

**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*

**DECLARATION OF
STEPHANIE HANDELAND**

Appellate Case Nos.
A19-0112
A19-0118
A19-0124

I, STEPHANIE HANDELAND, in accordance with section 358.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

Background

1. My job title is Environmental Specialist 4, Permit Writer, for the Minnesota Pollution Control Agency (“MPCA”). I have been employed by MPCA since May 1995.
2. My job responsibilities have included developing and drafting National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 (“Water Permit”) for the Poly Met NorthMet Mine project.
3. I was involved in developing the Water Permit from the beginning of preliminary discussions in 2015 until issuance on December 20, 2018. I also participated in regular meetings and conference calls with EPA during the development of the Water Permit, including the April 5, 2018, telephone call with EPA referenced in WaterLegacy’s May 17, 2019, Motion for Transfer to the District Court or, in the Alternative, for Stay Due

to Irregular Procedures and Missing Documents (“Motion”) and in its June 7, 2019, Reply in support of the Motion.

4. I submit this Declaration to the Court based on my personal knowledge and in support of MPCA’s Sur-reply to WaterLegacy’s Motion.

Factual Issues Raised in WaterLegacy’s Reply

5. In its Reply, WaterLegacy raises several questions it alleges require transfer to the district court for additional fact finding. *See* WaterLegacy Reply, at 19–20. I have first-hand knowledge of the answers to some of the questions WaterLegacy raises.

6. WaterLegacy asks what actions MPCA took to prevent EPA from submitting written comments on the Poly Met Permit in March 2018. *See id.* ¶ 1. I worked on developing the Poly Met Permit throughout the entire permit-development process and had regular conversations with other members of the MPCA staff and management. I also participated in twice-monthly conference calls with EPA from August 2016 until August 2017, and thereafter in periodic calls and meetings with EPA. I have no knowledge of any efforts by MPCA to influence whether EPA would submit comments in written form to MPCA. I have no knowledge of any alleged telephone call between MPCA Commissioner John Linc Stine and EPA Regional Administrator Cathy Stepp about complaints with EPA’s draft written comments.

7. WaterLegacy asks whether the “purpose of these actions” was “to prevent the creation of a written record disclosing EPA’s criticism” of the Poly Met Permit. *See id.* ¶ 2. First, to my knowledge, MPCA did not take any “actions” to suppress EPA’s written comments. It is in EPA’s discretion whether to submit written comments. MPCA never

had any intention of concealing that EPA had concerns with the Poly Met Permit. I was involved in conversations with EPA throughout the permit-development process. Any time that MPCA took substantive notes on the twice-monthly calls or meetings with EPA, those notes are included in the administrative record. The issues that EPA raised on the April 5, 2018, call overlapped nearly entirely with those of other stakeholders who did submit written comments. MPCA's responses to stakeholders' written comments thus responded to the substantive concerns that EPA had with the January 2018 version of the draft Poly Met Permit. Both the concerns and MPCA's responses are included in the administrative record.

8. WaterLegacy asks about the content of the comments EPA read over the phone on the April 5, 2018, conference call. *See id.* ¶ 3. As I stated in my previous declaration in support of MPCA's Response, there was nothing new or surprising in EPA's comments, all of which had been discussed in previous meetings or conference calls, except for one small concern about domestic wastewater, which MPCA summarized and addressed in the fact sheet. In short, on the call, EPA just restated the major concerns it had with the January 2018 version of the draft Poly Met Permit. EPA had previously raised those same concerns with MPCA. In addition, EPA's comments overlapped with other stakeholders' comments, so in summarizing and responding to all of the other stakeholders who actually submitted written comments, MPCA was summarizing and responding to EPA's substantive comments as well.

9. WaterLegacy asks what happened to the notes from the April 5, 2018, conference call "created by MPCA attorney Mike Schmidt and the unnamed member of

MPCA's water permitting team." *Id.* ¶ 4. I have no first-hand knowledge of what happened to Mike Schmidt's notes. I am, however, the "unnamed member of MPCA's water permitting team." *See id.* I expected the April 5, 2018, call to be similar to all of the other calls and meetings we had with EPA—conversational and deliberative. But it was clear from the beginning of the call that EPA was reading from a document. I did not know whether the document was a formal comment letter, a draft, or some other format. But EPA read from the document, and we listened.

10. EPA read the document very rapidly. For the first one or two minutes, I attempted to take notes on what EPA was saying, but because EPA was reading so quickly, I could not keep up accurate notetaking. I noticed that Mike Schmidt was also taking notes, so I stopped. I discarded the notes (recycled the paper) right after the call because my brief note taking was worthless. No one directed me to discard my brief notes. I did so on my own because the notes had no value. I discarded them directly after the call. I did not initially retain the notes and then discard them after WaterLegacy filed its subsequent Data Practices Act request.

11. WaterLegacy asks whether there are other notes of phone conversations or meetings with EPA that MPCA created but did not retain. *See id.* ¶ 6. I am not aware of any other notes that are not included in the administrative record for this appeal. The administrative record has many sets of notes, including my notes from the September 2018 two-day, in-person meeting with EPA. No one directed me to destroy or otherwise conceal any notes, and all of the substantive notes I took during the permit-development process are included in the administrative record.

12. WaterLegacy asks whether MPCA staff were directed at any time not to create or retain notes of telephone conversations or meetings with EPA. *See id.* at 20, ¶ 7. At no time was I ever directed or encouraged to not take notes or to destroy any notes that I did take.

13. WaterLegacy asks whether MPCA at any time after November 3, 2016, received any letters or emails from EPA memorializing conversations or meetings and describing the resolution of EPA's concerns or the failure to resolve EPA's concerns. *See id.* ¶ 8. The only written confirmation that we received was a response that EPA had reviewed Poly Met's permit application. We never received anything else in writing from EPA about resolution of its concerns throughout the entire permit-development process. The only other written communications we received from EPA (in addition to those already in the administrative record) were routine communications scheduling calls or meetings. We would send documents to EPA in advance of our twice-monthly calls so EPA could use them to prepare for discussions, but EPA never responded in writing. In fact, if EPA raised concerns on a conference call about something in the Poly Met Permit, I would sometimes ask EPA staff to please provide examples of solutions in other permits that we could use to get model language, but they never followed up by sending us that information.

14. Jeffrey Fowley's declaration states, "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." Fowley Decl. ¶ 17. In my experience, only once did EPA send a letter stating that all issues with a permit had been resolved to its satisfaction, and only then because I


personally requested the letter. In my experience it is not common practice for EPA Region 5 to send those types of communications.

15. WaterLegacy asks whether MPCA received a letter from EPA stating that any deficiencies in Poly Met's permit application had been cured and that the application was complete. *See id.* ¶ 9. To my knowledge, we did not receive any EPA correspondence subsequent to the November 3, 2016 letter from EPA (WL Motion Exh. H, page 19) stating that Poly Met's permit application was complete.

16. WaterLegacy asks whether MPCA discussed internally what its obligations were with respect to responding to EPA's oral comments from the April 5, 2018, conference call. *See id.* ¶ 10. I do not recall any internal conversations about how to address EPA's oral comments. Because EPA's comments were not written, we did not think to identify them separately in our responses to comments. We knew we had addressed the substance of EPA's comments in the responses-to-comments document because (except for EPA's comment about domestic wastewater) EPA's comments fully overlapped with other stakeholders' written comments, so we knew that when we responded in writing to those written comments, we would also have responded in writing to EPA's oral comments.

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Dated: June 12, 2019
Ramsey County
St. Paul, Minnesota


Stephanie Handeland
Environmental Specialist 4, Permit Writer
Minnesota Pollution Control Agency

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Court File Number: 62-CV-19-4626

Honorable Judge John H. Guthmann

**DECLARATION OF ANDREW C. EMRICH IN SUPPORT OF
MINNESOTA POLLUTION CONTROL AGENCY'S
RESPONSE OPPOSING RELATORS'
MOTION IN LIMINE FOR SPOILIATION SANCTIONS**

I, Andrew C. Emrich, in accordance with section 358.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

1. I am a partner with Holland & Hart LLP, 6380 South Fiddlers Green Circle, Suite 500, Greenwood Village, Colorado 80111. I have worked at Holland & Hart for over fourteen years. During that time, I have represented mining, oil and gas, renewable energy, and real estate clients in environmental and natural resources litigation and regulatory compliance involving a wide range of federal, state, and local administrative agencies. During my time in private practice, I have been involved in many cases in which one or more federal and/or state agencies were parties. I regularly work with attorneys from the U.S. Department of Justice ("DOJ") as well as agency counsel, and agency program personnel, from a wide range of federal, state, and local government agencies.

2. Prior to joining Holland & Hart LLP, I served as Counsel to the Assistant Attorney General at the Environment and Natural Resources Division of the DOJ from 2001 to 2005, where I both litigated significant environmental and natural resources cases and helped

develop and implement litigation positions and strategy for federal agencies in courts throughout the United States.

3. While at DOJ, I served as lead counsel or co-counsel in a number of federal court cases before federal district courts and appellate courts throughout the United States. Most of my litigation work involved defending federal agencies' decisions, regulations, and permits in Administrative Procedure Act ("APA") and similar record review cases.

4. As trial counsel in these record review cases, I regularly coordinated with agency counsel and agency program officials at multiple federal agencies including the Department of the Interior, the Environmental Protection Agency, the Army Corps of Engineers, the Forest Service, the Department of the Defense, the Department of Commerce, and the Department of Transportation in compiling the administrative records for agency decisions under judicial review. In connection with my litigation work at DOJ, I was personally acquainted with the procedures federal agencies used to compile and certify their administrative records in connection with legal challenges to agency decisions.

5. While the agencies' program personnel and counsel held primary responsibility for compiling the administrative records, these agency personnel consulted with me and other DOJ attorneys concerning the scope and content of their administrative records. I regularly worked with agency counsel and program personnel on issues related to the scope and content of administrative records, including the treatment of documents that were protected from disclosure under the attorney-client privilege and/or deliberative process privilege. These discussions often took place after a complaint had been filed challenging a particular federal agency decision.

6. In addition, in those cases where the agencies anticipated that their decisions were likely to be the subject of a future APA or similar legal challenge, I was often consulted during


the agency decision-making process concerning the type of information that should be documented and preserved for the administrative record.

7. During my time at DOJ, I never instructed agency counsel or agency program personnel to issue a “litigation hold” for agency documents related to decisions, regulations, or permits that were subject to judicial review under the APA or similar federal judicial review statute.

8. It was neither my practice, nor that of my colleagues at DOJ as far as I know, to instruct our federal agency clients to issue litigation holds in record review cases. I am not aware of any formal procedures at DOJ for instructing federal agencies to issue litigation holds in APA or similar record review cases.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 9, 2020
Arapahoe County
Greenwood Village, Colorado



Andrew C. Emrich

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Court File Number: 62-CV-19-4626

Honorable Judge John H. Guthmann

**DECLARATION OF THOMAS L. SANSONETTI IN SUPPORT OF
MINNESOTA POLLUTION CONTROL AGENCY'S
RESPONSE OPPOSING RELATORS'
MOTION IN LIMINE FOR SPOILIATION SANCTIONS**

I, Thomas L. Sansonetti, in accordance with section 358.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

1. I am a partner with Holland & Hart LLP, 6380 South Fiddlers Green Circle, Suite 500, Greenwood Village, Colorado 80111. I have been a partner at Holland & Hart for 21 years, specializing in natural resources and environmental law. I counsel clients on all aspects of project development on state, federal, and Indian lands, beginning with the permitting and environmental reviews that take place at a project's inception through any litigation challenging a project. A significant portion of my practice involves administrative record review cases before federal and state agencies and courts.

2. Prior to joining Holland & Hart LLP, I held three positions within the federal government. First, from 1987 through 1989, I served as the Associate Solicitor for the Division of Energy Resources at the Department of the Interior. Second, from April 1990 through January 1993, I served as the Solicitor at the Department of the Interior. Third, from December

2001 through April 2005, I served as the Assistant Attorney General for the Environment and Natural Resources Division (“ENRD”) in the Department of Justice (“DOJ”).

3. As Associate Solicitor for the Division of Energy Resources, I served as lead counsel for three agencies within the Department of the Interior: Bureau of Land Management, Bureau of Reclamation, Minerals Management Service (now known as Office of Natural Resources Revenue). I was lead agency counsel representing the agencies in administrative record review appeals within the Department’s Office of Hearings and Appeals. In these appeals, I was personally responsible for coordinating with agency officials to pull documents and data that would be included in the administrative record. In most instances, I oversaw line attorneys within the Office of the Solicitor coordination with agency officials to do the same. In all appeals, either I or line attorneys within the Office of the Solicitor would coordinate with the Assistant Attorney General at DOJ and any assigned DOJ trial attorney regarding the scope and content of the administrative records. During my time as Associate Solicitor, I did not issue “litigation holds” to agencies or agency officials responsible for compiling the administrative records, nor was I instructed by DOJ attorneys to issue “litigation holds.”

4. As the Solicitor at the Department of the Interior, I was chief legal advisor to the Secretary of the Interior and was the individual responsible for managing all the attorneys within the Office of the Solicitor.

5. As the Assistant Attorney General for the Environment and Natural Resources Division in the DOJ, I had two primary responsibilities: (1) overseeing policy, management, and budget for the Division, and (2) serving as lead trial counsel or overseeing division trial attorneys assigned to litigate cases on behalf of federal entities like the Department of the Interior, the Environmental Protection Agency, the Army Corps of Engineers, the Forest Service, the

Department of the Defense, the Department of Commerce, and the Department of Transportation.

6. In my role as lead counsel at DOJ, I represented the United States in numerous trials, Administrative Procedure Act (“APA”) appeals, and other record review cases in federal district courts and circuit courts of appeal across the country, as well as before the U.S. Supreme Court. In the APA and similar record review cases involving challenges to agency decisions, regulations, and permits, I coordinated with agency counsel, agency officials, and local Solicitors regarding the scope and content of the administrative record.

7. During my time as Associate Solicitor, Solicitor, and Assistant Attorney General of ENRD at DOJ, I never issued “litigation holds” to agencies preparing administrative records. While I am aware that each federal Department (i.e. Department of the Interior, Department of the Defense), adopts its own record retention policies, which may include the destruction of documents or other electronically stored information at certain times or after certain events, it was not my practice to issue “litigation holds” in record review cases to interfere with the agencies’ execution of those policies.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 9, 2020
Arapahoe County
Greenwood Village, Colorado


Thomas L. Sansonetti

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

In the Matter of the Denial of Contested
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County, Hoyt Lakes, Babbitt,
Minnesota.

Court File Number: 62-CV-19-4626

Honorable Judge John H. Guthmann

Declaration of Thomas Lorenzen

City of Washington)
) ss.
District of Columbia)

I, THOMAS A. LORENZEN, hereby declare as follows:

1. I am a lawyer and member in good standing of the Bar of the District of Columbia.

2. From March 2004 through the first half of 2013, I was the Department of Justice Assistant Section Chief charged with the responsibility for overseeing the legal defense of all rules, regulations, and other final agency actions issued by the United States Environmental Protection Agency ("EPA" or "Agency") under the federal pollution control statutes.

3. Like the action at issue in the present case, each of those EPA final actions was subject to review based on the certified administrative record compiled by the

Agency, and the Agency was required by law to maintain and produce for the parties and the reviewing court either the administrative record as a whole or an index to the record, with copies available to the individual parties or the reviewing court upon request.

4. As noted by the Administrative Conference of the United States in its May 14, 2013 report, “Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking,”¹ certification of the administrative record requires the certifying official submit to the court an affidavit or declaration of completeness and correctness. “Certification is largely a ministerial function. The key to certification is that the certifying individual can swear to the compilation, completeness and correctness of the administrative record being certified, which may rely on the performance of subordinate officials.” *Id.* at 57.

5. The consequence of the Agency’s failure to maintain, certify, and produce the administrative record can be harsh. This includes the possibility that the district court will “hold unlawful and set aside agency action” not supported by a proper record. *See id.* at 78.

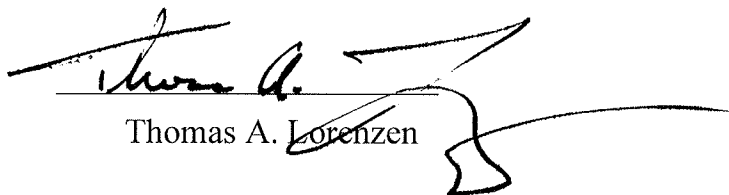
6. Given both the obligation imposed by law that an agency certify that the record on review is complete and correct, and the possible serious consequences for a rule that is not supported by a properly-certified record, I cannot recall any instance in which EPA was required to issue a “litigation hold” on documents related to the

¹ Available at <https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf>.

challenged agency action reviewable based on an administrative record. The law's obligation on the agency to certify the record on review already ensures that such documents will be preserved and produced for the litigation.

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Dated: January 8, 2020



Thomas A. Lorenzen

Message

From: Lotthammer, Shannon (MPCA) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bbccfa831d6c46229341b82243278e89-slottha]
Sent: 3/16/2018 2:00:18 PM
To: Thiede, Kurt [thiede.kurt@epa.gov]
CC: Korleski, Christopher [korleski.christopher@epa.gov]; Pierard, Kevin [pierard.kevin@epa.gov]; Nelson, Leverett [nelson.leverett@epa.gov]; Holst, Linda [holst.linda@epa.gov]; Stepp, Cathy [stepp.cathy@epa.gov]; Stine, John (MPCA) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2d5db0e00c054627951a8cd09961cb5c-jstine]; Smith, Jeff J (MPCA) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e01da579963b47d0972a7b171779de12-jsmith]; Udd, Jeff (MPCA) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e2ea3d7349cd4899865ce8c41466294e-judd]; Schmidt, Michael R (MPCA) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=797f9b29c4a648e98cbd0f11c3e402b7-mschmid]
Subject: RE: Polymet Draft Permit Discussion

Hi Kurt --

Thank you for your message. We concur with your characterization below of what we have agreed to for the Polymet draft permit next steps.

Thank you also for your demonstrated commitment to continued dialogue and cooperation, which we share. I have made a note of the suggestion for a face-to-face meeting, and will work with our team to determine when we've reached a good point to get that set up. In the meantime, if you have any questions, please let me know.

Kind regards,
Shannon

Shannon Lotthammer
Assistant Commissioner
Minnesota Pollution Control Agency
Shannon.lotthammer@state.mn.us
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Working to protect and improve the environment and human health.

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From: Thiede, Kurt [mailto:thiede.kurt@epa.gov]
Sent: Friday, March 16, 2018 12:44 PM
To: Lotthammer, Shannon (MPCA) <shannon.lotthammer@state.mn.us>
Cc: Korleski, Christopher <korleski.christopher@epa.gov>; Pierard, Kevin <pierard.kevin@epa.gov>; Nelson, Leverett <nelson.leverett@epa.gov>; Holst, Linda <holst.linda@epa.gov>; Stepp, Cathy <stepp.cathy@epa.gov>
Subject: Polymet Draft Permit Discussion

Shannon,

Thanks once again for working with us to find a solution to this matter. Here is our understanding of what EPA and MPCA have agreed to.

Once MPCA completes their response to public comments, it will develop a pre-proposed permit (PPP) and provide the PPP to EPA Region 5. Region 5 EPA will have up to 45 days to review the PPP and MPCA's responses to public comments and provide written comments on the PPP to MPCA. This would occur prior to MPCA submitting a proposed permit to EPA, which, according to the current MOA, would continue to give EPA 15 days to comment upon, generally object to, or make recommendations with respect to the proposed permit. In accordance with the current MOA and as specified in CWA Section 402(d)(2)(B) and 40 C.F.R. 123.44(b)(2), EPA still may raise specific objections within the 90 day period from receipt of the "final" proposed permit, but we are hopeful our discussions and the additional review will allow us to come to an agreement and avoid objections.

Again, it is our hope and intent to continue a dialog between MPCA staff and R5 EPA WD staff prior to receipt of the PPP and during EPA's review of the PPP as we work toward a NPDES permit that both parties can support. In fact, I would like to suggest setting up a face-to-face meeting when appropriate to discuss the draft permit and EPA observations. It is also our intent to turn around our review and comments on the PPP as soon as possible.

Please let me know if you have any questions.

Sincerely,

Kurt A. Thiede
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