

MASLON**Evan Nelson****Direct Dial: 612.672.8396****Direct Fax: 612.642.8396**

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October 28, 2019

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

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

Dear Judge Guthmann:

Pursuant to General Rule of Practice 115.11, Relators respectfully request leave to file a motion for reconsideration of this Court's ruling that limited Relators' discovery to written depositions of individuals currently employed by Respondent Minnesota Pollution Control Agency ("MPCA"). Order, Sept. 9, 2019 ("Order") ¶¶ 3-4; Aug. 7, 2019 Conference Tr. ("Tr.") 99:1-4. This limitation severely prejudices Relators' ability to establish the alleged procedural irregularities ("APIs") on which the Court was directed to do fact finding by the Court of Appeals.

Testimony shows that MPCA currently has access to, and indeed relies upon access to, the same key former employees whom the Court would not allow Relators to depose. Further, testimony demonstrates that former agency officials either destroyed or did not retain documents that would be directly relevant to the APIs. Without depositions of these former agency officials, Relators are unable to adequately prepare for the evidentiary hearing, while MPCA is fully able to prepare because it has unfettered access to these witnesses. To remedy this prejudice, Relators would request the Court allow oral depositions of former Assistant Commissioner Shannon Lotthammer, former Commissioner John Linc Stine, and former Mining Sector Chief Ann Foss.

A critical document here is a March 13, 2018 email from Lotthammer to political staff at EPA, in which Lotthammer "asked that [EPA] not send a written comment letter during the public comment period . . ." (RELATORS_0062902-04 (attached as **Exhibit A**)). Relators cannot obtain information surrounding that email from Lotthammer without a deposition. MPCA testified that Lotthammer "regularly managed [her] emails and [the March 13 email] was deleted prior to any outstanding Data Practices Act request." (MPCA Depo. at 11:9-11 (attached as **Exhibit B**)). MPCA further testified that Lotthammer "did not print a copy of the email . . . and *she doesn't recall* the date she deleted the email." (*Id.* at 11:16-19 (emphasis added)). This shows that MPCA communicated Relators' deposition questions to her, and she gave MPCA an answer.

Through FOIA litigation, WaterLegacy recently obtained the full email string that includes the March 13 email and a March 12 email in which Stine references a "phone conversation this morning" with EPA. (Exhibit A.) This email corroborates Relators' allegation that Stine was

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personally involved in the request for EPA to withhold written comments. Relators are left to guess as to Stine's testimony on this critical issue. But MPCA can communicate with Stine freely. Without the ability to fully depose Stine, including asking follow-up questions via oral deposition, Relators would be prejudiced in their ability to fully investigate and establish the procedural irregularity that is at the heart of this case, and a basis for the Court of Appeals' Transfer Order.

As for Foss, MPCA's designee testified that the agency has not retained *any* responsive documents to Relators' requests for documents regarding mining permits prepared or kept by Foss, the agency's former Mining Sector Chief. (MPCA Depo at 19:23-20:3.) This testimony defies credulity. Nonetheless, Relators are left with little information regarding Foss, who Relators allege took an active role in the plan to withhold EPA's comments and served in a leadership capacity during MPCA/EPA permit discussions.¹

If the Court grants leave, Relators' motion will not only demonstrate how limiting depositions prejudices Relators, but also establish that precedent supports oral depositions of former agency officials under these circumstances. *Cnty. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983) (describing exception to rule that allows discovery of agency officials regarding agency decision). Relators have never been given the opportunity to brief these issues, but if they are, Relators will show "grounds to suspect bad faith or improper behavior not apparent from the administrative record" and that the former officials have "relevant first-hand personal knowledge of matters material to the decision which are not a part of the administrative record and not available from some other source." *Id.*

Further, the rationale to conserve "time and energies of public officials . . . for the public's business" is irrelevant to Stine and Foss. *Ellingson & Assocs., Inc. v. Keefe*, 396 N.W.2d 694, 696 (Minn. App. 1986). They are no longer in government.² Rather, the Court should consider due process owed to Relators. Lacking any access to these witnesses while MPCA continues to have access to them, Relators are at a severe disadvantage in preparing for the evidentiary hearing.

The Court has explained the "due process purpose behind the discovery that the court permitted [is] the lack of litigation by ambush and surprise." (Tr. 115:18-21.) However, the Court's strictures on depositions leave Relators in the dark, undermine due process, and threaten the ability of the Court to fulfill its mandate from the Court of Appeals to hear and determine the APIs. Therefore, Relators respectfully request leave to file a motion for reconsideration in order to depose three key witnesses who are former MPCA officials. In making this limited request, Relators do not waive any objections to the Court's prior rulings.

¹ PolyMet documents show that Foss hosted MPCA/EPA Biweekly Permitting discussions. PolyMet_0000067, 0000167-84.

² Ms. Lotthammer is currently an Assistant Commissioner of the Minnesota DNR.

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Respectfully submitted,

MASLON LLP

/s/ Evan A. Nelson

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SUPERIOR CHIPPEWA**

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

Enclosures

cc: Counsel of Record

Message

From: Lotthammer, Shannon (MPCA) [shannon.lotthammer@state.mn.us]
Sent: 3/13/2018 7:06:42 PM
To: Thiede, Kurt [thiede.kurt@epa.gov]
Subject: FW: Minnesota Speakers Office
Attachments: mn-moa-npdes_wcmt.pdf

Dear Kurt --

Thank you and Cathy for the opportunity to connect with you on this matter. By way of introduction, as John notes below I'm Assistant Commissioner for Water at MPCA, and prior to that I led a division here at MPCA that included both our water quality standards efforts and support for our permitting programs.

The agreement John references is the Memorandum of Agreement (MOA) that exists between MPCA and Region 5 EPA regarding the NPDES program delegation to MPCA. That agreement is attached. The question at issue is the timing of EPA written comments on draft/proposed NPDES permits.

As you'll note in the highlighted portions of page pp. 27-28 of the attached pdf (which are pages 10-11 of the actual MOA), the established process is for MPCA to place the draft permit on public notice, consider and respond to public comments and make any resulting changes that are necessary, and then to submit the proposed permit to EPA for review and comment (which could include objection) prior to final issuance.

The concern we have expressed to Region 5 staff/mgrs is the *timing* of EPA comments, not the ability for EPA to comment. The draft permit that is the subject of this discussion is on public notice until March 16. We know that we will be making some changes to the draft permit in response to public comments, and also questions raised by EPA. We have asked that EPA Region 5 not send a written comment letter during the public comment period and instead follow the steps outlined in the MOA and wait until we have reviewed and responded to public comments and made associated changes before sending comments from EPA.

We have been meeting regularly with Region 5 permitting folks to identify and work through questions, and we would be happy to continue to do so as we review and respond to public comments and continue to refine the draft permit. I also understand that some EPA staff are concerned that the 15-day timeline laid out in the MOA for EPA review and comment/response/objection is not sufficient time given the complexity of this draft permit. We are certainly sympathetic to the need for adequate review time, and we'd be happy to talk about and memorialize via a letter or meeting a longer timeframe for EPA review prior to permit issuance.

Again, I wish to stress -- as I have with Chris Korleski and Kevin Pierard -- that the concern here is not about EPA's authority for review. We recognize and respect that authority. The question is about the timing of that review, and the importance of maintaining the approach laid out in the MOA for the sake of clarity and efficiency, among other goals.

I would be happy to talk with you more about this matter, or to provide any additional information that would be helpful. Thank you again for the opportunity to connect. The MPCA and Region 5 EPA have a strong working relationship, and I wish to do all I can to reinforce our partnership and continue to strive towards our shared goals of water quality protection and excellence in public service.

Kind regards,
Shannon

Shannon Lotthammer
Assistant Commissioner
Minnesota Pollution Control Agency

Shannon.lotthammer@state.mn.us
651/757-2537

Working to protect and improve the environment and human health.

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From: Stine, John (MPCA)
Sent: Monday, March 12, 2018 12:22 PM
To: Stepp, Cathy <stepp.cathy@epa.gov>; Thiede, Kurt <thiede.kurt@epa.gov>
Cc: Lotthammer, Shannon (MPCA) <shannon.lotthammer@state.mn.us>
Subject: RE: Minnesota Speakers Office

Thanks for the phone conversation this morning, Cathy and Kurt. I am looping in Shannon Lotthammer who serves as MPCA Assistant Commissioner for Water. She will follow up directly with Kurt regarding the Region 5 – MPCA agreement I mentioned on our call.

John Linc Stine
Commissioner
MN Pollution Control Agency
651-757-2014 (office)
Twitter: @JLincStine



MPCA's Mission: protect and improve the environment and enhance human health. Join us!

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From: Stepp, Cathy [<mailto:stepp.cathy@epa.gov>]
Sent: Thursday, March 8, 2018 10:55 AM
To: Thiede, Kurt <thiede.kurt@epa.gov>
Cc: Korleski, Christopher <korleski.christopher@epa.gov>; Stine, John (MPCA) <john.stine@state.mn.us>
Subject: Re: Minnesota Speakers Office

Thanks Kurt. This captures the conversation. I've ccd this to John in MN as well.

Sent from my iPhone

On Mar 8, 2018, at 10:51 AM, Thiede, Kurt <thiede.kurt@epa.gov> wrote:

Cathy,

Just to recap yesterday afternoon's conversation with Speaker Kurt Doubt and Rep. Dan Fabian of the MN Legislature.

After a discussion of a bill that is being debated in the MN state legislature that would limit MPCAs ability to impose a numerical standard for Sulfides, the Speaker asked if you would support their action (legislation). You did not commit to supporting their legislation, but rather you responded that what you could do is respect the MN legislative process and would reach out to and work with John Linc Stein on the implementation of any policies or rules needed to implement their MPDES program. In addition, you noted your commitment to resolve the longstanding MPDES impasse.

Kurt A. Thiede
Chief of Staff
U.S. EPA, Region 5
Office of the Regional Administrator
77 W Jackson Blvd
Chicago, IL 60604
Email: thiede.kurt@epa.gov
Office: (312) 886-6620

**Deposition of MPCA Designee Jeff Udd - 10/15/2019
In the Matter of the Denial of Contested Case Hearing Requests, et al.**

1 STATE OF MINNESOTA DISTRICT COURT
 2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
 3 Court File No. 62-CV-19-4626
 Case Type: Civil Other/Misc.

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

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 DEPOSITION OF
 MPCA DESIGNEE JEFF UDD
 BY WRITTEN QUESTIONS

25 Taken: October 15, 2019 By Mary Piehl, B.S.Ed, RPR

**Deposition of MPCA Designee Jeff Udd - 10/15/2019
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1 APPEARANCES	1 I N D E X
2 CROWELL MORING	2
3 1001 Pennsylvania Avenue NW	Instructions to the Witness, Page 7
4 Washington, DC 20004-2595	3
5 Phone: 202.624.2905	Written Questions to the Witness, Page 10
6 Fax: 202.628.5116	4
7 Email: rschwartz@crowell.com	Objections by Richard Schwartz, Page 12, 13, 17
8	5
9 By: Richard Schwartz, Esquire	Instructions Not to Answer by Richard Schwartz,
10 For MPCA	Pages 16, 19, 20
11	6 Objections by Paula Maccabee, Page 26
12 HOLLAND & HART	7
13 25 South Willow Street, Suite 200	8
14 Jackson, Wyoming 83001	INDEX OF EXHIBITS
15 Phone: 307.739.9741	9
16 Fax: 202.393.6551	NUMBER DESCRIPTION
17 Email: jcmartin@hollandhart.com	10
18 By: John Martin, Esquire	1 1 (Documents Re Leaked Union Release), Page 6
19 For MPCA	11
20	2 (Memorandum of Agreement), Page 6
21 MASLON	12
22 3300 Wells Fargo Center	3 (10/10/19 Email to Mr. Schwartz), Page 6
23 90 South 7th Street	13
24 Minneapolis, Minnesota 55402	4 (Question 18 and Question 5 Documents),
25 Phone: 612.672.8200	Page 15
	14
	15 5 (Question 17 and Question 6 Comments on
	Draft Permit), Page 16
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	6 (Response to Question 8), Page 16
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<p>1 Mr. Schwartz agreed that he would provide Relators 2 with a copy of that, those notes. 3 MR. SCHWARTZ: That's correct. 4 MS. MACCABEE: And similarly, if Mr. Udd 5 is referring to any notes in the course of the 6 deposition, we would request as part of Question 7 13 that we get a copy of those notes. 8 MR. SCHWARTZ: We will provide. 9 MS. MACCABEE: Thank you very much. And 10 we'd like to mark ahead of time, these are 11 Exhibits 1, 2, 3. 1 is the union's released or 12 leak of an email from Shannon Lothhammer, and 13 No. 2 is the Memorandum of Agreement with EPA and 14 PCA, and No. 3 -- and both of these exhibits were 15 provided as attachments to Questions For Written 16 Deposition. And No. 3 is the letter that Relators 17 sent on October 10th to counsel for MPCA. Thank 18 you. 19 (Exhibits Nos. 1-3 were marked for 20 identification.) 21 (The following instructions are read to 22 the witness by the court reporter.) 23 24 DEFINITIONS & DIRECTIONS 25</p>	<p>1 email, etc.); 2 H. "Administrative record" means the 3 administrative record filed with the Minnesota Court of 4 Appeals in Relators' appeals of the PolyMet NPDES Permit 5 in case numbers A19-0112, A19-0118, A19-0124 (the 6 "PolyMet NPDES Permit Appeal"); 7 I. "Comments" or "commented" of or by EPA means 8 communication of suggestions, concerns, recommendations, 9 requirements, or objections by EPA whether orally or 10 verbally; 11 J. "Data Practices Act" means the Minnesota 12 Government Data Practices Act. 13 K. "Declaration" means a declaration given in 14 connection with the Motion for Transfer to the District 15 Court or, in the Alternative, for Stay Due to Irregular 16 Procedure and Missing Documents in the PolyMet NPDES 17 Permit Appeal; 18 L. "Discarded" means thrown away physically or 19 deleted electronically; 20 M. "Documents" means any written or recorded 21 item, whether created or stored on paper, electronically, 22 or any other format, including, but not limited to, 23 notes, memoranda, agendas, emails, text messages, instant 24 messages, calendars, phone logs, PowerPoint or other 25 presentation programs, photographs, drawings, web ex</p>
Page 7	Page 9
<p>1 A. Please answer all questions with verbal 2 responses, rather than a nod of the head or other 3 non-verbal response; 4 B. Please answer each question fully and to the 5 best of your ability, and do not consult with your 6 attorney while the questioning is underway; 7 C. If you read from or refer to any document 8 during your answers, please identify that document by 9 Exhibit number or as set forth in the definition of 10 "identify" below; 11 D. If you are asked to "identify" a person or 12 persons in a question, please provide that person's name, 13 position, and the organization they were affiliated with 14 during the relevant time period; 15 E. If you are asked to "identify" a document or 16 documents in a question, please name the author or 17 authors, the recipients, the date and subject matter of 18 the document, and the present custodian of the document; 19 F. If you are asked to "identify" a permit issued 20 by MPCA, please state the name of the facility and the 21 date on which the permit was issued; 22 G. If you are asked to "identify" a communication 23 in a question, please state who the participants were to 24 the communication, when the communication occurred, and 25 the type of communication used (i.e. telephone call,</p>	<p>1 materials, and tape recordings; 2 N. "EPA" means the United States Environmental 3 Protection Agency, and its employees, representatives, 4 and agents; 5 O. "MPCA" means the Minnesota Pollution Control 6 Agency, and its employees, representatives, and agents; 7 P. "NPDES" means National Pollutant Discharge 8 Elimination System/State Disposal System as provided for 9 in the Clean Water Act and implementing regulations; 10 Q. "PolyMet" means Poly Met Mining, Inc., its 11 parent entities and subsidiaries, and its employees, 12 representatives, and agents, including counsel; 13 R. "PolyMet NPDES Permit" means and refers to the 14 NPDES permit issued to Poly Met Mining, Inc. by the MPCA 15 on or about December 20, 2018; 16 S. "Regarding" means and includes evidencing, 17 reflecting, relating to, concerning, consisting of, 18 comprising, discussing, recording, or in any way 19 referring to or pertaining to; 20 T. "Under MPCA's possession or control" means if 21 MPCA has a practical ability to influence the person in 22 possession to provide it or a right or privilege to 23 examine it upon request or demand; 24 U. "QBELs" means water quality-based effluent 25 limitations as provided for in the Clean Water Act and</p>

**Deposition of MPCA Designee Jeff Udd - 10/15/2019
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<p>1 implementing regulations; and</p> <p>2 V. "You" or "your" refers to the Minnesota</p> <p>3 Pollution Control Agency ("MPCA"), and its employees,</p> <p>4 agents, and representatives, including, but not limited</p> <p>5 to, counsel.</p> <p>6 (The following written questions were</p> <p>7 read to the witness by the court reporter.)</p> <p>8</p> <p>9 WRITTEN DEPOSITION QUESTIONS</p> <p>10</p> <p>11 1. The June 18, 2019 media release from the EPA union</p> <p>12 leaking a portion of an email on March 13, 2018</p> <p>13 from Shannon Lotthammer to Curt Thiede is attached</p> <p>14 as MPCA Exhibit 1. Ms. Lotthammer's email in MPCA</p> <p>15 Exhibit 1 is entitled "FW: Minnesota Speaker's</p> <p>16 Office." The email reads, in part, "We have asked</p> <p>17 that EPA Region 5 not send a written comment</p> <p>18 letter during the public comment period and</p> <p>19 instead follow the steps outlined in the MOA, and</p> <p>20 wait until we have reviewed and responded to</p> <p>21 public comments and made associated changes before</p> <p>22 sending comments from EPA." The email also refers</p> <p>23 to additional notes below from MPCA Commissioner</p> <p>24 John Linc Stine.</p> <p>25 MR. NELSON: Just want to take a moment.</p>	<p>1 conversation with the Speaker's Office about</p> <p>2 sulfate legislation. Cathy Stepp at EPA forwarded</p> <p>3 that on to John Linc Stine at MPCA. John Stine</p> <p>4 replied to EPA and added Shannon Lotthammer as cc</p> <p>5 to that email string. Shannon Lotthammer then</p> <p>6 used that same email string to discuss the</p> <p>7 application of the Memorandum of Agreement to the</p> <p>8 PolyMet project, and the subject of the email was</p> <p>9 never changed.</p> <p>10 2. Michael Schmidt's declaration of June 12, 2019</p> <p>11 (Paragraph 20) states with respect to the April 5,</p> <p>12 2018 call between MPCA and EPA regarding the</p> <p>13 PolyMet NPDES Permit, "I do not remember</p> <p>14 specifically what I did with my handwritten notes"</p> <p>15 and that Mr. Schmidt customarily would not retain</p> <p>16 handwritten notes because he would integrate those</p> <p>17 notes in a typed document.</p> <p>18 (a) Has MPCA retained either Mr. Schmidt's</p> <p>19 original handwritten notes of April 5, 2018 or his</p> <p>20 typed document regarding the substance of that</p> <p>21 call?</p> <p>22 MR. SCHWARTZ: The witness may answer the</p> <p>23 question, but at this point just want to register</p> <p>24 an objection to lack of foundation for part of the</p> <p>25 question. Having done that, the witness may</p>
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<p>1 Shannon Lotthammer was referred to as Sharon</p> <p>2 Lotthammer.</p> <p>3 (a) Please explain why Ms. Lotthammer's March</p> <p>4 13, 2018 email was not produced in response to</p> <p>5 WaterLegacy's five Data Practices Act requests</p> <p>6 beginning on March 26, 2018 or Minnesota Center</p> <p>7 for Environmental Advocacy's June 19, 2019 Data</p> <p>8 Practices Act request.</p> <p>9 THE WITNESS: Shannon Lotthammer regularly</p> <p>10 managed her emails and it was deleted prior to any</p> <p>11 outstanding EPA requests.</p> <p>12 (b) If MPCA claims that Ms. Lotthammer's March</p> <p>13 13, 2018 email has been discarded, state from</p> <p>14 which paper files and computers it was discarded,</p> <p>15 by whom and on what date.</p> <p>16 THE WITNESS: Shannon did not print a copy</p> <p>17 of the email she had deleted from the system, and</p> <p>18 she doesn't recall the date that she deleted the</p> <p>19 email.</p> <p>20 (c) Explain why Ms. Lotthammer's March 13, 2018</p> <p>21 email is entitled "FW: Minnesota Speaker's</p> <p>22 Office."</p> <p>23 THE WITNESS: The email string started as</p> <p>24 an email generated by Kurt Thiede at EPA on an</p> <p>25 unrelated subject. That subject was his</p>	<p>1 answer.</p> <p>2 THE WITNESS: No.</p> <p>3 (b) If MPCA claims that Mr. Schmidt's typed</p> <p>4 document regarding the substance of the April 5,</p> <p>5 2018 call has been discarded, state from which</p> <p>6 paper files and computers it was discarded, by</p> <p>7 whom and on what date.</p> <p>8 MR. SCHWARTZ: Again the witness may</p> <p>9 answer the question, but I want to register an</p> <p>10 objection to the lack of foundation.</p> <p>11 THE WITNESS: The MPCA does not claim such</p> <p>12 a typed document has been discarded.</p> <p>13 3. The Memorandum of Agreement ("MOA") between MPCA</p> <p>14 and EPA signed in 1974 and amended in 2000 to</p> <p>15 reflect the Great Lakes Initiative, is attached as</p> <p>16 MPCA Exhibit 2.</p> <p>17 (a) Given MPA provisions pertaining to Section</p> <p>18 124.22, including paragraph (8) on page 4, after</p> <p>19 MPCA received EPA's November 3, 2016 letter</p> <p>20 stating deficiencies in PolyMet's NPDES Permit</p> <p>21 application, on what basis did MPCA conclude it</p> <p>22 was entitled to proceed with the PolyMet NPDES</p> <p>23 Permit?</p> <p>24 THE WITNESS: The November EPA letter was</p> <p>25 based on the initial permit application, which the</p>

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<p>1 company submitted in July of 2016. They revised</p> <p>2 the permit application and submitted another one</p> <p>3 in October of 2017. Section 124.22, paragraph 7</p> <p>4 on page 4 of the MOA states "The director may</p> <p>5 assume, after verification of the receipt of the</p> <p>6 application, that no comment is forthcoming if he</p> <p>7 has received no response from the regional</p> <p>8 administrator at the end of 20 days."</p> <p>9 EPA did not provide any comments on the</p> <p>10 revised permit application at the end of 20 days,</p> <p>11 therefore MPCA concluded it could proceed.</p> <p>12 (b) Describe MPCA's discussions with EPA in</p> <p>13 2018 regarding potential amendment of the MOA to</p> <p>14 reflect a procedure specific to the PolyMet NPDES</p> <p>15 Permit, including for what purpose such</p> <p>16 discussions and how they were resolved.</p> <p>17 THE WITNESS: The MPCA is not aware of any</p> <p>18 such discussions.</p> <p>19 4. Since the 1974 MPA, identify every NPDES permit</p> <p>20 other than the PolyMet NPDES Permit for which EPA</p> <p>21 prepared written comments on the draft NPDES</p> <p>22 permit, did not send the written comments and,</p> <p>23 instead, read the comments aloud to MPCA.</p> <p>24 THE WITNESS: The MPCA is not aware of any.</p> <p>25 5. Since the 1974 MOA, identify every NPDES permit</p>	<p>1 MR. SCHWARTZ: When you say reviewed, we'll</p> <p>2 provide documents that conform to the question, in</p> <p>3 other words, as the question is stated we'll</p> <p>4 provide the documents.</p> <p>5 MS. MACCABEE: Thank you very much.</p> <p>6 MR. SCHWARTZ: Can we go off the record</p> <p>7 for a second?</p> <p>8 MR. NELSON: Yes.</p> <p>9 (A brief period of time was spent off the</p> <p>10 record.)</p> <p>11 (Exhibits Nos. 5-7 were marked for</p> <p>12 identification.)</p> <p>13 MR. NELSON: We're ready.</p> <p>14 MR. SCHWARTZ: Whenever you're ready.</p> <p>15 6. Since January 1, 2000, identify every NPDES permit</p> <p>16 where EPA commented upon or objected to MPCA's</p> <p>17 proposed final NPDES permit.</p> <p>18 THE WITNESS: A list was provided that's</p> <p>19 responsive to Question 6.</p> <p>20 MS. MACCABEE: That was Exhibit 5.</p> <p>21 7. Since what date has the MPCA anticipated the</p> <p>22 potential for litigation of the PolyMet NPDES</p> <p>23 Permit?</p> <p>24 MR. SCHWARTZ: I'm going to object</p> <p>25 and instruct the witness not to answer that</p>
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<p>1 where EPA commented upon or objected to MPCA's</p> <p>2 proposed final NPDES permit.</p> <p>3 MR. SCHWARTZ: And at this point I want to</p> <p>4 state for the record the parties have agreed and I</p> <p>5 believe the judge required that the start date for</p> <p>6 this question would be --</p> <p>7 MS. MACCABEE: 1990.</p> <p>8 MR. SCHWARTZ: Yeah, January 1, 1990, as</p> <p>9 opposed to 1974. But with that qualification, the</p> <p>10 witness may answer.</p> <p>11 THE WITNESS: I'm providing a list that is</p> <p>12 responsive to Question 5. It has Question 5 on</p> <p>13 topped of it.</p> <p>14 MR. NELSON: Mark that as Exhibit 4.</p> <p>15 (Exhibit No. 4 was marked for</p> <p>16 identification.)</p> <p>17 THE WITNESS: These are, these are all, 5,</p> <p>18 6, 7, 8, 9, and 10 are all in a pack.</p> <p>19 MS. MACCABEE: Mr. Schwartz, in connection</p> <p>20 with this list, in response to Question No. 13,</p> <p>21 are you going to provide us with all the documents</p> <p>22 that were reviewed to reach that conclusion?</p> <p>23 MR. SCHWARTZ: Yes.</p> <p>24 MS. MACCABEE: So we'll have a big pack of</p> <p>25 the documents.</p>	<p>1 question, based on Judge Guthmann's September 16th</p> <p>2 ruling.</p> <p>3 MS. MACCABEE: And Relators concur on that</p> <p>4 that's the ruling.</p> <p>5 8. Since January 1, 2010, state the date of every</p> <p>6 meeting MPCA had with EPA or with PolyMet related</p> <p>7 to the PolyMet NPDES Permit whether held in person</p> <p>8 or electronically.</p> <p>9 MR. SCHWARTZ: Yeah, again, I'm going to</p> <p>10 object to the question as written, but the parties</p> <p>11 have agreed that the start date will be July 11,</p> <p>12 2016 for Question 8. And the witness may answer</p> <p>13 on that basis.</p> <p>14 THE WITNESS: A list was provided that's</p> <p>15 responsive to Question 8.</p> <p>16 MS. MACCABEE: That list is Exhibit 6.</p> <p>17 9. Identify all meetings that MPCA has participated</p> <p>18 in since January 1, 2010 in which an applicant for</p> <p>19 an NPDES permit met with you and the EPA at the</p> <p>20 same time.</p> <p>21 THE WITNESS: A list was provided that's</p> <p>22 responsive to Question 9.</p> <p>23 MR. NELSON: That list was marked as</p> <p>24 Exhibit 7.</p> <p>25 10. In connection with MPCA's responses to public</p>

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<p>1 comments on the draft PolyMet NPDES Permit;</p> <p>2 (a) Identify every person responsible for the</p> <p>3 tasks involved in preparing responses to these</p> <p>4 public comments;</p> <p>5 THE WITNESS: The people involved in</p> <p>6 preparing responses included Jim Robin, R-O-B-I-N,</p> <p>7 Stephanie Handeland, H-A-N-D-E-L-A-N-D, Richard</p> <p>8 Clark, C-L-A-R-K, Mike Schmidt, S-C-H-M-I-D-T,</p> <p>9 Brian Schweiss, S-C-H-W-E-I-S-S, Jeff Udd. All</p> <p>10 are employees of the MPCA or former employees of</p> <p>11 the MPCA, and Rich Schwartz, S-C-H-W-A-R-T-Z, who</p> <p>12 was external counsel.</p> <p>13 MR. NELSON: If I may, Rich, if that's</p> <p>14 okay, was that Ryan Schweiss or Brian Schweiss?</p> <p>15 THE WITNESS: Brian.</p> <p>16 MR. NELSON: Thank you.</p> <p>17 (b) State for each person responsible for</p> <p>18 preparing responses to public comments with what</p> <p>19 specific tasks that person was involved;</p> <p>20 THE WITNESS: For Jim Robin, he managed</p> <p>21 the external contractors, managed the overall</p> <p>22 comment documents, and provided initial drafting</p> <p>23 of responses to the common themes;</p> <p>24 Stephanie Handeland drafted responses to</p> <p>25 individual comments;</p>	<p>1 former Mining Sector Director Ann Foss.</p> <p>2 THE WITNESS: The agency has no documents</p> <p>3 responsive to this request or the question.</p> <p>4 12. State whether MPCA's decision with respect to the</p> <p>5 PolyMet NPDES Permit that operating limits, rather</p> <p>6 than WQBELs would be sufficient to protect water</p> <p>7 quality was influenced by your perceptions of the</p> <p>8 character or experience of PolyMet's Executive</p> <p>9 Vice President for Environmental and Governmental</p> <p>10 Affairs, Brad Moore.</p> <p>11 MR. SCHWARTZ: I object to this question</p> <p>12 and instruct the witness not to answer, based on</p> <p>13 Judge Guthmann's September 16, 2019 ruling.</p> <p>14 MS. MACCABEE: Relators believe this</p> <p>15 question should be answered, but we agree that the</p> <p>16 court has ruled that it not be answered.</p> <p>17 13. State MPCA's understanding, as of December 20,</p> <p>18 2018, the date when the PolyMet NPDES Permit was</p> <p>19 issued, whether the following documents would be</p> <p>20 part of the administrative record provided to the</p> <p>21 Court of Appeals, should the MPCA's permit</p> <p>22 decision be appealed:</p> <p>23 (a) EPA's written comments on the draft PolyMet</p> <p>24 NPDES Permit;</p> <p>25 THE WITNESS: As of December 20, 2018, the</p>
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<p>1 Richard Clark drafted responses to individual</p> <p>2 comments and provided review of the comment</p> <p>3 responses;</p> <p>4 Mike Schmidt drafted responses to comments on</p> <p>5 the contested case hearing requests and provided</p> <p>6 internal legal review of all responses;</p> <p>7 Brian Schweiss provided internal technical</p> <p>8 consultation on selected questions;</p> <p>9 Jeff Udd provided oversight of the comment</p> <p>10 response process;</p> <p>11 And Rich Schwartz provided external legal</p> <p>12 review of the responses.</p> <p>13 (c) Identify the dates on which each person</p> <p>14 responsible for preparing responses to public</p> <p>15 comments began and completed each of their tasks</p> <p>16 identified in paragraph (b).</p> <p>17 MR. SCHWARTZ: I'm going to object to this</p> <p>18 question and instruct the witness not to answer,</p> <p>19 based on Judge Guthmann's September 16 ruling.</p> <p>20 MS. MACCABEE: And Relators agree that was</p> <p>21 the court's ruling and the witness does not need</p> <p>22 to answer.</p> <p>23 11. Identify all documents, including journals or</p> <p>24 notebooks, under MPCA's possession or control</p> <p>25 regarding MPCA mining permits prepared or kept by</p>	<p>1 PCA did not have any written comments from the</p> <p>2 EPA.</p> <p>3 (b) any notes from April 5, 2018, when EPA read</p> <p>4 its comments on the draft PolyMet NPDES Permit to</p> <p>5 MPCA over the phone;</p> <p>6 THE WITNESS: As of December 20th, 2018,</p> <p>7 MPCA did not have any notes from the April 5, 2018</p> <p>8 phone call with EPA.</p> <p>9 (c) Shannon Lotthammer's March 13, 2018 email</p> <p>10 to Kurt Thiede;</p> <p>11 THE WITNESS: As of December 20, 2018, the</p> <p>12 MPCA did not have the March 13, 2018 email.</p> <p>13 (d) any document indicating that EPA staff</p> <p>14 believed that EPA's comments regarding the PolyMet</p> <p>15 NPDES Permit had not been fully resolved by the</p> <p>16 time the Permit was finalized.</p> <p>17 THE WITNESS: As of December 20, 2018, the</p> <p>18 MPCA did not have any documents from EPA regarding</p> <p>19 any unresolved issues of the permit.</p> <p>20 14. Identify all documents that were reviewed,</p> <p>21 consulted, referred to or otherwise used in your</p> <p>22 preparation for or answers to each of the</p> <p>23 foregoing questions.</p> <p>24 THE WITNESS: I only relied on the</p> <p>25 exhibits provided by the Relators.</p>

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1 MS. MACCABEE: Mr. Schwartz, we have a
 2 huge list here of documents where there were
 3 written comments on the draft permits, and those
 4 were not documents that were provided by the
 5 Relators, so I'm wondering where those documents
 6 are.

7 MR. SCHWARTZ: Well, they would be -- let
 8 me just look.

9 MS. MACCABEE: Let me just identify for
 10 the record that I am speaking of Exhibit 5, and
 11 Exhibit 4 is also a document that pertains to
 12 identification of permits where there were
 13 comments of some sort on a final permit. So we
 14 would request all of the documents that were used
 15 or referred to in any way for preparation of
 16 Exhibits 4 and 5.

17 MR. SCHWARTZ: Those, this question asks
 18 him to -- asked the witness to identify the
 19 documents, and what you have in the two exhibits
 20 is identification of those permits.

21 MS. MACCABEE: And what the court provided
 22 for is that all the questions that identify all
 23 documents should be responded to by providing the
 24 actual documents.

25 MR. SCHWARTZ: Yes. We actually, I

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1 to check on.

2 MS. MACCABEE: Maybe we can have that
 3 clarified on the record. I don't know if you want
 4 to state.

5 MR. SCHWARTZ: It could be, it could be --
 6 well, I actually, I actually don't know the
 7 answer, so what we'll have to do is just check.

8 MS. MACCABEE: Maybe Mr. Udd can just
 9 clarify on the record in terms of the lists of
 10 meetings in Exhibit 6, were any sources used other
 11 than the documents.

12 MR. SCHWARTZ: I think we'll check and
 13 we'll get back to you on that.

14 MS. MACCABEE: Well, it has to be under
 15 oath, sir. That's why I'm asking.

16 MR. SCHWARTZ: Well, we'll get back to
 17 you. If we have to get back under oath we will.

18 MR. NELSON: Finally, Mr. Schwartz, you
 19 also mentioned Stephanie Handeland, the notes that
 20 she was reviewing during her testimony would be
 21 provided?

22 MR. SCHWARTZ: Yes.

23 MR. NELSON: And we would also state that
 24 the notes that Mr. Udd was referring to would be
 25 provided?

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1 believe that when we get to the Request For
 2 Production of Documents we'll be responding to
 3 documents. My understanding was that where the
 4 request was for identification of documents, that
 5 because it's generally easier to just provide the
 6 documents than to identify it, that that was an
 7 option that we had, but that we could also
 8 identify the documents where they were requested.

9 MS. MACCABEE: So if I understand you
 10 correctly, that will be the documents that were
 11 listed or used in the preparation of Exhibit 4 and
 12 5 will be part of the Request For Production, and
 13 will they be identified as such?

14 MR. SCHWARTZ: Assuming they're in the
 15 RFP, that that is the case, I'll have to look back
 16 and see if, see whether presumably you asked for
 17 the documents rather than the identification.

18 MS. MACCABEE: Yes. And then I understand
 19 from the statement of Mr. Udd that at least with
 20 respect to meetings, were there any documents
 21 reviewed other than the ones that were provided by
 22 Relators? Because he just said that there were no
 23 other documents other than the ones provided by
 24 Relators.

25 MR. SCHWARTZ: That's something I'll have

Page 25

1 MR. SCHWARTZ: Yes.

2 MR. NELSON: Just wanted to clarify.

3 MS. MACCABEE: We said that.

4 MR. SCHWARTZ: Yes.

5 MS. MACCABEE: So the things that are
 6 remaining to be resolved are if the witness's
 7 response that the meetings reflected in Exhibit 6
 8 are only based on the documents provided by
 9 Relators, and then the other clarification I would
 10 appreciate, counsel is going to provide the
 11 documents as part of the Request For Production,
 12 and Relators would ask that they be identified
 13 according to which questions that he responded to.

14 MR. SCHWARTZ: Again, with respect to the
 15 second question, I can tell you if, if the RFP
 16 would request the actual documents, then we'll
 17 provide them.

18 With respect to the first, what I might do,
 19 actually, is just talk to the witness, and maybe
 20 we could go off the record and I can talk to the
 21 witness or we can talk to the witness and get back
 22 to you.

23 MR. NELSON: So we'll keep the deposition
 24 open and go off the record.

25 MR. SCHWARTZ: For the next few minutes.

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1 MR. NELSON: That's fine.
 2 (A brief recess was taken.)
 3 MR. SCHWARTZ: We can go back on the
 4 record. The answer with respect to the list of
 5 meetings is they came from --
 6 MS. MACCABEE: I think we need to have the
 7 witness answer the question.
 8 MR. SCHWARTZ: The witness will not answer
 9 the question, and the answer is that they came
 10 from Outlook calendars. We could print them all
 11 out for you if you want. We think it's probably
 12 not worth our time, but that's what we would have
 13 to do.
 14 MS. MACCABEE: I'm going to ask that --
 15 Mr. Udd, apparently your counsel made a statement.
 16 I'm going to ask you.
 17 MR. SCHWARTZ: No, he's not going to
 18 answer.
 19 MS. MACCABEE: So in other words, you're
 20 testifying for him.
 21 MR. SCHWARTZ: No, I'm answering as
 22 counsel for MPCA.
 23 MS. MACCABEE: That, we're going to object
 24 that counsel cannot answer questions in a
 25 deposition. We're asking a witness under oath to

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1 (WHEREUPON, at approximately 11:03 a.m.
 2 the foregoing deposition was concluded.)
 3 (The ORIGINAL EXHIBITS were attached to the
 4 ORIGINAL TRANSCRIPT.)
 5 (The ORIGINAL TRANSCRIPT was provided to
 6 ATTORNEY NELSON and copies to ATTORNEYS MILL and
 7 SCHWARTZ.)
 8 * * (END OF RECORD) * *
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1 have reflected the position of MPCA, so unless
 2 Mr. Schwartz wants to say that he's testifying
 3 under oath as to the source of the documents and
 4 the extent of the search looked at that, that is
 5 not a satisfactory answer.
 6 MR. SCHWARTZ: Well, Judge Guthmann also
 7 ruled there would be no follow up questions, so
 8 I'm answering as counsel for MPCA. And then we're
 9 just asking if you want us to print out the
 10 calendars we will, but that's what it would be.
 11 That's what it would take. So just whatever you
 12 want, just decide.
 13 MS. MACCABEE: Relators would like copies
 14 of the Outlook calendars and copies of any other
 15 documents that were consulted in order to
 16 determine a list of questions.
 17 MR. SCHWARTZ: Yes, we will provide it.
 18 MS. MACCABEE: And I'm sorry. In order to
 19 determine a list of meetings, and that's the list
 20 of meetings that's reflected in Exhibit 6 and
 21 Exhibit 7.
 22 MR. SCHWARTZ: I take it with that we're
 23 done.
 24 MR. NELSON: Yes.
 25

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1 ERRATA SHEET
 2 Page/Ln Correction Reason Change
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1 I, MPCA DESIGNEE JEFF UDD, have read this
2 deposition transcript pages 1 - 30 and acknowledge
3 herein its accuracy except as noted on the errata
4 sheet.
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Signature

Notary Public

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1 STATE OF MINNESOTA
2 COUNTY OF DAKOTA

3 I, MARY E. PIEHL, hereby certify that I
4 reported the Deposition by Written Questions of
5 MPCA DESIGNEE JEFF UDD on the 15th day of October,
6 2019 in St. Paul, Minnesota, and that the witness
7 was by me first duly sworn to tell the truth and
8 nothing but the truth concerning the matter in
9 controversy aforesaid;

10 That I was then and there a notary public
11 in and for the County of Dakota, State of
12 Minnesota; that by virtue thereof I was duly
13 authorized to administer an oath;

14 That the foregoing transcript is a true and
15 correct transcript of my stenographic notes in
16 said matter, transcribed under my direction and
17 control;

18 That the cost of the original has been
19 charged to the party who noticed the deposition
20 and that all parties who ordered copies have been
21 charged at the same rate for such copies;

22 That the reading and signing of the
23 deposition was not waived;

24 That I am not related to any of the parties
25 hereto nor interested in the outcome of the action
and have no contract with any attorneys, or
persons with an interest in the action that has a
substantial tendency to affect my impartiality.

WITNESS MY HAND AND SEAL THIS 24TH DAY OF
OCTOBER, 2019.

MARY E. PIEHL
Notary Public

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<p>A</p> <p>a.m 5:6 28:1 A19-0112 8:5 A19-0118 8:5 A19-0124 8:5 ability 7:5 9:21 accuracy 30:3 acknowledge 30:2 Act 8:11,12 9:9 9:25 11:5,8 action 31:16,17 actual 22:24 25:16 added 12:4 additional 10:23 administer 31:8 administrative 8:2,3 20:20 administrator 14:8 Adonis 3:23 adonis.neble... 3:21 ADVOCACY 3:2 Advocacy's 11:7 Affairs 20:10 affect 31:18 affiliated 7:13 aforsaid 31:6 agency 3:19 5:4,19 9:3,6 10:3 20:2 agendas 8:23 agents 9:4,6,12 10:4 agree 19:20 20:15 agreed 6:1 15:4 17:11 Agreement 4:11 6:13 12:7 13:13 ahead 6:10 Alfonso 3:23 aloud 14:23 Alternative 8:15 amended 13:14 amendment 14:13 Ann 20:1 answer 4:5 7:1 7:4 12:22 13:1,9 15:10 16:25 17:12 19:18,22 20:12 24:7 26:4,7,8,9,18 26:24 27:5 answered</p>	<p>20:15,16 answering 26:21 27:8 answers 7:8 21:22 anticipated 16:21 apparently 26:15 Appeal 8:6,17 appealed 20:22 appeals 8:4,4 20:21 APPEARANCES 2:1 3:1 applicant 17:18 application 12:7 13:21,25 14:2,6,10 appreciate 25:10 appreciated 5:19 approximately 5:6 28:1 April 12:11,19 13:4 21:3,7 asked 7:11,15 7:19,22 10:16 22:18 23:16 asking 24:15 26:25 27:9 asks 22:17 Assistant 3:24 associated 10:21 assume 14:5 Assuming 23:14 attached 10:13 13:15 28:3 attachments 6:15 attorney 7:6 28:6 attorneys 28:6 31:17 author 7:16 authorized 31:8 authors 7:17 Avenue 2:2 3:3 3:8 aware 14:17,24</p>	<p>25:21 26:3 Band 3:17 based 13:25 17:1 19:19 20:12 25:8 basis 13:21 17:13 began 19:15 beginning 11:6 behalf 5:21 believe 15:5 20:14 23:1 believed 21:14 best 7:5 big 15:24 Biological 2:17 3:6 Boundary 2:18 Brad 20:10 Brian 18:9,14 18:15 19:7 brief 16:9 26:2</p>	<p>C</p> <p>c 5:13 7:7 11:20 19:13 21:9 C-L-A-R-K 18:8 calendars 8:24 26:10 27:10 27:14 call 7:25 12:12 12:21 13:5 21:8 called 5:9 case 1:3,6 8:5 19:5 23:15 Cathy 12:2 cc 12:4 Center 2:13,17 3:2,6 11:6 certify 31:3 CHAMBERS 3:13 Change 3:8 29:2 changed 12:9 changes 10:21 character 20:8 charged 31:12 31:13 check 24:1,7,12 Chippewas 3:18 Civil 1:3 claim 13:11 claims 11:12 13:3 clarification 25:9 clarified 24:3 clarify 24:9 25:2 Clark 18:8 19:1</p>	<p>Clean 9:9,25 clean-up 5:23 commencing 5:5 comment 10:17 10:18 14:6 18:22 19:2,9 commented 8:7 15:1 16:16 comments 4:15 8:7 10:21,22 14:9,21,22,23 18:1,4,18,25 19:2,4,15 20:23 21:1,4 21:14 22:3,13 Commissioner 3:24 10:23 common 18:23 communicati... 7:22,24,24,25 8:8 company 14:1 completed 19:15 comprising 9:18 computers 11:14 13:6 concerning 9:17 31:5 concerns 8:8 conclude 13:21 concluded 14:11 28:2 conclusion 15:22 concur 17:3 conform 16:2 connection 8:14 15:19 17:25 consisting 9:17 consult 7:5 consultation 19:8 consulted 21:21 27:15 cont'g 3:1 contested 1:5 19:5 contract 31:17 contractors 18:21 control 3:19 5:4 9:5,20 10:3 19:24 31:11 controversy 31:6 conversation 12:1 copies 27:13,14</p>	<p>28:6 31:13,13 copy 6:2,7 11:16 correct 6:3 31:10 Correction 29:2 correctly 23:10 cost 31:12 counsel 3:23 6:17 9:12 10:5 18:12 25:10 26:15 26:22,24 27:8 county 1:2,8 31:1,7 course 6:5 court 1:1,3 6:22 8:3,15 10:7 20:16,21 22:21 court's 19:21 created 8:21 CROWELL 2:2 Curt 10:13 custodian 7:18 customarily 12:15</p>	<p>D</p> <p>d 4:1 5:13 7:11 21:13 Dakota 31:1,7 Data 8:11,12 11:5,7 date 7:17,21 11:15,18 13:7 15:5 16:21 17:5,11 20:18 dates 19:13 Davida 2:23 day 5:2 31:4,19 days 14:8,10 DC 2:3 3:14 December 9:15 20:17,25 21:6 21:11,17 decide 27:12 decision 20:4 20:22 declaration 8:13,13 12:10 deficiencies 13:20 definition 7:9 DEFINITIONS 6:24 deleted 8:19 11:10,17,18 demand 9:23 Denial 1:5 deposition 1:14 5:1,16,25 6:6 6:16 10:9 25:23 26:25</p>	<p>28:2 30:2 31:3,12,15 Describe 14:12 DESCRIPTION 4:9 designated 5:21 designee 1:15 5:2,8,16 30:1 31:4 determine 27:16,19 direction 31:10 DIRECTIONS 6:24 director 14:4 20:1 discarded 8:18 11:13,14 13:5 13:6,12 Discharge 1:6 9:7 discuss 12:6 discussing 9:18 discussions 14:12,16,18 Disposal 1:7 9:8 District 1:1,2 8:14 Diversity 2:17 3:6 Division 3:23 document 7:7 7:8,15,18,18 12:17,20 13:4 13:12 21:13 22:11 documents 4:10,13 7:16 8:16,20 15:21 15:25 16:2,4 18:22 19:23 20:2,19 21:18 21:20 22:2,4 22:5,14,19,23 22:24 23:2,3 23:4,6,8,10 23:17,20,23 24:11 25:8,11 25:16 27:3,15 draft 4:15 14:21 18:1 20:23 21:4 22:3 drafted 18:24 19:1,4 drafting 18:22 drawings 8:25 du 3:17 Due 8:15 duly 5:10 31:5 31:8 dwilliams@g...</p>
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2:22	examine 9:23	G 5:13 7:22	impartiality	katrina.kessl...	17:3,16 19:20
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