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November 4, 2019

Via E-filing and hand delivery

The Honorable John H. Guthmann
Ramsey County District Court
1470 Ramsey County Courthouse
15 Kellogg Boulevard West
St. Paul, MN 55102

Re: Ramsey County Court File No. 62-cv-19-4626

Dear Judge Guthmann:

Relators respectfully request the Court's direction with respect to Respondent Minnesota Pollution Control Agency's ("MPCA") Motion to Compel and Notice of Motion ("Motion") filed on October 31, 2019. Because the Motion is contrary to this Court's prior orders, the provisions of Minnesota Rules of General Practice, and the purpose and scope of the hearing process this Court articulated, Relators ask that the Court clarify whether it will allow MPCA's Motion to go forward and, if so, on what timetable and by what process. Relators further request the Court's direction on the process by which all parties should address discovery deficiencies. Relators respectfully request the Court's expedited consideration in light of deadlines to brief the Motion.

1. The Courts' Orders Require Parties to Address Discovery Disputes through Informal Conference Pursuant to Minnesota Rules of General Practice 115.04(d).

The Court ruled that the sole basis for its jurisdiction is the Court of Appeals' transfer order under Minn. Stat. § 14.68. (Rule 16 Hearing ("Hr'g") Tr. 92:6-9, Aug. 7, 2019). The Court found the Minnesota Rules of Civil Procedure do not govern these proceedings; instead, the proceedings are part and parcel to the certiorari process. (*Id.* at 93:1-16). In this context, the Court instructed the parties to address discovery disputes pursuant to the informal process in Minn. R. Gen. Prac. 115.04(d). (*Id.* at 99:24-100:2). The Court also ordered the parties to attempt to resolve discovery disputes within one week, then request an informal conference with the Court, and finally file a three-page letter describing the issues. (Order ¶ 11, Sept. 9, 2019). If issues remained despite the conference defining the scope of discovery, the Court stated that any further remedies would be provided through another informal conference process. (Discovery Telephone Conference ("Conference") Tr. 17:3-14, 119:23-120:4, Sept. 16, 2019).

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Here, MPCA filed its Motion contrary to the Court's directions on how such disputes should be addressed. Relators were given less than 48 hours to attempt to resolve the discovery issues. MPCA did not ask this Court for an informal conference and MPCA submitted a formal 17-page Motion to Compel. Relators ask the Court to order MPCA to follow the informal process that has governed discovery disputes throughout this proceeding.

2. MPCA Failed to Comply with Its Meet and Confer Obligations.

MPCA did not attempt to resolve differences with Relators before proceeding with its Motion. At 7:06 p.m. on Monday, October 28, 2019, MPCA sent Relators a letter alleging deficiencies in discovery (Ex. A). This letter demanded that: “[u]nless Relators’ correct these failures immediately, MPCA will file a motion to compel with the District Court on Wednesday, October 30, 2019.” The next day, Evan Nelson responded on Relators’ behalf expressing surprise that MPCA’s counsel did not attempt to resolve issues through a meet and confer process before sending its letter. Mr. Nelson explained that Relators could not respond immediately because WaterLegacy’s sole counsel was on vacation and that Relators would respond “as soon as possible but no later than close-of-business Tuesday, November 5, 2019.” (Ex. B).

MPCA counsel sent a second email Tuesday evening, October 29, 2019 stating that “neither the Court’s schedule nor the local rules permit us to wait” for Relators’ response. Matt Murdock sent another email on Relators’ behalf on Wednesday, October 30, 2019 requesting sufficient time to discuss the disputed issues. (Ex. B). Hours later, MPCA attempted to file its Motion. (Ex. C). The Court rejected the Motion due to the failure to submit the filing fee (Ex. D), then MPCA refiled on October 31, 2019 (Ex. E). By the time WaterLegacy’s counsel returned from three days out of the office, MPCA had filed its Motion.

MPCA failed to comply either with the Court’s order that parties attempt to resolve their disputes in one week (*See* Order ¶ 11; Hr’g Tr. 99:24-25), or with the Minn. R. Gen. Prac. 115.10 requirement that “[n]o motion will be heard unless the parties have conferred either in person, or by telephone, or in writing in an attempt to resolve their differences prior to the hearing.” *See also* Minn. R. Civ. P. 37.01(b) (to the extent applicable, requiring the movant to attempt to confer in good faith before filing a motion to compel).

3. MPCA’s Motion Is Untimely.

Even if the Court allows the parties to file formal motions to compel discovery pursuant to Minn. R. Gen. Prac. 115.04(a), MPCA failed to meet the 14-day requirement for the Motion to be heard on November 13, 2019. Under Minn. R. Gen. Prac. 14.03(c), a document e-filed before midnight is deemed filed “so long as the document is not subsequently rejected for filing by the court administrator for a reason authorized by [Minn. R. Civ. P.] 5.04,” which includes submitting a filing without a required filing fee.

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MPCA failed to pay its filing fee so its Motion was not effectively filed until October 31, 2019 - 13 days before the November 13, 2019 hearing. This deviation is not trivial. MPCA's sole argument for failing to confer prior to filing was that "the Court's schedule" would not "permit [MPCA] to wait." (Ex. B). With MPCA's untimely filing, even if the Court permits formal discovery motions, MPCA should be required to reschedule its Motion and attempt to resolve discovery disputes.

4. MPCA's Motion Lacks Merit and Is Inconsistent with the Scope of this Hearing.

MPCA's Motion challenging Relators' answers to depositions and privilege log lacks merit and is outside the scope of discovery in these proceedings. The sole purpose of this hearing process is "to determine if there were irregularities in procedure by the Minnesota Pollution Control Agency, no one else." (Hr'g Tr. at 93:17-23).

Relators' designee properly answered each deposition question by providing a list precisely identifying documents Relators had in their possession that were responsive to MPCA's deposition questions. Each list "segregate[ed] documents responsive to specific questions." (*Id.* at 114:12-20). As the Court had determined, MPCA did not "get a narrative as to why [Relators] concluded that a certain document was a procedural irregularity." (Conference Tr. 115:6-15). MPCA's Motion demands more than the Court authorized.

MPCA's claims that Relators' privilege log is deficient are intrusive and meritless. The Court restricted MPCA discovery to documents that might prove or disprove Relators' claims of procedural irregularities. (*Id.* at 123:1-12). Relators' internal notes and documents neither probative nor exculpatory of alleged procedural irregularities are not within the scope of discovery. (*Id.*). Thus, they were not listed by Relators on their privilege log. Relators' privilege log was also produced subject to the Court's clear and repeated ruling that the Court would not "make [Relators] give up their sources" (Hr'g Tr. at 115:7-11; *see also* Conference Tr. 105:4-17).

Finally, MPCA alleges that the Fond du Lac Band withheld documents based on sovereign immunity. The Band produced all responsive documents within the scope of discovery directed to Relators and *did not* assert sovereign immunity to withhold any document. This should have been clear, because the Band did not list "sovereign immunity" on the privilege log as a basis for withholding any document. Relators' privilege log, and indeed Relators' production, is the result of Relators' full searches of their documents given the scope of discovery ordered by the Court.

In conclusion, Relators respectfully request that the Court reject MPCA's request to hear its Motion to Compel on November 13, 2019. In addition, Relators request that the Court clarify whether the parties should follow Minn. R. Gen. Prac. 115.04(d) and this Court's prior directions for resolving discovery disputes, submitting a brief letter and requesting an informal conference. The Court's expedited consideration of these issues is respectfully requested.

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Respectfully submitted,

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Enclosures

cc: Counsel of Record



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October 28, 2019

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Re: Relators' Discovery Responses in 62-CV-19-4626

Dear Counsel:

MPCA has identified significant shortcomings in Relators' discovery responses. Relators' Privilege Log is plainly incomplete and fails to provide even basic information on the few items listed. Relators also appear to have withheld documents in the absence of applicable privileges and to have withheld documents without including them in the Log. Further, our review thus far of the documents provided in response to MPCA's interrogatories to Relators' designated witness confirms concerns raised during Mr. Chris Knopf's deposition on written questions: Relators have not described with particularity the basis for their allegations contrary to the clear import of the propounded deposition questions.

Holland & Hart LLP Attorneys at Law



Relators' discovery responses do not satisfy the court's requirements. In addition, those responses again purport to expand the scope of this proceeding beyond the District Court's jurisdiction under the Court of Appeal's referral and even beyond the scope of Relators' own list of purported procedural irregularities. Unless Relators' correct these failures immediately, MPCA will file a motion to compel with the District Court on Wednesday, October 30, 2019.

Relators' Privilege Log

Relators' Privilege Log is incomplete. The entries it includes are insufficiently descriptive. Further, those entries plainly cannot represent all documents that Relators' have withheld. In addition, MPCA respectfully notes that Relators are not entitled to withhold documents based on claims of "sovereign immunity." Those documents must be produced.

The entries in the Privilege Log do not sufficiently identify the documents withheld, and do not provide MPCA, other parties, or the Court any basis for evaluating or testing the sufficiency of the claimed privileges. The Log does not specify the author or recipients of the withheld documents, and provides no other meaningful description of the documents. Providing appropriate descriptive information is particularly important for documents that Relators identify as withheld based on a "confidential source" claim. Relators must also provide the basis, under Minnesota law, for this designation.

Presumably, most of these documents can be produced if the name (or other identification) of the source is redacted. Relators should redact the name and email address of the "confidential source" and produce these documents, as they did with Document 0064134. Certainly, Relators are not free to withhold selectively documents that they claim are from a "confidential source."

Relators' Log is less than a page long. It consists of 21 entries. Two of these entries – both in the custody of the Fond du Lac Band – are identified as work product and confidential attorney client privileged communications. Neither MCEA nor Water Legacy identify any work product documents or attorney-client communications in the Log. It seems entirely implausible that neither MCEA nor Water Legacy are in possession of any responsive documents for which they would claim these protections, and that the Band has only two such documents. This is particularly true in view of Relators' repeated protestations before Judge Guthmann about the large number of work-product and privileged documents that were implicated by MPCA's discovery. Relators must include all such documents in a revised Privilege Log.

The Privilege Log includes an annotation for withheld documents identified as subject to "sovereign immunity." The Band represented to Judge Guthmann that it had "many" responsive documents that were protected from discovery by sovereign immunity. It thus appears incongruous that no documents are listed in the Privilege Log as subject to this claim. MPCA respectfully believes that sovereign immunity does not exempt the Band from discovery in this context but, in any event, the Band is obligated to include all these documents in Relators' revised Privilege Log.



Mr. Knopf's Response to Interrogatories on Written Questions

Relators designated Mr. Chris Knopf as their Rule 30.02 witness for purposes of responding to MPCA's written deposition questions. Mr. Knopf did not answer MPCA's deposition questions. Rather, for every question, Relators provided only documents. MPCA is left with the impossible task of guessing from the text of a multitude of documents the answers to direct questions. And, more fundamentally, Relators ignore the Court's directive that the purpose of this discovery is to avoid "surprise" at trial. MPCA is entitled to know Relators' claims and the basis for those claims. Relators may not simply provide a "document dump" and expect MPCA to sift through reams of data and guess at Relators' case. Thus, Mr. Knopf's response is directly contrary to the Court's instructions.

This collection of documents certainly does not serve to "describe with particularity" (i) "procedural irregularities that Relators allege occurred regarding the NPDES Permit," (ii) "the basis for Relators' allegation that MPCA and/or EPA sought to prevent EPA's comments from becoming part of the administrative record for the NPDES Permit," (iii) "the basis for Relators' allegation that MPCA sought to prevent documents or communications from being fully and fairly reviewed by the Court of Appeals," (iv) "each instance in which Relators allege that MPCA failed to act with truthfulness, accuracy, disclosure, or candor in connection with the NPDES Permit," (v) "each instance in which Relators allege that MPCA improperly destroyed, discarded, or failed to retain written records of communication with EPA regarding the NPDES Permit," (vi) "how relators allege that they were prejudiced by the alleged Procedural Irregularities associated with the NPDES Permit," and (vii) "for each document [alleged to have been improperly excluded] why Relators allege the document should be included in the administrative record." These are straightforward questions for which a response should have been provided.

MPCA acknowledges that a response concerning "the basis for Relators' allegation that MPCA's issuance of the NPDES Permit was based on communications or documents that are not reflected in the administrative record" may be answered with the list of all communications that Relators allege were not improperly excluded from the administrative record. And, of course, we expect that Relators have provided all of the documents they claim to have been omitted improperly from the administrative record. We acknowledge that this is the sort of question Judge Guthmann expected to have been answered with a list of documents.

In short, Relators' position provides no meaningful opportunity for MPCA to discern the answers to any of its interrogatories. The response simply does not comply with the Court's instructions. Unless Relators' agree to correct this, MPCA will be forced to file a motion to compel.

We look forward to hearing from you and trust that you will correct these deficiencies so that the parties can avoid the necessity of raising these issues before the District Court. Thank you for your consideration.



Sincerely,

/s/ John C. Martin

John C. Martin
Holland & Hart LLP

/s/ Richard E. Schwartz

Richard E. Schwartz
Crowell & Moring LLP

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Friday, November 1, 2019 at 10:16:21 AM Central Daylight Time

Subject: RE: Relators' Discovery Responses in 62-CV-19-4626
Date: Wednesday, October 30, 2019 at 3:19:48 PM Central Daylight Time
From: Matthew L. Murdock
To: John C. Martin, Evan Nelson, Schwartz, Rich
CC: Margo Brownell, elarson@mncenter.org, kreuther@mncenter.org, pmaccabee@justchangelaw.com, Vanessa Ray. Hodge, dporetti@nilanjohnson.com, mmurphy@nilanjohnson.com, Susan M. Mathiascheck, 'Tester, Peter (MPCA', 'Neblett, Adonis (MPCA', 'Monte A. Mills', Floyd, Kathryn K., 'Jay C. Johnson (jcjohnson@Venable.com)', 'Sean Copeland'
Attachments: image001.png, image002.png, image003.png

John, Rich,

We are in fact surprised that MPCA is pursuing these issues, given that your positions have no merit and contradict the Court's rulings.

As to the timing of our response, Relators were only provided with your letter regarding discovery Monday night with the expectation that a response be provided in less than 48 hours. First, we do not believe the letter, by itself, satisfies MPCA's meet and confer obligation. Second, even assuming it does, Relators were not provided sufficient time to respond, or for there to be any serious discussion regarding these issues.

Relators consist of separate and distinct entities. We are sure you understand that we cannot respond on WaterLegacy's behalf. As we explained, Ms. Maccabee is not available to review these matters, and we thus cannot respond within the deadline you seek to impose. As stated, Realtors will respond no later than close-of-business on Tuesday, November 5, 2019. If the parties cannot resolve this dispute at that time, then MPCA can move forward with its motion, and have it heard, within the timeline provided by the local rules. Thanks.

-Matt

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From: John C. Martin <JCMartin@hollandhart.com>
Sent: Tuesday, October 29, 2019 6:12 PM
To: Evan Nelson <Evan.Nelson@maslon.com>; Schwartz, Rich <RSchwartz@crowell.com>
Cc: Margo Brownell <Margo.Brownell@maslon.com>; elarson@mncenter.org; kreuther@mncenter.org; pmaccabee@justchangelaw.com; Vanessa Ray. Hodge <vrayhodge@abqsonosky.com>; Matthew L. Murdock <MMURDOCK@SONOSKY.COM>; dporetti@nilanjohnson.com; mmurphy@nilanjohnson.com; Susan M. Mathiascheck <SMMathiascheck@hollandhart.com>; 'Tester, Peter (MPCA)' <Peter.Tester@state.mn.us>; 'Neblett, Adonis (MPCA)' <adonis.neblett@state.mn.us>; 'Monte A. Mills' <MMills@greeneespel.com>; Floyd, Kathryn K. <KKFloyd@Venable.com>; 'Jay C. Johnson (jcjohnson@Venable.com)' <jcjohnson@Venable.com>
Subject: RE: Relators' Discovery Responses in 62-CV-19-4626

Thanks for your response Evan. As I'm sure you appreciate, our timeline is truncated and we wanted to review documents before we responded. I should mention that our letter is, in fact, a component of the meet and confer requirement. Finally, I don't expect that you're at all surprised that we're pursuing these issues. We're fortunate to have experienced counsel in this case and, in all likelihood, Relators' counsel anticipated these objections to the privilege log. Also, given the back-and-forth during Mr. Knopf's deposition, the objections to Relators' deposition question responses should come as no surprise. If, however, you'd like to have a further conversation, we're amenable to discussing the issues. Unfortunately, neither the Court's schedule nor the local rules permit us to wait for your November 5th response. Best, John

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From: Evan Nelson <Evan.Nelson@maslon.com>
Sent: Tuesday, October 29, 2019 3:30 PM
To: John C. Martin <JCMartin@hollandhart.com>; Schwartz, Rich <RSchwartz@crowell.com>
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Subject: RE: Relators' Discovery Responses in 62-CV-19-4626

External Email

Counsel:

We are in receipt of your letter dated October 28, 2019 regarding Relators' Discovery Responses. We are surprised you did not attempt to resolve these issues through a meet and confer or other informal process prior to sending a formal letter with a short timeline. Nonetheless, we are unable to respond in the timeline set forth in your letter. Paula Maccabee, counsel for WaterLegacy, is on a planned vacation this week and, as no available counsel represents WaterLegacy, we cannot respond without her input. Based on this schedule, Relators will respond to your letter as soon as possible but no later than close-of-business Tuesday, November 5, 2019 when Ms. Maccabee returns from her vacation.

Best,

Evan Nelson

EVAN A. NELSON | ATTORNEY

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MASLON LLP

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From: Trisa J. DiPaola <TJDiPaola@hollandhart.com>
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To: Bill Pentelovitch <Bill.Pentelovitch@maslon.com>; Margo Brownell <Margo.Brownell@maslon.com>; Evan Nelson <Evan.Nelson@maslon.com>; elaron@mncenter.org; kreuther@mncenter.org; pmaccabee@justchangelaw.com; vrayhodge@abqsonosky.com; mmurdock@sonosky.com; dporetti@nilanjohnson.com; mmurphy@nilanjohnson.com
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Subject: Relators' Discovery Responses in 62-CV-19-4626

All,

Attached please find a letter to Relators in the above-referenced matter.

Best regards,

Trisa J. DiPaola

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Subject: NOTIFICATION OF ESERVICE SUBMISSION FOR Case 62-CV-19-4626, Center for Biological Diversity, Friends of the Boundary Waters Wilderness, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, WaterLegacy, Fond Du Lac Band of Lake Superior vs MINNESOTA POLLUTION CONTROL AGENCY, PolyMet Mining, Inc.

Date: Wednesday, October 30, 2019 at 6:31:12 PM Central Daylight Time

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To: pmaccabee@justchangelaw.com



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You are the recipient of eServed documents in case 62-CV-19-4626, Center for Biological Diversity, Friends of the Boundary Waters Wilderness, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, WaterLegacy, Fond Du Lac Band of Lake Superior vs MINNESOTA POLLUTION CONTROL AGENCY, PolyMet Mining, Inc..

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Submitted by: Trisa DiPaola
Filing Attorney: Sarah Koniewicz
Filed Document Information: Motion
Filing Description: Notice of Motion and Motion to Compel

Date Submitted: 10/30/2019 6:29 PM CST

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Subject: REJECTED EFILING Case 62-CV-19-4626, Center for Biological Diversity, Friends of the Boundary Waters Wilderness, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, WaterLegacy, Fond Du Lac Band of Lake Superior vs MINNESOTA POLLUTION CONTROL AGENCY, PolyMet Mining, Inc.

Date: Thursday, October 31, 2019 at 10:34:17 AM Central Daylight Time

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Your submission in case 62-CV-19-4626, Center for Biological Diversity, Friends of the Boundary Waters Wilderness, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, WaterLegacy, Fond Du Lac Band of Lake Superior vs MINNESOTA POLLUTION CONTROL AGENCY, PolyMet Mining, Inc. has been rejected.

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Envelope Number: 13008041

Filing Code : Motion

Filing Description: Notice of Motion and Motion to Compel

Date Submitted: 10/30/2019 6:29 PM CST

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Submitted by: Trisa DiPaola
Filing Attorney: Sarah Koniewicz
Filed Document Information: Motion
Filing Description: Notice of Motion and Motion to Compel

Date Submitted: 10/31/2019 10:48 AM CST

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