

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

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

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

**DECLARATION OF
PAULA G. MACCABEE**

State of Minnesota)
) ss.
County of Ramsey)

I, Paula G. Maccabee, hereby declare as follows:

1. I am an attorney licensed in Minnesota. I represent WaterLegacy in the above-captioned matter.

2. MCEA, Friends of the Boundary Waters Wilderness, Center for Biological Diversity, WaterLegacy and the Fond du Lac Band of Lake Superior Chippewa (collectively, “Relators”) are the Relators in the above-captioned matter.

3. In late October 2019, WaterLegacy secured documents from the U.S. Environmental Protection Agency (“EPA”) as a result of a March 27, 2018 Freedom of Information Act (“FOIA”) request and the granting of a fee waiver appeal. These EPA FOIA documents suggested that the Minnesota Pollution Control Agency (“MPCA”) may have had phone calls and conferences with EPA not yet confirmed in any records produced to Relators.

4. On November 15, 2018, I filed another FOIA request on behalf of WaterLegacy, FOIA request EPA-R5-2020-001126. This FOIA request sought EPA notes pertaining to phone conferences or meetings that may have occurred between MPCA and EPA on March 12, 2018;

March 15, 2018; April 30, 2018; June 11, 2018; October 22, 2018; November 8, 2018 and November 28, 2018. I followed up this request with phone calls to EPA requesting expedition to the extent possible, due to imminent Court deadlines to disclose exhibits.

5. Late Friday afternoon, December 27, 2019, EPA sent WaterLegacy a final disposition regarding EPA-R5-2020-001126, along with EPA notes of various conversations with MPCA and a privilege log reflecting withheld attorney notes. The cover email (RELATORS_66003), disposition letter (RELATORS_66004-06), Enclosures A and B with privilege log and released records (RELATORS_66007-08) and EPA notes (RELATORS_66009-11) are attached with this declaration as **Attachment A**.

6. On Monday, December 30, 2019, I sent MPCA and PolyMet counsel copies of these newly-secured EPA FOIA documents with a meet-and-confer email asking for a response by this morning if counsel would agree to include these documents on Relators' Exhibit List, explaining that Relators had no access to these documents until December 27, 2019. Counsel did not respond and did not agree to add these new EPA FOIA documents to Relators Exhibit List.

7. There is good cause for Relators' failure to disclose these exhibits on or before December 16, 2019. WaterLegacy's previous FOIA requests had provided no notes from these phone conversations, and documents produced in discovery by MPCA were insufficient to determine if some of the conferences had even occurred, let alone the content of the conversations. WaterLegacy made its FOIA request EPA-R5-2020-001126 on November 15, 2019, and only received a response on the afternoon of December 27, 2019.

8. Relators would be severely prejudiced if EPA's notes and the Enclosures secured from EPA pursuant to EPA-R5-2020-001126 were not allowed as exhibits in this matter. These EPA documents provide the only documentary record in these proceedings proving that staff level

calls were in fact completed between MPCA and EPA on March 12, 2019 and that a call between MPCA and EPA took place on November 8, 2018. Notes from March 12, 2018 reflect MPCA's report of contacts since March 5, 2018 between MPCA and EPA. Notes from April 30, 2018 reflect that MPCA intended that its responses to comments would not directly address EPA's concerns, but would make responses to members of the public whose concerns overlapped those of EPA. The documents obtained by Relators as a result of EPA responses to FOIA request were under the sole custody and control of EPA until December 27, 2019 and provide highly probative evidence of Relators' alleged procedural irregularities in this matter.

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

Dated: December 31, 2019

s/s Paula G. Maccabee
PAULA G. MACCABEE

Message

From: r5foia@epa.gov [r5foia@epa.gov]
Sent: 12/27/2019 4:08:57 PM
To: pmaccabee@justchangelaw.com
Subject: Final Disposition, Request EPA-R5-2020-001126
Attachments: Other-20191220141007-WD Close out EPA-R5-2020-001126.pdf

EPA-R5-2020-001126 has been processed with the following final disposition: Full Grant.

Records were released to the public as a result of this request. You may retrieve these records immediately using the following link: [View Records](#) Over the next 2 hours, these records are also being added to FOIAonline's search pages, further enabling you to retrieve these documents associated with your FOIA request at any time.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

DEC 19 2019

WP-16J

Ms. Paula Maccabee, Esq.
Water Legacy
1961 Selby Avenue
Saint Paul, Minnesota 55104

RE: Freedom of Information Act Request
EPA-R5-2020-001126

Dear Ms. Maccabee:

This letter responds to your Freedom of Information Act (FOIA) request dated November 15, 2019. You requested the following:

All handwritten notes, emails or memoranda reflecting the factual content of phone conferences, or meetings between EPA and the Minnesota Pollution Control Agency (MPCA) occurring on any of the following dates: March 12, 2018, March 13, 2018, March 15, 2018, April 30, 2018, June 11, 2018, October 22, 2018, November 8, 2018, and November 28, 2018.

The response is from the following offices at EPA Region 5: Water Division, Office of Regional Counsel, and the Office of the Regional Administrator. Our response today includes only employees' personal handwritten notes and electronic notes taken during the meetings that occurred on the dates specified in your request and not any records that are not housed in the Agency's Outlook system. The Agency's responses to previous FOIA requests, that have been made available to you (and for which links are provided for convenience below), cover other Agency records, including those housed in the Agency's Outlook system and calendar entries and invitations for the meetings listed in your current request above, relating to the following: EPA's internal and external communications and deliberations regarding EPA's oversight of the MPCA Clean Water Act (CWA) Section 402 permitting process and EPA's records relating to the applicability of CWA Section 401(a)(2) (FOIA EPA-R5-2019-002881); and EPA's role in review of the U.S. Army Corps of Engineers CWA 404 permit and the associated state 401 certification and the applicability of CWA Section 401(a)(2) (EPA-R5-2019-003224). The period of time covered by these two FOIA requests is calendar year 2018. Therefore, that portion of your request relating to records other than handwritten notes, or electronic notes for the above meetings, can be found by reviewing the records released in response to the two aforementioned FOIAs. The following links will allow you to access the records previously released.

EPA-R5-2019-002881

<https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-R5-2019-002881&type=request>

EPA-R5-2019-003224

<https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-R5-2019-003224&type=request>

In response to your above-referenced request dated November 15, 2019, three pages of notes from the custodians, as noted in Enclosure A, are being produced. The nine pages of notes from Attorney Advisors Barbara Wester and Jillian Rountree are withheld in full pursuant to FOIA Exemption 5, the Attorney Work Product Privilege. An itemized list of the withheld records, along with the basis for withholding and an estimate of the volume of withheld records, is provided in Enclosure B to this letter.

The Agency would like to provide some context for the records that are produced today. These are the personal notes of individual staff. The staff taking these notes did so for their personal use, and, for that reason, some notes may be disorganized, unpolished, or otherwise reflect that the staff did not intend that the notes would be used by others. While the Agency does not necessarily take the position that these personal notes are subject to the FOIA, they are being produced today in the interest of transparency.

EPA will be providing the records responsive to your request through the FOIA Online system. An index of the records we are releasing is included with this letter as Enclosure A. We are unable to provide you with other records, or portions of other records, responsive to your request because we have determined that those records are exempt from mandatory disclosure under Exemption 5 of 5 U.S.C. §§ 552(b)(5). Exemption 5, 5 U.S.C. § 552(b)(5), protects inter- or intra-agency documents that would not be available by law to a party in litigation with the agency, which includes the attorney/client, attorney work product and deliberative process privilege(s) recognized under common law. An itemized list of the withheld material, along with the bases for withholding and an estimate of the volume of withheld materials, is provided in Enclosure B.

You will receive a "Final Disposition" email from the Region 5 FOIA Office. An invoice will be attached to the email if there are any applicable charges for search, review, and duplication of responsive records. If no invoice is attached to the email, then no charge is applicable for processing your request.

You can access the records responsive to your request by doing the following

1. Wait for the Final Disposition email to arrive;
2. Go to <https://foiaonline.gov/foiaonline/action/public/search>;
3. Enter the tracking number in the box next to "Keyword Search" and click Go;
4. A list of the records will come up. To access a record, click on the "+" under the Detail column, then click on the Title.

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals *received* after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (301) 837-1996 or (877) 684-6448; or fax, (301) 837-0348.

If you have questions regarding this response please contact Mark Ackerman, at (312) 353-4145 or ackerman.mark@epa.gov; or Barbara Wester at (312) 353-8514 or wester.barbara@epa.gov.

Sincerely,



Thomas R. Short Jr.
Acting Director, Water Division

Enclosure

Enclosure A

EPA Region 5 Water Division and Office of Regional Counsel

Index of released records for FOIA EPA-R5-2020-001126

Title	Author	To	From	Date	FOIA Exemption	Reason for Withholding	Length (pages)
Call With MPCA	Krista McKim	N/A	N/A	April 30, 2018	N/A	N/A	1
MPCA Call	Krista McKim	N/A	N/A	March 12, 2018	N/A	N/A	1
PolyMet	Mark Ackerman	N/A	N/A	March 12, 2018	N/A	N/A	1

Enclosure B

EPA Region 5 Water Division and Office of Regional Counsel

Index of Index of withheld records for FOIA EPA-R5-2020-001126

Title	Author	To	From	Date	FOIA Exemption	Reason for Redaction	Length (pages)
Wester Polymet Call Notes June 11 2018	Barbara L. Wester	Attorney's Personal File	N/A	June 11, 2018	Exemption 5	Attorney Work Product	2
Wester Polymet Call Notes October 22 2018	Barbara L. Wester	Attorney's Personal File	N/A	October 22, 2018	Exemption 5	Attorney Work Product	3
Wester Polymet Call Notes November 8 2018	Barbara L. Wester	Attorney's Personal File	N/A	November 8, 2018	Exemption 5	Attorney Work Product	2
FW: PolyMet Permitting (Handeland, 757-2405 POST)	Jillian Rountree	Attorney's Personal File	N/A	March 12, 2018	Exemption 5	Attorney Work Product	2

“(Call in number: 888-742-5095, Code: ***-***-****) Call with MPCA on Polymet”	Jillian Rountree	Attorney's Personal File	N/A	April 30, 2018	Exemption 5	Attorney Work Product	2
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Call with mpca

Monday, April 30, 2018

9:33 AM

Handeland schmit, clark udd

Bauer, mckim, ackerman, pierard, rountree

Update from mpca

- Received 850 comments

- 2500 individual comments

- 4 requests for contested case hearings, npdes, 401 cert only

 - Mpca rules focus on ...material issue of fact... not legal interpretations or policy.

 - Mpca in process of reviewing comments to see how it relates to hearing being warranted.

 - Timeline is Idea of proceeding by end of May. DNR has statutory deadline to make determination, and mpca is working on coordinating. Commissioner decides ultimately

Epa comments that we discussed a few weeks ago.... Some overlap with contested case hearing comments. Mcea and water legacy raised some of the same concerns.

Mpca's response to comments won't directly address epa's concerns, but they view our comments to be similar to other comments that were raised.

Comments similar to epa's -

- Wqbels - not in permit

- Rpa not adequate

- Permit shield due to lack of wqbels

- Reliance on operating limit as indicator

- Desire for WET limit

- Discharge prohibition with insufficient monitoring

- Adaptive management - and permit mods

Strategy to move forward

Steps

- Determine material issues of fact raised in contested case hearings

- Reviewing comments - with contractor support. Categorizing comments into themes/buckets

- Focus right now is on contested case hearing requests due to end of may dnr deadline

CCH - happens at draft permit phase, this is primary time for hearing and to have judge decide on factual issues. Appeals court would be legal arguments not factual.

Mpca call

Monday, March 12, 2018

11:03 AM

Epa:wester, pierard, bauer, compton, ackerman, mckim

Mpca - clark, schmidt, udd(?)

Responses to questions from last call:

Waiving ability to do unannounced inspections - draft language is generic across all permits. not interpreted as having to announce.

Authority to impose internal waste stream limits - epa's authority is limited. MN 115.03 subdiv 1e4, general powers and duties of mpca. ... one of the powers mpca given.... Construction, operation, maintenance..... Disposal system. Jill - is the statute part of the npdes approved program. Ms - this is part of our general program authority so it should have been cited as part of program that was cited for npdes approval authority. Jr - how does this work with mn rules at 7001.0180 .Q ... Commissioner establishes internal wastestream limits only where final outfall limitations are infeasible. MS - where there is rp we would, but did not, so applied at internal outfall. ms explains rationale - the way the facility is designed. Km - the only way this is ensured is via the operating limit. 10mg/l limit is extra requirement to provide reasonable assurance. Barbara explains that it doesn't seem like the authority is npdes authority. we will need to go and research if the rule cited is part of the approved program. Epa/citizen suit rprovisions can be hinged on state rules that are outside of approved program. It is a problem if permit is only enforceable by your own state. Mpca will discuss internally some more.

Outfall administrative extraction - mike - advice - not a major mod. Minnesota rules for mods authorize mods that do not authorize increase in pollutants. Would be allowed under mn rule 7001.0190.3c

Talking about termination - viewed figure that richard shared.

Diverted into question of whether WET is limited or not .

Bw - significance of sulfate op limit, if there were to be some action... by leg... to remove sulfate limits.... Would this result in permit mod, or would it result in change to operation/water treatment plant.

Jeff provides update on comment letter - lottheimer has been in contact with kp, chris. Kp - we briefed RA on Friday. She was going to talk to stein either Friday or Monday (today). No agreement b/w shannon and chris on how to proceed.

PolyMet

Monday, March 12, 2018 11:06 AM

Waiving ability to do unannounced inspections?...language in permit is consistent with other permits. Inspectors simply have to present credentials, and must occur during regular times. Intent is not to stop doing this.

Authority to impose internal waste stream limits...MN statute 115.03 subdiv. 1.e.4, general powers and duties of MPCA, one of which given by the statute is to issue permits that require installation o&M of disposal system

Outfall extraction from CE to PolyMet...7001.0190, subpart 3.c...subpart 3 addresses minor mods, 3c is about mods that will not have any potential increase in pollution.

JR...7001.0180

TDS, conductivity, hardness and pH??? Re. CE permit termination approach

Which limits are in the CE permits? No limits, but there are monitoring requirements...are these translatable to PolyMet? There are, but most of streams down gradient don't have effluent limits. At sd026, there is a conductance limit...the intent of monitoring in northmet permit is to monitor northmet impact.