

The logo for Maslon Law Firm, featuring the word "MASLON" in a serif font with a horizontal line underneath.

**Evan A. Nelson**  
Direct Dial: 612.672.8396  
Direct Fax: 612.642.8396  
evan.nelson@maslon.com

September 12, 2019

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

Re: *In the Matter of ... Issuance of NPDES/SDS Permit (PolyMet NorthMet Project)*  
Ramsey County Court File No. 62-CV-19-4626

Dear Judge Guthmann:

Despite the parties' diligent efforts, several remaining disputes require the Court's attention.<sup>1</sup> For the Court's convenience, we have attached as Exhibits A-I the discovery objections exchanged by the parties, as well as documents referenced in this letter.

### **I. Relators' Discovery Requests to Respondents MPCA and PolyMet**

MPCA has confirmed that full responses will be provided to written deposition questions ("Questions" or "Qs") to individual deponents, except for Qs 8(a), 8(b) and 13 to Jeff Udd and Q 6(a) to Richard Clark.<sup>2</sup> However, MPCA and PolyMet have objected to nearly all Requests for Production ("RFPs") and Questions addressed to a Rule 30.02(f) designee. Relators request that this Court resolve the remaining disputes as follows.<sup>3</sup>

A) The scope of discovery relates to the alleged procedural irregularities.

Relators are entitled to discovery of all non-privileged matters within the scope of alleged procedural irregularities raised in the transfer proceedings before the Court of Appeals. (Order, Sept. 9, 2019 ("Order") ¶ 8; Rule 16 Conference, Aug. 7, 2019 Hearing Tr. ("Tr.") 96:10-15). As required by the Court, Relators presented their List of Alleged Procedural Irregularities ("APIs") on August 14, 2019. Each API cites where the allegation was raised in the Court of Appeals

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<sup>1</sup> By submitting this letter, Relators do not waive, and explicitly reserve, each and all of their rights to request permission to file a motion for reconsideration or to request additional discovery, including but not limited to discovery based on information revealed after transfer motion papers were filed, pursuant to Minn. Stat. § 14.68, the Court of Appeals' Order of June 25, 2019, the Minnesota Rules of Civil Procedure and in the interests of justice.

<sup>2</sup> These depositions will proceed under the process outlined by Minnesota Rule of Civil Procedure 31. The Court referenced written deposition questions and expressly forbade interrogatories. (Tr. 99:1-2.) MPCA has agreed to produce its deponents for such depositions. PolyMet has not.

<sup>3</sup> The parties have no remaining disputes on RFPs to MPCA 1, 19-21; RFP to PolyMet 1; Q to MPCA 14; and Q to PolyMet 2(a).

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record. The APIs date from U.S. Environmental Protection Agency (“EPA”) comments in PolyMet environmental review on February 18, 2010, and beyond the date of permit issuance, due to failures to produce documents and to include documents in the administrative record, and continuing lack of candor. The Court further stated that the APIs should be read broadly and that evidence would include “any document or meeting or activity” relevant to the “fact-finding mission” regarding APIs. (Tr. 105:15-106:9). However, both MPCA and PolyMet objected to discovery within the scope of Relators’ APIs and improperly seek to limit discovery by subject and temporally.

This Court should reaffirm its ruling on the scope of discovery, and end Respondents’ obstructionism. This would address Respondents’ objections to RFPs to MPCA 2-18, 22-25; Qs to MPCA 1(a), 3(a), 4-9, 11-13; RFPs to PolyMet’s 3-13; and Qs to PolyMet 1, 2(c), 3, 5-10.

- 1) Discovery includes evidence of customary procedures and MPCA’s motives.

Relators are entitled to discovery of evidence related to customary procedures and conduct pertinent to MPCA motives and defenses to APIs. MPCA’s declarations to the Court of Appeals and public statements and WaterLegacy’s transfer motion put proper procedures and motives at issue. The Court recognized that evidence of proper procedures was within the broad fact-finding mission of discovery. (Tr. 96:1-7, 105:15-106:9). This Court should reaffirm its ruling that such evidence is within the scope of Relators’ discovery, which would address Respondents’ objections to RFPs to MPCA 9-13, 15-18; Qs to MPCA 4-7, 9-11, 13; RFPs to PolyMet 3-8, 12-13; and Q to PolyMet 4.

- 2) Discovery includes evidence that EPA’s permit concerns were not resolved.

Relators are entitled to discovery of evidence pertaining to the MPCA’s failure to address EPA’s concerns regarding the NPDES permit both because this claim was alleged by WaterLegacy in the Court of Appeals (API 6, 7, 9) and because the “resolution” of EPA’s claims was raised as a defense in MPCA declarations to the Court of Appeals. (*E.g.*, May 28, 2019 Clark Decl. ¶¶ 18-22). Clearly, such evidence is within the scope of Relators’ discovery, and the Court should so rule. This would address Respondents’ objections to RFPs to MPCA 7, 25; Q to MPCA 12; RFP to PolyMet 10; and Qs to PolyMet 3, 5-6.

- 3) Discovery includes evidence pertaining to the MOA between EPA and MPCA.

Relators are entitled to discovery of evidence pertaining to the Memorandum of Agreement (“MOA”) between EPA and MPCA, because such evidence is pertinent both to alleged procedural irregularities (API 6) and to MPCA’s defenses. (*E.g.*, May 28, 2019 Udd Decl. ¶¶ 9-11). This Court’s prior, clear direction on this issue should stand, and Respondents’ objections should be overruled. This would address Respondents’ objections to RFP to MPCA No. 9 and Q to MPCA 3(b).

- 4) Discovery includes information from PolyMet that relates to the APIs.

Relators are entitled to discovery of evidence of PolyMet’s communications with MPCA and EPA related to Relators alleged procedural irregularities. (API 1, 3, 6, 7, 10, 19). The Court held that Relators’ requests for production may include any documents that MPCA may have had in its possession or control or may have had but discarded at the time of MPCA’s permitting decision. (Order ¶ 5; Tr. 77:8-17, 80:17-82:24). Relators’ discovery may also include evidence when PolyMet was a party to conversations between EPA and MPCA. (Tr. 84:2-4). The Court stated that Relators were entitled to discover “information PolyMet may have that’s specifically

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relevant to the alleged conduct of the PCA so that the parties to the hearing are satisfied that the information that is the subject of the hearing has been fairly disclosed.” (Tr. 101:5-9).<sup>4</sup> This Court should clarify that such evidence is within the scope of Relators’ discovery, which would address Respondents’ objections to RFPs to MPCA Nos. 4, 6; Qs to MPCA 12; Qs to Udd 8(a), 8(b); RFPs to PolyMet 3-13; and Qs to PolyMet 1, 2(c), 3, 5-10.

Except as otherwise stated, Relators stand by their RFPs and Questions, and reserve the right to respond to any position taken by Respondents during the September 16 discovery teleconference.

## B) Inappropriate Objections

MPCA inappropriately objected to i) discovery of information available from its own computers and declarants to the Court of Appeals - Qs to MPCA 1(b), 1(c), 2(b), Q to Udd 13; ii) the lack of foundation for questions where documents were provided - Qs to MPCA 3(a)-3(b); and iii) providing hearsay evidence – Q to Clark 6(a). MPCA’s conduct is at issue, including its duty of candor, and these objections attempt to hide what transpired during the permitting process. PolyMet objected to describing any documents responsive to Qs 2, 4-9. The Court should overrule these objections and require MPCA to respond to Relators’ requests.

## II. Relators’ Objections to Respondents’ Discovery

Relators agreed to produce documents in their possession they intend to use at the hearing as evidence of procedural irregularities to the extent known to Relators, which is exactly the scope this Court directed. (Tr. 112:7-12, 114:1-6). Relators agreed to supplement production and proposed that all parties submit an exhibit list and witness list prior to the hearing. Relators refer the Court to their objections articulated in Relators’ August 28, 2019 letters to respondents, which are attached here. Further, Relators state as follows:

- Relators’ conduct is not at issue and is not within the scope of discovery. The Court clearly stated that discovery from Relators is “not a question of conduct. It’s a question of possession, of evidence that might be used at the hearing.” (Tr. 112:18-20). Relators’ confidential sources and how Relators obtained information are not discoverable. (Tr. 114:19-21, 115:7-8).
- Relators’ work product and mental impressions are not discoverable. Relators were not parties to the permitting procedure, or communications and meetings between MPCA, EPA, and PolyMet. Relators have no pertinent information other than what has been divulged from confidential sources, released or made public by MPCA, EPA, or PolyMet.
- Counsel for PolyMet did not request discovery, and the Court did not provide any discovery to PolyMet. Instead, the Court authorized a single set of discovery to Relators *from MPCA*. (Order ¶ 6; Tr. 115:13-21; *see also* Order ¶ 1 (“all requests for discovery not expressly permitted in this Order are denied”). Even if PolyMet’s requests were allowed, they are either duplicative of MPCA’s or explicitly request information outside the scope of discovery as identified above. Relators will produce copies of non-privileged, responsive documents to both MPCA and PolyMet, but Relators are under no obligation to answer PolyMet’s separate discovery requests.

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<sup>4</sup> Relators agree that PolyMet’s thought processes or wholly internal documents are outside the scope of discovery (Tr. 79:24-25) and withdraw RFP to PolyMet 2 on that basis.

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Respectfully submitted,

**MASLON LLP**

/s/ Evan A. Nelson  
WILLIAM Z. PENTELOVITCH (#0085078)  
MARGARET S. BROWNELL (#0307324)  
EVAN A. NELSON (#0398639)  
90 South Seventh Street  
3300 Wells Fargo Center  
Minneapolis, MN 55402-4140  
Phone: (612) 672-8200  
Email: bill.pentelovitch@maslon.com  
margo.brownell@maslon.com  
evan.nelson@maslon.com

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY**

/s/ Elise L. Larson  
ELISE L. LARSON (#0393069)  
KEVIN REUTHER (#0266255)  
1919 University Avenue West  
Saint Paul, MN 55105  
Phone: (651) 223-5969  
Email: elarson@mncenter.org  
kreuther@mncenter.org

**NILAN JOHNSON LEWIS PA**

/s/ Daniel Q. Poretti  
DANIEL Q. PORETTI (#185152)  
MATTHEW C. MURPHY (#0391948)  
120 South Sixth Street, Suite 400  
Minneapolis, MN 55402-4501  
Phone: (612) 305-7500

*Attorneys for Relators Center for Biological  
Diversity, Friends of the Boundary Waters  
Wilderness, and Minnesota Center for  
Environmental Advocacy*

**JUST CHANGE LAW OFFICES**

/s/ Paula Maccabee  
PAULA G. MACCABEE (#0129550)  
1961 Selby Avenue  
Saint Paul, MN 55104  
Phone: (651) 646-8890  
Email: pmaccabee@justchangelaw.com

*Attorneys for Relator WaterLegacy*

**FOND DU LAC BAND OF LAKE  
SUPERIOR CHIPPEWA**

/s/ Vanessa L. Ray-Hodge  
VANESSA A. RAY-HODGE (*pro hac vice*)  
MATTHEW L. MURDOCK (*pro hac vice*)  
500 Marquette Avenue, NW., Suite 600  
Albuquerque, NM 897102  
Phone: (505) 247-0147  
Email: vrayhodge@abqsonosky.com  
mmurdock@sonosky.com

SEAN W. COPELAND (#0387142)  
1720 Big Lake Road  
Cloquet, MN 55720  
Phone: (218) 878-2607  
Email: seancopeland@fdlrez.com

*Attorneys for Relators Fond du Lac Band of  
Lake Superior Chippewa*

cc (via Odyssey): Counsel for PolyMet, Counsel for MPCA

State of Minnesota  
Ramsey County

District Court  
Second Judicial District

Court File Number: 62-CV-19-4626

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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

**RESPONDENT MINNESOTA  
POLLUTION CONTROL AGENCY'S  
OBJECTIONS TO RELATORS'  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS AND WRITTEN  
DEPOSITION QUESTIONS**

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In its August 7, 2019 Order, the Court stated: "Respondents will have one week to object to [Relators' discovery] questions as beyond the scope of what I've permitted. The scope of what I'm permitting is limited solely to the alleged procedural irregularities. So if the questions don't relate to the discovery of alleged procedural irregularities, then there's a basis to object." Hr'g Tr. at 99:14-19. Moreover, the alleged procedural irregularities for which Relators may seek discovery are limited to those alleged before the Court of Appeals. *Id.* at 103:20-23. Pursuant to this Order, Respondent Minnesota Pollution Control Agency ("MPCA") hereby notifies Relators of its objections to Relators' requests for production and written deposition questions.<sup>1</sup>

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<sup>1</sup> MPCA fully preserves its rights to object to the scope of Relators' List of Procedural Irregularities filed on August 14, 2019.

**MPCA's Objections to Relators' Requests for Production of Documents to MPCA**

**General Objections:** MPCA objects to each of Relators' requests for production to the extent such requests seek privileged documents or documents that are not within MPCA's possession, custody, or control. Where MPCA does not list specific objections to a particular request, MPCA will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**Request No. 2:** All documents regarding any document retention or destruction policy, guidelines, custom, or practice which you had in place at any time from 2015 to the present.

**Objection:** MPCA objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued). Subject to and without waiving its objections, MPCA will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**Request No. 3:** All documents setting forth the procedures to be followed by you in the receipt, review, analysis, denial, or issuance of an NPDES permit, including documents related to the creation of the public record.

**Objection:** MPCA objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly

before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued). Subject to and without waiving its objections, MPCA will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**Request No. 4:** All documents regarding any communications between you and the EPA, including those involving third parties, during environmental review and PolyMet permitting.

**Objection:** MPCA objects to this request to the extent it seeks documents regarding communications during the environmental review of any project other than the PolyMet Project. MPCA further objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued). Subject to and without waiving its objections, MPCA will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**Request No. 5:** All documents regarding your evaluation of, or response to, comments made by the EPA regarding the PolyMet NPDES Permit and application from environmental review through PolyMet permitting.

**Objection:** MPCA objects to this request to the extent it seeks documents regarding communications during the environmental review of any project other than the PolyMet Project. MPCA further objects to this request as overly broad and unduly burdensome in temporal scope.

Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued). Subject to and without waiving its objections, MPCA will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**Request No. 6:** All documents regarding any communications between you and PolyMet, including but not limited to those involving other parties, regarding comments made by the EPA regarding the PolyMet NPDES Permit and application from environmental review through PolyMet permitting, including but not limited to whether the PolyMet NPDES Permit required WQBELs and how the reasonable potential analysis for WQBELs should be performed.

**Objection:** MPCA objects to this request as beyond the scope of alleged procedural irregularities, as Relators did not cite communications between MPCA and PolyMet as the basis of procedural irregularities in the briefing before the Court of Appeals. Furthermore, communications between MPCA and PolyMet have no relevance to whether MPCA violated any statute or regulation regarding permitting procedures for the PolyMet NPDES Permit. MPCA also objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued).

**Request No. 7:** All documents subsequent to November 3, 2016 indicating that the deficiencies in the PolyMet NPDES Permit application for the PolyMet Project identified by the EPA were corrected or that the EPA concurred that the PolyMet NPDES Permit application was complete. MPCA also objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued).

**Objection:** MPCA objects to this request because it seeks irrelevant documents that go beyond the scope of alleged procedural irregularities and instead implicates the PolyMet NPDES Permit's substantive compliance with the Clean Water Act and EPA regulations.

**Request No. 8:** All documents regarding any communications by or between John Linc Stine, Rebecca Flood, Shannon Lotthammer, Ann Foss, Jeff Udd, or the EPA regarding any aspect of the PolyMet Project.

**Objection:** MPCA objects to this request as vague, overly broad and unduly burdensome in that it is not limited to alleged procedural irregularities but rather extends to communications “regarding any aspect of the PolyMet Project.” MPCA also objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and

start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued).

**Request No. 9:** All documents regarding any communications by or between John Linc Stine, Rebecca Flood, Shannon Lotthammer, Ann Foss, Jeff Udd, or the EPA regarding potential amendments, changes or revisions of the Memorandum of Agreement between you and the EPA delegating Clean Water Act oversight to you.

**Objection:** MPCA objects to this request as overly broad and unduly burdensome in that it is not limited to alleged procedural irregularities regarding the PolyMet NPDES Permit. Any discussions regarding potential amendments to the MOA are irrelevant to whether MPCA engaged in procedural irregularities regarding the PolyMet NPDES Permit. MPCA further objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued).

**Request No. 10:** All documents regarding any communications by or between John Linc Stine, Rebecca Flood, Shannon Lotthammer, Ann Foss, Jeff Udd, or the EPA from January 1, 2015 to present regarding EPA oversight, including but not limited to whether communications on NPDES permit matters should or should not be in writing.

**Objection:** MPCA objects to this request as vague, overly broad and unduly burdensome in that it covers any communications “regarding EPA oversight,” which appears to extend well beyond alleged procedural irregularities. This request is properly limited to communications about

whether communications on NPDES permit matters should or should not be in writing. MPCA also objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued). Subject to and without waiving its objections, MPCA will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**Request No. 11:** All documents regarding any communications by or between you and the EPA from January 1, 2018 to present expressing any concerns of any nature regarding the EPA's NPDES program or its staff or counsel.

**Objection:** MPCA objects to this request as beyond the scope of the alleged procedural irregularities before the district court. The issue of MPCA's communications regarding concerns over EPA's NPDES program, staff, or counsel was not addressed before the Court of Appeals and therefore is not before the district court. Moreover, such communications are irrelevant to whether the permitting process for the PolyMet NPDES Permit involved procedural irregularities.

**Request No. 12:** All documents provided to Craig McDonnell at any time regarding or alleging practices or actions by you or by particular MPCA staff or managers to avoid creating a written or electronic record of concerns or issues regarding NPDES mining permits and the PolyMet NPDES Permit.

**Objection:** MPCA objects to this request as overly broad and unduly burdensome to the extent it seeks documents regarding NPDES mining permits other than the PolyMet NPDES Permit.

The only alleged procedural irregularities at issue are those regarding the PolyMet NPDES Permit. MPCA also objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued). Subject to and without waiving its objections, MPCA will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**Request No. 13:** All documents regarding any effort, plan, or actions, proposed or undertaken, to prevent, defer, or minimize written questions, concerns, suggestions or criticisms by the EPA of NPDES mining permits including but not limited to the PolyMet NPDES Permit.

**Objection:** MPCA objects to this request as overly broad and unduly burdensome to the extent it seeks documents regarding NPDES mining permits other than the PolyMet NPDES Permit.

The only alleged procedural irregularities at issue are those regarding the PolyMet NPDES Permit. MPCA also objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued). Subject to and without waiving its objections, MPCA will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**Request No. 14:** All documents from January 1, 2015 to the present regarding compliance with Minnesota Data Practices Act requests.

**Objection:** MPCA objects to this request as vague, overly broad, and unduly burdensome in that it is not limited to the MPCA, the subject matter of MDPA requests is unlimited in scope, and compliance with MDPA requests is not relevant to the alleged procedural irregularities regarding MPCA's decision to issue the PolyMet NPDES Permit. MPCA also objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued).

**Request No. 15:** All documents regarding any policy, guidelines, custom, or practice applicable at any time from January 1, 2015 to the present which you contend provides evidence that it was the usual or customary practice for you to request that EPA communications on permitting matters not be made in written form or that comments prepared in writing by EPA would be verbally conveyed to you (by telephone or otherwise) instead of being sent to you in written form.

**Objection:** MPCA objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018

(when the final NPDES Permit was issued). Subject to and without waiving its objections, MPCA will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**Request No. 16:** All documents from 1974 to the present regarding an example, procedure, or practice other than that for the PolyMet NPDES Permit where EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read EPA's comments aloud to MPCA.

**Objection:** MPCA objects to this request as overly broad and unduly burdensome in that it seeks documents spanning a temporal period of 45 years. MPCA further objects to this request as irrelevant in that it seeks documents regarding NPDES mining permits other than the PolyMet NPDES Permit. The only alleged procedural irregularities at issue are those regarding the PolyMet NPDES Permit. MPCA also objects to the extent that this request seeks documents that, by its own terms, would not have been provided to MPCA.

**Request No. 17:** All documents from 2000 to the present regarding the submission of EPA written comments on a draft NPDES permit proposed by you during the public comment period for that permit.

**Objection:** MPCA objects to this request as overly broad and unduly burdensome in that it seeks documents spanning a temporal period of 19 years. MPCA further objects to this request as irrelevant to the extent that it seeks documents regarding NPDES mining permits other than the PolyMet NPDES Permit. The only alleged procedural irregularities at issue are those regarding the PolyMet NPDES Permit.

**Request No. 18:** All documents from 2000 to the present regarding EPA's written comments upon a proposed final NPDES permit proposed by you.

**Objection:** MPCA objects to this request as overly broad and unduly burdensome in that it seeks documents spanning a temporal period of 19 years. MPCA further objects to this request as irrelevant to the extent that it seeks documents regarding NPDES mining permits other than the PolyMet NPDES Permit. The only alleged procedural irregularities at issue are those regarding the PolyMet NPDES Permit.

**Request No. 22:** All documents regarding any request made to you by PolyMet that EPA's comments and issues for the (pre-public notice, draft or final) PolyMet NPDES Permit not be reflected, recorded, or sent in written form.

**Objection:** MPCA objects to this request as going beyond the scope of alleged irregularities in that PolyMet's requests are irrelevant to the issue of whether MPCA engaged in procedural irregularities regarding the PolyMet NPDES Permit.

**Request No. 24:** All documents from January 1, 2017 to the present regarding communications between MPCA and any Minnesota elected official or any staff person of a Minnesota elected official regarding EPA comments, issues, or concerns regarding the PolyMet NPDES Permit.

**Objection:** MPCA objects to this request as going beyond the scope of alleged procedural irregularities. MPCA further objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018.

Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued).

**Request No. 25:** All documents received from EPA that confirm that EPA's comments and issues with the PolyMet NPDES Permit were resolved prior to MPCA's issuance of the PolyMet NPDES Permit.

**Objection:** MPCA objects to this request in that it goes beyond the scope of the alleged procedural irregularities and instead implicates the PolyMet NPDES Permit's substantive compliance with the Clean Water Act. In addition, MPCA objects given that resolution of EPA's comments is irrelevant to whether MPCA engaged in procedural irregularities regarding the PolyMet NPDES Permit.

**MPCA's Objections to Relators' Written Deposition Questions to MPCA**

**General Objections:** MPCA objects to each of Relators' written deposition questions to MPCA to the extent the question seeks testimony regarding privileged information or information that is not within MPCA's possession, custody, or control. Moreover, MPCA objects to all questions in which Relators request that MPCA "identify" documents. Having a deponent orally identify documents during a deposition is unduly burdensome and of no value. Subject to its objections and without waiving them, MPCA will produce "identified" documents and is willing to stipulate to their authenticity.

**General Objection to Question Nos. 1a-1c:** MPCA objects to these questions as vague and lacking in foundation in that the prefatory paragraph cites MPCA Exhibit 1, which purportedly contains a March 13, 2018 email from Shannon Lotthammer to Kurt Thiede. However, no exhibits are attached to Relators' list of questions.

**Question No. 1a:** Please explain why Ms. Lotthammer's March 13, 2018 email was not produced in response to WaterLegacy's five Data Practices Act requests beginning on March 26,

2018 or Minnesota Center for Environmental Advocacy's June 19, 2019 Data Practices Act request.

**Objection:** MPCA objects to this question as going beyond the scope of the alleged procedural irregularities. The only alleged procedural irregularities at issue are those regarding the permitting process for the PolyMet NPDES Permit. MPCA requests, and MPCA's responses thereto, are independent of and not relevant to the PolyMet NPDES permitting decision. MPCA also objects to this request as overly broad and unduly burdensome in temporal scope to the extent it extends beyond December 20, 2018 (when the final NPDES Permit was issued).

**Question No. 1b:** If MPCA claims that Ms. Lotthammer's March 13, 2018 email has been discarded, state from which paper files and computers it was discarded, by whom and on what date.

**Objection:** MPCA objects to this question because it lacks foundation and calls for speculation. Ms. Lotthammer is no longer employed by MPCA.

**Question 1c:** Explain why Ms. Lotthammer's March 13, 2018 email is entitled "FW: Minnesota Speaker's Office."

**Objection:** MPCA objects to this question because it lacks foundation and calls for speculation. Ms. Lotthammer is no longer employed by MPCA.

**Question 2b:** If MPCA claims that Mr. Schmidt's typed document regarding the substance of the April 5, 2018 call has been discarded, state from which paper files and computers it was discarded, by whom and on what date.

**Objection:** MPCA objects to this question because it lacks foundation and calls for speculation. Mr. Schmidt is no longer employed by MPCA.

**General Objection to Question Nos. 3a-3b:** MPCA objects to these questions as vague and lacking in foundation in that the prefatory paragraph cites MPCA Exhibit 2, which purportedly contains a Memorandum of Agreement between MPCA and EPA. However, no exhibits are attached to Relators' list of questions.

**Question No. 3a:** Given MOA provisions pertaining to Section 124.22, including paragraph (8) on page 4, after MPCA received EPA's November 3, 2016 letter stating deficiencies in PolyMet's NPDES Permit application, on what basis did MPCA conclude it was entitled to proceed with the PolyMet NPDES Permit?

**Objection:** MPCA objects to this question as going beyond the scope of the alleged procedural irregularities. MPCA's conclusion that it was entitled to proceed with the PolyMet NPDES Permit pertains to substantive compliance as opposed to procedural irregularities. MPCA also objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018—well after November 3, 2016.

**Question No. 3b:** Describe MPCA's discussions with EPA in 2018 regarding potential amendment of the MOA to reflect a procedure specific to the PolyMet NPDES Permit, including for what purpose such discussions and how they were resolved.

**Objection:** MPCA objects to this question as going beyond the scope of the alleged procedural irregularities. The issue of potential amendments to the MOA was not addressed before the Court of Appeals and therefore is not within the scope of matters before the district court.

**Question No. 4:** Since the 1974 MOA, identify every NPDES permit other than the PolyMet NPDES Permit for which EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read the comments aloud to MPCA.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that it seeks documents spanning a period of 45 years. MPCA further objects to this question as irrelevant in that it seeks documents regarding NPDES mining permits other than the PolyMet NPDES Permit. The only alleged procedural irregularities at issue are those regarding the PolyMet NPDES Permit. In addition, MPCA objects to this question as lacking in foundation and calling for speculation to the extent it seeks testimony regarding EPA's preparation of written comments.

**Question No. 5:** Since the 1974 MOA, identify every NPDES permit where EPA commented upon or objected to MPCA's proposed final NPDES permit.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that it seeks documents spanning a period of 45 years. MPCA further objects to this question as irrelevant in that it seeks documents regarding NPDES mining permits other than the PolyMet NPDES Permit. The only alleged procedural irregularities at issue are those regarding the PolyMet NPDES Permit.

**Question No. 6:** Since January 1, 2000, identify every NPDES permit proposed by MPCA for which EPA sent written comments on the draft NPDES permit during the public comment period.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that it seeks documents spanning a period of 19 years. MPCA further objects to this question as irrelevant in that it seeks documents regarding NPDES mining permits other than the PolyMet NPDES Permit. The only alleged procedural irregularities at issue are those regarding the PolyMet NPDES Permit.

**Question No. 7:** Since what date has the MPCA anticipated the potential for litigation of the PolyMet NPDES Permit?

**Objection:** MPCA objects to this question as going beyond the scope of the alleged procedural irregularities. The issue of MPCA's anticipation of potential litigation of the PolyMet NPDES Permit was not addressed before the Court of Appeals and therefore is not before the district court. Furthermore, this question is irrelevant to the issue of whether MPCA engaged in any procedural irregularities in regard to the PolyMet NPDES Permit.

**Question No. 8:** Since January 1, 2010, state the date of every meeting MPCA had with EPA or with PolyMet related to the PolyMet NPDES Permit whether held in person or electronically.

**Objection:** MPCA objects to this question as beyond the scope of the alleged procedural irregularities before the district court. The issue of MPCA's meetings with PolyMet, including whether such meetings were irregular, was not addressed before the Court of Appeals and therefore is not before the district court. MPCA also objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, the scope of this request should be limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (when the final NPDES Permit was issued).

**Question No. 9:** Identify all meetings that MPCA has participated in since January 1, 2010 in which an applicant for an NPDES permit met with you and the EPA at the same time.

**Objection:** MPCA objects to this question as beyond the scope of the alleged procedural irregularities before the district court. The issue of MPCA's meetings with NPDES permit applicants, including whether such meetings were irregular, was not addressed before the Court

of Appeals and therefore is not before the district court. MPCA further objects to this question as irrelevant in that it seeks documents regarding NPDES mining permits other than the PolyMet NPDES Permit. The only alleged procedural irregularities at issue are those regarding the PolyMet NPDES Permit.

**Question No. 10:** In connection with MPCA's responses to public comments on the draft PolyMet NPDES Permit,

- (a) Identify every person responsible for the tasks involved in preparing responses to these public comments;
- (b) State for each person responsible for preparing responses to public comments with what specific tasks that person was involved;
- (c) Identify the dates on which each person responsible for preparing responses to public comments began and completed each of their tasks identified in paragraph (b).

**Objection:** MPCA objects to these questions as overly broad and unduly burdensome in that they seek a wide range of information regarding numerous current and former MPCA employees. MPCA further objects to these questions as going beyond the scope of alleged procedural irregularities. MPCA staff are always involved in the preparation of responses to public comments regarding MPCA permits, so these questions do not seek information tied to procedural irregularities in the PolyMet NPDES Permit. MPCA further objects to this question as lacking in foundation and calling for speculation to the extent it seeks personal knowledge of individuals who are no longer employed by MPCA.

**Question No. 11:** Identify all documents, including journals or notebooks, under MPCA's possession or control regarding MPCA mining permits prepared or kept by former Mining Sector Director Ann Foss.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome to the extent it seeks documents regarding MPCA mining permits other than the PolyMet NPDES Permit.

Only the alleged procedural irregularities regarding the PolyMet NPDES Permit are at issue here.

**Question No. 12:** State whether MPCA's decision with respect to the PolyMet NPDES Permit that operating limits, rather than WQBELs would be sufficient to protect water quality was influenced by your perceptions of the character or experience of PolyMet's Executive Vice President for Environmental and Governmental Affairs, Brad Moore.

**Objection:** MPCA objects to this question as beyond the scope of the alleged procedural irregularities. The issue of MPCA's perceptions of PolyMet executives was not addressed before the Court of Appeals and is therefore not before the district court. This issue is also irrelevant to whether MPCA engaged in procedural irregularities. MPCA further objects to this question to the extent that it implicates questions of substantive compliance with the Clean Water Act and EPA regulations, as such issues are beyond the scope of the matter before the district court.

**Question No. 13:** State MPCA's understanding, as of December 20, 2018, the date when the PolyMet NPDES Permit was issued, whether the following documents would be part of the administrative record provided to the Court of Appeals, should the MPCA's permit decision be appealed:

- (a) EPA's written comments on the draft PolyMet NPDES Permit;
- (b) any notes from April 5, 2018, when EPA read its comments on the draft PolyMet NPDES Permit to MPCA over the phone;
- (c) Shannon Lotthammer's March 13, 2018 email to Kurt Thiede;
- (d) any document indicating that EPA staff believed that EPA's comments regarding the PolyMet NPDES Permit had not been fully resolved by the time the Permit was finalized.

**Objection:** MPCA objects to these questions as beyond the scope of the alleged procedural irregularities before the district court. The issue of MPCA's understanding of what would be in the record as of December 20, 2018, was not addressed before the Court of Appeals and therefore is not before the district court. MPCA further objects to these questions as irrelevant in that MPCA's duties to designate an administrative record are not triggered until an appeal is filed. No appeal of the PolyMet NPDES Permit was filed on December 20, 2018—the day the PolyMet NPDES Permit was issued.

**Question No. 14:** Identify all documents that were reviewed, consulted, referred to or otherwise used in your preparation for, or answers to each of the foregoing questions.

**Objection:** MPCA objects to this question as overly broad, unduly burdensome, and beyond the scope of alleged procedural irregularities.

**MPCA's Objections to Relators' Written Deposition Questions to Jeff Udd**

**General Objections:** MPCA objects to each of Relators' written deposition questions to Mr. Udd to the extent the question seeks testimony regarding privileged information or information that is unknown to Mr. Udd or not within Mr. Udd's possession, custody, or control. Moreover, MPCA objects to all questions in which Relators request that Mr. Udd "identify" documents. Having Mr. Udd orally identify documents during a deposition is unduly burdensome and of no value.

**Question No. 1a:** Identify every document and file pertaining to the PolyMet NPDES Permit transferred to you when you assumed responsibility for oversight of this Permit.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that it seeks an extremely wide range of documents. MPCA further objects to this question as irrelevant given that all requested documents that were considered by MPCA in its decision to

issue the PolyMet NPDES Permit are already included in the administrative record. MPCA further objects to this question as vague in that it is unclear what is meant by the statement that Mr. Udd “assumed responsibility for oversight of” the PolyMet NPDES Permit, as well as the implication that documents and files were “transferred” to Mr. Udd upon his assumption of such responsibility.

**Question No. 2:** Based on your experience working at MPCA since 2002, identify every NPDES permit other than the PolyMet NPDES Permit for which EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read EPA’s comments aloud to MPCA.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that its temporal scope covers a period of 19 years.

**Question No. 3:** Based on your experience working at MPCA since 2002, identify every NPDES permit for which EPA sent written comments on the draft NPDES permit during the public comment period.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that its temporal scope covers a period of 19 years.

**Question 4a:** Explain whether you agree that one of the primary issues that EPA was alerting MPCA would be looked at by EPA to evaluate the adequacy of the PolyMet NPDES Permit was whether the Permit contained the WQBELs EPA believed were required.

**Objection:** MPCA objects to this question as beyond the scope of alleged procedural irregularities. Mr. Udd’s opinions are irrelevant to whether MPCA engaged in procedural irregularities. Moreover, this question implicates substantive issues regarding the Clean Water Act and EPA regulations, which are beyond the scope of the matter before the district court.

**Question 4b:** Explain whether you agree that as of April 5, 2018 the issue of whether the PolyMet NPDES Permit would contain WQBELs had not been fully resolved.

**Objection:** MPCA objects to this question as beyond the scope of alleged procedural irregularities. Mr. Udd's opinions are irrelevant to whether MPCA engaged in procedural irregularities. Moreover, this question implicates substantive issues regarding the Clean Water Act and EPA regulations, which are beyond the scope of the matter before the district court.

**Question 5a:** Your declaration of May 28, 2019 (¶¶ 7-8) states that at the conclusion of the two-day in-person meeting between EPA and MPCA on September 25 and 26, 2018 "I believed that no unmanageable issues remained, and we were in a position to finalize the draft permit."

(a) State on what you based this opinion.

**Objection:** MPCA objects to this question as beyond the scope of alleged procedural irregularities. Mr. Udd's opinions are irrelevant to whether MPCA engaged in procedural irregularities. Moreover, this question implicates substantive issues regarding the Clean Water Act and EPA regulations, which are beyond the scope of the matter before the district court.

**Question 5b:** Explain whether you agree that as of September 26, 2018, the issue of whether the PolyMet NPDES Permit would contain WQBELs remained unresolved.

**Objection:** MPCA objects to this question as beyond the scope of alleged procedural irregularities. Mr. Udd's opinions are irrelevant to whether MPCA engaged in procedural irregularities. Moreover, this question implicates substantive issues regarding the Clean Water Act and EPA regulations, which are beyond the scope of the matter before the district court.

**Question 5c:** Explain whether you agree that, as of the October 22, 2018 call between MPCA and EPA regarding the PolyMet NPDES Permit, EPA stated they would focus their review on final draft permit language on WQBELs.

**Objection:** MPCA objects to this question as beyond the scope of alleged procedural irregularities. Mr. Udd’s opinions are irrelevant to whether MPCA engaged in procedural irregularities. Moreover, this question implicates substantive issues regarding the Clean Water Act and EPA regulations, which are beyond the scope of the matter before the district court.

**Question No. 6:** Your declaration of May 28, 2019 (¶ 9) cites the Memorandum of Agreement (“MOA”) between MPCA and EPA. Describe the substance of any discussions between MPCA and EPA in 2018 in which you participated or about which you were informed regarding the potential to amend the MOA in connection with the PolyMet NPDES Permit.

**Objection:** MPCA objects to this question as going beyond the scope of the alleged procedural irregularities. The issue of potential amendments to the MOA was not addressed before the Court of Appeals and therefore is not within the scope of matters before the district court.

MPCA further objects to this question to the extent it calls for hearsay or speculation.

**Question 7:** Your declaration of May 28, 2019 (¶ 10) states that the pre-proposed version of the PolyMet NPDES Permit sent to EPA on October 25, 2018 “reflected all of the discussion points from the two-day, in-person meeting in September 2018.” Do you agree that this pre-proposed version of the PolyMet NPDES Permit did not provide WQBELs?

**Objection:** MPCA objects to this question as beyond the scope of alleged procedural irregularities. Mr. Udd’s opinions are irrelevant to whether MPCA engaged in procedural irregularities. Moreover, this question implicates substantive issues regarding the Clean Water Act and EPA regulations, which are beyond the scope of the matter before the district court.

**Question No. 8a:** In the September 25, 2018 meeting between MPCA, EPA and PolyMet, did PolyMet oppose putting WQBELs in the PolyMet NPDES Permit due to concerns that “anti-backsliding” would prevent removing WQBELs even if water quality standards changed?

**Objection:** MPCA objects to this question as beyond the scope of the alleged procedural irregularities before the district court. The issue of whether PolyMet opposed WQBELs in the PolyMet NPDES Permit was not addressed before the Court of Appeals and therefore is not before the district court. MPCA further objects to this question to the extent it calls for hearsay.

**Question No. 8b:** Identify all other communications of which you are aware where PolyMet expressed opposition to including WQBELs in the PolyMet NPDES Permit.

**Objection:** MPCA objects to this question as beyond the scope of the alleged procedural irregularities before the district court. The issue of whether PolyMet opposed WQBELs in the PolyMet NPDES Permit was not addressed before the Court of Appeals and therefore is not before the district court. MPCA further objects to this question to the extent it calls for hearsay.

**Question 10b:** In the discussion with Mr. Pierard on or about Monday March 12, 2018, did he provide details about what would be contained in EPA's comments on the draft PolyMet NPDES Permit?

**Objection:** MPCA objects to this question to the extent it calls for hearsay.

**Question No. 11:** Your email to Richard Clark and Stephanie Handeland dated March 16, 2018, attached as Udd Exhibit 2, states that you just got off the phone with Kevin Pierard and that he would like to have a meeting "the first week of April to walk through what the comment letter would have said if it were sent." Other than Mr. Clark and Ms. Handeland, who else at MPCA was informed that Mr. Pierard was going to walk through what EPA's comment letter on the draft PolyMet NPDES Permit would have said if it were sent in a call with MPCA in early April?

**Objection:** MPCA objects to this question to the extent it calls for hearsay or speculation.

**Question No. 12b:** Please identify every NPDES permit other than the PolyMet NPDES Permit of which you have knowledge where MPCA and EPA acted on the understanding that it would

be “more efficient” to comment on the post-comment version of the permit to delay or prevent EPA’s written comments on a draft NPDES permit.

**Objection:** MPCA objects to this request as lacking in foundation and calling for speculation to the extent it seeks Mr. Udd’s testimony regarding the motives behind EPA’s actions.

**Question No. 13:** Your declaration of June 12, 2019 (§ 10) states that the comments regarding the PolyMet NPDES Permit that EPA read over the phone on April 5, 2018 “were duplicative of the feedback we had received from EPA throughout the permit-development period and are thus memorialized in the notes and other material included in the administrative record.” Please identify every document in the administrative record that memorialized the feedback MPCA had previously received from EPA throughout PolyMet NPDES Permit development so that the comments read by EPA over the phone on April 5, 2018 were duplicative.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome.

**Question No. 14:** Your declaration of June 12, 2019 (§ 8) states that on or about December 18, 2018, Kevin Pierard informed you that EPA would not file an objection to the PolyMet NPDES Permit. State to the best of your recollection what Mr. Pierard said in this phone conversation, including whether Mr. Pierard described EPA’s decision process or which issues EPA still considered unresolved.

**Objection:** MPCA objects to this question because it calls for hearsay.

**Question No. 15:** Identify all documents that were reviewed, consulted, referred to or otherwise used in your preparation for, or answers to each of the foregoing questions.

**Objection:** MPCA objects to this question as overly broad, unduly burdensome, and beyond the scope of alleged procedural irregularities.

**Question No. 16:** Other than legal counsel, identify all persons you communicated with regarding your answers to these questions.

**Objection:** MPCA objects to this question as overly broad, unduly burdensome, and beyond the scope of alleged procedural irregularities.

**MPCA's Objections to Relators' Written Deposition Questions to Richard Clark**

**General Objections:** MPCA objects to each of Relators' written deposition questions to Mr. Clark to the extent the question seeks testimony regarding privileged information or information that is unknown to Mr. Clark or not within Mr. Clark's possession, custody, or control.

Moreover, MPCA objects to all questions in which Relators request that Mr. Clark "identify" documents. Having Mr. Clark orally identify documents during a deposition is unduly burdensome and of no value.

**Question No. 1:** Based on your experience working at MPCA since 1986, identify every NPDES permit other than the PolyMet NPDES Permit for which EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read EPA's comments aloud to MPCA.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that its temporal scope covers a period of 33 years.

**Question No. 2:** Based on your experience working at MPCA since 1986, identify every NPDES permit for which EPA sent written comments on the draft NPDES permit during the public comment period.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that its temporal scope covers a period of 33 years.

**Question No. 3:** Based on your experience working at MPCA since 1986, identify every NPDES permit where EPA commented upon the proposed final NPDES permit.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that its temporal scope covers a period of 33 years.

**Question No. 4:** Your declaration of June 12, 2019 (¶ 8) states that MPCA “responded to the substance of EPA's April 5, 2018, comments” through MPCA’s responses to other public comments. Based on your experience working at MPCA since 1995, identify every NPDES permit other than the PolyMet NPDES Permit where MPCA responded to the substance of EPA comments in its responses without attributing the comments to EPA.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that its temporal scope covers a period of 24 years.

**Question No. 6a:** What did Ms. Foss communicate to you regarding her concerns about the content or process for documentation in Mr. Pierard’s memo and enclosure dated April 7, 2015 stating EPA’s requirements for the PolyMet NPDES Permit?

**Objection:** MPCA objects to this question because it calls for hearsay. MPCA further objects to this request as overly broad and unduly burdensome in temporal scope. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018—well after April 7, 2015.

**Question No. 6b:** What did you understand to be the position of MPCA’s Mining Sector as to the need for MPCA to agree in order for EPA to document items pertaining to the PolyMet NPDES Permit.

**Objection:** MPCA objects to this question because it lacks foundation, calls for speculation, and presumes facts not in evidence.

**Question No. 8:** Your declaration of May 28, 2019 (§ 10) states that by the August 2017 time frame “MPCA and EPA had discussed together all of the major issues that EPA had with the pre-proposed permit and MPCA fully understood and considered EPA’s positions.” Please explain in detail all of “EPA’s positions” that MPCA fully understood and considered by August 2017.

**Objection:** MPCA objects to this question because it lacks foundation and calls for speculation by asking Mr. Clark to opine on “EPA’s positions.”

**Question No. 10:** Your declaration of May 28, 2019 (§ 15) states with respect to the April 5, 2018 call with EPA regarding the PolyMet NPDES Permit, “EPA treated the call as a summary or compendium of all of its previous concerns about the public comment draft permit.” Do you agree that one of EPA’s primary concerns in EPA comments read to MPCA on April 5, 2018, was the lack of WQBELs in the PolyMet NPDES Permit?

**Objection:** MPCA objects to this question as beyond the scope of alleged procedural irregularities. Mr. Clark’s opinions are irrelevant to whether MPCA engaged in procedural irregularities. Moreover, this question implicates substantive issues regarding the Clean Water Act and EPA regulations, which are beyond the scope of the matter before the district court.

**Question No. 11:** Your declaration of May 28, 2019 (§ 17) states that a number of the issues raised in the April 5, 2018 call with EPA regarding the PolyMet NPDES Permit “were not finally resolved, however, until a September 2018 meeting between MPCA and EPA.” Do you agree that the EPA’s concern about the lack of WQBELs in the PolyMet NPDES Permit was also not resolved in the September 2018 meeting between MPCA and EPA regarding the PolyMet NPDES Permit?

**Objection:** MPCA objects to this question as beyond the scope of alleged procedural irregularities. Mr. Clark’s opinions are irrelevant to whether MPCA engaged in procedural

irregularities. Moreover, this question implicates substantive issues regarding the Clean Water Act and EPA regulations, which are beyond the scope of the matter before the district court.

**Question No. 14a:** Do you agree that EPA communicated to MPCA at least as early as November 1, 2017 that EPA did not find operating limits sufficient and wanted the PolyMet NPDES Permit to contain WQBELs?

**Objection:** MPCA objects to this question as beyond the scope of alleged procedural irregularities. Mr. Clark's opinions are irrelevant to whether MPCA engaged in procedural irregularities. Moreover, this question implicates substantive issues regarding the Clean Water Act and EPA regulations, which are beyond the scope of the matter before the district court.

**Question No. 14b:** Do you agree that on October 22, 2018, EPA communicated to MPCA that EPA wanted the proposed PolyMet NPDES Permit to have language providing WQBELs?

**Objection:** MPCA objects to this question as beyond the scope of alleged procedural irregularities. Mr. Clark's opinions are irrelevant to whether MPCA engaged in procedural irregularities. Moreover, this question implicates substantive issues regarding the Clean Water Act and EPA regulations, which are beyond the scope of the matter before the district court.

**Question No. 15:** Identify all documents that were reviewed, consulted, referred to or otherwise used in your preparation for, or answers to each of the foregoing questions.

**Objection:** MPCA objects to this question as overly broad, unduly burdensome, and beyond the scope of alleged procedural irregularities.

**Question No. 16:** Other than legal counsel, identify all persons you communicated with regarding your answers to these questions.

**Objection:** MPCA objects to this question as overly broad, unduly burdensome, and beyond the scope of alleged procedural irregularities.

**MPCA's Objections to Relators' Written Questions to Stephanie Handeland**

**General Objections:** MPCA objects to each of Relators' written deposition questions to Ms. Handeland to the extent the question seeks testimony regarding privileged information or information that is unknown to Ms. Handeland or not within Ms. Handeland's possession, custody, or control. Moreover, MPCA objects to all questions in which Relators request that Ms. Handeland "identify" documents. Having Ms. Handeland orally identify documents during a deposition is unduly burdensome and of no value.

**Question No. 1:** Based on your experience working at MPCA since 1995, identify every NPDES permit other than the PolyMet NPDES Permit for which EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read EPA's comments aloud to MPCA.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that its temporal scope covers a period of 24 years.

**Question No. 2:** Based on your experience working at MPCA since 1995, identify every NPDES permit for which EPA sent written comments on that draft NPDES permit during the public comment period.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that its temporal scope covers a period of 24 years.

**Question No. 3:** Based on your experience working at MPCA since 1995, identify every NPDES permit where EPA commented upon the proposed final NPDES permit.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that its temporal scope covers a period of 24 years.

**Question No. 4:** Your declaration of June 12, 2019 (¶ 8) states that MPCA “responded to the substance of EPA’s April 5, 2018, comments” through MPCA’s responses to other public comments. Based on your experience working at MPCA since 1995, identify every NPDES permit other than the PolyMet NPDES Permit where MPCA responded to the substance of EPA comments in its responses without attributing the comments to EPA.

**Objection:** MPCA objects to this question as overly broad and unduly burdensome in that its temporal scope covers a period of 24 years.

**Question 5c:** For any of the calls or meetings with EPA on the dates indicated in paragraph (b) that did not occur state your best understanding of why they did not take place.

**Objection:** MPCA objects to this question to the extent it calls for speculation.

**Question No. 12b:** State which written comments by other stakeholders on the draft PolyMet NPDES Permit you personally read.

**Objection:** MPCA objects to this question as beyond the scope of the alleged procedural irregularities before the district court. The issue of written comments by stakeholders other than EPA was not addressed before the Court of Appeals and therefore is not before the district court. Moreover, MPCA objects to this question as overly broad and unduly burdensome in scope.

**Question No. 12c:** For any written comments by other stakeholders on the draft PolyMet NPDES Permit that you read state when you read them.

**Objection:** MPCA objects to this question as beyond the scope of the alleged procedural irregularities before the district court. The issue of written comments by stakeholders other than EPA was not addressed before the Court of Appeals and therefore is not before the district court. Moreover, MPCA objects to this question as overly broad and unduly burdensome in scope.

**Question No. 13:** Identify all documents that were reviewed, consulted, referred to or otherwise used in your preparation for, or answers to each of the foregoing questions.

**Objection:** MPCA objects to this question as overly broad, unduly burdensome, and beyond the scope of alleged procedural irregularities.

**Question No. 14:** Other than legal counsel, identify all persons you communicated with regarding your answers to these questions.

**Objection:** MPCA objects to this question as overly broad, unduly burdensome, and beyond the scope of alleged procedural irregularities.

DATED: August 28, 2019

/s/ John C. Martin

Sarah Koniewicz  
MN Attorney License No.: 0389375  
John C. Martin (*pro hac vice*)  
Bryson C. Smith (*pro hac vice*)  
Holland & Hart, LLP  
975 F Street NW, Suite 900  
Washington, D.C. 20004  
(202) 654-6915  
SMKoniewicz@hollandhart.com  
JCMartin@hollandhart.com  
BCSmith@hollandhart.com

Richard E. Schwartz  
Washington, D.C. License No.  
185561  
Crowell & Moring  
1001 Pennsylvania Ave, NW  
Washington, D.C. 20004-2595  
Telephone: (202) 624-2905  
rschwartz@crowell.com

*Attorneys for Respondent Minnesota  
Pollution Control Agency*

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Civil/Other Misc.

Judge: John H. Guthmann

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 No. 62-CV-19-4626

**RESPONDENT  
POLY MET MINING, INC.'S  
OBJECTIONS TO RELATORS'  
REQUESTS FOR PRODUCTION AND  
WRITTEN DEPOSITION QUESTIONS**

Consistent with the Court's August 7, 2019 oral order (the "Order"), Respondent Poly Met Mining, Inc. ("PolyMet"), by its undersigned attorneys, object to Center for Biological Diversity, Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy, WaterLegacy, and the Fond du Lac Band of Lake Superior Chippewa's (collectively, "Relators") Alleged Procedural Irregularities ("APIs"), requests for production ("RFPs"), and written deposition questions ("DWQs") (collectively, the "Requests").

**ALLEGED PROCEDURAL IRREGULARITIES**

PolyMet objects to Relators' List of Alleged Procedural Irregularities ("APIs") as overly broad, vague, ambiguous, irrelevant, and beyond the scope of the Order. Relators' list fails to identify particular procedural requirements, statutory or

regulatory bases for each requirement, or how MPCA supposedly violated those statutes and rules. Relators' list of alleged procedural irregularities does not put MPCA, PolyMet, or the Court on notice as to the specific procedural requirements MPCA allegedly failed to follow. Moreover, Relators' list of alleged procedural irregularities fails to conform to, and exceeds the scope of, the list of alleged procedural irregularities Relators submitted to the court of appeals. PolyMet incorporates its objections to the APIs into its objections to the RFPs and DWQs.

**API No. 1:** MPCA sought to prevent and used irregular procedures to prevent creation of a record of United States Environmental Protection Agency ("EPA") concerns about NPDES Permit expectations, requirements, process, and conditions during NorthMet Project environmental review and throughout the NPDES Permit process.

**Objections to API No. 1:** PolyMet objects to this API as vague, ambiguous, and failing to identify the procedural requirement MPCA allegedly violated. The allegation that "MPCA sought to prevent and used irregular procedures to prevent creation of a record" is a legal conclusion, not a procedural irregularity. Relators do not identify a specific procedure MPCA had to follow, a statutory or regulatory source of that procedure, or how MPCA violated that procedure. PolyMet also objects to this API as irrelevant because only MPCA's actual conduct is at issue, not what MPCA "sought to" do.

**API No. 2:** MPCA and EPA departed from typical procedures in addressing the NPDES Permit, engaging in multiple telephone conferences and in-person meetings, some of which are not reflected in the administrative record.

**Objections to API No. 2:** PolyMet objects to this API as vague, ambiguous, and failing to identify the procedural requirement MPCA allegedly violated. The allegation that “MPCA and EPA departed from typical procedures in addressing the NPDES Permit” is a legal conclusion, not a procedural irregularity. Relators do not identify what statutory or regulatory rule set MPCA’s “typical procedures,” what those “typical procedures” are, the basis for claiming any “procedure” is “typical” if not required by law, or how MPCA failed to comply with those “typical procedures.” Relators also do not identify any statute or rule that prohibits telephonic or in-person meetings.

**API No. 3:** MPCA and EPA leadership acted in concert and used irregular and unusual procedures to prevent EPA staff from submitting written comments on the draft NPDES Permit, including, but not limited to: MPCA’s request that EPA not provide written comments, EPA leadership’s decision to withhold and conceal already prepared EPA written comments on the draft NPDES Permit from the public (“EPA Comments”), and EPA reading the EPA Comments to MPCA during an April 5, 2018 telephone call rather than submitting them in written form.

**Objections to API No. 3:** PolyMet objects to this API as vague, ambiguous, compound, and failing to identify the procedural requirement MPCA allegedly violated. Relators do not identify any statute or rule preventing MPCA from requesting oral comments from EPA or EPA from communicating orally with MPCA. Relators also fail to identify the basis for claiming any “procedure” was

“irregular and unusual” if not required by law, PolyMet further objects to Relators’ allegation as beyond the scope of the procedural irregularities identified in Relators’ court of appeals filings. Specifically, they never alleged that MPCA and EPA “acted in concert.” PolyMet also objects to this alleged procedural irregularity as compound because Relators combine several alleged irregularities.

**API No. 4:** MPCA improperly destroyed, discarded, and failed to retain portions of the written record of communications with EPA regarding the NPDES Permit, including, but not limited to, handwritten notes of the April 5, 2018 phone call where EPA staff read the EPA Comments over the phone to MPCA, and other records reflecting phone conferences, meetings, emails, and other communications with EPA pertaining to the NPDES Permit.

**Objections to API No. 4:** PolyMet objects to this API as vague, ambiguous, and failing to identify the procedural requirement MPCA allegedly violated. Relators do not identify any statute or rule requiring MPCA to retain every written record of communication with EPA. Further, Relators do not identify the legal basis of any such requirement or how MPCA did or did not comply with it. The allegation that MPCA acted “improperly” is a legal conclusion, not a procedural irregularity.

**API No. 5:** Despite Relators’ numerous pertinent requests under the Minnesota Government Data Practices Act (“MGDPA”), MPCA failed to produce public data reflecting communications between MPCA and EPA during NorthMet Project environmental review and the NPDES Permit process, including emails between MPCA and EPA, handwritten notes, and other documentation of pertinent meetings and phone conversations between MPCA and EPA.

**Objections to API No. 5:** PolyMet objects to this API as vague, ambiguous, irrelevant, and failing to identify the procedural requirement MPCA allegedly

violated. Relators identify no statute or rule requiring MPCA to produce the documents Relators allegedly requested. While Relators generically cite to the Minnesota Government Data Practices Act (“MGDPA”), they identify no specific procedure requiring release of the documents they contend are being withheld. Relators also do not explain how MPCA violated any procedural requirement. PolyMet further objects that the MGDPA is irrelevant and are beyond the scope of this proceeding because Relators did not bring this action under the MGDPA. If Relators are unsatisfied with MPCA’s response to their MGDPA requests, Relators can bring a MGDPA claim in the appropriate forum. This limited proceeding does not allow Relators to bring new claims and add factual allegations based on MPCA’s post-permitting conduct.

**API No. 6:** EPA wrote to MPCA citing deficiencies in the PolyMet NPDES Permit application in November 2016. Neither the administrative record nor MPCA’s MGDPA responses include a subsequent letter from EPA stating that deficiencies in the application were resolved, although such a letter is required for MPCA to proceed with an NPDES permit under the Memorandum of Agreement establishing MPCA’s delegated authority to issue NPDES permits.

**Objections to API No. 6:** PolyMet objects that this API fails to identify a statutory or regulatory basis for the alleged procedural irregularity. PolyMet further objects that the allegations are irrelevant and go beyond the scope of this proceeding. This proceeding centers on MPCA’s procedural duties related to the draft NPDES Permit public comment period in early 2018. Conduct two years prior about the

application is irrelevant and threatens to expand the scope of this limited proceeding. In 2016, the draft NPDES Permit did not exist yet.

**API No. 7:** Although EPA was highly involved with NorthMet Project environmental review and the NPDES Permit process, and communicated substantive expectations and concerns to MPCA regarding the NorthMet NPDES application and NPDES Permit, the NPDES Permit procedures and final NPDES Permit conditions are inconsistent with EPA expectations, concerns, and communications, including but not limited to those in EPA Comments.

**Objections to API No. 7:** PolyMet objects to this API as vague, ambiguous, irrelevant, and failing to identify the procedural requirement MPCA allegedly violated. Relators do not identify any statute or rule requiring MPCA or NPDES Permit “consistency” with EPA “expectations, concerns, and communications.” Relators further fail to describe any applicable EPA “expectations, concerns, and communications” or explain how MPCA failed to adhere to them. PolyMet finally objects to this API as beyond the scope of the procedural irregularities identified in Relators’ court of appeals briefing and this Court’s order, and beyond the scope of this Court’s jurisdiction, which does not extend to a review of the substance of the NPDES Permit.

**API No. 8:** MPCA responses to comments improperly failed to mention or respond to any EPA comments on the draft NPDES Permit and affirmatively conveyed the false impression that the NPDES Permit complied with all EPA’s comments and concerns.

**Objections to API No. 8:** PolyMet objects to this API as vague, ambiguous, compound, and failing to identify the procedural requirement MPCA allegedly

violated. Relators fail to identify any procedural requirement that MPCA “mention or respond” to all or any EPA comments and cite no statute or rule mandating the same. Relators also do not identify any statute or rule requiring that MPCA and the NPDES Permit “comply” with “all EPA’s comments and concerns.”

**API No. 9:** MPCA’s extra-record claims that MPCA and EPA had fundamentally agreed on NPDES Permit terms after a meeting between MPCA and EPA in September 2018 are highly disputed, undocumented in the administrative record, and such “resolution” without a written confirmation by EPA would be irregular.<sup>11</sup> The absence of an EPA objection blocking the final NPDES Permit does not signify that EPA concerns were resolved.

**Objections to API No. 9:** PolyMet objects to this API as vague, ambiguous, irrelevant, and failing to identify the procedural requirement MPCA allegedly violated. Relators do not identify any statute or rule requiring that MPCA and EPA “fundamentally agree” on the NPDES Permit’s terms or that MPCA “resolve” EPA’s concerns to EPA’s satisfaction. Nor do Relators explain how MPCA allegedly violated any procedural requirement. Finally, PolyMet objects that any “agree[ment]” between EPA and MPCA is irrelevant to whether MPCA engaged in procedural irregularities. The effect of any EPA comments is a merits question reserved for—and raised by Relators to—the court of appeals. Relators cannot reframe substantive questions as procedural questions.

**API No. 10:** MPCA's and EPA's procedures related to the NPDES Permit were irregular and did not follow customary EPA and MPCA practices in comparable NPDES permitting cases.

**Objections to API No. 10:** PolyMet objects to this API as vague, ambiguous, irrelevant, and failing to identify the procedural requirement MPCA allegedly violated. Relators identify no statute or rule requiring MPCA to follow "customary" practices, or even defining relevant MPCA or EPA "customary" practices. Relators also fail to explain how MPCA failed to comply with any "customary" practice. Relators' suggestion that MPCA and EPA acted differently in "comparable NPDES permitting cases" is vague, ambiguous, and irrelevant to whether MPCA complied with statutes or rules requiring certain procedures. PolyMet also objects to this API as irrelevant because EPA's practices and procedures are irrelevant to MPCA's actions and regulatory procedures.

**API No. 11:** MPCA's procedural irregularities undermine EPA oversight under the Clean Water Act ("CWA") and affect Relators' substantive claims that the NPDES Permit did not comply with MAPA and the CWA.

**Objections to API No. 11:** PolyMet objects to this API as vague, irrelevant, ambiguous, and failing to identify the procedural requirement MPCA allegedly violated. Relators' claims that MPCA's actions "undermine EPA oversight" and "affect Relators' substantive claims" are legal conclusions, not procedural irregularities, that attempt to import merits questions into this limited fact-finding

proceeding. Relators fail to identify a particular procedure, its legal basis, or how MPCA violated it.

**API No. 12:** MPCA failed to act with truthfulness, accuracy, disclosure, and candor in connection with the NPDES Permit.

**Objections to API No. 12:** PolyMet objects to this API as vague and failing to identify the procedural requirement MPCA allegedly violated. Relators fail to identify which statute, rule, or regulation requires MPCA to “act with truthfulness, accuracy, disclosure, and candor,” and how MPCA failed to comply with that requirement.

**API No. 13:** MPCA’s procedural irregularities conflict with MGDPA, Minn. Stat. ch. 13.

**Objections to API No. 13:** PolyMet objects to this API as vague, irrelevant, and failing to identify the procedural requirement MPCA allegedly violated. Relators’ general citation to Chapter 13 of the MGDPA, which includes over 100 distinct sections, does not identify any specific procedural requirement or explain how MPCA violated that unidentified requirement. PolyMet further objects to this API as vague because Relators claim some unidentified procedural irregularity “conflicts with” an unidentified section of the MGDPA. PolyMet further objects that this API is not a procedural irregularity at all, but instead, an attempt to bring a MGDPA claim into this MAPA proceeding.

**API No. 14:** MPCA's procedural irregularities conflict with the Official Records Act, Minn. Stat. ch. 15.

**Objections to API No. 14:** PolyMet objects to this API as vague, irrelevant, and failing to identify the procedural requirement MPCA allegedly violated. Relators' general citation to Chapter 15 of the Official Records Act ("ORA"), which includes over 100 individual sections, does not identify any specific procedural requirement or how MPCA violated that unidentified requirement. PolyMet also objects to this API as vague and ambiguous because Relators claim some unidentified procedural irregularity "conflicts" with an unidentified section of the ORA. PolyMet also objects to Relators' efforts to import an ORA claim into this MAPA proceeding.

**API No. 15:** MPCA's procedural irregularities conflict with 40 C.F.R. § 124.17, which requires states to provide publicly available responses to all significant comments on an NPDES permit application or draft NPDES permit.

**Objections to API No. 15:** PolyMet objects to this API as vague, ambiguous, and irrelevant. Though Relators cite a federal regulation, they do not explain whether and how the federal regulation is applicable to MPCA, a state agency, or how MPCA violated the regulation. PolyMet also objects that this API is irrelevant because a vague and unidentified "conflict" with a rule does not establish violation of that rule or its procedures.

**API No. 16:** MPCA's procedural irregularities conflict with its duty of candor established in Minn. R. 7000.0300 in issuing the NPDES Permit and these irregularities continued after the NPDES Permit was issued.

**Objections to API No. 16:** PolyMet objects to this API as vague, ambiguous, irrelevant, and beyond the scope of this proceeding. Relators do not explain what the duty of candor requires or how MPCA violated the duty. PolyMet also objects that this API is duplicative of API No. 12, which appears to track, but not cite, the language of Minn. R. 7000.0300. PolyMet further objects to this alleged procedural irregularity as vague and ambiguous because Relators allege some undefined procedural irregularities "conflict[s]" with Minn. R. 7000.0300. PolyMet also objects to allegations regarding MPCA's post-permitting conduct as beyond the scope of this proceeding.

**API No. 17:** MPCA's and EPA's irregular, improper, and unlawful procedures preventing the creation of a complete administrative record of EPA's comments and concerns regarding the NPDES Permit prejudiced Relators in their appeals from issuance of the NPDES Permit.

**Objections to API No. 17:** PolyMet objects to this API as vague, ambiguous, irrelevant, beyond the scope of this proceeding, and failing to identify the procedural requirement MPCA allegedly violated. Relators do not identify any controlling statutory or regulatory procedural requirement or describe how MPCA ran afoul of the requirement. PolyMet also objects to this API as vague and ambiguous because it is not clear whether the allegation flows from "preventing creation of a complete administrative record" or some "prejudice" to Relators, or if

instead the “prejudice” is the effect of some other, unidentified irregular procedure. Finally, PolyMet objects to this API as reaching conduct and questions beyond the scope of this proceeding. EPA’s actions or inactions are irrelevant to whether MPCA complied with MPCA’s procedural requirements. And Relators improperly ask the Court to reach the merits issues—e.g., whether Relators were prejudiced or MPCA acted unlawfully—that are committed to the court of appeals.

**API No. 18:** Upon information and belief, MPCA sought to withhold documents and communications from the administrative record, upon which documents and communications MPCA relied in its decision to issue the NPDES Permit, so that such documents and communications could not be fully and fairly reviewed by the Court of Appeals in the event of a challenge to the issuance of the NPDES Permit before the Court of Appeals.

**Objections to API No. 18:** PolyMet objects to this API as vague, ambiguous, beyond the scope of this proceeding, and failing to identify the procedural requirement MPCA allegedly violated. Relators do not identify any statute or rule requiring MPCA to place every document and communication into the administrative record or how MPCA failed to comply with that unidentified statute or rule. PolyMet also objects to this request as irrelevant, because only MPCA’s actual conduct is at issue, not what MPCA “sought to” do.

**API No. 19:** Upon information and belief, MPCA improperly based its decision to issue the NPDES Permit on communications and or documents exchanged between MPCA, PolyMet, and/or EPA and other irregular procedures, which are not reflected in the administrative record.

**Objections to API No. 19:** PolyMet objects to this API as vague, ambiguous, beyond the scope of this proceeding, and failing to identify the procedural requirement MPCA allegedly violated. Relators do not identify any particular procedural requirement, its statutory or regulatory basis, or how MPCA failed to follow that requirement. PolyMet further objects to this API as vague and ambiguous because it is unclear whether this constitutes an independent procedural irregularity or is, instead, the effect of some “other irregular procedures.” PolyMet also objects that this API goes beyond the scope of this proceeding, which does not include merits questions like whether MPCA’s permitting decision was “improper.”

**API No. 20:** Critical documents are missing from the administrative record as a result of procedural irregularities, including but not limited to documents pertaining to alleged violations of the MGDPA, the Official Records Act, and CWA regulations.

**Objections to API No. 20:** PolyMet objects to this API as vague, ambiguous, beyond the scope of this proceeding, and failing to identify the procedural requirement MPCA allegedly violated. Relators identify no specific procedural requirement and no specific statutory section governing MPCA’s procedures. Relators further fail to identify how MPCA did or did not comply with a particular

procedure. PolyMet also objects to the term “critical document” as vague and unrelated to any rule or statute identified by Relators. Finally, PolyMet objects to this API as vague and ambiguous because it is unclear whether this API is an independent alleged procedural irregularity or merely the effect of a different alleged procedural irregularity.

**API No. 21:** Because MPCA used irregular procedures, additional information may be uncovered during transfer proceedings which disclose the nature of the NPDES Permit process, the content of documents not present in the administrative record, and the degree to which MPCA and EPA leadership went to prevent public and judicial scrutiny of the NPDES Permit.

**Objections to API No. 21:** PolyMet objects to this API as vague, ambiguous, beyond the scope of this proceeding, irrelevant, and failing to identify the procedural requirement MPCA allegedly violated. Relators do not identify a specific procedure, or a statute or regulation creating that procedure, and also fail to allege how MPCA failed to comply with that unidentified procedure. PolyMet also objects to this API as vague and ambiguous because it is unclear whether this API is an independent alleged procedural irregularity or the result of some other alleged procedural irregularity. PolyMet further objects that MPCA’s and EPA’s *motives* are irrelevant to whether a particular *procedure* was followed. Finally, PolyMet objects to this API as beyond the scope of this proceeding because it is a legal conclusion, not a procedural requirement.

## REQUESTS FOR PRODUCTION

PolyMet objects to Relators' Requests for Production as follows and will produce responsive, non-privileged documents, if any, within 30 days of the Court's resolution of these objections:

**RFP No. 1:** All documents identified in your responses to Relators' Deposition On Written Questions to Respondent Poly Met Mining, Inc. served herewith.

**Objections to RFP No. 1:** PolyMet objects to RFP No. 1 as overly broad, unduly burdensome, and seeking irrelevant, privileged, and confidential information. PolyMet incorporates its objections to Relators' DWQs here. PolyMet will produce the documents specifically identified in PolyMet's responses to the DWQs.

**RFP No. 2:** All documents regarding any document retention or destruction policy, guidelines, custom, or practice applicable to MPCA permitting matters which you had in place at any time from January 1, 2015 to present.

**Objections to RFP No. 2:** PolyMet objects to RFP No. 2 as unduly burdensome and seeking privileged, confidential, and irrelevant information. PolyMet's conduct is not the subject of this proceeding and the Order requires PolyMet to produce only those documents, communications, or other information that MPCA and PolyMet exchanged in limited circumstances. PolyMet will not produce internal documents, including privileged or confidential communications or corporate governance and policy documents.

**RFP No. 3:** All documents you received from the MPCA regarding the MPCA's permit review procedure applicable to the PolyMet NPDES Permit.

**Objections to RFP No. 3:** PolyMet objects to RFP No. 3 as overly broad, unduly burdensome, ambiguous, vague, and seeking documents already in the administrative record. In particular, the phrase "MPCA's permit review procedure" is vague, ambiguous, and undefined. PolyMet will interpret that phrase in light of the court-ordered limits on discovery. This proceeding focuses on alleged procedural irregularities. The Court directed that discovery from PolyMet must be "limited to information that PolyMet may have that relates to the alleged procedural irregularities involving the Pollution Control Agency," and "documents that PolyMet may have in its possession that the MPCA had in its possession at the time of its decision."

Further, PolyMet objects to the unlimited temporal scope of RFP No. 3 as overbroad and unduly burdensome. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, PolyMet's response is limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (issuance of the final NPDES Permit).

PolyMet also objects to RFP No. 3 to the extent it seeks forms of electronically stored information that are not utilized in the ordinary course of

business and that would require extraordinary measures to collect, review, and produce, including “erased, fragmented or damaged data.” PolyMet will not search for or produce electronically stored information that is not reasonably accessible because of undue burden or cost, including erased, fragmented or damaged data.

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**RFP No. 4:** All documents you provided to the MPCA regarding the MPCA’s permit review procedure applicable to the PolyMet NPDES Permit.

**Objections to RFP No. 4:** PolyMet objects to RFP No. 4 as overly broad, unduly burdensome, ambiguous, vague, and seeking documents already in the administrative record. In particular, the phrase “MPCA’s permit review procedure” is vague, ambiguous, and undefined. PolyMet will interpret that phrase in light of the court-ordered limits on discovery. This proceeding focuses on alleged procedural irregularities. The Court directed that discovery from PolyMet must be “limited to information that PolyMet may have that relates to the alleged procedural irregularities involving the Pollution Control Agency,” and “documents that PolyMet may have in its possession that the MPCA had in its possession at the time of its decision.”

Further, PolyMet objects to the unlimited temporal scope of RFP No. 4 as overbroad and unduly burdensome. Relators allege that MPCA engaged in

procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, PolyMet's response is limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (issuance of the final NPDES Permit).

PolyMet also objects to RFP No. 4 to the extent it seeks forms of electronically stored information that are not utilized in the ordinary course of business and that would require extraordinary measures to collect, review, and produce, including "erased, fragmented or damaged data." PolyMet will not search for or produce electronically stored information that is not reasonably accessible because of undue burden or cost, including erased, fragmented or damaged data.

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**RFP No. 5:** All documents you received from the MPCA regarding the EPA's permit review procedure applicable to the PolyMet NPDES Permit.

**Objections to RFP No. 5:** PolyMet objects to RFP No. 5 as overly broad, unduly burdensome, ambiguous, vague, and seeking documents already in the administrative record. In particular, the phrase "EPA's permit review procedure" is vague, ambiguous, and undefined. PolyMet will interpret that phrase in light of the court-ordered limits on discovery. This proceeding focuses on alleged procedural

irregularities. The Court directed that discovery from PolyMet must be “limited to information that PolyMet may have that relates to the alleged procedural irregularities involving the Pollution Control Agency,” and “documents that PolyMet may have in its possession that the MPCA had in its possession at the time of its decision.”

Further, PolyMet objects to the unlimited temporal scope of RFP No. 5 as overbroad and unduly burdensome. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, PolyMet’s response is limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (issuance of the final NPDES Permit).

PolyMet also objects to RFP No. 5 to the extent it seeks forms of electronically stored information that are not utilized in the ordinary course of business and that would require extraordinary measures to collect, review, and produce, including “erased, fragmented or damaged data.” PolyMet will not search for or produce electronically stored information that is not reasonably accessible because of undue burden or cost, including erased, fragmented or damaged data.

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**RFP No. 6:** All documents you provided to the MPCA regarding the EPA's permit review procedure applicable to the PolyMet NPDES Permit.

**Objections to RFP No. 6:** PolyMet objects to RFP No. 6 as overly broad, unduly burdensome, ambiguous, vague, and seeking documents already in the administrative record. In particular, the phrase "EPA's permit review procedure" is vague, ambiguous, and undefined. PolyMet will interpret that phrase in light of the court-ordered limits on discovery. This proceeding focuses on alleged procedural irregularities. The Court directed that discovery from PolyMet must be "limited to information that PolyMet may have that relates to the alleged procedural irregularities involving the Pollution Control Agency," and "documents that PolyMet may have in its possession that the MPCA had in its possession at the time of its decision."

Further, PolyMet objects to the unlimited temporal scope of RFP No. 6 as overbroad and unduly burdensome. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, PolyMet's response is limited to information and documents from January 1, 2018 (shortly before release

of the draft permit and start of the public comment period) to December 20, 2018 (issuance of the final NPDES Permit).

PolyMet also objects to RFP No. 6 to the extent it seeks forms of electronically stored information that are not utilized in the ordinary course of business and that would require extraordinary measures to collect, review, and produce, including “erased, fragmented or damaged data.” PolyMet will not search for or produce electronically stored information that is not reasonably accessible because of undue burden or cost, including erased, fragmented or damaged data.

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**RFP No. 7:** All documents you received from the MPCA which, in any way, suggest that the procedure to be followed for the PolyMet NPDES Permit deviated in any manner from the MPCA’s customary procedures.

**Objections to RFP No. 7:** PolyMet objects to RFP No. 7 as overly broad, unduly burdensome, and vague. This proceeding focuses on alleged procedural irregularities, not MPCA’s “customary procedures.” Asking PolyMet to search for, collect, and produce “all documents” regarding MPCA’s “customary procedures” is unduly burdensome. PolyMet also objects to the term “customary procedures” as vague, ambiguous, and undefined. Further, PolyMet objects to the unlimited temporal scope of RFP No. 7 as overbroad and unduly burdensome. Relators allege

that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, PolyMet's response is limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (issuance of the final NPDES Permit).

PolyMet objects to RFP No. 7 to the extent it seeks forms of electronically stored information that are not utilized in the ordinary course of business and that would require extraordinary measures to collect, review, and produce, including "erased, fragmented or damaged data." PolyMet will not search for or produce electronically stored information that is not reasonably accessible because of undue burden or cost, including erased, fragmented or damaged data.

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**RFP No. 8:** All documents you provided to the MPCA which, in any way, suggest that the procedure to be followed for the PolyMet NPDES Permit should deviate in any manner from the MPCA's customary procedures.

**Objections to RFP No. 8:** PolyMet objects to RFP No. 8 as overly broad, unduly burdensome, and vague. This proceeding focuses on alleged procedural irregularities, not MPCA's "customary procedures." Asking PolyMet to search for, collect, and produce "all documents" regarding MPCA's "customary procedures" is

unduly burdensome. PolyMet also objects to the term “customary procedures” as vague, ambiguous, and undefined. Further, PolyMet objects to the unlimited temporal scope of RFP No. 8 as overbroad and unduly burdensome. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, PolyMet’s response is limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (issuance of the final NPDES Permit).

PolyMet also objects to RFP No. 8 to the extent it seeks forms of electronically stored information that are not utilized in the ordinary course of business and that would require extraordinary measures to collect, review, and produce, including “erased, fragmented or damaged data.” PolyMet will not search for or produce electronically stored information that is not reasonably accessible because of undue burden or cost, including erased, fragmented or damaged data.

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**RFP No. 9:** All documents which you received from, or provided to, the MPCA regarding any meetings, telephone conferences, or web ex meetings regarding the PolyMet Project involving the EPA, including but not limited to the September 25, 2018 meeting between you, the MPCA, and the EPA.

**Objections to RFP No. 9:** PolyMet objects to the unlimited temporal scope of RFP No. 9 as overbroad and unduly burdensome. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, PolyMet's response is limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (issuance of the final NPDES Permit).

Further, PolyMet objects to RFP No. 9 to the extent it seeks forms of electronically stored information that are not utilized in the ordinary course of business and that would require extraordinary measures to collect, review, and produce, including "erased, fragmented or damaged data." PolyMet will not search for or produce electronically stored information that is not reasonably accessible because of undue burden or cost, including erased, fragmented or damaged data.

Subject to and without waiving these objections, PolyMet will produce non-privileged documents, if any, within its possession, custody, or control that were received from, or provided to, MPCA regarding meetings, telephone conferences, or web ex meetings between PolyMet, MPCA, and EPA.

**RFP No. 10:** All documents you received from the MPCA regarding the use of operating limits in lieu of the inclusion of WQBELs in the PolyMet NPDES Permit, including any documents reflecting EPA's concerns that the PolyMet NPDES Permit should include WQBELs.

**Objections to RFP No. 10:** PolyMet objects to RFP No. 10 as irrelevant, vague, assuming facts not in evidence, and exceeding the scope of court-ordered limits on discovery. The details of the permit conditions relating to "operating limits" and whether WQBELs were required for the NPDES Permit is a substantive merits question about the permit and irrelevant to whether MPCA complied with its procedural obligations. The Court directed that discovery from PolyMet must be "limited to information that PolyMet may have that relates to the alleged procedural irregularities involving the Pollution Control Agency," and "documents that PolyMet may have in its possession that the MPCA had in its possession at the time of its decision." PolyMet also objects to the phrase "EPA's concerns" as vague, ambiguous, and undefined and because it is not established that "EPA" had "concerns" about the NPDES Permit.

**RFP No. 11** All documents you received from the MPCA which indicate that the deficiencies in your NPDES application for the PolyMet Project, identified by the EPA in a letter of November 3, 2016, were corrected or that the EPA concurred that the deficiencies in your NPDES application had been resolved.

**Objections to RFP No. 11:** PolyMet objects to RFP No. 11 as overly broad, unduly burdensome, vague, ambiguous, irrelevant, and exceeding the scope of court-ordered limits on discovery. This proceeding is limited to alleged procedural

irregularities occurring around the draft NPDES Permit public comment period, which did not begin until January 18, 2018. Conduct occurring more than a year before that time period, and which does not relate to draft permit procedures, is irrelevant. The Court directed that discovery from PolyMet must be “limited to information that PolyMet may have that relates to the alleged procedural irregularities involving the Pollution Control Agency,” and “documents that PolyMet may have in its possession that the MPCA had in its possession at the time of its decision.” PolyMet further objects that MPCA’s communications regarding EPA’s views on the completeness of PolyMet’s NPDES Permit application in 2016 are not probative of any alleged procedural irregularities in 2018. PolyMet’s application for a permit is distinct from the draft NPDES Permit itself. Events in 2016 are irrelevant to any alleged procedural irregularities occurring around the draft NPDES Permit public comment period, which did not begin until January 18, 2018.

**RFP No. 12:** All documents you received from the MPCA regarding the procedure by which EPA would not send written comments during the public notice period for the draft PolyMet NPDES Permit.

**Objections to RFP No. 12:** PolyMet objects to RFP No. 12 as vague and ambiguous. In particular, the phrase “procedure by which EPA would not send written comments” is vague, ambiguous, and undefined. PolyMet will interpret that phrase in light of the court-ordered limits on discovery. PolyMet also objects

to the unlimited temporal scope of RFP No. 12 as overbroad and unduly burdensome. PolyMet's response is limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (issuance of the final NPDES Permit).

Further, PolyMet objects to RFP No. 12 to the extent it seeks forms of electronically stored information that are not utilized in the ordinary course of business and that would require extraordinary measures to collect, review, and produce, including "erased, fragmented or damaged data." PolyMet will not search for or produce electronically stored information that is not reasonably accessible because of undue burden or cost, including erased, fragmented or damaged data.

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

**RFP No. 13:** All documents you received from the MPCA regarding the procedure by which EPA would read its written comments on the draft PolyMet NPDES Permit to MPCA over the phone.

**Objections to RFP No. 13:** PolyMet objects to RFP No. 13 as vague and ambiguous. PolyMet objects to the phrase "written comments" as vague and ambiguous because, to PolyMet's knowledge, EPA did not submit written comments on the NPDES Permit. PolyMet also objects to this request as irrelevant because procedures, practices, or policies governing EPA's conduct are irrelevant

to whether MPCA abided by its procedural duties. Further, the phrase “procedure by which EPA would read its written comments” is vague, ambiguous, and undefined. PolyMet will interpret that phrase in light of the court-ordered limits on discovery. PolyMet also objects to the unlimited temporal scope of RFP No. 13 as overbroad and unduly burdensome. PolyMet’s response is limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (issuance of the final NPDES Permit).

PolyMet also objects to RFP No. 13 to the extent it seeks forms of electronically stored information that are not utilized in the ordinary course of business and that would require extraordinary measures to collect, review, and produce, including “erased, fragmented or damaged data.” PolyMet will not search for or produce electronically stored information that is not reasonably accessible because of undue burden or cost, including erased, fragmented or damaged data.

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any, within its possession, custody, or control.

## DEPOSITION QUESTIONS

PolyMet objects to Relators' proposed deposition questions as follows and will answer these questions within 30 days of the Court's resolution of these objections:

**DWQ No. 1(a):** Identify every meeting, call, or web ex meeting with MPCA and EPA in which you participated regarding the PolyMet NPDES Permit.

**Objections to DWQ No. 1(a):** PolyMet objects to the unlimited temporal scope of DWQ No. 1(a) as overbroad and unduly burdensome. Relators allege that MPCA engaged in procedural irregularities during and around the draft NPDES Permit public comment period, which began in January 2018. Therefore, PolyMet's response is limited to information and documents from January 1, 2018 (shortly before release of the draft permit and start of the public comment period) to December 20, 2018 (issuance of the final NPDES Permit).

Subject to and without waiving its objections, PolyMet's representative will be reasonably prepared to answer this question and will produce responsive, non-privileged documents, if any, sufficient to identify calls and meetings between PolyMet, MPCA, and EPA that occurred between January 1 and December 20, 2018.

**DWQ No. 1(b):** Identify every document regarding every meeting, telephone call, or web ex meeting with MPCA and EPA in which you participated regarding the PolyMet NPDES Permit.

**Objections to DWQ No. 1(b):** PolyMet incorporates by reference its objections to DWQ No. 1(a). PolyMet objects to having a representative “identify” documents. The benefit of such identification is far outweighed by the burden and cost of educating a representative on each responsive document. PolyMet is willing to stipulate to the authenticity of documents it produces. PolyMet also objects to DWQ No. 1(b) as overbroad, unduly burdensome, and exceeding the scope of court-ordered limits on discovery. PolyMet’s conduct is not the subject of this proceeding. Yet DWQ No. 1 apparently seeks internal PolyMet documents, including privileged and confidential documents, “regarding” discussions, meetings, and calls PolyMet had with MPCA and EPA. The Court specifically instructed that it did not allow “any general discovery of PolyMet.” PolyMet will not produce any documents beyond those specifically identified herein. PolyMet will not produce its internal documents, all of which are confidential, irrelevant, and beyond the scope of this proceeding.

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any, sufficient to identify all calls and in-person meetings between PolyMet, MPCA, and EPA that occurred between January 1 and December 20, 2018.

**DWQ No. 2(a):** What did MPCA inform, suggest, or indicate to you would be PolyMet's role in participating in the September 25, 2018 meeting with MPCA and EPA regarding the PolyMet NPDES Permit?

**Objections to DWQ No. 2(a):** PolyMet objects to DWQ No. 2(a) as irrelevant, lacking foundation, and assuming facts not in evidence.

Subject to and without waiving its objections, PolyMet's representative will be reasonably prepared to answer this question.

**DWQ No. 2(b):** Identify all documents regarding MPCA's communication about your role in the September 25, 2018 meeting with MPCA and EPA regarding the PolyMet NPDES Permit.

**Objections to DWQ No. 2(b):** PolyMet incorporates by reference its objections to DWQ Nos. 1(b) and 2(a). PolyMet further objects that requiring PolyMet to identify "all documents" generally referring to the September 25, 2018 meeting is unduly burdensome.

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any, sufficient to identify communications from MPCA to PolyMet regarding PolyMet's role in the September 25, 2018 meeting with MPCA and EPA.

**DWQ No. 2(c):** Who presented information on behalf of PolyMet at the September 25, 2018 meeting?

**Objections to DWQ No. 2(c):** PolyMet objects to DWQ No. 2(c) as irrelevant. Any presentation by PolyMet is irrelevant to MPCA's procedural requirements.

The Court specifically instructed that it did not allow “any general discovery of PolyMet.”

**DWQ No. 3:** In your September 25, 2018 meeting with MPCA and EPA regarding the PolyMet NPDES Permit what grounds for your opposition to including WQBELs in the NPDES Permit did you communicate to MPCA and EPA?

**Objections to DWQ No. 3:** PolyMet objects to DWQ No. 3 as irrelevant, lacking foundation, and assuming facts not in evidence. What PolyMet said about WQBELs at the September 25, 2018 meeting, if anything, is irrelevant to whether MPCA engaged in alleged procedural irregularities. PolyMet’s conduct is not the subject of this proceeding. PolyMet further objects to DWQ No.3 as beyond the scope of this proceeding, because whether WQBELs were appropriate for the NPDES Permit is a substantive merits question for the court of appeals.

**DWQ No. 4(a):** Did MPCA inform, suggest, or indicate to you that a meeting between a permit applicant, the MPCA, and the EPA regarding the PolyMet NPDES Permit was an unusual or a customary procedure?

**Objections to DWQ No. 4(a):** PolyMet objects to DWQ No. 4(a) as irrelevant, vague, compound, and lacking foundation. Whether MPCA informed, suggested, or indicated to PolyMet that a particular meeting was “unusual” or “customary” is irrelevant to whether MPCA complied with all procedural requirements. PolyMet also objects to the terms “unusual” and “customary” as vague, ambiguous, and undefined.

Subject to and without waiving its objections, PolyMet's representative will be reasonably prepared to answer this question.

**DWQ No. 4(b):** Identify all documents regarding MPCA's communication that a meeting between a permit applicant, the MPCA, and the EPA regarding the PolyMet NPDES Permit was either unusual or was a customary procedure.

**Objections to DWQ No. 4(b):** PolyMet incorporates by reference its objections to DWQ Nos. 1(b) and 4(a).

Subject to and without waiving its objections, PolyMet will produce responsive, non-privileged documents, if any.

**DWQ No. 5(a):** Describe every communication with MPCA in which MPCA discussed with you EPA's position that the PolyMet NPDES Permit should contain WQBELs.

**Objections to DWQ No. 5(a):** PolyMet objects to DWQ No. 5(a) as irrelevant, lacking foundation, assuming facts not in evidence, unduly burdensome, and exceeding the scope of court-ordered limits on discovery. It is not established that "EPA's position" was that "the PolyMet NPDES Permit should contain WQBELs." Moreover, even if EPA had such a "position," it is irrelevant to whether MPCA complied with statutes or regulations defining certain procedural requirements. Whether WQBELs were appropriate for the NPDES Permit is a substantive merits question reserved for the court of appeals. PolyMet further objects that requiring a representative to search for, identify, and educate themselves on "every communication" regarding a topic is unduly burdensome.

**DWQ No. 5(b):** Identify all documents regarding MPCA’s communication to you discussing EPA’s position that the PolyMet NPDES Permit should contain WQBELs.

**Objections to DWQ No. 5(b):** PolyMet incorporates by reference its objections to DWQ Nos. 1(b) and 5(a).

**DWQ No. 6(a):** Describe every communication with MPCA in which you discussed PolyMet’s opposition to EPA’s position that the PolyMet NPDES Permit should contain WQBELs.

**Objections to DWQ No. 6(a):** PolyMet objects to DWQ No. 6(a) as irrelevant, lacking foundation, assuming facts not in evidence, unduly burdensome, and exceeding the scope of court-ordered limits on discovery. It is not established that “EPA’s position” was that “the PolyMet NPDES Permit should contain WQBELs.” Moreover, even if EPA had such a “position,” it is irrelevant to whether MPCA complied with statutes or regulations defining certain procedural requirements. Whether WQBELs were appropriate for the NPDES Permit is a substantive merits question reserved for the court of appeals. PolyMet further objects that requiring a representative to educate themselves on “every communication” regarding a topic is unduly burdensome.

**DWQ No. 6(b):** Identify all documents regarding your communication to MPCA discussing EPA’s position that the PolyMet NPDES Permit should contain WQBELs.

**Objections to DWQ No. 6(b):** PolyMet incorporates by reference its objections to DWQ Nos. 1(b) and 6(a).

**DWQ No. 7(a):** Did you communicate to MPCA at any time that you preferred that EPA's comments regarding the PolyMet NPDES Permit not be provided in written form or that such EPA writing should be deferred to some future time?

**Objections to DWQ No. 7(a):** PolyMet objects to DWQ No. 7(a) as compound, irrelevant, and exceeding the scope of court-ordered limits on discovery. PolyMet's conduct is not at issue—PolyMet's preferences or lack thereof are irrelevant to whether MPCA followed its procedural duties. EPA's decision-making about how and when to submit written comments is irrelevant to whether MPCA complied with procedural requirements. Even if EPA's internal commenting decisions were relevant to MPCA's procedural duties, PolyMet's preferences about those EPA decisions are not. The Court directed that discovery from PolyMet must be "limited to information that PolyMet may have that relates to the alleged procedural irregularities involving the Pollution Control Agency," and "documents that PolyMet may have in its possession that the MPCA had in its possession at the time of its decision." PolyMet is not required to answer questions about its preferences, strategies, goals, or conduct and is not required to turn over internal documents that were not received from or given to MPCA.

**DWQ No. 7(b):** Identify all documents regarding your communication to MPCA that EPA's comments regarding the PolyMet NPDES Permit should not be provided in written form or that they should be deferred.

**Objections to DWQ No. 7(b):** PolyMet incorporates by reference its objections to DWQ Nos. 1(b) and 7(a).

**DWQ No. 8(a):** Did you communicate to MPCA that you preferred that EPA's comments on the draft PolyMet NPDES Permit not be provided in written form during the public comment period?

**Objections to DWQ No. 8(a):** PolyMet objects to DWQ No. 8(a) as irrelevant and exceeding the scope of court-ordered limits on discovery. PolyMet's conduct is not at issue—PolyMet's preferences or lack thereof are irrelevant to whether MPCA followed its procedural duties. EPA's decision-making about how and when to submit written comments is irrelevant to whether MPCA complied with procedural requirements. Even if EPA's internal commenting decisions were relevant to MPCA's procedural duties, PolyMet's preferences about those EPA decisions are not. The Court directed that discovery from PolyMet must be "limited to information that PolyMet may have that relates to the alleged procedural irregularities involving the Pollution Control Agency," and "documents that PolyMet may have in its possession that the MPCA had in its possession at the time of its decision." PolyMet is not required to answer questions about its preferences, strategies, goals, or conduct and is not required to turn over internal documents that were not received from or given to MPCA.

**DWQ No. 8(b):** Identify all documents regarding your communication to MPCA that you preferred that EPA's comments on the draft PolyMet NPDES Permit not be provided in written form during the public comment period.

**Objections to DWQ No. 8(b):** PolyMet incorporates by reference its objections to DWQ Nos. 1(b) and 8(a).

**DWQ No. 9(a):** When and how did you learn that MPCA had asked EPA on or about March 13, 2018 not to provide EPA's written comments on the draft PolyMet NPDES Permit during the public comment period?

**Objections to DWQ No. 9(a):** PolyMet objects to DWQ No. 9(a) as irrelevant, compound, lacking foundation, assuming facts not in evidence, and exceeding the scope of court-ordered limits on discovery. When and how PolyMet learned of an alleged MPCA communication to EPA is irrelevant to whether MPCA complied with all applicable procedures. DWQ No. 9(a) also assumes facts not in evidence because it is not established that MPCA asked EPA on or about March 13, 2018 not to provide EPA's written comments on the draft PolyMet NPDES Permit during the public comment period.

**DWQ No. 9(b):** Identify all documents regarding the way you learned that MPCA had asked EPA on or about March 13, 2018 not to provide EPA's written comments on the draft PolyMet NPDES Permit.

**Objections to DWQ No. 9(b):** PolyMet incorporates by reference its objections to DWQ Nos. 1(b) and 9(a).

**DWQ No. 10(a):** After EPA's November 3, 2016 letter stating that there were deficiencies in your application for the PolyMet NPDES Permit, what did MPCA communicate about the need for you to correct the deficiencies identified by EPA?

**Objections to DWQ No. 10(a):** PolyMet objects to DWQ No. 10(a) as overly broad, unduly burdensome, irrelevant, and exceeding the scope of court-ordered limits on discovery. This proceeding focuses on alleged procedural irregularities occurring around the draft NPDES Permit public comment period, which did not

begin until January 18, 2018. Conduct occurring more than a year before that time period, and which does not relate to draft permit procedures, is irrelevant. MPCA's communications regarding EPA's views on the completeness of PolyMet's NPDES Permit application in 2016 are not probative of any alleged procedural irregularities in 2018. PolyMet's application for a permit is distinct from the draft NPDES Permit itself. Events in 2016 are irrelevant to any alleged procedural irregularities occurring around the draft NPDES Permit public comment period, which did not begin until January 18, 2018.

**DWQ No. 10(b):** After EPA's November 3, 2016 letter stating that there were deficiencies in your application for the PolyMet NPDES Permit, did MPCA communicate at any time that EPA considered those deficiencies to have been resolved?

**Objections to DWQ No. 10(b):** PolyMet incorporates by reference its objections to DWQ No. 10(a).

**DWQ No. 10(c):** Identify all documents regarding MPCA's communication to you regarding EPA's November 3, 2016 letter or the deficiencies in your application for the PolyMet NPDES Permit stated by EPA in that letter.

**Objections to DWQ No. 10(c):** PolyMet incorporates by reference its objections to DWQ Nos. 1(b) and 10(a).

Dated: August 28, 2019

**GREENE ESPEL PLLP**

/s/ Monte A. Mills

Monte A. Mills, Reg. No. 030458X

Caitlinrose H. Fisher, Reg. No. 0398358

David S. McGhee, Reg. No. 0400175

222 S. Ninth Street, Suite 2200

Minneapolis, MN 55402

mmills@greeneespel.com

cfisher@greeneespel.com

dwilliams@greeneespel.com

(612) 373-0830

**VENABLE LLP**

Kathryn A. Kusske Floyd,

DC Reg. No. 411027

Jay C. Johnson, VA Reg. No. 47009

Kyle W. Robisch, DC Reg. No. 1046856

600 Massachusetts Avenue, NW

Washington, DC 20001

kkfloyd@venable.com

jcjohnson@venable.com

kwrobisch@venable.com

(202) 344-4000

Attorneys for Poly Met Mining, Inc.

**MASLON**

**Evan A. Nelson**  
Direct Dial: 612.672.8396  
Direct Fax: 612.642.8396  
evan.nelson@maslon.com

August 28, 2019

***Via E-filing***

Counsel for Minnesota Pollution Control Agency

John Martin  
Bryson C. Smith  
HOLLAND & HART, LLP  
25 S Willow Street  
Jackson, WY 83001

Sarah Koniewicz  
HOLLAND & HART, LLP  
1800 Broadway, Suite 300  
Boulder, CO 80302

**Re: *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, Ramsey County Court File No. 62-CV-19-4626***

**Relators' Objections to Respondent Minnesota Pollution Control Agency ("MPCA")'s Requests For Production of Documents And Written Deposition Questions**

Dear Counsel:

Relators' counsel write, pursuant to the order of the Ramsey County District Court, the Honorable John H. Guthmann presiding (the "Order"), to inform you of Relators' objections to MPCA's requests for production of documents and written deposition questions.

Based on the Court's Order, the nature and scope of MPCA's discovery exceeds the scope permitted by the Court.

As the Court indicated, the scope of your discovery is for the limited purpose of avoiding ambush and surprise at the Evidentiary Hearing. Rule 16 Conference Transcript of Proceedings, August 7, 2019 ("Hearing Tr.") at 115:13-21. Questions regarding confidential sources of information are outside the scope of discovery in this matter, *id.* at 115:7-8, as are questions asking from where Relators received documents. *Id.* at 114:19-21. Indeed, the Court made clear that the scope of MPCA's discovery did not extend to questions regarding Relators' conduct, but only to "question[s] of possession, of evidence that might be used at the hearing." *Id.* at 112:18-20.

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With that scope in mind, the Court permitted MPCA 25 requests for production of documents and 25 written deposition questions. *Id.* at 115:13-16. The Court did not permit interrogatory questions. *Id.* at 99:1-2.

Further, the Court indicated that Relators were to inform MPCA of their objections to the discovery request by August 28, 2019. *Id.* at 115:22 (referencing schedule regarding Relators' discovery requests), 99:14-23. If Relators and MPCA are unable to resolve any disagreements regarding our objections by September 4, 2019, we are to schedule a conference with the Court. *Id.* at 99:24-100:6. We are not to answer your discovery requests until after these objections have been resolved. *Id.* at 100:7-10. Thus, pursuant to the Court's Order, Relators will not answer any of MPCA's discovery requests until after the following objections are resolved by mutual agreement or by court order.

#### 1. Preliminary Statement

First, while Relators understand that the Court has declared that the Minnesota Rules of Civil Procedure do not govern this proceeding, Relators assume that where the Court made reference to provisions of the Minnesota Rules of Civil Procedure, the Court meant for such references to be interpreted as they would be under the Minnesota Rules of Civil Procedure. Indeed, the Court styled the August 7, 2019 Hearing as a Rule 16 Conference. Thus, except to the extent the Rules are inconsistent with the Court's Order, the Court's Order is understood to incorporate the concepts and definitions of the Minnesota Rules of Civil Procedure regarding requests for production of documents, depositions upon written questions, and objections to discovery requests.

The responses set forth herein are based on information currently known by the Relators and their attorneys. Discovery has not yet commenced. Prior to bringing the Motion to Transfer, Relators only had information regarding MPCA's procedural irregularities via litigation regarding Freedom of Information Act requests, Minnesota Government Data Practices Act requests, and leaks from concerned, anonymous sources.

As discovery progresses, Relators will supplement their responses to MPCA's Requests for Production of Documents ("Requests") accordingly. Depositions, however, are not continuing in nature, but rather elicit a witness's testimony before a court reporter. Minn. R. Civ. P. 31.02.

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## 2. Objections to Requests for Production of Documents

Subject to and without waiving the foregoing, Relators' objections to MPCA's Requests are as follows.<sup>1</sup>

**Request No. 1:** Produce all documents regarding any Procedural Irregularities in the NPDES Permit that are alleged by Relators.

**Objections:** Relators object to this Request to the extent it is unduly burdensome, seeks documents that are not in Relators' possession or control and/or documents that are within the possession or control of MPCA, and seeks documents that are subject to the attorney-client and/or joint defense/common interest privilege, the work product doctrine, and/or protections afforded trial preparation materials. Relators further object to this Request to the extent it seeks documents excluded from discovery by the Court's Order allowing discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see* Hearing Tr. at 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8. Further, Relators object to providing a privilege log to the extent it will directly or indirectly divulge any such confidential source. Relators also object that this Request is premature, especially considering that discovery has not yet commenced.

Subject to and without waiving the foregoing, Relators will produce non-privileged, responsive documents in their possession at a time and place to be determined by stipulation or court order, no later than 30 days from the date which all objections are resolved.

**Request No. 2:** Produce all documents regarding any allegation by Relators that MPCA violated any statute, regulation, rule, or policy in relation to the NPDES Permit.

**Objections:** Relators object to this Request to the extent it is unduly burdensome, is duplicative of Request No. 1, seeks documents that are not in Relators' possession or control and/or documents that are within the possession or control of MPCA, and seeks documents that are subject to the attorney-client and/or joint defense/common interest privilege, the work product doctrine, and/or protections afforded trial preparation materials. Relators further object to this Request to the extent it seeks documents excluded from discovery by the Court's Order allowing discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see* Hearing Tr. at 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed

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<sup>1</sup> The Fond du Lac Band of Lake Superior Chippewa is a governmental entity and also reserves the right to assert privileges based on deliberative process and/or immunities to the extent they become applicable.

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to Relators from any such confidential source. *Id.* at 115:7-8. Relators also object that this Request is premature, especially considering that discovery has not yet commenced.

Subject to and without waiving the foregoing, Relators will produce non-privileged, responsive documents in their possession at a time and place to be determined by stipulation or court order, no later than 30 days from the date which all objections are resolved.

**Request No. 3:** Produce all documents that Relators allege were improperly excluded from the administrative record for the NPDES Permit.

**Objections:** Relators object to this Request to the extent it is unduly burdensome, is duplicative of Requests Nos. 1 and 2, seeks documents that are not in Relators' possession or control and/or documents that are within the possession or control of MPCA and documents which may have been discarded by MPCA, which MPCA has failed to produce in response to Minnesota Government Data Practices Act Requests, or which MPCA has asked not be provided to MPCA in written form. Finally, this request is premature, especially considering that discovery has not yet commenced.

Subject to and without waiving the foregoing, Relators will produce non-privileged, responsive documents in their possession at a time and place to be determined by stipulation or court order, no later than 30 days from the date which all objections are resolved.

**Request No. 4:** Produce all documents regarding Relators' allegation that MPCA failed to act with truthfulness, accuracy, disclosure, or candor in connection with the NPDES Permit.

**Objections:** Relators object to this Request to the extent it is unduly burdensome, is duplicative of Requests Nos. 1, 2, and 3, seeks documents that are not in Relators' possession or control and/or documents that are within the possession or control of MPCA, and seeks documents that are privileged attorney client communications, and/or protected by the work product doctrine. Relators further object to this Request to the extent it seeks documents excluded from discovery by the Court's Order allowing discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see* Hearing Tr. at 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8. Further, Relators will not indirectly divulge any such confidential source via a privilege log. Relators also object that this Request is premature, especially considering that discovery has not yet commenced.

Subject to and without waiving the foregoing, Relators will produce non-privileged, responsive documents in their possession at a time and place to be determined by stipulation or court order, no later than 30 days from the date which all objections are resolved.

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**Request No. 5:** Produce all documents that Relators may seek to introduce at the Hearing, regardless of the purpose of such use.

**Objection:** Relators object to this Request to the extent it seeks to impose a greater burden on Relators than would be found under the Minnesota Rules of Civil Procedure. Relators also object that this Request is premature, especially considering that discovery has not yet commenced. Relators further object to this Request to the extent it is duplicative of Requests Nos. 1, 2, 3, and 4.

Relators propose that all parties exchange exhibit lists prior to the Evidentiary Hearing at a time and place determined by stipulation and/or court order. Further, Relators reserve the right to amend or supplement their exhibit list, or otherwise introduce evidence at the Evidentiary Hearing not on the exhibit list, due to the fact that while discovery is limited prior to the Evidentiary Hearing, Relators reserve their right to continue efforts to obtain evidence relating to MPCA's procedural irregularities, and also reserve their right to introduce new documents at the Evidentiary Hearing in response to testimony of witnesses.

**Request No. 6:** Produce all documents that in any way support Relators' responses to any of the written deposition questions set forth below.

**Objections:** Relators object to this Request to the extent it is vague, as the phrase "in any way support" is open to multiple interpretations, is unduly burdensome, seeks documents that are within the possession or control of MPCA, and seeks documents that are privileged attorney client communications, and/or protected by the work product doctrine. Relators further object to this Request to the extent it seeks documents excluded from discovery by the Court's Order allowing discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see* Hearing Tr. at 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8. Further, Relators will not indirectly divulge any such confidential source via a privilege log. Relators also object that this Request is premature, especially considering that discovery has not yet commenced.

Subject to and without waiving the foregoing, Relators will produce non-privileged, responsive documents in their possession at a time and place to be determined by stipulation or court order, no later than 30 days from the date which all objections are resolved.

### 3. Objections to Written Deposition Questions

Relators object that MPCA's written deposition question fail to follow the procedure provided by Rule 31 of the Minnesota Rules of Civil Procedure. The Court was clear that interrogatories are not permitted in this matter. Hearing Tr. 99:1-2. Relators object that MPCA "written deposition questions" are not properly framed as deposition questions put to a deponent designated by Relators. Instead, these are merely interrogatories that are labeled deposition questions. They are

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not calculated to lead to discovery of factual matters related to procedural irregularities, but rather they seek the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of Relators concerning the litigation.

Further, while an interrogatory is not “objectionable merely because its answer involves an opinion or contention that relates to fact or the application of law to fact,” Minn. R. Civ. P. 33.02, there is nothing to suggest that this provision applies to written deposition questions. Indeed, the Court’s clear Order that no interrogatories are permitted indicates that this provision does not apply here. Hearing Tr. 99:1-2. And while an interrogatory is to be answered “fully in writing,” Minn. R. Civ. P. 33.01, a deposition upon written questions is to take place before an officer of the court. Minn. R. Civ. P. 31.02. MPCA has not provided notice of the deposition, and this failure leaves Relators without any indication of when, where, or before whom the deposition will occur. Minn. R. Civ. P. 31.01.

Finally, the Court indicated that the deposition is to be of Relators’ designee as would be governed by Rule 30.02. Hearing Tr. 113:5-12. MPCA’s counsel agreed to this provision. *Id.* at 112:5-6. And the scope of these questions was limited, as MPCA’s counsel suggested, to “what evidence do [Relators] have . . .” *Id.* at 111:24-25; *see also* 112:7-12 (MPCA’s counsel agreeing with Court that questions would be related to disclosing the evidence Relators have), 112:18-20 (Court stating that questions would be limited to “question[s] of possession, of what evidence might be used at the hearing”).

Relators reserve their right to “designate one or more officers, directors, or managing agents, or other persons who consent to testify on [their] behalf, and may set forth, for each person designated, the matters on which the person will testify.” Minn. R. Civ. P. 30.02(f). Once MPCA notices the time and location of the deposition, Relators will inform MPCA of their designee(s).

For the foregoing reasons, Relators object to the entirety of MPCA’s written deposition questions as improper and procedurally inadequate.

a. Specific Objections To Written Deposition Questions

Subject to and without waiving the foregoing, Relators object to the specific Written Deposition Questions (“Questions”) as follows.<sup>2</sup>

**Question No. 1:** Describe with particularity any Procedural Irregularities that Relators allege occurred regarding the NPDES Permit.

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<sup>2</sup> The Fond du Lac Band of Lake Superior Chippewa is a governmental entity and also reserves the right to assert privileges based on deliberative process and/or immunities to the extent they become applicable.

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**Objections:** Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 2:** Describe with particularity 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.

**Objections:** Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 3:** Describe with particularity 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.

**Objections:** Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 4:** Describe with particularity the basis for Relators' allegation that MPCA sought to prevent documents or communications from being fully and fairly reviewed by the Court of Appeals.

**Objections:** Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 5:** Describe with particularity each instance in which Relators allege that MPCA failed to act with truthfulness, accuracy, disclosure, or candor in connection with the NPDES Permit.

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**Objections:** Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 6:** Describe with particularity each instance in which Relators allege that MPCA improperly destroyed, discarded, or failed to retain written records of communications with EPA regarding the NPDES Permit.

**Objections:** Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 7:** Describe with particularity how Relators allege that they were prejudiced by the alleged Procedural Irregularities associated with the NPDES Permit.

**Objections:** Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 8:** For each document that Relators allege was improperly excluded from the administrative record for the NPDES Permit, describe with particularity why Relators allege the document should be included in the administrative record.

**Objections:** Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

Subject to and without waiving the foregoing objections, and upon sufficient notice provided by MPCA and proper written questions for a deposition, Relators will designate one or more persons to be deposed.

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Relators reserve the right to supplement, extend, or modify these objections.

In keeping with the Court's Order, Relators propose a telephonic meet-and-confer on Tuesday, September 3, starting at 10 a.m. central time, during which call Relators will make a good faith effort to resolve the above objections. Please advise, via email, your availability for such a call.

Portions of the hearing transcript cited in this document are attached for your convenience.

*[signature blocks on following page]*

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Dated: August 28, 2019

**MASLON LLP**

*/s/ Evan A. Nelson*

WILLIAM Z. PENTELOVITCH (#0085078)  
MARGARET S. BROWNELL (#0307324)  
EVAN A. NELSON (#0398639)  
90 South Seventh Street  
3300 Wells Fargo Center  
Minneapolis, MN 55402-4140  
Phone: (612) 672-8200  
Email: bill.pentelovitch@maslon.com  
margo.brownell@maslon.com  
evan.nelson@maslon.com

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY**

ELISE L. LARSON (#0393069)  
KEVIN REUTHER (#0266255)  
1919 University Avenue West  
Saint Paul, MN 55105  
Phone: (651) 223-5969  
Email: elarson@mncenter.org  
kreuther@mncenter.org

**NILAN JOHNSON LEWIS PA**

DANIEL Q. PORETTI (#185152)  
MATTHEW C. MURPHY (#0391948)  
120 South Sixth Street, Suite 400  
Minneapolis, MN 55402-4501  
Phone: (612) 305-7500  
Email: dporetti@nilanjohnson.com  
mmurphy@nilanjohnson.com

*Attorneys for Relators Center for Biological  
Diversity, Friends of the Boundary Waters  
Wilderness, and Minnesota  
Center for Environmental Advocacy*

**JUST CHANGE LAW OFFICES**

*/s/ Paula Maccabee*

PAULA G. MACCABEE (#0129550)  
1961 Selby Avenue  
Saint Paul, MN 55104  
Phone: (651) 646-8890  
Email: pmaccabee@justchangelaw.com

*Attorney for Relators WaterLegacy*

**FOND DU LAC BAND OF LAKE  
SUPERIOR CHIPPEWA LEGAL  
AFFAIRS OFFICE**

*/s/ Vanessa Ray-Hodge*

SEAN W. COPELAND (#0387142)  
1720 Big Lake Road  
Cloquet, MN 55720  
Phone: (218) 878-2607  
Email: seancopeland@fdlrez.com

**SONOSKY, CHAMBERS, SACHSE,  
MIELKE & BROWNELL, LLP**

VANESSA L. RAY-HODGE (*pro hac vice*)  
MATTHEW L. MURDOCK (*pro hac vice*)  
500 Marquette Avenue, NW, Suite 660  
Albuquerque, NM 87102  
Phone: (505) 247-0147  
Email: vrayhodge@abqsonosky.com  
mmurdock@sonosky.com

*Attorneys for Relators Fond du Lac Band of  
Lake Superior Chippewa*

August 28, 2019  
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cc: Counsel for PolyMet: Monte A. Mills, Davida S. McGhee,  
Caitlinrose H. Fisher, Kathryn A. Kusske Floyd, Kyle W.  
Robish, and Jay C. Johnson

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

3 \*\*\*\*\*

4 In the Matter of the Denial

5 of Contested Case Hearing Requests

6 and Issuance of National Pollutant

7 Discharge Elimination System / State

8 Disposal System, Permit No. MN0071013

9 for the Proposed NorthMet Project,

10 St. Louis County, Hoyt Lakes,

11 Babbitt, Minnesota.

12 \*\*\*\*\*

13

14

15

RULE 16 CONFERENCE

16

TRANSCRIPT OF PROCEEDINGS

17

18 The above-entitled Rule 16 Conference came on

19 for hearing on Wednesday, the 7th day of August, 2019,

20 before the Honorable John H. Guthmann, District Court

21 Judge, at the Ramsey County Courthouse, City of St. Paul,

22 State of Minnesota.

23

24

25 REPORTED BY: Lori Morrow, RMR, CRR, CLR, CBC

## ATTACHMENT

1           There will be no depositions, and there will be  
2 no interrogatories. But I am going to permit written  
3 deposition questions directed to a limited group of  
4 people with the PCA. I am going to permit each of those  
5 persons to be asked up to 25 questions, including  
6 subparts, whether those subparts are numbered or not. I  
7 say that because I've been in your shoes before writing  
8 stuff like this.

9           Relators will have two weeks to provide the  
10 proposed written deposition questions for each witness to  
11 Respondents. That's no later than August 21 at 4:30.  
12 Don't file it with the court. Just give it to each  
13 other.

14           Respondents will have one week to object to the  
15 questions as beyond the scope of what I've permitted.  
16 The scope of what I'm permitting is limited solely to the  
17 alleged procedural irregularities. So if the questions  
18 don't relate to the discovery of alleged procedural  
19 irregularities, then there's a basis to object. If the  
20 questions, including subparts, whether separately  
21 numbered or not, are in excess of 25, that's a reason to  
22 object. So any objections within a week, that would be  
23 August 28 at 4:30, don't file it.

24           If the objections cannot be resolved in a week,  
25 which is September 4, you can schedule an informal

## ATTACHMENT

1 conference with me as provided for in the Rules of  
2 General Practice 15.10. I ordinarily do those off the  
3 record. If someone wants it on the record, we can do it.  
4 All I want in advance of that conference is whatever it  
5 is you're disputing and why, which I'll want in a letter  
6 no longer than three pages from each of you.

7 Once any dispute is resolved or once you agree  
8 on the written deposition questions, assuming there's  
9 no -- if there is no dispute, then the PCA will have 30  
10 days to respond. So I anticipate that even if there is a  
11 dispute sometime in the first half of October, those  
12 written questions will have been responded to.

13 I will also permit Relators to make 25 document  
14 requests to the Minnesota Pollution Control Agency on the  
15 same schedule as the written depositions. Present,  
16 object, try to resolve, and, if you can't resolve, a Rule  
17 15.10 conference with the court. I'll rule right at the  
18 conference on those objections, and then the clock starts  
19 running on 30 days to respond.

20 I'm also going to permit 25 document requests  
21 and 25 written deposition questions to a single PolyMet  
22 corporate representative. And I'm thinking of a 30.02  
23 kind of standard, solely limited to information that  
24 PolyMet may have that relates to the alleged procedural  
25 irregularities involving the Pollution Control Agency and

## ATTACHMENT

1 efforts. There aren't that many questions to be asked.  
2 The parties have extensively briefed their positions to  
3 the court of appeals. And I think that the parties have  
4 probably rather clearly articulated in their own heads  
5 what they need on numerous occasions over the last six  
6 months to a year with regard to this case. So I'm going  
7 to leave the deadlines as I've indicated.

8 MR. MARTIN: Your Honor, one of my colleagues  
9 just pointed out that at least so far you haven't talked  
10 about what discovery we at MPCA and perhaps at PolyMet  
11 might have of the Relators. May we have something akin  
12 to what you've allowed and specific --

13 THE COURT: What do you want? I didn't give  
14 you any or suggest any because of the way you've argued  
15 the case to me.

16 MR. MARTIN: Well, and your Honor, I think  
17 that --

18 THE COURT: I won't elaborate, but you know  
19 what I mean.

20 MR. MARTIN: I know what you mean. That sounds  
21 like my daughter now.

22 THE COURT: Only I get to make kid analogies.

23 MR. MARTIN: Yeah. Okay.

24 But, you know, here is, for example, a question  
25 that we might ask. You know, what evidence do you have

## ATTACHMENT

1 that EPA had suppressed its comments? And I'm talking  
2 now. Obviously, there would be subparts of that. And if  
3 there is evidence like that, I think it's incumbent upon  
4 them to give it to us. And thinking about your Honor's  
5 order, it strikes me that the 30.02 sort of questions  
6 might make the most sense.

7 THE COURT: So you're thinking about a list of  
8 up to 25 questions of the Relators as a group --

9 MR. MARTIN: I think so.

10 THE COURT: -- asking them to disclose what  
11 they have to make sure that you're not going to be  
12 surprised?

13 MR. MARTIN: Exactly, your Honor.

14 THE COURT: What do you think, Relators?

15 MS. MACCABEE: Two things. Number one,  
16 Relators' conduct is not at issue and the Court -- gave  
17 the Court absolutely --

18 THE COURT: It's not a question of conduct.  
19 It's a question of possession, of evidence that might be  
20 used at the hearing. And by the way, if you had been  
21 granted the discovery you wanted, that means that the  
22 Respondents could have deposed all your clients, because  
23 that's what you wanted. You wanted the rules to apply.  
24 If the rules applied, they would get full, unfettered  
25 discovery, because there wouldn't be any basis to limit

## ATTACHMENT

1 it to one set of parties, right?

2 MS. MACCABEE: Your Honor, I would like to give  
3 an opportunity for Ms. Ray-Hodge to speak.

4 MS. RAY-HODGE: Vanessa Ray-Hodge again,  
5 attorney for the Band.

6 I think we need to know with specificity as  
7 well who those individuals are that MPCA and/or PolyMet  
8 would be asking to ask deposition questions to --

9 THE COURT: I think what is being suggested  
10 here is a set of up to 25 questions and document requests  
11 to -- in the philosophy of Rule 30.02 to the Relators as  
12 a whole.

13 MS. RAY-HODGE: Okay.

14 THE COURT: What documents do you have that you  
15 feel prove that there were procedural irregularities  
16 might be one of the questions that they ask.

17 MS. RAY-HODGE: Right. And I would only say  
18 that, you know, one of the concerns that we may have,  
19 depending on what they're asking, could relate to  
20 confidential sources that we're not able to disclose  
21 where we've received some of this information from. For  
22 example --

23 THE COURT: That may or may not be the  
24 question --

25 MS. RAY-HODGE: Right.

## ATTACHMENT

1 THE COURT: -- because I would likely require  
2 you to produce all documents that you plan to offer at  
3 the hearing --

4 MS. RAY-HODGE: Absolutely.

5 THE COURT: -- sometime in advance. So that's  
6 what they're looking for. They want to know before the  
7 date of the hearing and the witness starts testifying  
8 what you've got.

9 MS. RAY-HODGE: Right. And most of what we've  
10 gotten is from them --

11 THE COURT: It's what you want from them,  
12 right?

13 MS. RAY-HODGE: Exactly. And we're happy to  
14 share the documents we have. It's just -- if it gets  
15 into issues that relate to confidential sources and  
16 information that is meant to be kept confidential, we may  
17 have some other issues that we will need to come to you  
18 about. That's all I just wanted to raise.

19 THE COURT: And, Mr. Martin, you're not  
20 intending to ask them where they got it. You just want  
21 to know if they've got it?

22 MR. MARTIN: Well, and, you know, I really  
23 believe that your Honor has laid out a procedure where  
24 these sorts of issues can be addressed. And, you know, I  
25 recognize that Ms. Hodge --

## ATTACHMENT

1 MS. RAY-HODGE: Ray-Hodge.

2 MR. MARTIN: I'm sorry, Ray-Hodge. I  
3 apologize. Ms. Ray-Hodge makes the point that we could  
4 ask a deposition question that's objectionable, and I  
5 think the procedure that you have laid out would address  
6 those sorts of things.

7 THE COURT: And I'm not going to make them give  
8 up their sources, so, you know, you know that now. They  
9 are going to still have to establish admissibility at the  
10 hearing, but that doesn't necessarily require someone to  
11 give up their source. Okay?

12 MR. MARTIN: I understand, your Honor.

13 THE COURT: All right. I'm going to permit a  
14 Rule 30.02 style set of 25 document requests and 25  
15 written depositions to be directed to the Relators as a  
16 whole. So a question to one Relator applies to all. And  
17 this is strictly for the limited purpose of -- the same  
18 due process purpose that is behind the discovery that the  
19 court permitted of the Relators -- by the Relators  
20 towards the Respondents, that is, the lack of litigation  
21 by ambush and surprise.

22 Same schedule. Everything is the same.

23 Any other questions or concerns?

24 MR. PORETTI: Just a housekeeping.

25 THE COURT: Name.

MASLON

**Evan A. Nelson**  
Direct Dial: 612.672.8396  
Direct Fax: 612.642.8396  
evan.nelson@maslon.com

August 28, 2019

***Via E-filing***

Counsel for Poly Met Mining, Inc.

Monte A. Mills  
Caitlinrose H. Fisher  
Davida S. McGhee  
GREENE ESPEL PLLP  
225 South Ninth Street, Suite 2200  
Minneapolis, MN 55402

Kathryn A. Kusske Floyd  
Jay C. Johnson  
Kyle W. Robish  
VENABLE LLP  
600 Massachusetts Avenue NW  
Washington, DC 20001

**Re: *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, Ramsey County Court File No. 62-CV-19-4626***

**Relators' Objections to Respondent Poly Met Mining, Inc. ("PolyMet")'s Requests For Production of Documents And Written Deposition Questions**

Dear Counsel:

Relators' counsel write, pursuant to the order of the Ramsey County District Court, the Honorable John H. Guthmann presiding (the "Order"), to inform you of Relators' objections to PolyMet's requests for production of documents and written deposition questions.

Relators object to PolyMet's discovery because it not only exceeds the nature and scope permitted by the Court, but it is fundamentally inconsistent with the direction of the Court. As a threshold matter, the Court did not grant PolyMet permission to propound its own, separate discovery requests. Rather, in discussions with Minnesota Pollution Control Agency ("MPCA")'s counsel, the Court granted MPCA permission to propound "a Rule 30.02 style set of up to 25 document requests and 25 written deposition[ questions] to be directed to the Relators as a whole." Rule 16 Conference Transcript of Proceedings, August 7, 2019 ("Hearing Tr.") at 115:13-21 (granting permission for discovery requests following colloquy with MPCA's counsel) (emphasis added). Ignoring this instruction, PolyMet has gone ahead and served its own separate set of discovery on Relators. Therefore, Relators are under no obligation to respond to PolyMet's separate, unauthorized discovery requests.

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In fact, responding to separate discovery requests places an undue burden on Relators, specifically to the extent that MPCA's and PolyMet's discovery requests are duplicative of each other and to the extent that Relators would be required to designate one or more deponent to appear for two separate depositions. Moreover, MPCA and PolyMet each proceeding separately is counter to what the Court has required of Relators, i.e. that they serve a joint set of discovery. Such a double standard would be fundamentally unfair and Relators do not believe that this is what the Court had in mind.

Notwithstanding this threshold objection, Relators would not object if PolyMet were to join with MPCA and serve a joint set of discovery requests that comply in nature and scope with the Court's order. As the Court indicated, questions regarding confidential sources of information are outside the scope of discovery in this matter, *id.* at 115:7-8, as are questions asking from where Relators received documents. *Id.* at 114:19-21. Indeed, the Court made clear that the scope of Respondents' discovery did not extend to questions regarding Relators' conduct, but only to "question[s] of possession, of evidence that might be used at the hearing." *Id.* at 112:18-20. In addition, the Court did not permit interrogatory questions. *Id.* at 99:1-2. PolyMet's current requests exceed the scope of the Court's order. Therefore, Relators reserve the right to specifically object to such discovery requests as set forth below, if and when PolyMet's discovery is properly propounded.

#### 1. Preliminary Statement

While Relators understand that the Court has declared that the Minnesota Rules of Civil Procedure do not govern this proceeding, Relators assume that where the Court referred to provisions of the Minnesota Rules of Civil Procedure, the Court meant for such references to be interpreted as they would be under the Minnesota Rules of Civil Procedure. Indeed, the Court styled the August 7, 2019 Hearing a Rule 16 Conference. Thus, except to the extent the Rules are inconsistent with the Court's Order, the Court's Order is understood to incorporate the concepts and definitions of the Minnesota Rules of Civil Procedure regarding requests for production of documents, depositions upon written questions, and objections to discovery requests.

#### 2. Objections to Requests for Production of Documents

In addition to Relators' objection to PolyMet's serving a separate and unauthorized set of discovery requests, Relators' objections to PolyMet's Requests for Production of Documents ("Requests") are as follows.<sup>1</sup>

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<sup>1</sup> The Fond du Lac Band of Lake Superior Chippewa is a governmental entity and also reserves the right to assert privileges based on deliberative process and/or immunities to the extent they become applicable.

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**Request No. 1:** Produce all documents regarding any NPDES Permit-related irregularities in procedure you allege.

**Objections:** Relators object to this Request to the extent it is duplicative of MPCA's Request No. 1.

Relators also object to this Request to the extent it is unduly burdensome, seeks documents that are not in Relators' possession or control and/or documents that are within the possession or control of PolyMet, and seeks documents that are subject to the attorney-client and/or joint defense/common interest privilege, the work product doctrine, and/or protections afforded trial preparation materials. Relators further object to this Request to the extent it seeks documents protected from discovery by the Court's Order allowing discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see* Hearing Tr. 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8. Further, Relators object to providing a privilege log to the extent it will directly or indirectly divulge any such confidential source.

**Request No. 2:** Produce all documents you may introduce at the Evidentiary Hearing, whether intended for use as substantive admissible evidence, a demonstrative exhibit, for impeachment purposes, or for any other purpose.

**Objections:** Relators object to this Request to the extent it is duplicative of MPCA's Request No. 5.

Relators also object to this Request to the extent it seeks to impose a greater burden on Relators than would be found under the Minnesota Rules of Civil Procedure. Relators further object that this Request is premature, especially considering that discovery has not yet commenced.

Relators propose that all parties exchange exhibit lists prior to the Evidentiary Hearing at a time and place determined by stipulation and/or court order. Further, Relators reserve the right to amend or supplement their exhibit list, or otherwise introduce evidence at the Evidentiary Hearing not on the exhibit list, due to the fact that while discovery is limited prior to the Evidentiary Hearing, Relators reserve their right to continue efforts to obtain evidence relating to MPCA's procedural irregularities, and also reserve their right to introduce new documents at the Evidentiary Hearing in response to testimony of witnesses.

**Request No. 3:** Produce all communications between or among you and EPA, MPCA, or any witness you may call at the Evidentiary Hearing regarding the NPDES Permit.

**Objections:** Relators object to this Request as explicitly and wholly outside the scope of discovery authorized by the Court. The Court's Order allowed Respondents discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where

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Relators received documents, *see* Hearing Tr. 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8.

Relators further object to this Request to the extent it is unduly burdensome, seeks documents that are not in Relators' possession or control, and seeks documents that are subject to the attorney-client and/or joint defense/common interest privilege, the work product doctrine, and/or protections afforded trial preparation materials. Further, Relators object to providing a privilege log to the extent it will directly or indirectly divulge any confidential source.

**Request No. 4:** Produce all communications between or among you and any person that provided you with information or documents regarding any NPDES Permit-related irregularities you allege.

**Objections:** Relators object to this Request as explicitly and wholly outside the scope of discovery authorized by the Court. The Court's Order allowed Respondents discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see* Hearing Tr. 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8.

**Request No. 5:** Produce all communications, including oral recorded communications, to or from any person that provided you with information or documents regarding any NPDES Permit-related irregularities in procedure you allege.

**Objections:** Relators object to this Request as explicitly and wholly outside the scope of discovery authorized by the Court. The Court's Order allowed Respondents discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see* Hearing Tr. 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8.

Relators reserve the right to supplement, extend, or modify these objections.

### 3. Objections to Written Deposition Questions

As stated previously, Relators object to PolyMet's serving a separate and unauthorized set of written deposition questions.

In addition, Relators object that PolyMet's written deposition questions fail to follow the procedure provided by Rule 31 of the Minnesota Rules of Civil Procedure. The Court was clear that interrogatories are not permitted in this matter. Hearing Tr. 99:1-2. Relators object that PolyMet's written deposition questions are not properly framed as deposition questions put to a deponent designated by Relators. Instead, they are merely interrogatories that are labeled deposition

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questions. They are not calculated to lead to discovery of factual matters related to procedural irregularities, but rather they seek the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of Relators concerning the litigation.

Further, while an interrogatory is not “objectionable merely because its answer involves an opinion or contention that relates to fact or the application of law to fact,” Minn. R. Civ. P. 33.02, there is nothing to suggest that this provision applies to a written deposition question. Indeed, the Court’s clear order that no interrogatories are permitted indicates that this provision does not apply here. Hearing Tr. 99:1-2. And while an interrogatory is to be answered “fully in writing,” Minn. R. Civ. P. 33.01, a deposition upon written questions is to take place before an officer of the court. Minn. R. Civ. P. 31.02. PolyMet has not provided notice of the deposition, and this failure leaves Relators without any indication of when, where, or before whom the deposition will occur. Minn. R. Civ. P. 31.01.

Finally, the Court indicated that the deposition is to be of Relators’ designee as would be governed by Rule 30.02. Hearing Tr. 113:9-12. MPCA’s counsel agreed that the deposition would be governed by Rule 30.02. *Id.* at 112:5-6. And the scope of these questions was limited, as MPCA’s counsel suggested, to “what evidence do [Relators] have . . . .” *Id.* at 111:24-25; *see also* 112:7-13 (MPCA’s counsel agreeing with Court that questions would be related to disclosing the evidence Relators have), 112:18-20 (Court stating that questions would be limited to “question[s] of possession, of what evidence might be used at the hearing”).

Relators reserve their right to “designate one or more officers, directors, or managing agents, or other persons who consent to testify on [their] behalf, and may set forth, for each person designated, the matters on which the person will testify.” Minn. R. Civ. P. 30.02(f). Should PolyMet seek to join with MPCA in serving a joint set of discovery requests and jointly notice the time and location of the deposition, Relators will respond to that notice to provide a designee.

Relators object to the entirety of PolyMet’s written deposition questions as improper and procedurally inadequate.

a. Specific Objections To Written Deposition Questions

Subject to and without waiving the foregoing, Relators object to the specific Written Deposition Questions (“Questions” or “DWQ”) as follows.<sup>2</sup>

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<sup>2</sup> The Fond du Lac Band of Lake Superior Chippewa is a governmental entity and also reserves the right to assert privileges based on deliberative process and/or immunities to the extent they become applicable.

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**Question No. 1:** Identify all witnesses you may call at the Evidentiary Hearing and the nature of their anticipated testimony.

**Objections:** Relators object to this Question to the extent it asks for information already given to PolyMet, as Relators provided a witness list to Respondents and to the Court at the August 7, 2019 hearing. Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney-client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

Relators propose that all parties exchange witness lists prior to the Evidentiary Hearing at a time and place determined by stipulation and/or court order. Further, Relators reserve the right to amend or supplement their witness list, or otherwise call witnesses at the Evidentiary Hearing not on the exhibit list, due to the fact that while discovery is limited prior to the Evidentiary Hearing, Relators reserve their right to continue efforts to obtain evidence and uncover witnesses relating to MPCA's procedural irregularities. Indeed, the testimony of a witness at the Evidentiary Hearing itself may reveal that some other witness ought to be called.

**Question No. 2:** For all witnesses identified in DWQ No. 1, describe with particularity how you learned about the basis of their anticipated testimony.

**Objections:** Relators object to this Request as wholly outside the scope of discovery authorized by the Court. The Court's Order allowed Respondents' discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see* Hearing Tr. 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8.

**Question No. 3:** Identify all documents regarding any NPDES Permit-related irregularities in procedure you allege or that you may introduce at the Evidentiary Hearing.

**Objections:** Relators object to this Question to the extent it is burdensome and duplicative of PolyMet Requests Nos. 1 and 2, which in turn, were duplicative of MPCA Requests Nos. 1 and 5.

Relators further object to this Question to the extent it seeks documents that are not in Relators' possession or control and/or documents that are within the possession or control of PolyMet, and seeks documents that are subject to the attorney-client and/or joint defense/common interest privilege, the work product doctrine, and/or protections afforded trial preparation materials. Relators further object to this Question to the extent it seeks documents protected from discovery by the Court's Order allowing discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see*

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Hearing Tr. 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8. Relators further object that this Question is premature, especially considering that discovery has not yet commenced.

Relators propose that all parties exchange exhibit lists prior to the Evidentiary Hearing at a time and place determined by stipulation and/or court order. Further, Relators reserve the right to amend or supplement their exhibit list, or otherwise introduce evidence at the Evidentiary Hearing not on the exhibit list, due to the fact that while discovery is limited prior to the Evidentiary Hearing, Relators reserve their right to continue efforts to obtain evidence relating to MPCA's procedural irregularities, and also reserve their right to introduce new documents at the Evidentiary Hearing in response to testimony of witnesses.

**Question No. 4:** For all documents identified in DWQ No. 3, identify which irregularity in procedure you allege the document relates to.

**Objections:** Relators object to this Question as duplicative of MPCA's Questions Nos. 1, 2, 3, 4, 5, 6, and 8.

Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 5:** For all documents identified in DWQ No. 3, describe with particularity how, where, when, in what form, and from which person you obtained the document.

**Objections:** Relators object to this Request as explicitly and wholly outside the scope of discovery authorized by the Court. The Court's Order allowed Respondents discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see* Hearing Tr. 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8.

**Question No. 6:** Describe by date, medium, and substance, all meetings between you and MPCA, EPA, or other witnesses you may call at the Evidentiary Hearing regarding the NPDES Permit.

Relators object to this Request as explicitly and wholly outside the scope of discovery authorized by the Court. The Court's Order allowed Respondents discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators

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received documents, *see* Hearing Tr. 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8.

**Question No. 7:** Describe with particularity all efforts to obtain documents and/or information from MPCA and EPA relating to the NPDES Permit.

Relators object to this Request as explicitly and wholly outside the scope of discovery authorized by the Court. The Court's Order allowed Respondents discovery only of documents reflecting irregularities while excluding from the scope of discovery information on where Relators received documents, *see* Hearing Tr. 114:19-21, and excluding from the scope of discovery the identity of any confidential sources and/or the source of any document revealed to Relators from any such confidential source. *Id.* at 115:7-8.

**Question No. 8:** For each irregularity in procedure you allege, describe with particularity the statute, regulation, or rule MPCA allegedly violated.

**Objections:** Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 9:** For each statute, regulation, or rule identified in DWQ No. 8, describe with particularity each procedure you allege MPCA was required to follow.

**Objections:** Relators object to this question to the extent it characterizes Relators' claims or burden of proof. Relators also object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 10:** For each procedure you identified in DWQ No. 9, describe with particularity how MPCA allegedly violated that procedure.

**Objections:** Relators object to this question to the extent it characterizes Relators' claims or burden of proof. Relators also object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators,

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exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 11:** If you allege MPCA failed to respond to EPA comments, describe with particularity each EPA comment that MPCA failed to address.

**Objections:** Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

**Question No. 12:** Describe with particularity all facts you contend support any alleged NPDES Permit-related irregularities in procedure.

**Objections:** Relators object to this Question as duplicative of MPCA Question No. 1. Relators object to this Question to the extent it seeks an opinion or contention that relates to fact or the application of law to fact, seeks the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Relators, exceeds the scope of questions permitted by the Court, and seeks privileged attorney client communications and/or information protected by the work product doctrine. Relators further object to this Question as premature, especially considering that discovery has not yet commenced.

Relators reserve the right to supplement, extend, or modify these objections.

In keeping with the Court's Order, Relators propose a telephonic meet-and-confer on Tuesday, September 3, starting at 10 a.m. central time, during which call Relators will make a good faith effort to resolve the above objections. Please advise, via email, your availability for such a call.

Portions of the hearing transcript cited in this document are attached for your convenience.

August 28, 2019  
 Page 10

Dated: August 28, 2019

**MASLON LLP**

*/s/ Evan A. Nelson*

WILLIAM Z. PENTELOVITCH (#0085078)  
 MARGARET S. BROWNELL (#0307324)  
 EVAN A. NELSON (#0398639)  
 90 South Seventh Street  
 3300 Wells Fargo Center  
 Minneapolis, MN 55402-4140  
 Phone: (612) 672-8200  
 Email: bill.pentelovitch@maslon.com  
 margo.brownell@maslon.com  
 evan.nelson@maslon.com

**MINNESOTA CENTER FOR  
 ENVIRONMENTAL ADVOCACY**

ELISE L. LARSON (#0393069)  
 KEVIN REUTHER (#0266255)  
 1919 University Avenue West  
 Saint Paul, MN 55105  
 Phone: (651) 223-5969  
 Email: elarson@mncenter.org  
 kreuther@mncenter.org

**NILAN JOHNSON LEWIS PA**

DANIEL Q. PORETTI (#185152)  
 MATTHEW C. MURPHY (#0391948)  
 120 South Sixth Street, Suite 400  
 Minneapolis, MN 55402-4501  
 Phone: (612) 305-7500  
 Email: dporetti@nilanjohnson.com  
 mmurphy@nilanjohnson.com

*Attorneys for Relators Center for Biological  
 Diversity, Friends of the Boundary Waters  
 Wilderness, and Minnesota  
 Center for Environmental Advocacy*

**JUST CHANGE LAW OFFICES**

*/s/ Paula Maccabee*

PAULA G. MACCABEE (#0129550)  
 1961 Selby Avenue  
 Saint Paul, MN 55104  
 Phone: (651) 646-8890  
 Email: pmaccabee@justchangelaw.com

*Attorney for Relators WaterLegacy*

**FOND DU LAC BAND OF LAKE  
 SUPERIOR CHIPPEWA LEGAL  
 AFFAIRS OFFICE**

*/s/ Vanessa Ray-Hodge*

SEAN W. COPELAND (#0387142)  
 1720 Big Lake Road  
 Cloquet, MN 55720  
 Phone: (218) 878-2607  
 Email: seancopeland@fdlrez.com

**SONOSKY, CHAMBERS, SACHSE,  
 MIELKE & BROWNELL, LLP**

VANESSA L. RAY-HODGE (*pro hac vice*)  
 MATTHEW L. MURDOCK (*pro hac vice*)  
 500 Marquette Avenue, NW, Suite 660  
 Albuquerque, NM 87102  
 Phone: (505) 247-0147  
 Email: vrayhodge@abqsonosky.com  
 mmurdock@sonosky.com

*Attorneys for Relators Fond du Lac Band of  
 Lake Superior Chippewa*

August 28, 2019  
Page 11

cc: Counsel for MPCA: John Martin, Bryson C. Smith, and  
Sarah Koniewicz

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

3 \*\*\*\*\*

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

12 \*\*\*\*\*

13

14

15

RULE 16 CONFERENCE

16

TRANSCRIPT OF PROCEEDINGS

17

18 The above-entitled Rule 16 Conference came on  
19 for hearing on Wednesday, the 7th day of August, 2019,  
20 before the Honorable John H. Guthmann, District Court  
21 Judge, at the Ramsey County Courthouse, City of St. Paul,  
22 State of Minnesota.

23

24

25 REPORTED BY: Lori Morrow, RMR, CRR, CLR, CBC

## ATTACHMENT

1           There will be no depositions, and there will be  
2 no interrogatories. But I am going to permit written  
3 deposition questions directed to a limited group of  
4 people with the PCA. I am going to permit each of those  
5 persons to be asked up to 25 questions, including  
6 subparts, whether those subparts are numbered or not. I  
7 say that because I've been in your shoes before writing  
8 stuff like this.

9           Relators will have two weeks to provide the  
10 proposed written deposition questions for each witness to  
11 Respondents. That's no later than August 21 at 4:30.  
12 Don't file it with the court. Just give it to each  
13 other.

14           Respondents will have one week to object to the  
15 questions as beyond the scope of what I've permitted.  
16 The scope of what I'm permitting is limited solely to the  
17 alleged procedural irregularities. So if the questions  
18 don't relate to the discovery of alleged procedural  
19 irregularities, then there's a basis to object. If the  
20 questions, including subparts, whether separately  
21 numbered or not, are in excess of 25, that's a reason to  
22 object. So any objections within a week, that would be  
23 August 28 at 4:30, don't file it.

24           If the objections cannot be resolved in a week,  
25 which is September 4, you can schedule an informal

## ATTACHMENT

1 efforts. There aren't that many questions to be asked.  
2 The parties have extensively briefed their positions to  
3 the court of appeals. And I think that the parties have  
4 probably rather clearly articulated in their own heads  
5 what they need on numerous occasions over the last six  
6 months to a year with regard to this case. So I'm going  
7 to leave the deadlines as I've indicated.

8 MR. MARTIN: Your Honor, one of my colleagues  
9 just pointed out that at least so far you haven't talked  
10 about what discovery we at MPCA and perhaps at PolyMet  
11 might have of the Relators. May we have something akin  
12 to what you've allowed and specific --

13 THE COURT: What do you want? I didn't give  
14 you any or suggest any because of the way you've argued  
15 the case to me.

16 MR. MARTIN: Well, and your Honor, I think  
17 that --

18 THE COURT: I won't elaborate, but you know  
19 what I mean.

20 MR. MARTIN: I know what you mean. That sounds  
21 like my daughter now.

22 THE COURT: Only I get to make kid analogies.

23 MR. MARTIN: Yeah. Okay.

24 But, you know, here is, for example, a question  
25 that we might ask. You know, what evidence do you have

## ATTACHMENT

1 that EPA had suppressed its comments? And I'm talking  
2 now. Obviously, there would be subparts of that. And if  
3 there is evidence like that, I think it's incumbent upon  
4 them to give it to us. And thinking about your Honor's  
5 order, it strikes me that the 30.02 sort of questions  
6 might make the most sense.

7 THE COURT: So you're thinking about a list of  
8 up to 25 questions of the Relators as a group --

9 MR. MARTIN: I think so.

10 THE COURT: -- asking them to disclose what  
11 they have to make sure that you're not going to be  
12 surprised?

13 MR. MARTIN: Exactly, your Honor.

14 THE COURT: What do you think, Relators?

15 MS. MACCABEE: Two things. Number one,  
16 Relators' conduct is not at issue and the Court -- gave  
17 the Court absolutely --

18 THE COURT: It's not a question of conduct.  
19 It's a question of possession, of evidence that might be  
20 used at the hearing. And by the way, if you had been  
21 granted the discovery you wanted, that means that the  
22 Respondents could have deposed all your clients, because  
23 that's what you wanted. You wanted the rules to apply.  
24 If the rules applied, they would get full, unfettered  
25 discovery, because there wouldn't be any basis to limit

## ATTACHMENT

1 it to one set of parties, right?

2 MS. MACCABEE: Your Honor, I would like to give  
3 an opportunity for Ms. Ray-Hodge to speak.

4 MS. RAY-HODGE: Vanessa Ray-Hodge again,  
5 attorney for the Band.

6 I think we need to know with specificity as  
7 well who those individuals are that MPCA and/or PolyMet  
8 would be asking to ask deposition questions to --

9 THE COURT: I think what is being suggested  
10 here is a set of up to 25 questions and document requests  
11 to -- in the philosophy of Rule 30.02 to the Relators as  
12 a whole.

13 MS. RAY-HODGE: Okay.

14 THE COURT: What documents do you have that you  
15 feel prove that there were procedural irregularities  
16 might be one of the questions that they ask.

17 MS. RAY-HODGE: Right. And I would only say  
18 that, you know, one of the concerns that we may have,  
19 depending on what they're asking, could relate to  
20 confidential sources that we're not able to disclose  
21 where we've received some of this information from. For  
22 example --

23 THE COURT: That may or may not be the  
24 question --

25 MS. RAY-HODGE: Right.

## ATTACHMENT

1 THE COURT: -- because I would likely require  
2 you to produce all documents that you plan to offer at  
3 the hearing --

4 MS. RAY-HODGE: Absolutely.

5 THE COURT: -- sometime in advance. So that's  
6 what they're looking for. They want to know before the  
7 date of the hearing and the witness starts testifying  
8 what you've got.

9 MS. RAY-HODGE: Right. And most of what we've  
10 gotten is from them --

11 THE COURT: It's what you want from them,  
12 right?

13 MS. RAY-HODGE: Exactly. And we're happy to  
14 share the documents we have. It's just -- if it gets  
15 into issues that relate to confidential sources and  
16 information that is meant to be kept confidential, we may  
17 have some other issues that we will need to come to you  
18 about. That's all I just wanted to raise.

19 THE COURT: And, Mr. Martin, you're not  
20 intending to ask them where they got it. You just want  
21 to know if they've got it?

22 MR. MARTIN: Well, and, you know, I really  
23 believe that your Honor has laid out a procedure where  
24 these sorts of issues can be addressed. And, you know, I  
25 recognize that Ms. Hodge --

## ATTACHMENT

1 MS. RAY-HODGE: Ray-Hodge.

2 MR. MARTIN: I'm sorry, Ray-Hodge. I  
3 apologize. Ms. Ray-Hodge makes the point that we could  
4 ask a deposition question that's objectionable, and I  
5 think the procedure that you have laid out would address  
6 those sorts of things.

7 THE COURT: And I'm not going to make them give  
8 up their sources, so, you know, you know that now. They  
9 are going to still have to establish admissibility at the  
10 hearing, but that doesn't necessarily require someone to  
11 give up their source. Okay?

12 MR. MARTIN: I understand, your Honor.

13 THE COURT: All right. I'm going to permit a  
14 Rule 30.02 style set of 25 document requests and 25  
15 written depositions to be directed to the Relators as a  
16 whole. So a question to one Relator applies to all. And  
17 this is strictly for the limited purpose of -- the same  
18 due process purpose that is behind the discovery that the  
19 court permitted of the Relators -- by the Relators  
20 towards the Respondents, that is, the lack of litigation  
21 by ambush and surprise.

22 Same schedule. Everything is the same.

23 Any other questions or concerns?

24 MR. PORETTI: Just a housekeeping.

25 THE COURT: Name.

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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*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  
RICHARD CLARK, P.G.**

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

---

I, RICHARD CLARK, in accordance with section 38.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

**Background**

1. My job title is Supervisor, Metallic Mining Sector Unit, Water and Mining Section, Industrial Division, for the Minnesota Pollution Control Agency (“MPCA”). I have been employed by MPCA since July 23, 1986.
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 Mining, Inc. 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”).

4. I submit this Declaration based on my personal knowledge and in support of MPCA's Response to WaterLegacy's Motion.

**Development of the Water Permit in Consultation with EPA**

5. Under normal circumstances, MPCA typically has limited, if any, discussions, meetings, or interactions with EPA during the permit-development period. Normally, MPCA drafts the permit and submits the draft permit to EPA shortly in advance of the public-comment period. EPA then has the opportunity to submit comments on the permit prior to the permit being placed on notice, or as is more typically the case, during the notice period itself. After the public comment period, MPCA may revise the draft permit as appropriate and then submits the proposed permit to EPA, which has the right to object to the issuance of the proposed permit. MPCA usually has limited, if any, discussions with EPA during the permit-development stage and does not interact with EPA about a permit until the public-comment period, if at all. MPCA always makes information about a permit available to EPA, however, and if EPA has comments, there may be (usually one) meeting or a conference call about EPA's comments.

6. However, in the case of the Water Permit, in my 33 years of experience developing NPDES/SDS permits with MPCA, EPA has never been as involved in the development of a permit from start to finish as it was with this permit.

7. MPCA and EPA began having discussions about the NorthMet project in 2015, long before Poly Met even submitted its permit application in the summer of 2016.

8. The proposed NorthMet Project went through extensive environmental review with the Department of Natural Resources with input from MPCA and EPA as early as 2005.

9. MPCA wanted a method of receiving consistent EPA feedback throughout the permit-development process, so shortly before Poly Met submitted its completed permit application, MPCA and EPA jointly decided to hold twice-monthly conference calls that would take place throughout the permit-development process. These twice-monthly conference calls were unique to this permit. I have never before worked on a permit where MPCA and EPA had routine discussions throughout the entire permit-development process.

10. MPCA and EPA held the first conference call in August 2016, within a month of receiving PolyMet's permit application package. These calls were scheduled to be held twice monthly, but on occasion there was only one call per month due to scheduling issues. But there was always at least one call per month. These calls were held regularly until August 2017, when MPCA and EPA took a break from the calls so that MPCA could focus on drafting the permit and the fact sheet in light of discussions over the previous year with EPA. By that time, MPCA and EPA had discussed together all of the major issues that EPA had with the pre-proposed permit and MPCA fully understood and considered EPA's positions.

11. MPCA had begun drafting portions of the Water Permit long before August 2017. As MPCA and EPA resolved different issues on the twice-monthly conference calls, MPCA would integrate those solutions into the relevant parts of the draft permit. But after

discussing all issues by August 2017, MPCA began to actively draft the remaining parts of the permit and the fact sheet and to tie together the parts of the permit that had already been drafted.

12. During this drafting period, MPCA and EPA met twice: on November 1, and November 9, 2017.

13. After completing the pre-comment draft permit, MPCA sent this version to EPA on January 18, 2018.

14. MPCA and EPA again had a conference call to discuss this version of the draft permit on January 31, 2018, and again during the public-comment period on February 13, 2018, and March 5, 2018.

15. On April 5, 2018, MPCA and EPA had a conference call in which EPA told us that it would read from its draft written comments. Mike Schmidt, an attorney with MPCA and another member of the Water Permit team, took notes on the call. After the call, MPCA reviewed the notes and we confirmed our impression of the call, which was that EPA had not raised any new, substantial concerns about the January 2018 public comment draft permit but had instead reiterated the principal concerns that it had previously raised in the twice-monthly calls and in-person meetings. In effect, EPA treated the call as a summary or compendium of all of its previous concerns about the public comment draft permit. There was no discussion or debate about the permit provisions on this call. It was simply an opportunity for EPA to summarize its feedback on the draft permit.

16. One primary focus of EPA's comments involved the prohibition against unauthorized discharges. MPCA had included that prohibition in the draft permit, but EPA wanted to include more explicit conditions in the Water Permit. MPCA agreed to revise the phrasing to address this concern.

17. After the call and after reviewing the notes, MPCA found that EPA had not raised any issues during the call that had not already been fully discussed in previous calls. A number of these issues were not finally resolved, however, until a September 2018 meeting between MPCA and EPA.

18. On September 25 and 26, 2018, MPCA and EPA met for a two-day, in-person meeting about the appropriate terms for the next draft of the Water Permit - the post-public comment draft. At these meetings, there was an exchange of views about a number of issues concerning the draft permit. For instance, EPA wanted MPCA to add operating limits for additional parameters and had some concerns about the federal enforceability of the Water Permit. MPCA added the additional operating limits and committed to add a permit condition prohibiting the violation of any water-quality standard, which commitment satisfied EPA's concern about enforceability.

19. At the September 2018 meeting, EPA also wanted to ensure that there would be public participation if there were subsequent modifications to the Water Permit as a result of submittals such as engineering, groundwater, or monitoring reports etc., or as a result of adaptive-management changes. MPCA added language to the draft permit that increased EPA's assurance that any changes meeting the threshold for public review would be subject to notice and comment.

20. At the conclusion of the September 2018 meeting, all the key issues had been discussed, and MPCA and EPA were in fundamental agreement on the required contents of the permit.

21. MPCA and EPA both left the meetings satisfied that they had made progress in developing a final version of the Water Permit. MPCA agreed to the remaining changes that EPA recommended, and I believe that EPA came away with a better understanding of what MPCA was trying to accomplish in the Water Permit. I had the impression that there were no remaining unresolvable issues.

22. On October 25, 2018, MPCA sent EPA a new draft of the Water Permit. This new draft, which MPCA made available for public review on its website, incorporated the issue resolutions that MPCA and EPA reached at the September 2018 meeting. This initiated a 45-day review period by EPA. Towards the end of this review period EPA indicated they did not have any comments on the new draft permit.

23. On December 4, 2018, per previous agreement with EPA, MPCA sent EPA a final draft of the Water Permit for their final 15 day review. Except for some stylistic revisions and corrections of some typographical errors, the December 4 draft was essentially identical to the October 25 draft. Again, MPCA received no comments or objections from EPA.

24. Although MPCA gave EPA a total of 60 days (instead of the typical 15) to object to the draft permit, EPA did not object to MPCA issuing the draft Water Permit, which MPCA did on December 20, 2018.

Dated: May 28, 2019  
Ramsey County  
St. Paul, Minnesota



Richard Clark, P.G.  
Supervisor, Metallic Mining Sector Unit  
Water and Mining Section, Industrial Div.  
Minnesota Pollution Control Agency

12538885\_v1

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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*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  
JEFF UDD**

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

---

I, JEFF UDD, in accordance with section 38.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

**Background**

1. My job title is Manager of the Water and Mining Section for the Minnesota Pollution Control Agency (“MPCA”). I have been employed by MPCA since February 2002.

2. My job responsibilities have included oversight of 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 oversight of the Water Permit from January 2018 until issuance on December 20, 2018. I also participated in regular meetings and conference calls with EPA during this time period, 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”).

4. I submit this Declaration to the Court based on my personal knowledge and in support of MPCA's Response to WaterLegacy's Motion.

**MPCA and EPA Process and Procedures to Arrive at the Terms of the Water Permit**

5. I participated in the April 5, 2018, conference call between MPCA and EPA in which EPA read from its written comments. EPA summarized all of the issues it had previously raised about the pre-public comment draft permit. My impression of this set of summary comments was that EPA was alerting MPCA to the issues it would be looking at most carefully when MPCA responded to the public comments. As of April 5, 2018, most of these issues had been discussed, but some had not been finally resolved.

6. After the April 5 call, MPCA focused on finishing all of its draft responses to significant public comments and EPA's concerns, so it could discuss all of the issues with EPA.

7. That comprehensive discussion, which was the culmination of the entire collaboration between MPCA and EPA on the Water Permit, took place at a two-day, in-person meeting with EPA on September 25 and 26, 2018, where MPCA explained to EPA how it was addressing all of the substantial public comments it had received during the public-comment period and how MPCA was addressing EPA's concerns with the draft permit that EPA had repeated in the April 5, 2018, conference call.

8. There was a lot of discussion during the two-day meeting. MPCA agreed to add new operating limits for cobalt and mercury. MPCA also agreed to add express language prohibiting discharges from violating water quality standards. EPA expressed

satisfaction with the results of the meeting. At the conclusion of the meeting, I believed that no unmanageable issues remained, and we were in a position to finalize the draft permit.

9. Under the Memorandum of Agreement (“MOA”) between MPCA and EPA, once MPCA has completed a “proposed” permit—which in this context refers to a post-public-comment draft permit—MPCA sends the proposed permit to EPA, and it is this version that EPA officially comments on. The MOA allows EPA 15 days to decide whether or not to veto the proposed permit.

10. On October 25, 2018—a month after the September 25-26 meeting—MPCA sent a pre-proposed version of the permit to EPA. The pre-proposed permit reflected all of the discussion points from the two-day, in-person meeting in September 2018. While the May 1974 Memorandum of Agreement (“MOA”) between MPCA and EPA provides for a 15-day period for EPA to object to (veto) the issuance of a proposed NPDES permit, EPA requested an extra 45 days from October 25, 2018, to review this pre-proposed version of the permit, and MPCA agreed to the extended review period.

11. It turned out that EPA did not need the entire 45 extra days. On December 4, 2018, EPA notified MPCA that it was ready to begin its 15-day review of the proposed permit. Thus, rather than the required 15-day review under the MOA, MPCA agreed to extend EPA’s review to 60 days total. During this 60-day review period, EPA did not veto or otherwise object to the permit.

12. MPCA issued the final Water Permit and fact sheet on December 20, 2018.

Dated: May 28, 2019  
Ramsey County  
St. Paul, Minnesota



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Jeff Udd  
Manager, Water and Mining Section  
Minnesota Pollution Control Agency

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

3 \*\*\*\*\*

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

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RULE 16 CONFERENCE

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TRANSCRIPT OF PROCEEDINGS

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The above-entitled Rule 16 Conference came on  
19 for hearing on Wednesday, the 7th day of August, 2019,  
20 before the Honorable John H. Guthmann, District Court  
21 Judge, at the Ramsey County Courthouse, City of St. Paul,  
22 State of Minnesota.

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REPORTED BY: Lori Morrow, RMR, CRR, CLR, CBC

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## APPEARANCES:

On Behalf of the Plaintiff Center for Biological  
Diversity, Friends of the Boundary Waters Wilderness, and  
Minnesota Center for Environmental Advocacy:

Elise L. Larson, Esquire

MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY

1919 University Avenue West

Suite 515

St. Paul, Minnesota 55104

(651) 223-5969

elarson@mncenter.org

- and -

Daniel Q. Poretti, Esquire

Matthew C. Murphy, Esquire

NILAN JOHNSON LEWIS, P.A.

120 South Sixth Street, Suite 400

Minneapolis, Minnesota 55402

(612) 305-7500

dporetti@nilanjohnson.com

mmurphy@nilanjohnson.com

- and -

(APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 Also On Behalf of the Plaintiff Center for Biological  
3 Diversity, Friends of the Boundary Waters Wilderness, and  
4 Minnesota Center for Environmental Advocacy:

5 Margo S. Brownell, Esquire

6 Evan A. Nelson, Esquire

7 MASLON LLP

8 3300 Wells Fargo Center

9 90 South Seventh Street

10 Minneapolis, Minnesota 55402

11 (612) 672-8200

12 margo.brownell@maslon.com

13 evan.nelson@maslon.com

14

15 On Behalf of the Plaintiff WaterLegacy:

16 Paula Goodman Maccabee, Esquire

17 JUST CHANGE LAW OFFICES

18 1961 Selby Avenue

19 St. Paul, Minnesota 55104

20 (651) 646-8890

21 pmaccabee@justchangelaw.com

22

23

24

25 (APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 On Behalf of the Plaintiff Fond du Lac Band of Lake

3 Superior Chippewa:

4 Vanessa Ray-Hodge, Esquire

5 SONOSKY, CHAMBERS, SACHSE, MIELKE & BROWNELL, LLP

6 500 Marquette Avenue, N.W.

7 Suite 660

8 Albuquerque, New Mexico 87102-5302

9 (505) 247-0147

10 vrayhodge@abqsonosky.com

11 - and -

12 Matthew L. Murdock, Esquire

13 SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP

14 1425 K Street, N.W.

15 Washington, D.C. 20005

16 (202) 682-0240

17 mmurdock@sonosky.com

18

19

20

21

22

23

24

25 (APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 On Behalf of the Defendant Minnesota Pollution Control  
3 Agency:

4 John C. Martin, Esquire  
5 Bryson C. Smith, Esquire  
6 HOLLAND & HART  
7 975 F Street, Suite 900  
8 Washington, D.C. 20004  
9 (202) 654-6915  
10 jcmartin@hollandhart.com  
11 bcsmith@hollandhart.com

12

13 On Behalf of the Defendant PolyMet Mining, Inc.:

14 Monte A. Mills, Esquire  
15 Davida S. McGhee, Esquire  
16 GREENE ESPEL P.L.L.P.  
17 222 South Ninth Street  
18 Suite 2200  
19 Minneapolis, Minnesota 55402-3362  
20 (612) 373-0830  
21 mmills@greeneespel.com  
22 dmcghee@greeneespel.com

23 - and -

24

25 (APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 Kathryn Kusske Floyd, Esquire

3 Kyle W. Robisch, Esquire

4 VENABLE LLP

5 600 Massachusetts Avenue, N.W.

6 Washington, D.C. 20001

7 (202) 344-4000

8 kkfloyd@venable.com

9 kwrobisch@venable.com

10

11 ALSO PRESENT: Adonis A. Neblett, General Counsel, MPCA

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1 P R O C E E D I N G S

2 THE COURT: Have a seat, please.

3 Good morning, everybody.

4 NUMEROUS SPEAKERS: Good morning, your Honor.

5 THE COURT: We are here today for a Rule 16  
6 Conference on the officially captioned case of In the  
7 Matter of the Denial of Contested Case Hearing Requests  
8 and Issuance of National Pollutant Discharge Elimination  
9 System/State Disposal System, Permit Number MN-007-1013  
10 for the proposed NorthMet Project, St. Louis County, Hoyt  
11 Lakes, Babbitt, Minnesota.

12 Let's get all the appearances for the record.  
13 Who wants to begin?

14 MS. MACCABEE: Your Honor, good morning. I am  
15 Paula Maccabee, and I represent WaterLegacy.

16 THE COURT: Okay.

17 MS. RAY-HODGE: Good morning, your Honor. My  
18 name is Vanessa Ray-Hodge, and I represent the Fond du  
19 Lac Band of Lake Superior Chippewa.

20 MR. MURDOCK: Good morning, your Honor. My  
21 name is Matthew Murdock, and I represent the Fond du Lac  
22 Band.

23 MS. LARSON: Good morning, your Honor. Elise  
24 Larson, and I represent the Minnesota Center for  
25 Environmental Advocacy, Friends of the Boundary Waters

1 Wilderness, and Center for Biological Diversity. Behind  
2 me I have Dan Poretti from the Nilan Johnson firm.

3 MR. PORETTI: Good morning, your Honor.

4 THE COURT: Good morning.

5 MS. LARSON: Margo Brownell from Maslon.

6 MS. BROWNELL: Good morning, your Honor.

7 MS. LARSON: Matthew Murphy from the Nilan  
8 Johnson firm and Evan Nelson also from the Maslon firm.

9 MR. NELSON: Good morning, your Honor.

10 THE COURT: All right. Good morning.

11 MR. MILLS: Good morning, your Honor.

12 Monte Mills on behalf of PolyMet. I, like Ms. Larson,  
13 will introduce some colleagues as well.

14 MR. ROBISCH: Kyle Robisch.

15 MS. FLOYD: Kathryn Floyd.

16 MS. MCGHEE: Davida McGhee.

17 MR. MARTIN: Your Honor, my name is  
18 John Martin, and I have the privilege of representing the  
19 Minnesota Pollution Control Agency. I have with me my  
20 colleague Bryson Smith, and in addition to that, we have  
21 the general counsel of MPCA, Adonis Neblett.

22 THE COURT: All right. And everyone else is  
23 just generally interested? Okay. All right. Very good.

24 Well, I accidentally noticed a lot of pleadings  
25 last night about 6:00, so you kept me up late. I think

1 if someone is going to make a motion, they need to advise  
2 the Court that they are making a motion, and they need to  
3 provide courtesy copies to the Court. None of that was  
4 done. And it was only accidentally that I even knew that  
5 you had filed 75 pages of briefs since August 1,  
6 including right up until yesterday late in the day. And  
7 I had accidentally discovered that when I got a stack of  
8 last-minute pro hoc vice applications. And lo and  
9 behold, in looking at those, other things had been filed.  
10 So for all the expertise and experience in the room, that  
11 is not the best way of putting matters before the Court.  
12 And in the future, I assume you will do better.  
13 Fortunately, I have read everything, and I am prepared to  
14 proceed and hear what you have to say.

15 The primary purpose of me scheduling the  
16 hearing today was to find out what you thought this was  
17 going to be about, which I think you made clear in your  
18 written submissions, so they were helpful in that regard  
19 as to tip me off as to what you're thinking, and then to  
20 figure out how long the hearing will take and the volume  
21 of evidence and witnesses that will be a part of that  
22 hearing. And then finally on the agenda is to set a date  
23 for the hearing.

24 So the first question I have is a stupid  
25 procedural question. You heard me read the caption. I

1 read the caption off the order from the court of appeals  
2 that sent the case here. But the pleadings on various  
3 motions that I read have a bunch of parties listed as  
4 "Plaintiffs" and two parties listed as "Defendants." And  
5 I'm interested in knowing where that came from, whether  
6 it comes from an actual pleading in the case or whether  
7 somebody made that up for purposes of today.

8 Who would like to speak to that first? If no  
9 one is volunteering, I'll pick someone.

10 MS. LARSON: I can speak to that, your Honor.

11 THE COURT: Say who you are. Whenever anyone  
12 speaks today, say who you are.

13 MS. LARSON: Elise Larson for the Minnesota  
14 Center for Environmental Advocacy.

15 I believe that we had looked at the docket, and  
16 I had copied the case caption based on what appeared on  
17 the docket. We even had a conversation about whether it  
18 was appropriate to call us plaintiffs, and we decided to  
19 try to follow what was on the electronic system.

20 THE COURT: Whose electronic system, ours or --

21 MS. LARSON: On your --

22 THE COURT: -- the Court of Appeals'?

23 MS. LARSON: On your electronic system.

24 THE COURT: Because the order setting today's  
25 case, the caption appears as it does from the court of

1 appeals.

2 MS. LARSON: Yes, your Honor, absolutely. But  
3 I would also note that in your notice of case filing and  
4 the notice for hearing, you have Center for Biological --  
5 you list it as a "V" as well in your notices. And that  
6 was the only reason we had done it that way, your Honor.

7 THE COURT: Okay.

8 MS. LARSON: And we can certainly capture it  
9 differently in the future.

10 THE COURT: All right. I think it makes sense  
11 to caption the case the way the case was sent to us.

12 MS. LARSON: Okay.

13 THE COURT: Okay?

14 The second question I have is another stupid  
15 procedural question. We have the Fond du Lac Band, the  
16 Center for Biological Diversity; we have Friends of the  
17 BWCA; we have WaterLegacy. And what is the capacity of  
18 those organizations in the case as it went to the court  
19 of appeals? Were you all parties to the administrative  
20 process before the Minnesota Pollution Control Agency, or  
21 are you amici, or are you a combination of the two?

22 Ms. Maccabee, you can speak to that.

23 MS. MACCABEE: Your Honor, Paula Maccabee from  
24 WaterLegacy.

25 All of the parties here were parties to the

1       appellate procedure. All of us filed certiorari appeals.  
2       Initially, WaterLegacy made the motion, and then the  
3       other parties supported it, and then the Band actually  
4       joined in making the motion.

5                 And the Court's order of June 25 specifically  
6       referred to all Relators participating in this hearing.

7                 THE COURT: Okay. And so those who filed for  
8       writs of certiorari and obtained review of the issuance  
9       of the permit would be Relators, and everyone else would  
10      be a Respondent. And that's how you should refer to  
11     yourselves in pleadings before this Court. So you would  
12     have the In Re: caption, and then your signature lines at  
13     the end of whatever you submit will refer to yourself as  
14     either a Relator or a Respondent. And I think that will  
15     create a level of consistency for the process, because I  
16     am an arm of or a tool of the court of appeals in this  
17     case. All right? I'm hesitant to use the word "tool"  
18     because that's what I was to my children for many years.

19                Okay. I think those are the stupid procedural  
20     questions. So let's get into something involving a bit  
21     more substance. And I'm going to let the Relators go  
22     first, not just because they made motions, but since  
23     they're Relators, they're the Appellants and probably  
24     have the burden here as well if there is such a thing.  
25     And I'm interested in focusing on why we are here, the

1 scope of the hearing, and then what it is we need in  
2 order to conduct the hearing. And we'll start with you  
3 Ms. Maccabee because you put yourself in that first seat.

4 MS. MACCABEE: Yes, your Honor. Would you  
5 prefer if we use the podium or not use the podium? How  
6 do you like to do it?

7 THE COURT: Whatever makes you comfortable. If  
8 you're going to fall over without leaning on something,  
9 you might want the podium.

10 MS. MACCABEE: My eyes may be problematic, your  
11 Honor.

12 MR. MARTIN: Yeah, I think I'd like to use it,  
13 too.

14 THE COURT: I like lawyers to be comfortable,  
15 so if that's what you need, that's what I want you to  
16 have.

17 MS. MACCABEE: It's my security blanket, your  
18 Honor. Thank you so much.

19 And I'm here to summarize for Relators today  
20 the court of appeals process that brought us here and the  
21 scope of the hearing as we see it and also some of the  
22 content of Plaintiffs' Rule 7.02 motion that provides the  
23 factual basis for Relators' request for discovery.

24 First, I want to talk about the scope of this  
25 hearing. From our perspective, the jurisdiction

1 conferred by the transfer order encompasses all the  
2 issues of procedural irregularities that we raised. It's  
3 important to note that the Court found that there was  
4 substantial evidence of procedural irregularities and  
5 that this is only the second time in Minnesota history  
6 that this relief was granted of transferring a case back  
7 to the district court. And Respondents have argued that  
8 Relators in their motion to the Court requested discovery  
9 and that somehow that was denied. Actually, WaterLegacy  
10 did not ask the court of appeals for discovery in our  
11 transfer order because we believed that the power to  
12 determine the scope of discovery is vested here in the  
13 district court.

14 THE COURT: Before you go further, is the other  
15 case the *Hard-Times-Cafè* case?

16 MS. MACCABEE: Yes, sir.

17 THE COURT: Okay. I want to make sure we're  
18 not missing anything.

19 MS. MACCABEE: And if you wish, your Honor, we  
20 have brought copies of all the documents that were in the  
21 file in Hennepin County and also a contemporaneous  
22 article from the *Minnesota Daily* which summarizes the  
23 resolution there. So if you would like that, we can  
24 provide it.

25 THE COURT: All right. If I do, I'll ask.

1 MS. MACCABEE: All right. Yes, sir.

2 THE COURT: Did the court of appeals fully  
3 capture all the alleged procedural irregularities that  
4 you included in your motion for transfer?

5 MS. MACCABEE: Your Honor, the Court did not  
6 list them all in its order. The Court specified some of  
7 the issues that were -- that the court determined were  
8 undisputed, and then the Court referenced the Declarants'  
9 disputes of several issues. The issues that are  
10 reflected in our Rule 7.02 motion really cover everything  
11 that we raised in that proceeding. And as we understand  
12 the court of appeals' order, even though the Court talked  
13 about a limited purpose, that limited purpose meant that  
14 the district court isn't going to look at should the  
15 Minnesota Pollution Control Agency put in effluent  
16 limits. This Court is only looking at the issue of  
17 procedural irregularities, but the Court did not limit  
18 which issues to only those that Declarants had disputed.  
19 There's a --

20 THE COURT: Well, one of the -- that raises a  
21 concern, because what you're saying is consistent with  
22 how I read things, but it doesn't appear consistent with  
23 the Rule 7.02 motion, because in the Rule 7.02 motion,  
24 which appears to be the equivalent of my draft order, if  
25 you get what you want, you're asking me to comment on the

1 viability of the permit itself and whether the permit  
2 should have been issued at all. And how does that relate  
3 to anything the court of appeals asks me to do? Isn't  
4 that up to the court of appeals?

5 MS. MACCABEE: Your Honor, we frame it either  
6 that this Court could make that decision or this Court  
7 could simply make findings of fact that would justify the  
8 court of appeals in making the findings under 14.69, not  
9 just as to unlawful procedure. But one of the issues in  
10 the case where there's been so much irregularity is  
11 whether that contributes to a finding that the matter is  
12 arbitrary and capricious And we actually have cited also  
13 some legal violations, so there may be errors of law in  
14 the way this was put together.

15 So we gave you the menu, and you can say you  
16 only want the entrée and you don't want the appetizer or  
17 the other way around. But we believe that this Court  
18 would have the jurisdiction should the Court choose to  
19 exercise that and that the Court is definitely tasked  
20 with the idea of making the recommendations that would  
21 support the finding by the court of appeals.

22 THE COURT: It wasn't really presented as a  
23 menu. It was sort of like a safe dropped on my head. So  
24 what you're saying is that -- well, let's put it this  
25 way. Are you or are you not advocating for me to do

1 everything that's in there?

2 MS. MACCABEE: Yes, sir, we are advocating for  
3 that.

4 THE COURT: Okay.

5 MS. MACCABEE: And we would not presume to tell  
6 you what your choice will be. We believe that once the  
7 Court has seen the degree of procedural irregularity and  
8 even unlawful conduct that it will be more clear at that  
9 point at the close of discovery which of the courses of  
10 action seem appropriate to the Court.

11 THE COURT: If there were other alleged  
12 procedural irregularities included in the motion to  
13 transfer but not listed in the court of appeals' order,  
14 on what basis would I expand the scope of the hearing?

15 MS. MACCABEE: Your Honor, it does not appear  
16 to us that the court of appeals was intending to say that  
17 only the issues that the Declarants disputed in their  
18 declarations are procedural irregularities. What they  
19 said is that there was substantial evidence of procedural  
20 irregularities and that this Court was to make a  
21 determination that included -- and they use the word  
22 included, they didn't say limited to -- procedural  
23 irregularities. So I think the bounds of this Court are  
24 nothing about whether or not to have effluent  
25 limitations, nothing about whether mercury is going to be

1 too high. That remains with the court of appeals. But  
2 the breadth of procedural irregularities -- and, you  
3 know, I'm not sure if this Court has seen the motion that  
4 was attached with one of the Respondents' briefs, but the  
5 issues that are in the 7.02 description were all part of  
6 this motion to transfer.

7 THE COURT: Okay. Well, it's implied in the  
8 opposition that there's more in the 7.02 motion than  
9 there was in the motion to transfer. So I think that's  
10 going to have to be fleshed out a little bit. I'm only  
11 reading what is being submitted to me. I'm not doing my  
12 own investigation. I didn't go out and read the whole  
13 court of appeals file. If it was submitted to me, I read  
14 it.

15 MS. MACCABEE: Yes, sir.

16 THE COURT: And if you want me to see  
17 something, you need to give it to me directly.

18 MS. MACCABEE: We would also make the point,  
19 your Honor, that although we have done multiple freedom  
20 of information requests and litigation and Data Practices  
21 Act requests, as is set forth in our Rule 7.02 papers, we  
22 don't know the full extent of procedural irregularities.  
23 Even though WaterLegacy got a lot of documents from the  
24 Pollution Control Agency, we didn't get any documents  
25 from the management. We didn't get any folders labeled

1 for the assistant commissioners or other managers who  
2 were in charge of this project. Also, even though we've  
3 sort of figured out from the handwritten notes that the  
4 time period between March 5, 2018, and March 16, which is  
5 the end of the comment period, which is the time when the  
6 EPA said we're going to give you those comments, we know  
7 that that's a critical period. We didn't get any  
8 documents, whether handwritten notes or emails, from that  
9 period. And the --

10 THE COURT: Were they requested?

11 MS. MACCABEE: Oh, yes, sir. Five different  
12 Data Practices Act requested. I know because I made  
13 them.

14 THE COURT: Were you given an explanation of  
15 why you didn't get those materials?

16 MS. MACCABEE: No. No, sir, not in --

17 THE COURT: We got a no shake on the right and  
18 a yes shake on the left, so...

19 MS. MACCABEE: If -- what I was told in writing  
20 by the staff is that I had received everything that there  
21 was.

22 THE COURT: So if they destroyed it, it doesn't  
23 exist.

24 MS. MACCABEE: It's possible that they  
25 destroyed it. We learned later, because we asked also

1 about the notes that were take -- we found out that there  
2 were notes taken by the Pollution Control Agency's staff  
3 on April 5, 2018, when the EPA actually read its comments  
4 aloud, and we found out that two Pollution Control Agency  
5 staff members, one of whom was an attorney, had taken  
6 notes and that those notes had been destroyed. What we  
7 found out late in the process, I think in response to --  
8 in one of the declarations is that the attorney had  
9 incorporated what had been in his handwritten notes into  
10 a document that he now claims is attorney-client  
11 privileged. So we don't know whether some of the -- even  
12 though I asked specifically please disclose, is there any  
13 information that you're not providing WaterLegacy because  
14 it's privileged. Unlike the Freedom of Information Act,  
15 they didn't give me a list of what they withheld. So we  
16 don't know what has been withheld. And we also don't  
17 know whether there are other parties who might have this  
18 information that hasn't been disclosed.

19 So I will say, your Honor, that our  
20 understanding is that our job was to give substantial  
21 evidence of procedural irregularities and that we would  
22 then have the opportunity to see is this all there is or  
23 is there -- are there additional documents, testimony  
24 that shows even a larger problem than what we were able  
25 to conclude based on what we had.

1 THE COURT: And when you say you don't know if  
2 other parties have what was withheld, what do you mean?

3 MS. MACCABEE: Whether there are documents that  
4 are held by Pollution Control Agency staff that are  
5 retired, whether there are documents that the EPA has  
6 that are disclosing this information. I mean, for  
7 example, we confirmed that the assistant commissioner had  
8 actually actively sought that the EPA not provide its  
9 written comments by virtue of a portion of an email that  
10 was leaked by the EPA union. That's not information that  
11 we had on our own, and we hadn't been able to find it.  
12 We still don't have the rest of that email, but it  
13 says -- it's entitled "Forward: Minnesota House  
14 Speaker." So we don't know if there are other parties  
15 not even -- that we didn't even realize were involved in  
16 any way who somehow may have documents or information.  
17 And we've tried our best in that Rule 7.02 to lay out  
18 some of the gaps as well as some of the knowledge that we  
19 have already been able to apply.

20 THE COURT: Okay.

21 MS. MACCABEE: I don't know, your Honor, if you  
22 have any additional questions.

23 THE COURT: Oh, yes.

24 MS. MACCABEE: Yes, sir.

25 THE COURT: I'm just trying to ask them in the

1 right order. So I'm consulting with something here.  
2 Just a second.

3 The first page of your motion for findings of  
4 fact, conclusions of law and order contains a summary of  
5 what you are asking me to do.

6 MS. MACCABEE: Yes, sir.

7 THE COURT: It says that you're asking me to  
8 make a finding that the issuance of the NPDES permit at  
9 issue here was, one, in excess of the Pollution Control  
10 Agency's authority, two, made upon unlawful procedure,  
11 three, affected by legal error, four, unsupported by  
12 substantial evidence, and five was arbitrary and  
13 capricious in violation of the Administrative Procedure  
14 Act. Explain why each of those five things is within the  
15 scope of my authority based on the jurisdiction granted  
16 to me by Minn. Stat. § 14.68 and the order of transfer by  
17 the court of appeals.

18 MS. MACCABEE: Your Honor, Relators believe  
19 that if your Honor makes actual factual determinations  
20 about the specifics, whether it is the specific about  
21 attempting to keep documents out of the record or the  
22 specific about failing to produce documents or retain  
23 them in accordance with Minnesota law, or whether it's  
24 the specific finding under the Clean Water Act, that the  
25 Pollution Control Agency had comments from EPA and didn't

1 provide written responses the way they're supposed to  
2 according to the Minnesota -- to the Federal Code of  
3 Regulations, that if your Honor makes those findings, the  
4 rest will follow, because what we will -- what we believe  
5 the evidence will show is that not only were there  
6 violations of federal law, violations of state law, but a  
7 concerted effort to keep criticism of the PolyMet water  
8 pollution permit out of the public record. And it is  
9 only a fluke that we have been able to discover as much  
10 as we have thus far about the degree of the EPA's  
11 concerns and the strength of Minnesota Pollution Control  
12 Agency's efforts to suppress those concerns and conceal  
13 them from the public and, ultimately, if we hadn't found  
14 them, from the Court as well.

15 THE COURT: Well, aren't you describing what  
16 you called an unlawful procedure in the first page of  
17 this pleading?

18 MS. MACCABEE: Yes, your Honor. But some of  
19 the cases that have found unlawful procedural  
20 irregularities hold that it goes to other issues,  
21 particularly the issue of whether the decision was  
22 arbitrary and capricious. But we also believe that if  
23 the Pollution Control Agency acted in ways that were not  
24 consistent with the Clean Water Act is that it was  
25 outside their authority and that when you look -- when

1 one looks at the record, and there's important evidence  
2 that's missing from the record, for example, all the  
3 criticism of EPA, that a decision that's based without  
4 having that evidence before it is not supported by what  
5 should have been the whole record.

6 THE COURT: So the task before me by the court  
7 of appeals is to, one, make a finding as to what the  
8 proper procedures for the consideration of this type of  
9 permit are.

10 MS. MACCABEE: Yes, sir.

11 THE COURT: And what are the statutes and rules  
12 that set forth those procedures. That would be part of  
13 what I need to do, right?

14 MS. MACCABEE: Yes, sir.

15 THE COURT: And then I would need to make a  
16 determination through findings and conclusions as to  
17 whether those procedural statutes and rules were  
18 followed, did something happen that shouldn't have  
19 happened, or did something not happen that should have  
20 happened, right?

21 MS. MACCABEE: Yes, sir.

22 THE COURT: So all those things you would agree  
23 the court of appeals is asking me to do. But how does  
24 that lead to me concluding that the permit shouldn't have  
25 been issued? That's not within the scope of what I do,

1 is it? And how would it be based on anything the court  
2 of appeals said?

3 MS. MACCABEE: Your Honor, I think the easiest  
4 one is if it was done on unlawful procedure and if your  
5 Honor's findings result in a finding and a determination  
6 that this permit was issued based on unlawful procedure.  
7 It may be that the court of appeals will officially make  
8 that decision, but those findings could be, I would say,  
9 outcome determinative. And we can't say that right now  
10 because there is still additional information that we  
11 need to obtain and present to the Court.

12 THE COURT: Right. But even if those findings  
13 are ultimately outcome determinative, I wasn't asked to  
14 say that, right?

15 MS. MACCABEE: Your Honor, I would suggest that  
16 the Court's order says determination of procedural  
17 irregularities, and perhaps --

18 THE COURT: And that's it.

19 MS. MACCABEE: Yes. And perhaps that -- and  
20 my -- our sense of it is that actually goes to the merits  
21 of the case. And this Court may say -- I will go up to  
22 that line of issuing the order that's in the findings and  
23 conclusions, but I will not go any further than that.  
24 But we presented it to give -- give this Court the  
25 option, should the evidence warrant it, to resolve this

1 matter.

2 THE COURT: Because in reality, I'm acting sort  
3 of like a special master here to develop a record.  
4 Wouldn't you agree that what the court of appeals was  
5 doing was deciding whether there's a prima facie case to  
6 proceed? Right?

7 MS. MACCABEE: Yes, your Honor.

8 THE COURT: And they weren't deciding that  
9 there actually were procedural irregularities.

10 MS. MACCABEE: That's correct, your Honor.

11 THE COURT: They want me to examine the issues  
12 and make findings as to whether there were. And if I  
13 decide that there weren't or that there were procedural  
14 irregularities, regardless of whether anyone appeals from  
15 those findings, then they will draw the ultimate  
16 conclusion from those findings. Do you agree with all  
17 that?

18 MS. MACCABEE: Your Honor, I believe that's a  
19 legitimate interpretation of what your task is, and I  
20 think that we presented the potential that the Court  
21 would choose to take one step further. But we agree with  
22 you that it is absolutely critical to look at what should  
23 the procedures have been, not just for the permit, but  
24 how should documents have been held, how should documents  
25 have been retained, how should documents have been

1 released, how should communications have been  
2 memorialized. And we believe that your determination,  
3 your findings of fact and conclusions of law will  
4 determine the fate of this permit. It may be that the  
5 proper procedure as you see it in interpreting the court  
6 of appeals is to make those findings as clearly as you  
7 can and then let the court of appeals make the ultimate  
8 decision. And I think that would be -- that would be a  
9 huge help. That would be a very huge help in  
10 illuminating the truth. And this has been a struggle for  
11 Relators. Some of us have been doing this since early in  
12 2018 when we heard from secondhand whistleblowers that  
13 something was not right about this process, that it  
14 wasn't working right. And what we've been trying to do  
15 since then is get at the truth.

16 And I'm not sure if your Honor saw the paper  
17 this morning, if you were reading our pleadings. Maybe  
18 you didn't. But --

19 THE COURT: It's your fault.

20 MS. MACCABEE: Our apologizes. Yes, it is my  
21 fault. It is my fault. I will say that.

22 The court of appeals yesterday decided to stay  
23 the PolyMet NPDES permit.

24 THE COURT: Yes, I saw that.

25 MS. MACCABEE: And I think that that

1 underscores --

2 THE COURT: That's a different permit, or is  
3 that --

4 MS. MACCABEE: It's this one. It's --

5 THE COURT: It's the PolyMet permit.

6 MS. MACCABEE: -- this one, and it's based on  
7 the Court's determination that there's something  
8 seriously wrong here. And from our perspective, it just  
9 underscores the importance and seriousness with which the  
10 court of appeals has taken this and empowers this Court  
11 to do what's necessary to find the truth.

12 THE COURT: Okay. There's a big difference  
13 between the transfer order in the *Hard Times Cafè* case  
14 and in this case. In the *Hard Times Cafè* case, the court  
15 transferred the matter back to the district court --  
16 actually, not back to the district court, to the district  
17 court to conduct an investigation of procedural  
18 irregularities. The word "investigation" was the only  
19 guidance given to the trial court, almost like the court  
20 of appeals was directing the trial court to act like a  
21 grand jury. That was not done here. I was told that my  
22 jurisdiction is limited to certain specific things. And  
23 if that's the case, how do you get discovery?

24 MS. MACCABEE: Your Honor, Relators don't  
25 believe your jurisdiction is limited to certain specific

1 things. It's not -- in a sense that it is not -- it is  
2 not limited to the issues that Declarants chose to put in  
3 their declarations and that the Court held out. The  
4 Court's order says that -- it uses the word "includes."  
5 It does not say this is all that the Court can do.

6 And let me pull out the order if that's helpful  
7 to you, your Honor.

8 THE COURT: It was under my pillow last night.

9 MS. MACCABEE: Yes. A lot of us have been  
10 holding that under our pillows.

11 The Court used the words "determining the  
12 procedural [sic] irregularities." It didn't say  
13 determining only the procedural irregularities that  
14 Declarants had disputed in their declaration. It said  
15 "determining the alleged irregularities."

16 THE COURT: It says, "of the alleged  
17 irregularities." I mean, wouldn't those be the ones that  
18 the Relators alleged to have occurred?

19 MS. MACCABEE: That's correct, sir.

20 THE COURT: Okay. And it doesn't say  
21 "including." That word isn't there.

22 MS. MACCABEE: That's a different part of the  
23 order.

24 THE COURT: That's not in the order.

25 MS. MACCABEE: It says, "The District Court

1 shall issue an order that includes findings of fact on  
2 the alleged irregularities." And to us, it tells us two  
3 things. One is that the scope of irregularities is  
4 whatever has been alleged by Relators, not just what  
5 Declarants may have disputed in their declarations.  
6 And --

7 THE COURT: Well, isn't the "includes" language  
8 a modifier of what my order must contain and not what the  
9 scope of the order should be? The scope of the order  
10 would be the clause on the alleged irregularities?

11 MS. MACCABEE: Yes, sir.

12 THE COURT: Okay. And you indicated earlier  
13 that the irregularities listed in the order aren't all of  
14 the alleged irregularities, that you alleged other  
15 irregularities in your moving papers.

16 MS. MACCABEE: Yes, your Honor.

17 THE COURT: Okay.

18 MS. MACCABEE: Yes, your Honor. And in other  
19 cases, once there was a prima facie case of  
20 irregularities, all the irregularities alleged went back  
21 to the district court, and there was a process of  
22 discovery. And I think a couple of the cases that I want  
23 to bring to your attention, I'm not -- maybe --

24 Do you want to join me?

25 THE COURT: Are there any cases under the

1 current version of 14.68 in Minnesota that have allowed  
2 discovery?

3 MS. MACCABEE: Your Honor, this is a rare  
4 enough occasion what the court of appeals has called --  
5 the court of appeals has said exceptional is that has not  
6 happened. But we've looked at other cases, including  
7 Supreme Court -- United States Supreme Court cases where  
8 there was an allegation that materials were missing from  
9 the record and how those were handled in terms of being  
10 able to address the full range of materials that were  
11 missing from the record and the ability to have discovery  
12 on remand as well.

13 THE COURT: Isn't there a sufficiently robust  
14 history of appellate case law under the previous version  
15 of this statute to guide us as to what, if anything,  
16 should be allowed under the current version of the  
17 statute?

18 MS. MACCABEE: There is not case law where  
19 there was a specific finding of procedural irregularity.

20 THE COURT: No. But there is case law under  
21 the previous version of the statute that discussed what  
22 discovery should be allowed and severely limited the  
23 scope of that discovery.

24 MS. MACCABEE: Your Honor, if I could let my  
25 colleague from the Fond du Lac Band respond on that

1 issue.

2 THE COURT: Yes. Go right ahead.

3 MS. RAY-HODGE: Thank you, your Honor.

4 THE COURT: Your name again?

5 MS. RAY-HODGE: Vanessa Ray-Hodge for the  
6 Fond du Lac Band.

7 THE COURT: Okay. Go ahead.

8 MS. RAY-HODGE: You're actually right, there  
9 are some cases, and both PolyMet and MPCA cite three  
10 cases in their brief, *Mampel* and a couple other ones  
11 under the previous rule prior to 14.68. And those talk  
12 about allowing some limited discovery.

13 But *Mampel*, if you read it, actually relies on  
14 a Supreme Court case, *United States versus Morgan*. And  
15 in *Morgan*, the rule was discovery of the mental processes  
16 by which an administrative decision is made is generally  
17 not proper. But this case is different. The court of  
18 appeals has already found substantial evidence of  
19 procedural irregularities and directed this Court to  
20 determine all the disputed issues of whether or not MPCA  
21 sought to keep EPA comments out of the record. And so  
22 this issue goes directly to the mental impressions and  
23 intent of the MPCA officials during the permitting  
24 process. So we think a different standard applies. And  
25 in fact, in the Supreme Court case of *Citizens to*

1       *Preserve Overton Park versus Volpe*, the Supreme Court  
2 held that extra record evidence may be justified on a  
3 showing of bad faith or improper behavior. So an inquiry  
4 into the mental processes of decision makers may be  
5 warranted and justify extra record discovery. The  
6 *Overton* --

7               THE COURT: Well, that -- okay. Everything  
8 we're doing here is extra record.

9               MS. RAY-HODGE: Right.

10              THE COURT: That's the whole point of why we're  
11 here. The question is, how does that get developed?  
12 Does that get developed by a lot of subpoenas and figure  
13 it out as you go during a hearing, or is there some --  
14 and is the record of procedural irregularities fixed  
15 based on what you submitted to the court of appeals, or  
16 do I let you do more? And if I'm going to let you do  
17 more, where is the authority for that, particularly in  
18 light of the fact that we have a pretty clear history of  
19 the Minnesota Legislature after the cases that you cited,  
20 not expanding the scope of authority but contracting the  
21 scope of authority by eliminating the reference to the  
22 Minnesota Rules of Civil Procedure, meaning the  
23 legislature removed all the discovery processes from the  
24 scope of my task.

25              MS. RAY-HODGE: Well, we reviewed Rule 81.01 of

1 the Civil Rules of Procedure and Appendix A, and we did  
2 not see that those rules actually exempted out  
3 proceedings that were transferred back to the district  
4 court under Rule 14.68. And the court of appeals' order  
5 actually on page 4 talks about transferring this case to  
6 the district court. And by virtue of the transfer under  
7 14.68, there was no need for a summons or a complaint.  
8 But otherwise, reading the Rules of Civil Procedure, they  
9 apply to this proceeding, including the rules of  
10 discovery. And an evidentiary hearing --

11 THE COURT: Based on what?

12 MS. RAY-HODGE: The rules themselves.

13 THE COURT: This is not a proceeding under the  
14 Minnesota Rules of Civil Procedure. This is a proceeding  
15 under the Minnesota Administrative Procedure Act.

16 MS. RAY-HODGE: But once --

17 THE COURT: That's what governs what we're  
18 doing.

19 MS. RAY-HODGE: But once it's transferred, if  
20 there's no exemption for the inapplicability of the Rules  
21 of Civil Procedure, they apply to the proceeding, in our  
22 view. And an evidentiary hearing by its very nature  
23 implies the need for discovery to aid in any hearing  
24 that's going to happen, especially when you're dealing  
25 with Relators, on the one hand, who have had very little

1 to no access to information despite repeated attempts to  
2 try to piece together what happened. And MPCA, on the  
3 other hand, has had access to all of the witnesses, all  
4 of the information, but has been able to cherry-pick and  
5 present the facts that best suit their case to the court  
6 of appeals to defeat the transfer motion. At that time,  
7 we did not know everything that was involved. We did not  
8 have a full picture of all of the irregularities that  
9 were being implicated in this case. Even since that  
10 hearing, additional documents through leaks at the EPA  
11 have come to light showing that there is additional  
12 evidence that we have not obtained through MPCA or EPA  
13 processes themselves. And the discovery process will  
14 allow us to not only question witnesses and decide  
15 whether or not they are relevant to streamline any  
16 evidentiary hearing but also to know the substance of  
17 their testimony in the event that we have been able to  
18 uncover documents that impeach their testimony.

19 THE COURT: On what basis would I allow full  
20 discovery, including depositions, under the current  
21 version of 14.68, which does not include a reference to  
22 the Rules of Civil Procedure, when all the cases that  
23 were decided when that reference was in the statute said  
24 no, you can't do that?

25 MS. RAY-HODGE: Because those state cases rely

1 on Supreme Court precedent. And Supreme Court precedent  
2 to date allows for exceptions to get at extra record  
3 evidence, including deposition of -- depositions of  
4 decision makers, and that if you look at the case of  
5 *Overton Park* after it was taken back to the district  
6 court, they did allow deposition of key decision makers  
7 to determine the mental processes of what happened during  
8 the administrative process because that information was  
9 not contained in the record.

10 Most recently, the Supreme Court --

11 THE COURT: Doesn't the amendment to the  
12 statute imply a legislative intent to limit the scope of  
13 a transfer hearing?

14 MS. RAY-HODGE: We don't think so, because even  
15 the last time --

16 THE COURT: What import do I give to the  
17 elimination of the reference to the Rules of Civil  
18 Procedure? Because the Rules of Statutory Construction  
19 are quite clear that if there's a change to the statute,  
20 the legislature intends a change in interpretation. So  
21 what does it mean that the reference to the Rules of  
22 Civil Procedure was eliminated?

23 MS. RAY-HODGE: It was to refer back to the  
24 Rules of Civil Procedure and 81.01 and Appendix A in  
25 determining when those rules don't apply. Appendix A was

1 last amended in 1997. So were the legislature intending  
2 to incorporate a limitation on the Rules of Civil  
3 Procedure, it could have done so and exempted 14.68 from  
4 the applicability of the Rules of Civil Procedure --

5 THE COURT: Well --

6 MS. RAY-HODGE: -- which it didn't do.

7 THE COURT: Isn't that what it did do by  
8 eliminating the reference?

9 MS. RAY-HODGE: Not when you have to read the  
10 two things together.

11 THE COURT: Except, if the transfer is an  
12 Administrative Procedure Act, mechanism, isn't all of my  
13 authority derived from the Administrative Procedure Act  
14 and the court of appeals' transfer order? What authority  
15 do I have other than that?

16 MS. RAY-HODGE: You have the court of appeals'  
17 order, which says that you have the authority to hold an  
18 evidentiary hearing to create -- and you are ordered to  
19 create findings of fact. You cannot do that without a  
20 record. We cannot get to a record without discovery.  
21 There is nothing that expressly prohibits your ability to  
22 authorize discovery. And we believe it's necessary here.

23 THE COURT: You can get into a record without  
24 discovery. I was asked to conduct a hearing. That's  
25 ultimately going to be the only record, right?

1 MS. RAY-HODGE: But we have -- we don't have a  
2 full record before us at this point because we have not  
3 been able to access the witnesses that the MPCA has. We  
4 also --

5 THE COURT: You can access any witness you want  
6 at the hearing.

7 MS. RAY-HODGE: But we haven't had time to  
8 prepare. They will have had plenty of time to prepare  
9 those witnesses under the substance of their testimony.  
10 We will not have been able to do that in order to fully  
11 understand the scope of how each witness is relevant.  
12 And by the way, we don't know yet if every -- if all the  
13 folks that we've identified to date are the only people  
14 that have relevant information, nor do we know if all the  
15 documents that we've been able to obtain through leaks  
16 and third parties is the realm of documents that actually  
17 encapsulate all the irregularities that occurred.

18 In order to fill out what we don't know, we  
19 need to have requests for documents; we need to be able  
20 to question the witnesses to understand what their  
21 relevance is. Some folks that we've identified may have  
22 no relevance at all, and it would waste the Court's time  
23 to put them on the stand so that we could have a fishing  
24 expedition. The discovery process will allow us to  
25 winnow things down and decide who is relevant, who is

1 not, and know if we have documents that will impeach the  
2 veracity of what they're going to testify to, none of  
3 which we have today.

4 THE COURT: If I allowed you to do limited  
5 written discovery, what would that entail, and how long  
6 would it take?

7 MS. RAY-HODGE: I think we could do requests  
8 for admissions in interrogatories. I don't think it  
9 would be sufficient. It would be akin to just what MPCA  
10 attempted before the court of appeals in putting forth  
11 very vague answers that we can't then follow up on. But  
12 if that was the Court's order, I think we would have  
13 to -- it would still take some time. We've been  
14 coordinating as a group. We would have to sit down and  
15 figure out which witnesses we wanted requests for  
16 admissions from, which witnesses we wanted  
17 interrogatories on. But then I think depending on those  
18 answers, we might need to come back to you and ask for  
19 more because it's been -- the practice what we've seen  
20 before the court of appeals is they're cherry-picking who  
21 they're having answer certain questions. They have been  
22 very vague in some of their answers. It's not allowing  
23 us a full and fair opportunity to examine the witnesses.

24 THE COURT: Okay. Anything else?

25 MS. RAY-HODGE: That's it, your Honor.

1 THE COURT: All right. Ms. Maccabee, come on  
2 back.

3 MS. MACCABEE: Just one more point, your Honor.  
4 I'm not sure if your Honor has had a chance to read the  
5 *Department of Commerce against New York* case, the recent  
6 Supreme Court case having to do with the census. And in  
7 that case, there was an allegation that there was a great  
8 deal of ex- --

9 THE COURT: No one cited it in any brief  
10 submitted to the Court, so you wouldn't expect me to read  
11 it.

12 MS. MACCABEE: No, your Honor. And I would be  
13 happy to provide you with a copy if you would like, sir.

14 THE COURT: If a case wasn't cited in your  
15 briefs, I didn't read it. All right? Because it's  
16 telling me you didn't think it was important. I didn't  
17 see *U.S. v. Morgan* cited. I didn't see *Citizens v. Volpe*  
18 cited.

19 MS. MACCABEE: Your Honor, Relators received  
20 the opposition papers at dinnertime last night, the same  
21 time you did.

22 THE COURT: Well, that's what you get when you  
23 initiate untimely motion practice. You're citing --  
24 you're telling me what rules apply, and then you're not  
25 following the same rules.

1 MS. MACCABEE: Your Honor, I --

2 THE COURT: Right?

3 MS. MACCABEE: We're not saying that the rules  
4 apply. We're saying we would love to have the  
5 opportunity to provide you with additional cases that we  
6 are citing today. Because you're right, you haven't had  
7 a chance to see them. But what I would like to inform  
8 you is that in the case of *Department of Commerce against*  
9 *New York*, when there was significant extra record  
10 evidence, evidence that should have been in the  
11 administrative record and wasn't, that the district court  
12 did allow depositions. And the Supreme Court said  
13 initially, once there was the extra record of evidence  
14 found, that all -- that the deposition evidence could be  
15 allowed as part of the case as well. So both in the  
16 *Volpe* case, the *Overton* case, and the *Department of*  
17 *Commerce*, there was deposition testimony -- deposition  
18 examination as well, which is still the best way to find  
19 out what the evidence is. And up to this point, Relators  
20 have been operating under a pretty heavy burden.

21 THE COURT: But no Minnesota case has ever  
22 allowed depositions even when the statute is broader. So  
23 why would I allow that now?

24 MS. MACCABEE: Well, your Honor, I think when  
25 the -- if you look at the case of the *Hard Times Cafè*,

1 the record in that case shows that that was the very  
2 argument at the Hennepin County District Court. The  
3 argument was that there should be no discovery. And the  
4 Relators there said there should be discovery. And at  
5 least the Court doesn't -- the only order of the Court  
6 that's reflected in the record is an order of dismissal.  
7 But contemporaneous reporting from the *Minnesota Daily* is  
8 that the case was settled by the City of Minneapolis once  
9 the Judge said there's going to be discovery in this case  
10 and there are going to be depositions. So that is --

11 THE COURT: You didn't answer my question,  
12 because whatever the Judge did that was reported in the  
13 *Minnesota Daily* isn't something that I'm bound by. I'm  
14 bound by appellate decisions. And isn't it true that no  
15 Minnesota appellate decision has ever allowed  
16 depositions, and in fact, the cases say they aren't  
17 allowed. And those cases were decided when there was a  
18 reference to the Rules of Civil Procedure in the statute,  
19 which has since been removed. So what -- so how can I  
20 include anything other than the fact that no depositions  
21 are allowed even if I allow some kind of discovery? That  
22 shouldn't be part of it.

23 MS. MACCABEE: Your Honor, where there is an  
24 allegation here that there is bias, and that is what the  
25 *Overton* case held and what was also resolved in the

1        *Department of Commerce* case, then the mental impressions  
2        of the decision makers become relevant. And that is why  
3        their case allowed deposition evidence in order to find  
4        out what the bases were of those decisions. And one of  
5        the challenges we have is that if there is no or  
6        inadequate documentation and the only thing we have in  
7        front of us is a written record, there really is no way  
8        to examine and find out what happened and why it  
9        happened, which is vital to determine whether the  
10       decision was arbitrary and capricious under the Supreme  
11       Court of Minnesota's decisions.

12                    THE COURT: But even if that's true, I still  
13        have to have authority to let you do it, don't I?

14                    MS. LARSON: Your Honor, my colleague  
15        Dan Poretti would like to take five minutes to speak to  
16        your questions about this.

17                    THE COURT: Yes.

18                    MR. PORETTI: Thank you, your Honor.

19                    Let me start off with changes to 14.68, your  
20        Honor --

21                    THE COURT: Yes.

22                    MR. PORETTI: -- since you've obviously been  
23        focused on that for good reason. I think you have to  
24        look at the overall scope of that change, though, your  
25        Honor. That was done in 1983. It was part of the

1 shifting of jurisdiction from district court to the court  
2 of appeals from agency actions, the kind of appeal we  
3 have going on here.

4 THE COURT: Right.

5 MR. PORETTI: And so at the time the old  
6 statute was written, those were going in to the district  
7 court, which had a truncated set of responsibilities.  
8 And so --

9 THE COURT: Well, and the district court was  
10 limited to the administrative record when it had the  
11 responsibility, just like the court of appeals is limited  
12 to the administrative record now.

13 MR. PORETTI: Except in cases of procedural  
14 irregularities, your Honor.

15 THE COURT: Correct.

16 MR. PORETTI: But the point is --

17 THE COURT: And in fact, the purpose of the  
18 transfer statute is to create a mechanism for expanding  
19 the administrative record solely for the purpose of  
20 identifying procedural irregularities.

21 MR. PORETTI: I think that's probably accurate,  
22 your Honor.

23 THE COURT: Okay.

24 MR. PORETTI: But the language that was in the  
25 prior version of that statute, after listing out some of

1 the things the district court couldn't do, went on to  
2 say, "Otherwise, as provided herein, the Rules of Civil  
3 Procedure shall apply." So it's that "otherwise"  
4 language that's important here, Judge, because once this  
5 process gets flipped to the court of appeals on transfer,  
6 the limitations that we're talking about, no jury trials  
7 and that sort of thing, in the old rule no longer  
8 applied. And so there's no reason for the legislature to  
9 call out that the Rules of Civil Procedure otherwise  
10 still apply because those prior limitations are gone, and  
11 it's presumed under the Rules of Civil Procedure, Rule 1  
12 says, "all proceedings before this court." In district  
13 court, the Rules of Civil Procedure apply except those  
14 listed in 81. And 81 doesn't have any effect on this  
15 proceeding. It's not one of the statutes identified as  
16 being exempt from the rules.

17 THE COURT: Well, the problem with your  
18 presentation is that the Rules of Civil Procedure are  
19 designed to apply to civil actions. This isn't a civil  
20 action. This is an administrative proceeding. So I need  
21 a direct link. Where is the direct link?

22 MR. PORETTI: So, your Honor, I think you need  
23 to look a little further into the Rules of Civil  
24 Procedure even though you're not sure they apply, because  
25 Rule 26.01(a) has an exemption for this very proceeding

1 saying when this has been transferred back from another  
2 court as part of an administrative proceeding, the Rule  
3 26.01 informational statements are not required. But  
4 Rule 26.02, which has the discovery -- the grant of broad  
5 discovery does not have that same exemption. It doesn't  
6 say rules transferred -- or cases transferred back to the  
7 district court for administrative purposes. There's no  
8 discovery applying. So as you work your way through the  
9 rules, your Honor, I think it's very clear that the rules  
10 contemplate that this action is going to have discovery.

11 And, your Honor, I realize the Court can  
12 obviously hold a hearing and have fact finding, but  
13 that's going to be a chaotic and less than fruitful  
14 process if there's been no pre-hearing discovery.

15 I mean, Judge, let's get down to brass tacks.  
16 We're here because the MPCA engaged in irregular  
17 procedures and then hid the ball about those procedures.  
18 It does not seem appropriate that this Court should allow  
19 MPCA to carry out their game plan of hiding the ball,  
20 hiding their tracks about those procedures by not  
21 allowing discovery. Nothing in the court of appeals'  
22 order says there shall not be discovery. And that was --

23 THE COURT: Well, let's --

24 MR. PORETTI: -- discussed.

25 THE COURT: Let's dig into that a little bit.

1 A representation was made by PolyMet that you asked for  
2 discovery in your motion, in your reply brief, and  
3 therefore, since the court of appeals didn't mention  
4 discovery, you don't get it. I didn't get a copy of the  
5 reply brief. Is there a reference in the reply brief to  
6 a request to conduct discovery?

7 MR. PORETTI: I think in the reply brief -- and  
8 I didn't write that, your Honor. But in the reply  
9 brief --

10 THE COURT: Don't run away from it.

11 MR. PORETTI: I'm not, your Honor. I don't  
12 want to be quoting it because I'm not the person --

13 THE COURT: That's fair.

14 MR. PORETTI: -- most familiar with it.

15 THE COURT: That's fair.

16 MR. PORETTI: But it does identify areas for  
17 which discovery would need to happen. And it  
18 certainly -- I think it lists ten areas or something like  
19 that. And that was certainly in the reply brief before  
20 the court of appeals.

21 But, your Honor, why is the presumption that --  
22 if the court of appeals knows that the Relators want  
23 discovery and stay silent on that, why is the presumption  
24 that there's no discovery? Shouldn't the court of  
25 appeals say, and by the way, there won't be any

1 discovery; this is just a straight fact-finding hearing  
2 based on what's available? They didn't do that, your  
3 Honor. So I think the presumption, particularly given  
4 the way the rules work, is that there should be discovery  
5 in this case. And obviously, it's subject to reasonable  
6 limits and all of that stuff and should be done  
7 expeditiously. But to carry forth on a hearing where we  
8 have both hands tied behind our back, they have control  
9 of all the information.

10 And by the way, Judge, they haven't been  
11 forthcoming. We've learned things since the transfer  
12 order that show they haven't been forthcoming. We still  
13 don't have some of the emails that we know exist from the  
14 Data Practices Act request. They didn't produce them.  
15 But we got them from leaking sources at the EPA. Why is  
16 that? According to them, we don't even get to find out  
17 about that stuff because we can't conduct any kind of  
18 discovery. And I don't think this Court wants a  
19 freewheeling discovery process guised as a fact-finding  
20 hearing. That's not efficient, it's chaotic, and it's  
21 unfair to the Relators, your Honor.

22 THE COURT: Your reference to 26.01(a)(2).

23 MR. PORETTI: "(2)(A), An action for review on  
24 administrative record."

25 THE COURT: Right. Is this an action for

1 review on an administrative record? I think you could  
2 take issue with that.

3 MR. PORETTI: I think it is. And if it's not,  
4 then look at F, a proceeding that's ancillary to a  
5 proceeding in another court. It's one or the other, your  
6 Honor.

7 THE COURT: That's true.

8 MR. PORETTI: And so this calls that out and  
9 says you don't do the 26.01 typical informational  
10 disclosures, but you go to 26.02; that's where the grant  
11 of discovery rights is. There's no exemption for that.  
12 Doesn't call that out. So obviously, they knew it was  
13 there, and if they wanted to say, by the way, discovery  
14 doesn't apply, they would have picked up on that very  
15 same language.

16 THE COURT: All right.

17 MR. PORETTI: Your Honor, just --

18 THE COURT: So my directive to conduct this  
19 hearing as soon as reasonably practical could take years  
20 then, right?

21 MR. PORETTI: No, because you're going to keep  
22 a tight reign on discovery. You're going to make the  
23 parties respond to interrogatories. You're going to make  
24 them respond to requests for admissions. You're going to  
25 make them respond and produce witnesses in a timely

1 manner. And we're going to get this thing done in a  
2 matter of months, your Honor.

3 And we're a group of five parties that don't  
4 have a lot of resources. We're not going to go wasting  
5 time and money on fishing expeditions. That's not what  
6 we're about. We're here to get to the truth of what  
7 happened. The MPCA has done its utmost to hide that  
8 truth from the public and from the Court, the court of  
9 appeals. And we have to engage in discovery to get that  
10 truth.

11 And before I step back, your Honor, I'm just  
12 going to briefly address those old cases that you were  
13 talking about, the --

14 THE COURT: Yes.

15 MR. PORETTI: -- *Mampel* line. A couple things  
16 on that, your Honor. First of all, those cases, the  
17 *Mampel* case talk about we don't want to have depositions  
18 of the senior executives, the commissioners of government  
19 departments, because they will be in depositions, you  
20 know, three days a week given all the cases these  
21 agencies have to face. That concern doesn't apply here,  
22 Judge, because the people who were the commissioners and  
23 assistant commissioners at MPCA no longer are there.  
24 They are retired or have moved on. And so we won't be  
25 taking up the time of the executives at the MPCA who are

1 currently doing the job. These are former people.

2 Secondly, your Honor, none of those cases  
3 involved a situation where those executives, those  
4 commissioners and assistant commissioners, are the ones  
5 who stand accused of alleged improprieties and procedural  
6 irregularities. That's where this game plan came from  
7 that caused this whole problem, the upper echelons of the  
8 MPCA. In the cases that they rely on, the commissioners  
9 are not accused in anyway, shape, or form of having  
10 committed or planned or promoted any kind of procedural  
11 irregularities. So this is a situation where we need to  
12 look at those folks to see what happened. And it would  
13 certainly seem to be an odd process if we're not allowed  
14 to depose and take testimony from the very people who are  
15 alleged to have masterminded this plan to avoid public  
16 scrutiny.

17 Thank you, your Honor.

18 THE COURT: One last question.

19 MR. PORETTI: Sure.

20 THE COURT: It was represented that Appendix A  
21 to the civil rules contain the list of types of  
22 proceedings that are exempt from the civil rules. And it  
23 says exempt insofar as they are inconsistent or in  
24 conflict with the procedure and practice provided by  
25 these rules. The Administrative Procedure Act is not

1 listed by chapter number. However, writ of certiorari is  
2 listed. Isn't writ of certiorari a proceeding and  
3 therefore exempt from the Rules of Civil Procedure?

4 MR. PORETTI: I think once it's transferred  
5 back here, your Honor, it's not.

6 THE COURT: Aren't I an arm of the certiorari  
7 proceeding?

8 MR. PORETTI: No. You're jurisdiction. This  
9 is a transfer. It's not a remand, your Honor.

10 THE COURT: Right.

11 MR. PORETTI: Transfer means jurisdiction is  
12 now vested here. And your transfer is based on 14.68.

13 THE COURT: Right, which got to me through a  
14 writ of certiorari process. I have been directed to  
15 conduct a hearing as a part of the certiorari proceeding,  
16 haven't I?

17 MR. PORETTI: I don't believe it's a part of  
18 the certiorari proceeding. I think that's what's  
19 happening in the court of appeals.

20 THE COURT: Well, the transfer is something  
21 that is authorized during a certiorari proceeding under  
22 limited circumstances that have been found to exist by  
23 the court of appeals, right?

24 MR. PORETTI: True.

25 THE COURT: Okay. Then --

1 MR. PORETTI: But I think the transfer changes  
2 that equation, your Honor.

3 THE COURT: All right.

4 MS. LARSON: And, your Honor, I think if you  
5 look --

6 THE COURT: Your name?

7 MS. LARSON: Oh, Elise Larson. I'm sorry, your  
8 Honor.

9 I think that if you look in the order itself,  
10 it says this matter has been transferred, and then it  
11 says, "these certiorari appeals are stayed." And so I  
12 think these certiorari appeals themselves have been  
13 stayed. Those are not pending -- well, they are pending,  
14 but they're not active matters right now. What you have  
15 is a transfer by which you have jurisdiction over the  
16 matter, which is the permit and this permit dispute on  
17 the limited -- for the limited purpose of determining  
18 alleged irregularities. And I think then when you think  
19 about what is the scope of your jurisdiction, it needs to  
20 be rooted in what the court of appeals has said. And  
21 they have said that the certiorari appeals themselves are  
22 stayed, and we are in a separate matter here where  
23 jurisdiction has been transferred to you.

24 THE COURT: Okay. Let's hear from the other  
25 side. Who wants to go first?

1 MR. MARTIN: Your Honor, John Martin for MPCA.  
2 And it may be easiest, given that I'm spread out here,  
3 for me to speak from counsel table with your Honor's  
4 permission.

5 THE COURT: That's fine.

6 MR. MARTIN: Thank you, your Honor.

7 First, your Honor, I would like to apologize  
8 for not having provided your Honor with a chambers copy  
9 of our submission. That's a mistake on our part, and I  
10 promise you that it won't be repeated.

11 I would like to, if I can, build on the  
12 colloquy that you had with Relators' counsel and talk for  
13 a moment both about your statutory authority and the  
14 authority that was conveyed by the court of appeals.

15 So first, the statutory authority. I would  
16 like to begin with 14.68, obviously, the provision that  
17 governs this proceeding. 14.68 begins with the phrase  
18 that the review will be, quote, confined to the record,  
19 end quote. So, your Honor, as a general proposition, in  
20 this cert appeal, this is a matter that is confined to  
21 the record. Now, it may well be the case that Relators  
22 would prefer otherwise. But as a general proposition, an  
23 appeal of this nature is necessarily confined to the  
24 record. Now, there is an exception carved out, and it's  
25 an exception that the court of appeals applied in this

1 instance.

2 THE COURT: Right. We're living the exception,  
3 right?

4 MR. MARTIN: We certainly are, your Honor.

5 THE COURT: Which means the purpose of this  
6 proceeding is to develop an additional record for the  
7 court of appeals to consider.

8 MR. MARTIN: That's correct, your Honor. And  
9 that's something that obviously we would not dispute.

10 I would like to, if I can, talk about that  
11 particular provision. First, let's begin with a couple  
12 of the limiting words in that particular provision.  
13 First, it says jurisdiction, as in the district court  
14 will have jurisdiction. And the suggestion given its  
15 context is that that jurisdiction is going to be limited  
16 as it's termed in the statute. What it says is, quote,  
17 jurisdiction to take testimony and to hear and determine  
18 the alleged irregularities. So your jurisdiction, your  
19 Honor, as you pointed out in the colloquy earlier, is  
20 only to take testimony. The jurisdiction does not  
21 extend, as your Honor pointed out, to a full-blown civil  
22 proceeding. It does not extend to discovery. That's not  
23 part of this statute. And it's patently the case.

24 It's also interesting that if one were to read  
25 14.68 in conjunction with 14.69, you would find some

1 parallels between what Ms. Maccabee has suggested you  
2 need to address and what is specifically handed over to  
3 the court of appeals. When she talks about excess of  
4 authority, legal error, whether or not the decision was  
5 arbitrary and capricious, whether or not there is  
6 substantial evidence, those are precisely the issues that  
7 the court of appeals needs to decide, and those have to  
8 be decided based upon the administrative record.

9 Your Honor, I think that the statute and the  
10 case law that your Honor has cited very much limits this  
11 proceeding. I think it limits its scope to the alleged  
12 irregularities as defined in the Court's order, and  
13 second, it does not allow for discovery. It only allows  
14 for the taking of testimony.

15 THE COURT: How can I hear and determine an  
16 issue if the parties don't have full disclosure of the  
17 relevant information needed to determine the issue?

18 MR. MARTIN: And, your Honor, I think that  
19 there are a couple of things. And at the risk of getting  
20 ahead of ourselves, let me say that this was the most  
21 transparent public proceeding arguably in the history of  
22 Minnesota environmental law.

23 THE COURT: I think the concern here isn't with  
24 what was made public. It's what wasn't made public.

25 MR. MARTIN: And, your Honor, it's interesting,

1 because the alleged irregularities concern the  
2 communications between EPA and MPCA. We think that when  
3 your Honor takes the testimony, you will conclude with us  
4 that there really weren't irregularities, that in fact  
5 MPCA acted well beyond what was necessary in terms of its  
6 interaction with EPA. Indeed, we already have in the  
7 record a declaration to the effect that there was more  
8 interaction with EPA, more communication between MPCA and  
9 EPA than has ever occurred on any other water permit in  
10 the history of the Agency. That's, frankly, the case.

11 THE COURT: But that's, to me, just a  
12 platitude, because every case has its own magnitude,  
13 and -- well, records are made to be broken, right? And  
14 so the record amount of contact and communication  
15 ultimately may prove not to have been enough. So that's  
16 not helpful.

17 MR. MARTIN: And, your Honor, I think -- again,  
18 I think we're getting ahead of ourselves. I think it's  
19 not fair for me to say how I think this testimony will  
20 ultimately evolve.

21 But let me get back to your initial question,  
22 and let's address the issue that was raised by opposing  
23 counsel that this might be a chaotic proceeding. The  
24 fact of the matter is we have submitted declarations that  
25 detail what is required, what was done, the

1 communications between EPA responding to the specific  
2 allegations, the, quote, alleged irregularities. We have  
3 provided that already, so it's not as if the other side  
4 doesn't know what these witnesses will testify to. And  
5 let me take that a step further. We would offer -- to  
6 the extent that we have other witnesses, we would offer  
7 to provide a similarly detailed declaration so that the  
8 other side does have some appreciation, some  
9 understanding of what these witnesses will testify to.  
10 This will not be a chaotic proceeding.

11 Let me also say --

12 THE COURT: If you're willing to offer a  
13 declaration, why aren't you willing to answer questions?

14 MR. MARTIN: Well, your Honor, it's --

15 THE COURT: Because if you offer a declaration,  
16 you're choosing what to disclose. If you're required to  
17 answer a question, it may completely overlap what you  
18 would have voluntarily disclosed, but it might not.

19 MR. MARTIN: Well, and, your Honor, we think  
20 that that's why testimony is allowed in this proceeding.  
21 This is a very narrow exception. And as you pointed out  
22 in the wake of *Mampel*, the legislature had the  
23 opportunity if they chose to allow some sort of further  
24 discovery; they could have done that. They chose not to.  
25 And instead, they narrowed the statute. They left out

1 the reference to the Rules of Civil Procedure and instead  
2 said, in essence, that it will be limited to the alleged  
3 irregularities and limited to the taking of testimony.

4 THE COURT: Well, just because the civil rules  
5 don't apply, does that necessarily mean that I'm  
6 prohibited from requiring some form of discovery?

7 MR. MARTIN: Your Honor, I do believe that this  
8 statute is drawn sufficiently narrow that that would be  
9 outside your jurisdiction. I do believe that's the case.

10 THE COURT: Ultimately, there's a requirement  
11 that parties be given due process, isn't there?

12 MR. MARTIN: There certainly is, your Honor.

13 THE COURT: And would you agree or disagree  
14 with the proposition that trial by surprise lacks due  
15 process?

16 MR. MARTIN: I would disagree with it as a  
17 general statement. I will grant you that under some  
18 circumstances that could be a violation of due process.  
19 In this instance, I don't believe it is.

20 THE COURT: Why not?

21 MR. MARTIN: And it's because this is a  
22 proceeding that is generally confined to the  
23 administrative record. This is a narrow exception to  
24 that general rule.

25 THE COURT: But that -- what you're doing then

1 is making a circular argument. The proceedings confined  
2 to the administrative record with a transfer order allows  
3 the expansion of the administrative record. But because  
4 you're limited to the administrative record, you can't  
5 expand the record. That's essentially what you're  
6 saying.

7 MR. MARTIN: No, your Honor, I'm not. What I'm  
8 saying is that that exception should be read narrowly,  
9 because 14.68, as your Honor well knows, says that these  
10 proceedings before the court of appeals are confined to  
11 the administrative record. And make no mistake about it.  
12 Relators had an opportunity to submit thousands of pages  
13 of documents, which they did, in the administrative  
14 record, and so they have been allowed to participate in  
15 that administrative proceeding. And my only point in  
16 referring to that backdrop is to emphasize that this  
17 is -- this is an unusual proceeding. It's only a narrow  
18 exception. And I should also say that I think the court  
19 of appeals' order further is that notion that in fact it  
20 is limited. You know, it's --

21 THE COURT: It actually uses the word  
22 "limited." I get that.

23 MR. MARTIN: It certainly does, your Honor.

24 THE COURT: But when I have an allegation that  
25 the information to establish a prima facie case of

1 irregularities came to those parties in bits and pieces,  
2 which creates the image of a partially completed puzzle,  
3 why shouldn't there be a mechanism prior to the hearing  
4 to determine whether the remaining puzzle pieces are out  
5 there waiting to be found?

6 MR. MARTIN: Well, and I think for two reasons.  
7 We touched on the statute. And the first is -- and  
8 obviously, argue that the statute doesn't allow that sort  
9 of thing.

10 And let me address the practicality, because we  
11 have this narrow exception; we have these allegations of  
12 procedural irregularities. The other side will designate  
13 today the witnesses that they believe will testify to  
14 these irregularities. We can take testimony, and at that  
15 point they will have a chance to offer testimony that  
16 they believe demonstrates that there were procedural  
17 irregularities. And presumably, the witnesses that we  
18 will designate today will rebut that and demonstrate  
19 that, in fact, there were not procedural irregularities.  
20 That's the way I see the process working.

21 And your Honor's point about the language of  
22 the order is telling. As your Honor points out -- and  
23 I'll quote directly from the order. It says -- the  
24 referral is for, quote, the limited purpose of an  
25 evidentiary hearing and determination of the alleged

1 irregularities and procedure, end quote. So we have a  
2 limited order. It specifically says an evidentiary  
3 hearing. It doesn't say discovery. And as your Honor  
4 pointed out, this statute has been narrowed since the  
5 days when even the only questions that were allowed were  
6 written deposition questions.

7 THE COURT: And in those cases, was there a  
8 limit on the number of written deposition questions?

9 MR. MARTIN: My recollection of *Mampel* was that  
10 there wasn't necessarily a numeric limit, but it required  
11 approval of the Court before those questions could be  
12 conveyed to the Agency. That's my recollection.

13 THE COURT: All right.

14 MR. MARTIN: I think --

15 THE COURT: What is the -- I would like someone  
16 on your side of the table to read me the reply brief  
17 language that you contend contains a request to the court  
18 of appeals by Relators to conduct discovery. Does  
19 someone have that?

20 MR. MILLS: I can do that, your Honor.

21 THE COURT: Your name?

22 MR. MILLS: Monte Mills, your Honor, on behalf  
23 of PolyMet.

24 THE COURT: All right.

25 MR. MILLS: We did attach the briefing that

1 Relators submitted to the court of appeals. It's  
2 attached to the declaration of Davida McGhee dated  
3 yesterday. We -- I also apologize for not submitting  
4 courtesy copies to the Court in a timely manner.

5 The reply brief is attached as Exhibit 2 to the  
6 declaration of McGhee, and that is --

7 THE COURT: I don't recall seeing that, so that  
8 may have not been an accepted document in MNCIS at the  
9 time I was looking yesterday. It might have been  
10 accepted this morning.

11 MR. MILLS: We have it filed at 12:34 p.m.  
12 yesterday.

13 THE COURT: That doesn't --

14 MR. MILLS: I can look into that.

15 THE COURT: It's retroactively dated to the  
16 date it was filed. But if the document is being  
17 processed and then later accepted -- for example, one of  
18 the pro hoc petitions even this morning hadn't been  
19 accepted yet, so I didn't see it. That may be the reason  
20 I didn't see it. It doesn't mean you didn't file it, and  
21 I'm not being critical of you. I'm just telling you that  
22 because of the lateness of the filing, sometimes things  
23 aren't accepted, and they aren't posted on MNCIS, and I  
24 don't see them, which means if you want me to see things,  
25 you need to give them to me even in this electronic era.

1                   You should also know that there is no mechanism  
2                   to notify me when something has been filed. So unless I  
3                   look or unless you tell me, I don't know. I don't get a  
4                   little alert in an email saying a document has been  
5                   filed. Picture the horror of that, because you're not  
6                   the only case. Okay? So just get to the point.

7                   MR. MILLS: Yes, your Honor.

8                   THE COURT: What is it?

9                   MR. MILLS: So we will submit these courtesy  
10                  copies to you shortly. It's Exhibit 2. It is entitled  
11                  the WaterLegacy Reply Memorandum that was submitted to  
12                  the court of appeals in support of the motion to  
13                  transfer.

14                 THE COURT: Okay. What page, and then read the  
15                  excerpt.

16                 MR. MILLS: Page 20.

17                 THE COURT: Okay.

18                 MR. MILLS: It's following a list of questions  
19                  that Relators submitted. They said, "Transfer to the  
20                  district court would allow discovery, including  
21                  depositions, to disclose the nature of the NorthMet  
22                  permit process. The content of documents not contained  
23                  in the administrative record and the degree to which the  
24                  desire to protect the NorthMet permit from public and  
25                  judicial scrutiny and to ensure the project would move

1 forward may have affected the nature of the  
2 administrative record and MPCA's final decision."

3 THE COURT: Okay. So --

4 MR. MILLS: So there's the request; they said  
5 depositions, discovery. And the court of appeals' order  
6 didn't say anything about that.

7 THE COURT: Right, thereby creating a debate as  
8 to whether it's impliedly allowed or impliedly not  
9 allowed, a simple question based on our discussions.

10 MR. MILLS: Do you want me --

11 THE COURT: That's good for now.

12 MR. MILLS: Okay. I can address that, but I  
13 don't know if it's my turn yet.

14 THE COURT: It's not. What can I say?

15 Go ahead.

16 MR. MARTIN: Thank you, your Honor. So I'll  
17 take my turn.

18 Let me respond to your Honor's question. So  
19 the response is the language that you and I have just  
20 been talking about. It's a referral for, quote, the  
21 limited purpose of an evidentiary hearing, end quote.

22 THE COURT: Right. And that gets back to  
23 the -- where we, you and I, started is, is some form of  
24 discovery implied when I'm given permission to conduct an  
25 evidentiary hearing to ensure that the parties to that

1 hearing have some modicum of due process to ensure that  
2 everything -- every purpose for the hearing is going to  
3 be a robust, fair process.

4 MR. MARTIN: And, your Honor, in terms of the  
5 due process issue, you and I have been involved in  
6 proceedings, for example, motions for preliminary  
7 injunction. There were criminal proceedings that we all  
8 know about where we don't really have discovery. So I'm  
9 not so sure that it implicates due process. And in this  
10 instance, I think it's incumbent upon the parties to  
11 streamline this process so it's not, as counsel  
12 suggested, a chaotic process. We and I'm sure the other  
13 side will do everything we can to make sure that your  
14 Honor is in a position where you know who the witnesses  
15 are, where that witness testimony is properly narrow,  
16 where you don't have repetitious testimony.

17 There are allegations here that they have  
18 discovered procedural irregularities. It's incumbent  
19 upon them to come forward to demonstrate to the Court  
20 that there is such a thing. We believe we have witnesses  
21 who will testify otherwise. We don't believe that there  
22 were procedural irregularities. And that's what the  
23 statute requires. Under ordinary circumstances, they  
24 would be confined to the administrative record. This is  
25 the narrow exception. It's their allegation. They have

1 the burden of proving it. Today they will tell us what  
2 witnesses they intend to call. We will have the  
3 obligation of cross-examining them. And then your Honor  
4 will do presumably what you've indicated, set a hearing  
5 as soon as practicable.

6 Let me also say that, procedurally, almost the  
7 only way this could possibly fit in terms of what the  
8 court of appeals wanted is if we have that hearing very  
9 soon. They say as soon as practicable. They have  
10 suspended the proceeding before the court of appeals.  
11 Now they have suspended the permit. And I think it's  
12 only fair for us to infer that the court of appeals  
13 intended that this process would be completed in a  
14 relatively short period of time. So it's our view that  
15 we ought to schedule the evidentiary hearing as soon as  
16 practicable, probably in the month of September, that we  
17 as parties do everything we can to work with one another  
18 to narrow that process, to limit what the direct  
19 testimony will be, to not ask the extraneous questions  
20 that go beyond the alleged irregularities.

21 THE COURT: You know, it's easy for you folks  
22 to sit there and argue to me about this stuff. But when  
23 people throw words at me like "as soon as practicable"  
24 and "relatively soon," that could be the width of my pen  
25 or the Grand Canyon.

1 MR. MARTIN: Fair enough.

2 THE COURT: And that's what advocacy is for.

3 And that's the advocacy I'm getting.

4 MR. MARTIN: Well --

5 THE COURT: And it's all arguably encompassed  
6 in those words. It doesn't preclude limited discovery.

7 MR. MARTIN: Well, your Honor, I guess, you  
8 know, if we're talking about timing, let me be more  
9 specific, because I think you're right. When we're  
10 talking about generalities and platitudes, that's not  
11 helpful. If we had our druthers, the preference of MPCA  
12 would be to hold this hearing before the end of  
13 September. So I want to be specific on that point. I  
14 can give you the specific witnesses today that we intend  
15 to call in response to the procedural irregularities.

16 THE COURT: Have both sides, Relators and  
17 Respondents, brought witness lists with them today?  
18 That's part of what I asked you to do.

19 Okay. Have any of those been exchanged?

20 MS. MACCABEE: No.

21 MR. MARTIN: We have not.

22 THE COURT: You guys are so careful. Okay.

23 Ms. Maccabee?

24 MS. MACCABEE: Your Honor, our list of  
25 witnesses was based on the idea that we would have the

1 opportunity to do discovery and that these would be  
2 primarily people who would be under subpoena and would be  
3 hostile witnesses subject to cross-examination. So the  
4 list is not people who we know what they're going to say.  
5 The list is of people who are in our documents, in the  
6 EPA records, in the complaint.

7 THE COURT: I get that. I'm basically assuming  
8 that you assembled a list of people who you would like to  
9 testify at the hearing if I announce that we're starting  
10 tomorrow. And you would run out and subpoena those  
11 people and get them here. That's what I'm assuming was  
12 the basis for your list. I'm also assuming that you  
13 don't want me to limit you to those people because you --  
14 one side is hoping for some discovery where there might  
15 be new names added to the list, and the other side  
16 doesn't want any discovery. So I get all that. As I  
17 tell my kids, I wasn't born yesterday.

18 We are going to take a 15-minute recess and  
19 then resume. And during the recess, why don't you pull  
20 out your witness lists. I'm hoping you brought a copy  
21 for me that you can -- that you can give me, and then  
22 I'll complete going around the table and give everyone a  
23 chance to be heard, and then we'll cover some timing  
24 issues and things like that. Okay?

25 (A recess was taken.)

1 THE COURT: Please remain seated.

2 All right, Mr. Martin, you may continue.

3 MR. MARTIN: Your Honor, during the break,  
4 Mr. Neblett noted that I hadn't specifically said that  
5 MPCA never suppressed EPA comments. And I need to say  
6 that. I know that's getting ahead of ourselves. I know  
7 that is going to be the subject of this hearing, but that  
8 never happened.

9 Second, MPCA never destroyed documents. To the  
10 contrary, what happened with respect to EPA is that they  
11 were actually given more time and more opportunity to  
12 make comments on this particular permit. In fact, the  
13 way the ordinary process works pursuant to the 1974  
14 memorandum of agreement is that EPA would ordinarily have  
15 roughly 15 days to respond to a proposed permit. By  
16 agreement between MPCA and EPA, that period of time was  
17 actually extended to a total of 60 days in addition to  
18 all of the conversations, the bimonthly conversations  
19 that occurred beginning in 2016. So, your Honor, we  
20 specifically and clearly -- and I want to make certain  
21 that everyone understands, we deny that allegation.

22 In terms of, quote, destroying documents, end  
23 quote, the declarations in -- and I started to say in the  
24 matter below; it's actually in the matter above,  
25 demonstrate that what happened with respect to one

1 counsel is he had notes that he took on the April 5  
2 discussion with EPA. He incorporated them into typed  
3 notes. They were obviously attorney work product. They  
4 were attorney-client privilege. They were not things  
5 that should be given over to -- in response to a Data  
6 Practices Act request. And perhaps more importantly, and  
7 this is something that seems to be lost in the discussion  
8 of that issue, there was not a Data Practices Act request  
9 made at that point in time that demanded those documents.  
10 The last EPA request was on March 26, several days  
11 before. MPCA, like every other agency in Minnesota, only  
12 looks back on the documents it has. They do not take a  
13 DPA request as something that continues infinitum.  
14 Obviously, if they did have that interpretation of the  
15 statute, they would spend the entire time producing  
16 documents. They are only required to produce those  
17 documents that exist. That document did not exist as of  
18 March 26 when the DPA request was received. So first,  
19 it's an attorney's notes. Second, there wasn't a request  
20 made of those notes when he discarded them and  
21 incorporated them instead into a typed document.

22 As Mr. Schmitt put it, I go paperless --

23 THE COURT: And a typed document that you  
24 contend was itself privileged?

25 MR. MARTIN: Yes.

1 THE COURT: Okay. Go ahead.

2 MR. MARTIN: And by the way, no one to this  
3 point has contested that notion. So I don't think that's  
4 an issue here.

5 Your Honor, if I may, just getting back to the  
6 central points -- and I don't mean to belabor what I  
7 think is apparent from the conversations that we've had  
8 so far. Let me just say that when we talk about the  
9 prior version of the statute, you refer back to the  
10 *Mampel* decision. The *Mampel* decision said, given the  
11 language of this statute, given all of the policy  
12 considerations, the only thing we'll allow are written  
13 deposition questions, nothing more. In fact, the *Mampel*  
14 court, the Minnesota Supreme Court invited the  
15 legislature to change the statute. If they wanted to  
16 allow some sort of discovery, the Minnesota Supreme Court  
17 said the legislature can do that. Not only did they not  
18 change the statute to allow for discovery, as your Honor  
19 points out, they actually narrowed the statute and  
20 eliminated the reference to civil procedure rules. That  
21 being the case, I think it's clear that the jurisdiction  
22 of this Court is limited to taking testimony.

23 I think that I've summarized our position here,  
24 and I think it's only fair that I allow the folks from  
25 PolyMet to speak to these issues, if your Honor please.

1 THE COURT: All right. That would be fine. I  
2 do have the Relators' witness list here. Do you have  
3 something for me?

4 MR. MARTIN: Your Honor, I do. I had planned  
5 on just providing the list to you orally, and we will  
6 give it to you in writing. The witnesses that we  
7 anticipate calling include Stephanie Handeland,  
8 H-a-n-d-e-l-a-n-d, Michael Schmitt, Shannon Lotthammer,  
9 Jeff Udd, spelled U-d-d, Richard Clark, and John Linc  
10 Stine. In addition, your Honor, we may request of EPA to  
11 make an EPA witness or witnesses available who can speak  
12 to the interaction between MPCA and EPA. We've made that  
13 request. It's in process right now. We haven't heard  
14 back from Region 5 EPA, but we're told that that request  
15 is in process.

16 THE COURT: Who are they?

17 MR. MARTIN: I'm sorry, who are the  
18 individuals? They may well include Kurt Thiede,  
19 T-h-i-e-d-e, or someone on his staff. And at least so  
20 far, the folks from EPA haven't told us who they would  
21 make available and who would be knowledgeable on this  
22 subject.

23 THE COURT: All right. Thank you.

24 PolyMet?

25 MR. MILLS: Thank you, your Honor. Monte Mills

1 on behalf of PolyMet.

2 PolyMet received a permit from the MPCA in  
3 December 2018. It's a water quality permit. The  
4 Relators filed a certiorari appeal shortly after that and  
5 then in May of 2018 moved to transfer the certiorari  
6 appeal to this Court.

7 The court of appeals in that order identified  
8 two issues of disputed evidence. They listed five things  
9 that they considered undisputed. And that's in their  
10 order. I wanted to underscore the two issues the court  
11 of appeals identified that had disputed evidence. And  
12 those two were whether it was unusual for EPA not to  
13 submit written comments, and the second disputed issue of  
14 evidence was whether the MPCA sought to keep EPA's  
15 comments out of the public record. And that court of  
16 appeals order transferring the matter to this Court  
17 stated that it is for the limited purpose of an  
18 evidentiary hearing and a determination of the alleged  
19 irregularities in procedure. Now, the court of appeals  
20 did say it would like this hearing to be scheduled as  
21 soon as practicable. And I also note that the court of  
22 appeals directed Relators that as soon as this Court  
23 issues its findings, it directs that those findings be  
24 filed with the court of appeals within three days of this  
25 Court's order submitting findings.

1           The court of appeals yesterday stayed PolyMet's  
2 permit. And that's important to keep in mind. PolyMet  
3 is waiting now for this proceeding to move forward and  
4 for PolyMet to have its day in court in front of the  
5 court of appeals, because only the court of appeals has  
6 jurisdiction to decide the ultimate question, which is  
7 whether there was a violation of the Minnesota  
8 Administrative Procedure Act. And PolyMet is waiting for  
9 its stay of court there. And yesterday, the court of  
10 appeals issued that stay order, and it confirmed several  
11 things in its previous transfer order. And the one thing  
12 I want to focus on is that the August 6 order, the one  
13 that came out yesterday that stayed the permit, it  
14 confirms that the transfer to district court is for the  
15 limited purpose of an evidentiary hearing and a  
16 determination of the alleged irregularities in procedure.  
17 And it again confirmed that the two issues in dispute are  
18 whether it was unusual for EPA not to submit written  
19 comments and, two, whether MPCA sought to keep the EPA's  
20 comments out of the public record.

21           A stay of a permit is an extraordinary relief  
22 that's been granted. And again, PolyMet is waiting to  
23 have its day of court in front of the court of appeals.  
24 This Court should move with all due speed to hold the  
25 evidentiary hearing and make the findings effect.

1 I want to address -- there was a question that  
2 you posed to Relators' counsel about written  
3 interrogatories. And I heard in response them say it  
4 will take some time to do that. And they might come back  
5 for more. And I want to underscore that the Relators  
6 here have been relatively undisguised in trying to delay  
7 PolyMet's efforts to move forward. And that's important  
8 consideration this Court needs to keep in mind, that  
9 there shouldn't just be delay for the sake of delay, and  
10 there shouldn't be more process just for the sake of more  
11 time. And the notion of coming back for more is  
12 something to keep in mind. I would cite the *Give a Mouse*  
13 *a Cookie* precedent, that if you give a little bit, they  
14 will come back and ask for a glass of milk, a pillow, and  
15 so forth. And given what the statute says about this  
16 Court's limited jurisdiction, that this Court has  
17 jurisdiction to take testimony and to hear and determine  
18 the alleged irregularities in procedure, the Court  
19 should, you know, follow the limited jurisdiction that is  
20 being granted under the Minnesota Administrative  
21 Procedure Act to this Court.

22 Finally, I want to discuss, in their  
23 memorandum -- you didn't hear much today, but in their  
24 memorandum, and now I see in the witness list, Relators  
25 have circulated that they seem to be interested in

1 discovery from PolyMet or testimony from PolyMet. And  
2 that's not right. Under both the court of appeals' order  
3 and if you look back at their motion to the court of  
4 appeals, the motion to transfer and the reply -- we've  
5 submitted both of those attached to the declaration of  
6 McGhee -- they don't make any mention of PolyMet  
7 witnesses or any information from PolyMet.

8 THE COURT: What if PolyMet had a copy of the  
9 memo that the Pollution Control Agency claims is  
10 privileged? Wouldn't that therefore mean that the  
11 document really isn't privileged because privilege has  
12 been waived? Why wouldn't they be able to ask you for  
13 that?

14 MR. MILLS: Your Honor, that's an interesting  
15 hypothetical. But I think the first step before --

16 THE COURT: Don't you think that's potentially  
17 within the realm of possibility?

18 MR. MILLS: I think the first question would be  
19 to a witness --

20 THE COURT: That's a double speculative  
21 question.

22 MR. MILLS: Yeah. The first question would be  
23 to the Agency on the stand, the did you waive privilege  
24 on that memo, did you give it to anyone else, and they're  
25 under oath and would testify to that. I don't think

1 PolyMet --

2 THE COURT: Well, if they already know from you  
3 that you either do or don't have it, they wouldn't need  
4 to ask that question, right?

5 MR. MILLS: But we go back to the limited  
6 issues here.

7 THE COURT: Yes.

8 MR. MILLS: And there are two of them, right,  
9 whether it's unusual for the EPA --

10 THE COURT: Well, I guess --

11 MR. MILLS: -- not to submit comments --

12 THE COURT: Well, hold on. Before you say that  
13 there's only two issues, because one of the -- I'm sort  
14 of looking at the court of appeals' determination as to a  
15 probable cause hearing; is there probable cause to send  
16 the case back. I don't see the court of appeals having  
17 decided anything with regard to whether there actually  
18 were procedural irregularities. And number one on the  
19 list here of what the court of appeals said was, based on  
20 undisputed evidence, is that the PCA and the EPA departed  
21 from typical procedures in addressing the permit. I'm  
22 not so sure that the Pollution Control Agency will  
23 concede that point. So I've read a list of seven items  
24 as being all for the Court to determine in context of  
25 each other.

1 MR. MILLS: And I have no quarrel with that --

2 THE COURT: Just because the record of the  
3 court of appeals was undisputed doesn't mean the record  
4 before me will be undisputed.

5 MR. MILLS: I have no disagreement with that  
6 reading.

7 THE COURT: Okay.

8 MR. MILLS: But what is clear is that even  
9 counting the one, two, three, four, five, and then the  
10 one, two, whether it's seven, nothing there is about  
11 PolyMet. And discovery of PolyMet isn't necessary to  
12 prove those allegations about interactions between EPA  
13 and PCA. This is really about --

14 THE COURT: That may be true.

15 MR. MILLS: -- those two agencies and what  
16 happened between them.

17 THE COURT: That may be true, which is why I  
18 posed the question to you the way I did, because the  
19 discovery effort by the Relators goes to filling in the  
20 puzzle, as I described before the break. And if they  
21 discarded something that turns out not to be privileged  
22 or protected in some way, and PolyMet happens to have it,  
23 that's really limited to whether PolyMet has someone  
24 else's documents, which is different than doing discovery  
25 of PolyMet or PolyMet's thought process or how PolyMet

1 acted. Do you see the distinction?

2 MR. MILLS: Yes.

3 THE COURT: Okay. Go ahead.

4 MR. MILLS: But I would go back to the point  
5 that this business, the issues on this transferred  
6 proceeding are about EPA and whether EPA, you know,  
7 quote, should have submitted, you know, the written  
8 comments and whether there was something between PCA and  
9 EPA that they worked to keep the comments out of the  
10 record. It's all about between the two agencies, and  
11 discovery of PolyMet or testimony from PolyMet isn't  
12 probative of either of those questions or any of the  
13 seven questions in the court of appeals' order.

14 THE COURT: And I haven't heard or read the  
15 Relators say anything to suggest something different.

16 MR. MILLS: Well, their witness --

17 THE COURT: But what if, again, hypothetically,  
18 the only known copy of the EPA's written comments that  
19 survives is in PolyMet's possession?

20 MR. MILLS: Well, we know that is absolutely  
21 not true because the --

22 THE COURT: That's not the point --

23 MR. MILLS: -- PCA has --

24 THE COURT: That's not the point of my  
25 question.

1 MR. MILLS: Okay.

2 THE COURT: The point of my question is within  
3 the realm of maybe not discovery of PolyMet but does  
4 PolyMet have documents that the Agency should have had or  
5 should have or arguably should have but don't but PolyMet  
6 does.

7 MR. MILLS: So we have to keep in mind that the  
8 scope of a -- of review under an Administrative Procedure  
9 Act violation is what the Agency had before it when it  
10 made the decision.

11 THE COURT: Right.

12 MR. MILLS: So that's -- it's confined to the  
13 record when the Agency decided this is what -- we're  
14 going to issue this permit.

15 THE COURT: Right. And my --

16 MR. MILLS: That's the question --

17 THE COURT: And my question to you assumes that  
18 they have the document, no longer have the document, but  
19 PolyMet still has the document.

20 MR. MILLS: It wouldn't -- if they didn't have  
21 it when they made the decision --

22 THE COURT: I'm presuming they had it when they  
23 made the decision; they no longer have it; it's not part  
24 of the administrative record, but PolyMet has it.

25 MR. MILLS: I just -- I mean, that's so

1 hypothetical, I can't agree or disagree with that.

2 THE COURT: Okay.

3 MR. MILLS: But it certainly would be  
4 irrelevant to the legal question of was there a violation  
5 of the Minnesota Administrative Procedure Act when the  
6 Agency made its decision in issuing the permit. And if  
7 PolyMet had it, so what. PolyMet is the applicant for  
8 the permit. The Agency and what it had when it made the  
9 decision, that's what matters --

10 THE COURT: Right. But --

11 MR. MILLS: -- and not what copies PolyMet may  
12 have.

13 THE COURT: Again, you're chasing your tail.  
14 The question is a document that the Agency had when it  
15 made its decision, a document that Relators argue should  
16 be part of the administrative record but isn't, a  
17 document that the Agency claims it doesn't have, but, for  
18 whatever reason, PolyMet has it. Why shouldn't we find  
19 that out?

20 MR. MILLS: I don't think that exists. I can't  
21 say it's impossible, but I just don't think that is  
22 within the realm of possibility here.

23 THE COURT: Well, then you wouldn't be harmed  
24 by trying to find that out, right?

25 MR. MILLS: We would because they are asking to

1 move this hearing to May of 2020. They have listed  
2 several --

3 THE COURT: Where did they ask to do that?

4 MR. MILLS: In their motion. It's in their  
5 proposed order --

6 THE COURT: Okay.

7 MR. MILLS: -- filed with the Court. And I  
8 know you just saw it. But I --

9 THE COURT: I didn't read the proposed order.  
10 I read the pleadings and the advocacy.

11 MR. MILLS: They are asking for a lot of  
12 discovery and the evidentiary hearing that the court of  
13 appeals said to hold as soon as practicable in May of  
14 2020.

15 THE COURT: Okay.

16 MR. MILLS: We object to that. They now -- we  
17 just were handed this list. They have a list of four or  
18 five. I think one is a consultant of PolyMet, but they  
19 have listed PolyMet witnesses. PolyMet witnesses don't  
20 have any information that would be relevant to these  
21 questions that the court of appeals has directed this  
22 Court to find facts about in an evidentiary hearing. The  
23 allegations are about the two agencies, the EPA and the  
24 PCA, and what went on between those two agencies.  
25 PolyMet witnesses should not be dragged in here just for

1 the sake of delay.

2 THE COURT: What if those PolyMet witnesses  
3 were a party to conversations between the EPA and the  
4 MPCA?

5 MR. MILLS: I think the administrative record  
6 is clear on who was on the call when PCA and EPA were  
7 discussing this EPA comment, and they had the comments  
8 read -- EPA read the comments to PCA. The record shows  
9 who was on that call. No one from PolyMet was on that  
10 call. That's in the record already.

11 THE COURT: Okay.

12 MR. MILLS: And so the issues for the  
13 evidentiary hearing are between EPA and PCA, and those  
14 issues should not involve PolyMet witnesses. We would  
15 ask that the Court schedule an evidentiary hearing as  
16 soon as practicable. We agree with PCA that some date in  
17 September that works on the Court's calendar would be  
18 appropriate.

19 THE COURT: All right.

20 MR. MILLS: Thank you.

21 THE COURT: Thank you. And we've heard from  
22 the Respondents. Do about five minutes from the Relators  
23 to respond and address the role of PolyMet in particular.

24 MS. MACCABEE: Thank you, your Honor. And I  
25 would also apologize for not having given you all the

1 documents. We didn't -- we didn't mean to cause trouble,  
2 and we will make sure to learn in the future.

3 First, I think your Honor has actually done a  
4 great job of framing what the court of appeals was doing  
5 in making a finding of a prima facie case. And in the  
6 Court's stay order, they actually explained a little bit  
7 perhaps more clearly than in the transfer order that the  
8 five issues where there was substantial evidence were  
9 undisputed at the court of appeals. And the Court was --  
10 the Court said the order was also based on disputed extra  
11 record evidence. The court of appeals didn't say that  
12 this Court's jurisdiction is limited to those issues, but  
13 that is the evidence which the Court is using to make a  
14 prima facie finding and sending it back to the Court.

15 Similarly, you've been told several times that  
16 it's a limited purpose. But the limited purpose includes  
17 both evidentiary hearing and the determination of  
18 procedural irregularities. So the Court's understanding  
19 of how to determine procedural irregularities was not  
20 specified by the court of appeals.

21 And WaterLegacy in talking about -- in our  
22 motion talking about discovery, before that, we had  
23 listed ten issues that we felt we didn't have the  
24 information about. And we didn't ask the Court to  
25 specifically grant us this relief. We simply said if the

1 Court transfers, there would be discovery. And that's on  
2 page 20 of our reply. And if your Honor, if you -- I  
3 believe that's already part of your exhibits, but we're  
4 happy to provide you with paper copies of everything that  
5 we've submitted.

6 THE COURT: Well, and I did pick up on the  
7 distinction when I heard the phrase "read" the  
8 distinction between requesting discovery and assuming  
9 discovery would take place.

10 MS. MACCABEE: Okay, sir.

11 In terms of PolyMet, you've raised the two  
12 issues that we have. One is that it's possible that  
13 PolyMet has documents that have somehow gone missing, and  
14 the other is that PolyMet was actually a participant at  
15 at least one meeting that we know about between the EPA,  
16 PCA, and PolyMet. And that was on September 25, 2018.  
17 And so if we're trying to find out as matters of fact  
18 what happened there, PolyMet's witnesses, and those are  
19 the people we've named, could be directly relevant.

20 I think the question has been asked, and I  
21 think Mr. Martin responded to it in terms of why isn't  
22 written questions enough.

23 THE COURT: Now, hold on. Before you go there,  
24 I saw on the list of witnesses you submitted four people  
25 from PolyMet. Is it your position that all four of those

1 people were a party to this September 25, 2018  
2 conversation?

3 MS. MACCABEE: They are all identified in an  
4 email from the PCA saying that these people would be  
5 there. I don't have the sufficient information to know  
6 if they all actually participated in that meeting. But  
7 that's where we got those names.

8 THE COURT: All right.

9 MS. MACCABEE: Let's see. What are the other  
10 issues that you --

11 THE COURT: You were just leading into a  
12 conversation about whether written depositions are  
13 enough.

14 MS. MACCABEE: Our concern, and it's based on  
15 the declarations in front of the court of appeals, is  
16 that the answers to those written declarations may not be  
17 candid or accurate. And for example, in the declarations  
18 that were filed with the court of appeals, and I think  
19 this one might be Mr. Clark's declaration, it says, "At  
20 the conclusion of the September 2018 meeting, all the key  
21 issues had been discussed and MPCA and EPA were in  
22 fundamental agreement on the required contents of the  
23 permit." And MPCA has since then represented in the  
24 press on numerous occasions that everything was resolved  
25 and has even put out a memo saying that.

1                   Had it not been for a document leaked by the  
2                   EPA union, Relators would be completely unaware that this  
3                   was not true. But the EPA leaked that document. And  
4                   that document was dated December 18, 2018, and it was  
5                   from a man by the name of Kevin Pierard, who at the time  
6                   was the chief of the NPDES branch section having to do  
7                   with this kind of water permit. And he submitted a memo  
8                   to file, a 29-page memo identifying all of the issues  
9                   that were not resolved.

10                   Now, the question of why the EPA didn't object  
11                   to the permit, that's one of the questions that we really  
12                   need to know. But we do know for a fact that EPA did not  
13                   feel that everything was resolved. And we know that had  
14                   it not been for this leaked document, Relators would have  
15                   had no idea that what was in this written declaration  
16                   wasn't completely true. And so that is why we're asking  
17                   for time to get document discovery and also the ability  
18                   to actually question people and figure out what is true  
19                   and what is not true, what is a gloss on the information  
20                   and what is actual information.

21                   THE COURT: If you could depose somebody, who  
22                   would you depose?

23                   MS. MACCABEE: Your Honor, I'm going to tell  
24                   you on that list that some of the people we would depose  
25                   are relatively easily identifiable.

1 THE COURT: Okay.

2 MS. MACCABEE: Commissioner Stine we would need  
3 to depose; Assistant Commissioner Lotthammer we would  
4 need to depose; the people who were Declarants at the  
5 court of appeals we would need to depose.

6 THE COURT: Who declared to the court of  
7 appeals?

8 MS. MACCABEE: Let's see. Mr. Clark,  
9 Ms. Handeland, Mr. Udd, Mr. Schmitt, Ms. Lotthammer. Is  
10 that all? And then there's another person who we believe  
11 we would need to depose as well, and that's Ann Foss.  
12 And that's based not on the declarations that were made  
13 in the court; Ms. Foss has retired. But the earliest  
14 documentation we have of MPCA's insisting that there not  
15 be written communications from EPA is an email from Ann  
16 Foss on April 9, 2015. And she was the manager for  
17 mining permits throughout much of the period.

18 THE COURT: Is she the only retired person on  
19 your witness list?

20 MS. MACCABEE: I believe -- Commissioner Stine  
21 is no longer with the MPCA. And the other person who  
22 would have had knowledge because Ann Foss came to her and  
23 is retired is Rebecca Flood.

24 (Court reporter clarification.)

25 MS. MACCABEE: Flood, as in lots of water.

1 THE COURT: Retired, washed away.

2 MS. MACCABEE: Ms. Lotthammer is no longer with  
3 the Pollution Control Agency.

4 THE COURT: All right.

5 MS. MACCABEE: But I think part of the -- our  
6 job in doing a decent request for production of documents  
7 would be either to add to that list or narrow it down.  
8 And I will say, your Honor, that having the Court oversee  
9 discovery, the only reason we ever got the comments is  
10 because the EPA capitulated in a Freedom of Information  
11 Act lawsuit. And we have never had the Court's  
12 authority. I mean, I don't know, I'm not making -- I  
13 don't know what else is in the MPCA's files, but I know  
14 the file folders I got from the MPCA staff only had the  
15 names of line staff. There wasn't an Ann Foss folder or  
16 a Shannon Lotthammer folder. So I don't know if there  
17 are additional documents or not, but it is a lot easier  
18 for an agency simply not to provide things to a tiny,  
19 little non-profit than it is for an agency to tell the  
20 Court the documents don't exist when they do.

21 THE COURT: Okay. Thank you.

22 MS. MACCABEE: Thank you, your Honor.

23 THE COURT: Thank you for the excellent  
24 presentations. This is an extremely interesting matter.  
25 I've been asked by the court of appeals to do it in an

1 expedited fashion. I don't want to sit around and wait.  
2 I'm allowed to take motions under advisement for 90 days.  
3 And the amount of time that you can add on to a  
4 proceeding can appear endless. And if we were starting  
5 from scratch, and if this was a case that had been filed  
6 here initially, then it would be treated as a complex  
7 case, and it could go on for -- I'm not going to say  
8 years, but certainly more than a year. And that's not  
9 supposed to happen in this case.

10 Just a couple of observations just to summarize  
11 where we're at. This case arose out of the  
12 Administrative Procedure Act permit process before the  
13 Minnesota Pollution Control Agency. It granted an  
14 NPDES/SDS permit. Appeals were taken from that order by  
15 certiorari to the Minnesota Court of Appeals.  
16 WaterLegacy moved for a transfer to district court per  
17 Minn. Stat. § 14.68 claiming that there were procedural  
18 irregularities not shown in the record on appeal.

19 On June 25, 2019, the court of appeals issued a  
20 special term order noting specifically that the permit is  
21 subject to judicial review under the Minnesota  
22 Administrative Procedure Act. Appellate review,  
23 according to statute, quote, shall be confined to the  
24 record except that in cases of alleged irregularities in  
25 procedure not shown in the record. The court of appeals

1 may transfer the case to the district court in which the  
2 Agency has its principal office.

3 According to Section 14.68, if a transfer is  
4 ordered, quote, the district court shall have  
5 jurisdiction to take testimony and herein determine the  
6 alleged irregularities in procedure, unquote. The  
7 parties appear to agree here today that my jurisdiction  
8 exists solely by virtue of a court of appeals transfer  
9 order under Minn. Stat. § 14.68.

10 Due to the limited grant of jurisdiction by  
11 statute, this Court rejects any contention that the  
12 present proceedings constitute a civil action controlled  
13 by the Minnesota Rules of Civil Procedure. Rather, this  
14 is an administrative proceeding controlled by the  
15 Minnesota Administrative Procedure Act. Essentially, as  
16 I've indicated before, acting as a special master to the  
17 court of appeals, I am conducting a review of the  
18 administrative process. The statute used to specifically  
19 reference the Minnesota Rules of Civil Procedure, and  
20 that was repealed and removed from the statute, I  
21 believe, in 1983, if memory serves me well, but quite a  
22 while ago. It was represented that the Rules of Civil  
23 Procedure still apply because there's nothing in Appendix  
24 A pursuant to Rule 81.01 to exempt this proceeding from  
25 the rules. But there actually is. It says writ of

1 certiorari. So proceedings that follow from a writ of  
2 certiorari are not controlled by the Minnesota Rules of  
3 Civil Procedure, and there is no right to conduct Rule 26  
4 discovery by virtue of Rule 81.01 in Appendix A. This  
5 proceeding and the transfer to this Court is part and  
6 parcel of the original certiorari review being conducted  
7 by the Minnesota Court of Appeals. The court of appeals  
8 has stayed its own appellate process while the transfer  
9 takes place, but this transfer and everything that goes  
10 with it is still part and parcel of the certiorari  
11 process. So the Court rejects the notion that the Rules  
12 of Civil Procedure control this process and that the  
13 discovery ordinarily permitted by Rule 26 and other rules  
14 in the Rules of Civil Procedure is allowed. There is no  
15 express provision for discovery in the case of a transfer  
16 under Minn. Stat. § 14.68.

17 The court of appeals transferred this matter to  
18 the district court for a purpose -- that's a word the  
19 court of appeals chose -- that it described as limited.  
20 That's also a word that the court of appeals chose. It  
21 said I'm to conduct an evidentiary hearing; I'm to  
22 determine if there were irregularities in procedure by  
23 the Minnesota Pollution Control Agency, no one else; I'm  
24 to schedule the evidentiary hearing as soon as  
25 practicable. May 2020, no matter how you define the term

1 practicable, is well beyond that. And after I conduct  
2 the hearing, I'm supposed to issue an order that includes  
3 findings of fact on the alleged irregularities.

4 The court of appeals cited the *Hard Times Café*  
5 case in its order in stating that its own process was to  
6 determine whether there is substantial evidence of  
7 irregularities, which to me means is there a prima facie  
8 case for the transfer. The whole idea behind a Section  
9 14.68 transfer order is to reopen an otherwise closed  
10 appellate record so extra record materials may be  
11 developed solely on the question of whether there  
12 actually were procedural irregularities. So the court of  
13 appeals hasn't decided that there were procedural  
14 irregularities. And even the items that it listed as  
15 undisputed in the record before it doesn't mean that  
16 those items won't be disputed in a hearing before me.  
17 What gets developed at the district court level then  
18 becomes part of the appellate record, and then, of  
19 course, the district court findings themselves are  
20 subject to appeal, which is sort of a two-layer process  
21 for the court of appeals. Lucky them. If there is no  
22 appeal, they would simply view my findings as  
23 unchallenged and do whatever it wishes with those  
24 findings in the context of the scope of review within the  
25 meaning of the Administrative Procedure Act 14.68 and

1 14.69. If there's an appeal from any findings of the  
2 Court, the Appellate Court would first have to figure out  
3 what to do with that appeal, figure out what it is  
4 willing to accept as the findings, and then go to the  
5 second step, which is to incorporate whatever those  
6 findings are, revised or not revised on appeal, into its  
7 determination of the appeal. No simple task.

8 If an Agency decision was made upon an unlawful  
9 procedure, which I'm quoting of Section 14.69, grounds  
10 exist to reverse or modify the decision or to remand the  
11 case for further proceedings. That remand would then be  
12 to the Agency. Thus, the question of whether there were  
13 irregularities in the proceedings is more than academic.  
14 As we've discussed, absent a transfer order, the extra  
15 record evidence cannot be considered on appeal, nor can  
16 the evidence be used to determine whether the Agency  
17 decision was, quote, made upon unlawful procedure,  
18 unquote.

19 The Rule 7.02 motion that the Plaintiffs -- and  
20 I should say Relators, submitted asks this Court to go  
21 far beyond the limited inquiry directed by the court of  
22 appeals and the limited jurisdiction granted to this  
23 Court by the Minnesota Administrative Procedure Act. I  
24 am going to limit myself to what the court of appeals  
25 told me to do, and that is, what are the alleged

1 irregularities, what are the proper procedures for  
2 consideration of a permit of this nature, what statutes  
3 and rules set forth the proper procedures. To the extent  
4 there's a claim that the proper administrative procedures  
5 were not followed, what happened that should not have  
6 happened, and what did not happen that should have  
7 happened. And the information that I accept in evidence  
8 at a hearing is going to be limited to what is needed to  
9 resolve those issues.

10 If the court of appeals didn't list all the  
11 alleged administrative irregularities in its order, then  
12 I'm going to need a list of administrative -- alleged  
13 administrative irregularities from Relators. And I  
14 assume it's going to be no different than the list that  
15 was submitted to the court of appeals in its briefing.

16 Now, with regard to the issue of discovery, the  
17 briefing to the court of appeals by Relators,  
18 particularly the reply brief, told the court of appeals  
19 that it was presuming that it would be able to conduct  
20 discovery prior to any hearing. The court of appeals  
21 didn't say anything about discovery one way or another.  
22 It didn't say you could have discovery, didn't say you  
23 can't have discovery. And it's not really readily  
24 apparent to the Court from reading the court of appeals'  
25 decision what direction I should go. Arguably, if they

1 didn't expressly authorize it, I shouldn't allow it. But  
2 also arguably, the parties and the court of appeals know  
3 that Relators built their case for a transfer on snippets  
4 of information that were provided to them outside the  
5 administrative record. The issue is whether there should  
6 be more in the administrative record than there is. And  
7 if some sort of fact finding is not allowed, then it  
8 essentially means that there is a substantial risk that  
9 the hearing process itself will be useless in whole or in  
10 part. And that offends my own notion of due process.  
11 The purpose of the Administrative Procedure Act and the  
12 appeal right itself is to create a due process for the  
13 parties to have the matter fully and fairly heard. If  
14 the parties are not allowed to have access to the  
15 information that they allege they need to prove that the  
16 process itself was flawed and that information has been  
17 hidden, there isn't any due process. At the same time,  
18 the Court decisions cited by the parties in their  
19 briefing, primarily preceding the amendment of the  
20 Administrative Procedure Act Section 14.68, make it quite  
21 clear that whatever discovery is allowed should be  
22 extremely limited. And in fact, a case can be and has  
23 been made that whatever should be allowed is even more  
24 limited now in light of the amendment of the statute.  
25 I'm not so sure I accept that in the sense that the

1 elimination of the reference to the Rules of Civil  
2 Procedure is not an elimination of basic rights of due  
3 process to parties to have their rights fully and fairly  
4 aired in court. I think that transcends reference to the  
5 rules and is implicit in any court proceeding that takes  
6 place that it should be full and fair and the parties  
7 have an opportunity to gain access to the evidence that  
8 they need to prove their case. I think that was the  
9 original justification for the court decisions allowing  
10 some but not the full array of discovery that is  
11 ordinarily permitted under the Minnesota Rules of Civil  
12 Procedure.

13 So to ensure a modicum of due process in the  
14 hearing that the court of appeals ordered, I'm going to  
15 permit some limited written discovery, and it's going to  
16 be done in an expedited basis.

17 And in that regard, I already referenced the  
18 *Hard Times Cafè* case in which the court of appeals'  
19 transfer order simply sent it back to the trial court --  
20 or to the district court for a, quote-unquote,  
21 investigation. This isn't an investigation. This is a  
22 carefully prescribed hearing process that the court of  
23 appeals told all of us is limited. And that's why what  
24 I'm going to order is going to be extremely limited, and  
25 the timetable is going to be expedited.

1           There will be no depositions, and there will be  
2 no interrogatories. But I am going to permit written  
3 deposition questions directed to a limited group of  
4 people with the PCA. I am going to permit each of those  
5 persons to be asked up to 25 questions, including  
6 subparts, whether those subparts are numbered or not. I  
7 say that because I've been in your shoes before writing  
8 stuff like this.

9           Relators will have two weeks to provide the  
10 proposed written deposition questions for each witness to  
11 Respondents. That's no later than August 21 at 4:30.  
12 Don't file it with the court. Just give it to each  
13 other.

14           Respondents will have one week to object to the  
15 questions as beyond the scope of what I've permitted.  
16 The scope of what I'm permitting is limited solely to the  
17 alleged procedural irregularities. So if the questions  
18 don't relate to the discovery of alleged procedural  
19 irregularities, then there's a basis to object. If the  
20 questions, including subparts, whether separately  
21 numbered or not, are in excess of 25, that's a reason to  
22 object. So any objections within a week, that would be  
23 August 28 at 4:30, don't file it.

24           If the objections cannot be resolved in a week,  
25 which is September 4, you can schedule an informal

1 conference with me as provided for in the Rules of  
2 General Practice 15.10. I ordinarily do those off the  
3 record. If someone wants it on the record, we can do it.  
4 All I want in advance of that conference is whatever it  
5 is you're disputing and why, which I'll want in a letter  
6 no longer than three pages from each of you.

7           Once any dispute is resolved or once you agree  
8 on the written deposition questions, assuming there's  
9 no -- if there is no dispute, then the PCA will have 30  
10 days to respond. So I anticipate that even if there is a  
11 dispute sometime in the first half of October, those  
12 written questions will have been responded to.

13           I will also permit Relators to make 25 document  
14 requests to the Minnesota Pollution Control Agency on the  
15 same schedule as the written depositions. Present,  
16 object, try to resolve, and, if you can't resolve, a Rule  
17 15.10 conference with the court. I'll rule right at the  
18 conference on those objections, and then the clock starts  
19 running on 30 days to respond.

20           I'm also going to permit 25 document requests  
21 and 25 written deposition questions to a single PolyMet  
22 corporate representative. And I'm thinking of a 30.02  
23 kind of standard, solely limited to information that  
24 PolyMet may have that relates to the alleged procedural  
25 irregularities involving the Pollution Control Agency and

1 documents that PolyMet may have in its possession that  
2 the MPCA had in its possession at the time of its  
3 decision. Same timetable. This is a carefully tailored  
4 and limited request, not for any general discovery of  
5 PolyMet but only information PolyMet may have that's  
6 specifically relevant to the alleged conduct of the PCA  
7 so that the parties to the hearing are satisfied that the  
8 information that is the subject of the hearing has been  
9 fairly disclosed.

10 The written depositions that I'll permit of the  
11 PCA are of Richard Clark, Stephanie Handeland, Michael  
12 Schmitt, and Jeff Udd. I don't think the PCA has any  
13 control or right of control over people who have retired  
14 or left the Agency. And I'm not going to permit any  
15 discovery directed at the other folks that were listed,  
16 Rebecca Flood, Ann Foss, Shannon Lotthammer, or John Linc  
17 Stine. They are outside the scope of the discovery if  
18 they are not with the Agency.

19 MR. MARTIN: Your Honor, I apologize for  
20 interrupting, but Michael Schmitt is no longer with the  
21 Agency. He is working in Des Moines for an advocacy  
22 organization, an environmental organization.

23 THE COURT: Okay. Well, then we'll cross him  
24 off the list, too.

25 I will permit Relators to add one 30.02 witness

1 who speaks for the Agency to the list, which is directed  
2 at assuring Relators that the Agency officially is taking  
3 a position on whether full disclosure has been made.

4 If any party who is the subject of this  
5 discovery objects to disclosing a document arguably  
6 within the scope of discovery, they have to provide a  
7 privilege log describing anything that was withheld and  
8 setting forth the privilege that is being asserted. When  
9 that is completed, I will schedule a hearing. It could  
10 be in person or by telephone. We can talk about that.  
11 It will be on the record to finalize witness and exhibit  
12 lists and to set a hearing date and determine how long  
13 the hearing will take. And at that point, the list of  
14 witnesses will be the actual people who are going to be  
15 called, not the potential people who are going to be  
16 called, because it is hoped that with this limited  
17 discovery, you will be able to pare down the process  
18 because you will, hopefully, know more. I'm an optimist.  
19 And it will be important to figure out how long this  
20 hearing is going to take so I know how much time to  
21 allow. I am currently scheduled for asbestos trials in  
22 the asbestos litigation in October, in December, and the  
23 end of February, end of March. I do trials quarterly.  
24 And they all take three weeks each if they happen. They  
25 don't always happen.

1                   So we've got to work around that.

2                   Did I leave anything out?

3                   Okay. Silence.

4                   One thing I would like to have from the  
5 Relators is just a list of the alleged administrative  
6 irregularities. What specific alleged administrative  
7 irregularities do you contend occurred? I assume you'll  
8 take that out of your brief. I don't expect you to be  
9 adding to the list. I assume -- I expect the list to be  
10 from the motion you made to the court of appeals for the  
11 transfer order.

12                   Ms. Maccabee, you indicated that the court of  
13 appeals didn't list all the procedural irregularities  
14 that you claimed in your brief. I would guess that if I  
15 were to ask the court of appeals, they would say I didn't  
16 know we had to. Their order says that the scope of my  
17 hearing is to determine the alleged irregularities. And  
18 I take that as being whatever irregularities were alleged  
19 to them. I need to determine if they actually were  
20 irregularities. And I'm not going to limit you to what  
21 you -- what the court of appeals put in its order, but I  
22 will limit you to what you put in your motion to the  
23 court of appeals. I would like you to present that to me  
24 in the form of a list within the next week and,  
25 obviously, provide that to counsel, because I want

1 everyone to know what the rules are. And the rules will  
2 be that whatever is on that list, that will govern the  
3 scope of the discovery that you request.

4 Someone is standing up.

5 MR. PORETTI: Your Honor, Dan Poretti again.  
6 Just a point of clarification. There were several items  
7 that -- documents that we obtained, that Ms. Maccabee  
8 obtained after the filings with the court of appeals  
9 which also demonstrate further irregularities. We would  
10 ask that we be allowed to put those -- and it's a limited  
11 set --

12 THE COURT: Is that a new irregularity, or is  
13 that a new document that proves an old irregularity?

14 MR. PORETTI: I'll let Ms. Maccabee address  
15 that.

16 THE COURT: Do you see the distinction?

17 MS. MACCABEE: Your Honor, I think that one of  
18 the challenges here in the way we wrote our motion is we  
19 wrote it very clearly stating that we did not know all  
20 the extent of irregularities, and that's why we were  
21 looking for discovery. Some of the documents, like the  
22 EPA comments, we knew they existed because one of the  
23 counsel at the EPA told us they existed. We did not know  
24 when we wrote our memo that there was so much  
25 dissatisfaction at the EPA scientist level that there was

1 a December 2018 memorandum reflecting that. You know, we  
2 knew that there had been meetings and comments and that  
3 it did not appear that EPA's concerns were resolved, but  
4 we had no way of knowing that that memorandum existed.  
5 Similarly, we had no way of knowing that Shannon  
6 Lotthammer had actually sent emails apparently routing  
7 them through the House Speaker's office. That was  
8 something that we had no information about. We had  
9 just -- the claim in our motion was that these  
10 conversations had taken place, and that was based on the  
11 complaint for the Office of Inspector General. So part  
12 of the situation I see us in now is that we told the  
13 Court that there was additional information, and now  
14 we're -- I don't know how we're going to get that.

15 THE COURT: Well, one of the procedural  
16 irregularities that's been alleged is that the Pollution  
17 Control Agency departed from its typical procedures in  
18 addressing the permit and did things that aren't in the  
19 administrative record. That's a very broadly stated  
20 irregularity. So any document or meeting or activity  
21 that's relevant to that would be subject to your  
22 fact-finding mission. And that's why I made the  
23 distinction between an irregularity and a document that  
24 demonstrates an irregularity. So because this is a  
25 rather broad -- because what you're looking for, I detect

1 from the tone of what you've written, are things that  
2 should have been in the administrative record that  
3 weren't and things that were considered by the Agency  
4 that should have been in the administrative record and  
5 wasn't, so the court of appeals really doesn't have a  
6 full record and/or the Agency was influenced by factors  
7 that are currently unknown because the administrative  
8 record was put together improperly. That's how I view  
9 your primary allegation here. Is that accurate?

10 MS. MACCABEE: Your Honor, that is accurate.  
11 And then in response to the -- to our allegations that  
12 things weren't in the record, what has happened is that  
13 MPCA has declared that the reason they weren't in the  
14 record is because there were no concerns. So once they  
15 have made that statement, then a document that they  
16 didn't have in their hands becomes relevant because the  
17 EPA says we raised these concerns and they weren't  
18 resolved. And so that's, I think, what Mr. Nilan [sic]  
19 was getting at is some of these documents are in --  
20 basically are responses to what PCA people alleged, and  
21 then we have to -- it's incumbent on us to say, well,  
22 this is why we know it's not true.

23 THE COURT: Yeah. And those are conclusions  
24 from documents or from meetings that took place, which is  
25 different from being able to ask for the information. It

1 just seems to me that the irregularity that you've  
2 alleged is rather broad.

3 MS. MACCABEE: Yes, sir.

4 THE COURT: And so you would be able to bring  
5 in the proof of those irregularities. And the proof may  
6 take you somewhere in an area that has not heretofore  
7 been disclosed. I mean, that's the whole point of  
8 allowing you to fill in the puzzle.

9 MS. MACCABEE: Your Honor, I have a couple  
10 other clarification questions.

11 One of the allegations that not only did  
12 Relators make but also is part of the complaint that's  
13 the subject of the investigation of the Office of  
14 Inspector General is that then Commissioner Stine and  
15 Assistant Commissioner Shannon Lotthammer lobbied,  
16 basically put political pressure on political appointees  
17 at the EPA, and that's why the document that is the EPA  
18 comments was never submitted. Initially, what the MPCA  
19 said is there were no communications, and then they said,  
20 well, we never tried to repress -- or had them withhold  
21 the comments permanently. We just tried to give them  
22 more time.

23 Without having an opportunity to cross  
24 examine -- to even communicate with Shannon Lotthammer or  
25 John Linc Stine, how is the Court proposing we find out

1 what their position is before we get ambushed at the  
2 evidentiary hearing?

3 THE COURT: Well, that's one of the reasons for  
4 granting the 30.02 questions, because you can request  
5 documentation -- ask whether there were meetings  
6 involving her and request documents related to those  
7 meetings --

8 MS. MACCABEE: What I'm --

9 THE COURT: -- to the extent the Agency has a  
10 record of it. Presumably, they would even have her  
11 calendar.

12 MS. MACCABEE: Well, they have already said  
13 they don't have records, because we've asked for them.  
14 And so the question is, if we believe the record is  
15 incomplete or for whatever reason it's incomplete, we  
16 are -- this process would seem to deprive us of access to  
17 the only people who really have knowledge of what  
18 happened.

19 THE COURT: Well, in the end, you'll have  
20 access to them in court. I'm permitting a very limited  
21 written discovery process, and it isn't as full and  
22 robust as what you would get in the Rules of Civil  
23 Procedure if this was actually a civil case and if I  
24 hadn't been given an order from the court of appeals that  
25 is worded the way it was worded. So I think it creates a

1 fair playing field. It doesn't create a perfect playing  
2 field.

3 MS. MACCABEE: One other thing --

4 THE COURT: It's not going to last forever.

5 MS. MACCABEE: One other thing, your Honor.  
6 The specific deadline that you set for discovery,  
7 Relators right now -- and there are very few of us, and  
8 for WaterLegacy, you're looking at it. You're looking at  
9 their resources. We have a reply brief due on August 12.  
10 Even a couple weeks pushing that back -- it's not about  
11 delay. It's about simple how many 24-hour days are there  
12 in a week. And this makes it very difficult. And even  
13 though I have all these wonderful people who are  
14 representing different parties, there's no one else  
15 representing WaterLegacy. And a bunch of the discovery  
16 has been ours. So that's a really challenging -- I would  
17 say it's not possible. Not that it's challenging. I  
18 mean, and I'm working seven days a week, ten to fifteen  
19 hours a day as it is.

20 THE COURT: All right. Let me mull that over  
21 while Mr. Martin speaks.

22 MR. MARTIN: Your Honor, I stood up, frankly,  
23 before your Honor addressed virtually everything I have  
24 to say. And the only thing that I would add is that we  
25 would insist that whatever sorts of things are the

1 subject of discovery would be limited to the alleged  
2 irregularities, as your Honor suggested.

3 THE COURT: And I think that cuts both ways,  
4 because those alleged irregularities are pretty broadly  
5 stated and, I think, opens the discovery that I'm  
6 allowing up to quite a bit of information. And I  
7 expressed some -- I detected some concern on the part of  
8 counsel for Relators that they would be stymied in their  
9 efforts to uncover irregularities -- evidence of  
10 irregularities. And that's not the case. I think the  
11 way I intended to lay this out is to permit you to  
12 discover evidence of the irregularities that you've  
13 asserted and to make a distinction between an  
14 irregularity and evidence of irregularities. Okay?

15 MR. MARTIN: And I think I understand, your  
16 Honor.

17 THE COURT: And the parties to the case don't  
18 have control over people who are retired or live in  
19 another state and have left the Agency and that it's just  
20 going to have to -- you're going to have to make due with  
21 what you get.

22 With regard to extra time, I think this needs  
23 to be an expedited process. The briefs for the motions  
24 were signed by multiple parties. There seems to be a  
25 team of lawyers on each side who have joined their

1 efforts. There aren't that many questions to be asked.  
2 The parties have extensively briefed their positions to  
3 the court of appeals. And I think that the parties have  
4 probably rather clearly articulated in their own heads  
5 what they need on numerous occasions over the last six  
6 months to a year with regard to this case. So I'm going  
7 to leave the deadlines as I've indicated.

8 MR. MARTIN: Your Honor, one of my colleagues  
9 just pointed out that at least so far you haven't talked  
10 about what discovery we at MPCA and perhaps at PolyMet  
11 might have of the Relators. May we have something akin  
12 to what you've allowed and specific --

13 THE COURT: What do you want? I didn't give  
14 you any or suggest any because of the way you've argued  
15 the case to me.

16 MR. MARTIN: Well, and your Honor, I think  
17 that --

18 THE COURT: I won't elaborate, but you know  
19 what I mean.

20 MR. MARTIN: I know what you mean. That sounds  
21 like my daughter now.

22 THE COURT: Only I get to make kid analogies.

23 MR. MARTIN: Yeah. Okay.

24 But, you know, here is, for example, a question  
25 that we might ask. You know, what evidence do you have

1 that EPA had suppressed its comments? And I'm talking  
2 now. Obviously, there would be subparts of that. And if  
3 there is evidence like that, I think it's incumbent upon  
4 them to give it to us. And thinking about your Honor's  
5 order, it strikes me that the 30.02 sort of questions  
6 might make the most sense.

7 THE COURT: So you're thinking about a list of  
8 up to 25 questions of the Relators as a group --

9 MR. MARTIN: I think so.

10 THE COURT: -- asking them to disclose what  
11 they have to make sure that you're not going to be  
12 surprised?

13 MR. MARTIN: Exactly, your Honor.

14 THE COURT: What do you think, Relators?

15 MS. MACCABEE: Two things. Number one,  
16 Relators' conduct is not at issue and the Court -- gave  
17 the Court absolutely --

18 THE COURT: It's not a question of conduct.  
19 It's a question of possession, of evidence that might be  
20 used at the hearing. And by the way, if you had been  
21 granted the discovery you wanted, that means that the  
22 Respondents could have deposed all your clients, because  
23 that's what you wanted. You wanted the rules to apply.  
24 If the rules applied, they would get full, unfettered  
25 discovery, because there wouldn't be any basis to limit

1 it to one set of parties, right?

2 MS. MACCABEE: Your Honor, I would like to give  
3 an opportunity for Ms. Ray-Hodge to speak.

4 MS. RAY-HODGE: Vanessa Ray-Hodge again,  
5 attorney for the Band.

6 I think we need to know with specificity as  
7 well who those individuals are that MPCA and/or PolyMet  
8 would be asking to ask deposition questions to --

9 THE COURT: I think what is being suggested  
10 here is a set of up to 25 questions and document requests  
11 to -- in the philosophy of Rule 30.02 to the Relators as  
12 a whole.

13 MS. RAY-HODGE: Okay.

14 THE COURT: What documents do you have that you  
15 feel prove that there were procedural irregularities  
16 might be one of the questions that they ask.

17 MS. RAY-HODGE: Right. And I would only say  
18 that, you know, one of the concerns that we may have,  
19 depending on what they're asking, could relate to  
20 confidential sources that we're not able to disclose  
21 where we've received some of this information from. For  
22 example --

23 THE COURT: That may or may not be the  
24 question --

25 MS. RAY-HODGE: Right.

1 THE COURT: -- because I would likely require  
2 you to produce all documents that you plan to offer at  
3 the hearing --

4 MS. RAY-HODGE: Absolutely.

5 THE COURT: -- sometime in advance. So that's  
6 what they're looking for. They want to know before the  
7 date of the hearing and the witness starts testifying  
8 what you've got.

9 MS. RAY-HODGE: Right. And most of what we've  
10 gotten is from them --

11 THE COURT: It's what you want from them,  
12 right?

13 MS. RAY-HODGE: Exactly. And we're happy to  
14 share the documents we have. It's just -- if it gets  
15 into issues that relate to confidential sources and  
16 information that is meant to be kept confidential, we may  
17 have some other issues that we will need to come to you  
18 about. That's all I just wanted to raise.

19 THE COURT: And, Mr. Martin, you're not  
20 intending to ask them where they got it. You just want  
21 to know if they've got it?

22 MR. MARTIN: Well, and, you know, I really  
23 believe that your Honor has laid out a procedure where  
24 these sorts of issues can be addressed. And, you know, I  
25 recognize that Ms. Hodge --

1 MS. RAY-HODGE: Ray-Hodge.

2 MR. MARTIN: I'm sorry, Ray-Hodge. I  
3 apologize. Ms. Ray-Hodge makes the point that we could  
4 ask a deposition question that's objectionable, and I  
5 think the procedure that you have laid out would address  
6 those sorts of things.

7 THE COURT: And I'm not going to make them give  
8 up their sources, so, you know, you know that now. They  
9 are going to still have to establish admissibility at the  
10 hearing, but that doesn't necessarily require someone to  
11 give up their source. Okay?

12 MR. MARTIN: I understand, your Honor.

13 THE COURT: All right. I'm going to permit a  
14 Rule 30.02 style set of 25 document requests and 25  
15 written depositions to be directed to the Relators as a  
16 whole. So a question to one Relator applies to all. And  
17 this is strictly for the limited purpose of -- the same  
18 due process purpose that is behind the discovery that the  
19 court permitted of the Relators -- by the Relators  
20 towards the Respondents, that is, the lack of litigation  
21 by ambush and surprise.

22 Same schedule. Everything is the same.

23 Any other questions or concerns?

24 MR. PORETTI: Just a housekeeping.

25 THE COURT: Name.

1 MR. PORETTI: Dan Poretti, your Honor.

2 THE COURT: All right.

3 MR. PORETTI: Just a housekeeping matter. I  
4 don't think you set a date for when you want the list of  
5 irregularities provided.

6 THE COURT: I want the list of irregularities a  
7 week from today. And the reason is is because that list  
8 may guide questions that get asked. And it's probably  
9 the simplest thing to assemble because you've already  
10 written it in a brief format in the motion to the court  
11 of appeals.

12 Anything else?

13 Okay. Thanks for the nice morning. And we'll  
14 talk soon.

15 MR. MARTIN: Thank you, your Honor.

16 THE CLERK: That concludes the calendar. Court  
17 is adjourned.

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STATE OF MINNESOTA  
 COUNTY OF RAMSEY

DISTRICT COURT  
 SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

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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

**RELATORS' LIST OF  
 ALLEGED PROCEDURAL  
 IRREGULARITIES**

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Relators Center for Biological Diversity, Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy, WaterLegacy, and Fond du Lac Band of Lake Superior Chippewa (the “Band”) (collectively, “Relators”), identify the following alleged irregularities in procedure pertaining to the National Pollutant Discharge Elimination System/State Disposal System Permit (“NPDES Permit”) that Respondent Minnesota Pollution Control Agency (“MPCA”) issued to Respondent Poly Met Mining Inc. (“PolyMet”) for the NorthMet (the “NorthMet Project”) pursuant to the Court’s August 7, 2019 oral ruling. Relators raised these alleged procedural irregularities before the Court of Appeals in the Motion for Transfer to District Court or, in the Alternative, for Stay Due to Irregular Procedure and Missing Documents (“Transfer Motion”) and supporting papers.<sup>1</sup>

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<sup>1</sup> Relators attach copies of documents filed in connection with the Transfer Motion in *In re Denial of Contested Case Hearing Request 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* (“*In re Proposed NorthMet Project*”), Nos. A19-0112, A19-0118, A19-0124 to this List of Alleged Procedural Irregularities as Attachments 1-7. Relators’ references to the Transfer Motion and supporting papers may not include all potential citations.

1. MPCA sought to prevent and used irregular procedures to prevent creation of a record of United States Environmental Protection Agency (“EPA”) concerns about NPDES Permit expectations, requirements, process, and conditions during NorthMet Project environmental review and throughout the NPDES Permit process.<sup>2</sup>

2. MPCA and EPA departed from typical procedures in addressing the NPDES Permit, engaging in multiple telephone conferences and in-person meetings, some of which are not reflected in the administrative record.<sup>3</sup>

3. MPCA and EPA leadership acted in concert and used irregular and unusual procedures to prevent EPA staff from submitting written comments on the draft NPDES Permit, including, but not limited to: MPCA’s request that EPA not provide written comments, EPA leadership’s decision to withhold and conceal already prepared EPA written comments on the draft NPDES Permit from the public (“EPA Comments”), and EPA reading the EPA Comments to MPCA during an April 5, 2018 telephone call rather than submitting them in written form.<sup>4</sup>

4. MPCA improperly destroyed, discarded, and failed to retain portions of the written record of communications with EPA regarding the NPDES Permit, including, but not limited to, handwritten notes of the April 5, 2018 phone call where EPA staff read the EPA

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<sup>2</sup> WaterLegacy Mot. for Transfer to District Ct. or, in the Alternative, for Stay Due to Irregular Procedure and Missing Docs. at 5-7, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. May 17, 2019) (“Transfer Mot.”); WaterLegacy Reply Mem. in Supp. of Mot. for Transfer to District Ct. or, in the Alternative, for Stay Due to Irregular Procedure and Missing Docs. at 1, 4, 5-6, 12-13, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 5, 2019) (“Transfer Reply”); Decl. of Paula Maccabee (“Maccabee Decl.”), Exs. A, C, F-H, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. May 17, 2019); *see also* Order at 4, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 25, 2019) (“Order”) (disputed issue (2)).

<sup>3</sup> Order at 3 (undisputed issue (1)).

<sup>4</sup> Transfer Mot. 2, 5-7; Transfer Reply 1, 5-8, 13; Maccabee Decl. ¶¶ 6, 12, 14 & Exs. C, F-G; *see also* Order at 3-4 (undisputed issues (2)-(4) and disputed issue (1)).

Comments over the phone to MPCA, and other records reflecting phone conferences, meetings, emails, and other communications with EPA pertaining to the NPDES Permit.<sup>5</sup>

5. Despite Relators' numerous pertinent requests under the Minnesota Government Data Practices Act ("MGDPA"), MPCA failed to produce public data reflecting communications between MPCA and EPA during NorthMet Project environmental review and the NPDES Permit process, including emails between MPCA and EPA, handwritten notes, and other documentation of pertinent meetings and phone conversations between MPCA and EPA.<sup>6</sup>

6. EPA wrote to MPCA citing deficiencies in the PolyMet NPDES Permit application in November 2016.<sup>7</sup> Neither the administrative record nor MPCA's MGDPA responses include a subsequent letter from EPA stating that deficiencies in the application were resolved, although such a letter is required for MPCA to proceed with an NPDES permit under the Memorandum of Agreement establishing MPCA's delegated authority to issue NPDES permits.<sup>8</sup>

7. Although EPA was highly involved with NorthMet Project environmental review and the NPDES Permit process, and communicated substantive expectations and concerns to MPCA regarding the NorthMet NPDES application and NPDES Permit, the NPDES Permit procedures and final NPDES Permit conditions are inconsistent with EPA expectations, concerns, and communications, including but not limited to those in EPA Comments.<sup>9</sup>

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<sup>5</sup> Transfer Mot. 11-12; Transfer Reply 1, 5-6, 8; *see also* Order at 3 (undisputed issue (5)).

<sup>6</sup> Transfer Mot. 3, 11-12; Transfer Reply 1, 5-6, 19-20; Maccabee Decl. ¶ 5 & Ex. B.

<sup>7</sup> Transfer Mot. 3; Transfer Reply 4; Maccabee Decl., Ex. A; Reply Decl. of Paula Maccabee ("Maccabee Reply Decl."), Ex. H, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 5, 2019).

<sup>8</sup> Transfer Reply 4, 20; Maccabee Decl., Ex. B at 1-5; Maccabee Reply Decl., Ex. H.

<sup>9</sup> Transfer Mot. 2-5; Maccabee Decl., Ex. A at 1-12, Exs. C, F-G; Maccabee Decl., Ex. H; Decl. of Jeffrey Fowley ("Fowley Decl.") ¶¶ 17-23, *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 5, 2019); Relators' Notice of Withdrawal of Mot. for a

8. MPCA responses to comments improperly failed to mention or respond to any EPA comments on the draft NPDES Permit and affirmatively conveyed the false impression that the NPDES Permit complied with all EPA's comments and concerns.<sup>10</sup>

9. MPCA's extra-record claims that MPCA and EPA had fundamentally agreed on NPDES Permit terms after a meeting between MPCA and EPA in September 2018 are highly disputed, undocumented in the administrative record, and such "resolution" without a written confirmation by EPA would be irregular.<sup>11</sup> The absence of an EPA objection blocking the final NPDES Permit does not signify that EPA concerns were resolved.<sup>12</sup>

10. MPCA's and EPA's procedures related to the NPDES Permit were irregular and did not follow customary EPA and MPCA practices in comparable NPDES permitting cases.<sup>13</sup>

11. MPCA's procedural irregularities undermine EPA oversight under the Clean Water Act ("CWA") and affect Relators' substantive claims that the NPDES Permit did not comply with MAPA and the CWA.<sup>14</sup>

12. MPCA failed to act with truthfulness, accuracy, disclosure, and candor in connection with the NPDES Permit.<sup>15</sup>

13. MPCA's procedural irregularities conflict with MGDPA, Minn. Stat. ch. 13.<sup>16</sup>

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Stay and Continuing Req. for Transfer to District Ct. Due to Irregular Procedure at 1-2 & Attach. A ("Notice Attach."), *In re Proposed NorthMet Project*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 13, 2019).

<sup>10</sup> Transfer Mot. 8, 10-11; Transfer Reply 1, 9-10, 13-14; Maccabee Decl., Ex. C; Maccabee Reply Decl., Ex. I; Fowley Decl. ¶¶ 24-25.

<sup>11</sup> See Transfer Mot. 2, 5; Transfer Reply 10; Maccabee Decl., Ex. C; Maccabee Reply Decl., Ex. H; Fowley Decl. ¶ 17.

<sup>12</sup> Transfer Reply 10-11, 20-21; Fowley Decl. ¶¶ 13, 26-27.

<sup>13</sup> Transfer Reply 4, 6-9, 13-14; Fowley Decl. ¶¶ 9-13, 15-16; Maccabee Decl., Exs. E-F; Maccabee Reply Decl. ¶ 5 & Ex. I.

<sup>14</sup> Transfer Mot. 2, 13-14; Transfer Reply 24; Maccabee Decl. ¶¶ 14-15 & Exs. A, C; Maccabee Reply Decl. ¶ 6 & Ex. H.

<sup>15</sup> Transfer Reply Mem. 13.

14. MPCA's procedural irregularities conflict with the Official Records Act, Minn. Stat. ch. 15.<sup>17</sup>

15. MPCA's procedural irregularities conflict with 40 C.F.R. § 124.17, which requires states to provide publicly available responses to all significant comments on an NPDES permit application or draft NPDES permit.<sup>18</sup>

16. MPCA's procedural irregularities conflict with its duty of candor established in Minn. R. 7000.0300 in issuing the NPDES Permit and these irregularities continued after the NPDES Permit was issued.<sup>19</sup>

17. MPCA's and EPA's irregular, improper, and unlawful procedures preventing the creation of a complete administrative record of EPA's comments and concerns regarding the NPDES Permit prejudiced Relators in their appeals from issuance of the NPDES Permit.<sup>20</sup>

18. Upon information and belief, MPCA sought to withhold documents and communications from the administrative record, upon which documents and communications MPCA relied in its decision to issue the NPDES Permit, so that such documents and communications could not be fully and fairly reviewed by the Court of Appeals in the event of a challenge to the issuance of the NPDES Permit before the Court of Appeals.<sup>21</sup>

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<sup>16</sup> Transfer Mot. 11-12; Transfer Reply 5-6, 15-16.

<sup>17</sup> Transfer Reply 15-16.

<sup>18</sup> Transfer Mot. 10-11; Transfer Reply 4, 14-15; Maccabee Decl., Exs. C, I; Fowley Decl. ¶¶ 6(c), 6(e), 24, 29, 31.

<sup>19</sup> Transfer Mot. 12-13; Transfer Reply 6, 13, 17-18, 24.

<sup>20</sup> Transfer Mot. 2, 6, 9-10; Transfer Reply 23-25; Maccabee Decl. ¶ 14.

<sup>21</sup> Transfer Mot. 2, 6, 18, Transfer Reply 2, 11.

19. Upon information and belief, MPCA improperly based its decision to issue the NPDES Permit on communications and or documents exchanged between MPCA, PolyMet, and/or EPA and other irregular procedures, which are not reflected in the administrative record.<sup>22</sup>

20. Critical documents are missing from the administrative record as a result of procedural irregularities, including but not limited to documents pertaining to alleged violations of the MGDPA, the Official Records Act, and CWA regulations.<sup>23</sup>

21. Because MPCA used irregular procedures, additional information may be uncovered during transfer proceedings which disclose the nature of the NPDES Permit process, the content of documents not present in the administrative record, and the degree to which MPCA and EPA leadership went to prevent public and judicial scrutiny of the NPDES Permit.<sup>24</sup>

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<sup>22</sup> Transfer Mot. 2, 8, 13-14; Transfer Reply 10-11, 19-20.

<sup>23</sup> Transfer Reply 1-2, 13-15, 24; Maccabee Decl. ¶ 14.

<sup>24</sup> Transfer Reply 18-21.

Dated: August 14, 2019

**MINNESOTA CENTER FOR  
 ENVIRONMENTAL ADVOCACY**

/s/ Elise L. Larson

ELISE L. LARSON (#0393069)  
 KEVIN REUTHER (#0266255)  
 1919 University Avenue West  
 Saint Paul, MN 55105  
 Phone: (651) 223-5969  
 Email: elarson@mncenter.org  
 kreuther@mncenter.org

**MASLON LLP**

WILLIAM Z. PENTELOVITCH (#0085078)  
 MARGARET S. BROWNELL (#0307324)  
 EVAN A. NELSON (#0398639)  
 90 South Seventh Street  
 3300 Wells Fargo Center  
 Minneapolis, MN 55402-4140  
 Phone: (612) 672-8200  
 Email: bill.pentelovitch@maslon.com  
 margo.brownell@maslon.com  
 evan.nelson@maslon.com

**NILAN JOHNSON LEWIS, P.A.**

DANIEL Q. PORETTI (#185152)  
 MATTHEW C. MURPHY (#0391948)  
 120 South Sixth Street, Suite 400  
 Minneapolis, MN 55402-4501  
 Phone: (612) 305-7500  
 Email: dporetti@nilanjohnson.com  
 mmurphy@nilanjohnson.com

*Attorneys for Plaintiffs Center for Biological  
 Diversity, Friends of the Boundary Waters  
 Wilderness, and Minnesota Center for  
 Environmental Advocacy*

**JUST CHANGE LAW OFFICES**

/s/ Paula G. Maccabee

PAULA G. MACCABEE (#0129550)  
 1961 Selby Avenue  
 Saint Paul, MN 55104  
 Phone: (651) 646-8890  
 Email: pmaccabee@justchangelaw.com

*Attorney for Plaintiff WaterLegacy*

**FOND DU LAC BAND OF LAKE  
 SUPERIOR CHIPPEWA LEGAL  
 AFFAIRS OFFICE**

/s/ Sean Copeland

SEAN W. COPELAND (#0387142)  
 1720 Big Lake Road  
 Cloquet, MN 55720  
 Phone: (218) 878-2607  
 Email: seancopeland@fdlrez.com

**SONOSKY, CHAMBERS, SACHSE,  
 MIELKE & BROWNELL, LLP**

VANESSA L. RAY-HODGE (*pro hac vice*)  
 MATTHEW L. MURDOCK (*pro hac vice*)  
 500 Marquette Avenue, NW, Suite 660  
 Albuquerque, NM 87102  
 Phone: (505) 247-0147  
 Email: vrayhodge@abqsonosky.com  
 mmurdock@sonosky.com

*Attorneys for Plaintiff Fond du Lac Band of  
 Lake Superior Chippewa*

STATE OF MINNESOTA  
COUNTY OF RAMSEY

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DISTRICT COURT  
SECOND JUDICIAL DISTRICT

Case Type: Civil Other  
File No.: 62-CV-19-4626  
Judge: John H. Guthmann

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.

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ORDER

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on August 7, 2019, at the Ramsey County Courthouse, St. Paul, Minnesota on referral from the Minnesota Court of Appeals. Appearances were as noted on the record. Based upon all of the files, records, submissions and arguments, the court issues the following:

PREAMBLE

WHEREAS, the Minnesota Court of Appeals referred the above captioned matter to the Second Judicial District to conduct an evidentiary hearing “for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure.” The hearing must “be scheduled as soon as practicable.”

WHEREAS, this court noticed a Rule 16 Conference to identify the issues, identify the witnesses, determine the volume of exhibits, arrive at an estimate of the time needed for the hearing, and schedule the hearing.

WHEREAS, after the notice of hearing was issued, relators<sup>1</sup> filed two motions: a motion for a scheduling order and pretrial discovery and a Rule 7.2 motion for Findings of Fact, Conclusions of Law, and Order. Through their motions, relators sought leave to conduct all forms of discovery authorized by the Minnesota Rules of Civil Procedure, including witness depositions, and requested that the hearing be scheduled on or after May 11, 2020.

WHEREAS, the court made certain rulings from the bench during the hearing that are memorialized herein.

THEREFORE, IT IS ORDERED:

1. All motions filed prior to the August 7<sup>th</sup> hearing are denied to the extent relief is not provided in this Order. Similarly, all requests for discovery not expressly permitted in this Order are denied.

2. Relators shall file with the court, and serve on all other parties, a list of all alleged procedural irregularities with the MPCA/Polymet permitting process no later than August 14, 2019.

3. Relators as a group are permitted to serve no more than 25 written deposition questions to each of the following MPCA witnesses: Richard Clark; Stephanie Handeland; and, Jeff Udd.

4. Relators as a group may serve up to 25 written deposition questions and up to 25 document requests upon the MPCA. A representative acting on behalf of the MPCA shall respond to these requests. Document requests directed to the MPCA and its witnesses are limited to documents that the MPCA had in its possession or control at the time of its permitting decision.

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<sup>1</sup> Relators consist of the following organizations: Center for Biological Diversity, Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy, and Fond du Lac Band of Lake Superior Chippewa.

5. Relators as a group may serve up to 25 written deposition questions and 25 document requests upon Polymet. Document requests directed to Polymet are limited to documents in Polymet's possession or control that the MPCA had in its possession or control at the time of the MPCA's permitting decision.

6. The MPCA may serve up to 25 written deposition questions and 25 document requests upon relators as a group.

7. The standard applicable to Rule 30.02(f) of the Minnesota Rules of Civil Procedure shall govern all discovery served on an organization.

8. The scope of discovery is limited to information that relates to alleged procedural irregularities in the permitting process by the MPCA as alleged in briefing to the Minnesota Court of Appeals.

9. The question/document request limit includes all subparts regardless of whether the subparts are separately numbered.

10. If a party objects to disclosing a document that is arguably within the scope of discovery on the basis of a privilege, that party shall provide to the requesting party a privilege log describing what was withheld and stating the privilege being asserted.

11. The following timelines govern all discovery:

- a. All permitted discovery shall be served no later than August 28, 2019 at 4:30 p.m.
- b. If any party objects to discovery, the parties shall attempt to resolve their differences by September 4, 2019 at 4:30 p.m.
- c. If differences cannot be resolved, the parties may schedule an informal conference with the court as provided in Rule 115.04(d) of the Minnesota

General Rules of Practice. Any requested conference may take place after September 13, 2019 as long as it is scheduled no later than 4:00 p.m. on September 13, 2019. No later than 24 hours prior to a conference, each party (relators constitute a single party for this purpose) to the dispute shall file a letter no longer than three pages in length outlining the nature of the dispute.

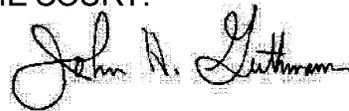
- d. Discovery responses are due within 30 days of service or 30 days from the date disputes are resolved by the parties or the court, whichever date is later. A dispute over one question or request shall not delay the due date for responding to the other questions or requests.

12. Once discovery is completed, another pre-hearing conference shall be set. During the conference, the parties shall be prepared to exchange their final list of witnesses who will actually testify, set a deadline for the exchange of documents that actually will be introduced at the hearing, determine the number of days needed for the hearing, and schedule the hearing.

13. The rationale, factual basis, and legal basis for the court's ruling was stated in the record of the August 7, 2019 hearing, which record is incorporated herein by reference.

Dated: September 9, 2019

BY THE COURT:



Guthmann, John (Judge)  
Sep 9 2019 1:11 PM

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John H. Guthmann  
Judge of District Court