shared these concerns. EPA's detailed written comments are critical to WaterLegacy's presentation of these substantive claims on their merits.

In addition, WaterLegacy's appeal claims that MPCA's issuance of the NorthMet permit was procedurally unlawful. *Id*., ¶ 7. EPA's comments on the draft permit, MPCA's notes from the April 5, 2018 phone conference when these comments were read to MPCA,

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as well as discovery regarding MPCA's failure to acknowledge and respond to EPA's comments are necessary to avoid prejudice and adequately prosecute this claim. *Id.*, ¶ 7.

This Court's relief would prevent severe prejudice to relators as well as upholding the integrity of the process and the administrative record in these NorthMet permit cases and in future Minnesota permitting cases.

CONCLUSION

On the files, records and proceedings herein, WaterLegacy respectfully requests the Court's transfer of this matter to district court pursuant to Minn. Stat. § 14.68 due to the substantial procedural irregularities and potential violations of law in the NorthMet permitting process that affected the administrative record and, possibly, MPCA's final permit decision. In the alternative, WaterLegacy respectfully requests the Court's stay of this matter pursuant to Minn. Stat. § 14.65 to allow time to secure EPA comments on the draft NorthMet permit improperly withheld from the administrative record.

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Respectfully submitted,

/s/ Paula G. Maccabee
Paula G. Maccabee (#129550)
JUST CHANGE LAW OFFICES
1961 Selby Avenue
St. Paul, Minnesota 55104
(651) 646-8890
pmaccabee@justchangelaw.com

Attorney for Relator WaterLegacy