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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

**RESPONSE TO RESPONDENT POLY MET MINING INC.'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF ALLEGED IRREGULARITIES THAT EXCEED THE SCOPE OF THE MATTER**

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## INTRODUCTION

Although Respondent Poly Met Mining, Inc. ("PolyMet") has styled its motion as a motion *in limine,* in order to grant PolyMet's motion this Court would have to make dispositive rulings effectively dismissing three of the alleged procedural irregularities ("API") asserted by Relators in this proceeding. Since such a dispositive ruling would effectively be a summary judgment, PolyMet's motion should be treated as a summary judgment motion rather than a motion *in limine.* As the Court has already ruled that it is not entertaining summary judgment motions in this proceeding, PolyMet's motion should be summarily denied.

To the extent the Court decides to treat PolyMet's motion as it is styled, as a *motion in limine,* it should be denied because PolyMet seeks to exclude relevant evidence wholly within the scope of this hearing that Respondent Minnesota Pollution Control Agency ("MPCA") engaged in irregular procedures when permitting the NorthMet Mine Project ("the Project"). Relators Center for Biological Diversity, Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy ("MCEA"), WaterLegacy, and the Fond du Lac Band of Lake Superior Chippewa (collectively, "Relators") ask this Court to deny PolyMet's motion.

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## FACTUAL BACKGROUND

Since at least 2015, MPCA has sought to influence EPA to provide comments orally rather than in written form on mining permits. Back then, MPCA chastised EPA for submitting written comments rather than having a meeting or conference call. (Relators Ex. 370). That influence continued throughout the National Pollutant Discharge Elimination System/State Disposal System ("NPDES") permitting process for the Project. (Relators Exs. 685 (Foss reminds staff in 2016 not to create a written record); 333 (2018 Stine requests EPA not to send written comments); 498 (undisclosed emails regarding issues with "submitting comments on Polymet")).

In June 2016, PolyMet submitted its application for a NPDES permit for the Project ("July 2016 application"). In November 2016, EPA sent a deficiency letter. (Relators Exs. 107, 306). In so doing, EPA exercised its right under the Memorandum of Agreement ("MOA") between MPCA and EPA to determine "the application [was] not complete." (Realtors Ex. 704 at 3-4). Under the MOA, once EPA sent a deficiency letter, MPCA could not process the application "until all deficiencies identified by EPA [were] corrected and [MPCA] receive[d] a letter from the EPA concurring with the Director that the application [was] complete." (*Id.* at 4 (emphasis added)). MCPA never received such a letter. (Relators Ex. 572 ¶ 13).

PolyMet updated its July 2016 application in October 2017 ("October 2017 update"). (Relators Exs. 19 (October 2017 "Updated permit application")); 348 at 5 ("updated in October 2017"), 350 ¶ 3 ("updated in November 2016 and again in October 2017")). In December 2018, MPCA issued a NPDES Permit to PolyMet (the "PolyMet Permit"). (Relators Ex. 349). The PolyMet Permit described PolyMet's application as follows: "The proposed mine and processing facilities . . . are described in detail in the [NPDES] Permit Application dated July 2016 and updated in October 2017 (*collectively, permit application*)." (*Id.* at 3 (emphasis added)).

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Relators appealed the PolyMet Permit. (Relators Exs. 664-66). Relators challenged the PolyMet Permit's legality, whether the PolyMet Permit was supported by substantial evidence, and whether MPCA's decision was arbitrary and capricious. (*See id.*) MPCA submitted the administrative record to the Minnesota Court of Appeals in April 2019. (Relators Ex. 568). The administrative record included the Final Environmental Impact Statement (*id.* at 32), over 85 documents dated between 2011 and 2015 (*see id.* at 1-65), the July 2016 application (*id.* at 31), and over 50 documents dated between the July 2016 application and the October 2017 update (*see id.* at 1-65).

WaterLegacy filed a motion to transfer the appeal to the district court based on the allegation that MPCA sought to keep EPA criticisms of the Project out of the public record and the record for judicial review. (Order at 3 ("Transfer Order"), Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 15, 2019)). Finding WaterLegacy "provided substantial evidence of procedural irregularities," the Court of Appeals transferred Relators appeals to this Court "for the limited purpose of an evidentiary hearing and determination of alleged irregularities in procedure." (*Id.* at 4). WaterLegacy's submissions supporting the Court of Appeals' substantial evidence finding included claims about MPCA's conduct during environmental review, failure to put evidence in the administrative record showing PolyMet resolved the deficiencies in the July 2016 application, and effort to hide EPA's substantive comments from the public and the courts. (WaterLegacy Mem. in Supp. of Mot for Transfer ("Transfer Motion") at 2-5, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. May 17, 2019); WaterLegacy Reply Mem. in Supp. of Mot. for Transfer ("Transfer Reply") at 3-4, 13, 20, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 5, 2019); Decl. of Paula Maccabee ("Maccabee Decl."), Exs. A, C, F-H, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. May 17, 2019)). In August, Relators submitted their list of

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alleged procedural irregularities ("APIs") to this Court and opposing counsel, including claims related to environmental review, violation of the MOA related to the July 2016 application, and failure to inform the public of EPA's substantive concerns with the PolyMet Permit. (*See* Relators' List of Alleged Procedural Irregularities ("APIs") ¶¶ 1, 6, 7 (Aug. 14, 2019)).

On December 27, 2019, PolyMet filed its motion to "Exclude Evidence of Alleged Irregularities that Exceed the Scope of this Matter." (Mem. in Supp. of Mot. to Exclude Evidence of Alleged Irregularities ("Mem. to Exclude") at 1 (Minn. Dist. Ct. Dec. 27, 2109)). PolyMet seeks to exclude all testimony and evidence related to three of the APIs, namely claims related to environmental review, violation of the MOA related to the July 2016 application, and failure to inform the public of EPA's substantive concerns. (*Id.*) Relators respectfully request this Court deny PolyMet's motion.

## ARGUMENT

### I. THE COURT SHOULD DISMISS POLYMET'S DISGUISED SUMMARY JUDGMENT MOTION

PolyMet improperly attempts to have this Court preclude, as a matter of law, APIs the Court of Appeals transferred to this Court. (Mem. to Exclude at 1). In doing so, PolyMet seeks relief inconsistent with the Court of Appeals' order, incompatible with due process, and in conflict with the summary judgment rules. Realtors ask the Court to deny PolyMet's motion.

#### A. The Motion Is a Disguised Summary Judgment Motion.

PolyMet seeks for this Court to decide as a matter of law that a part of API 1 and all of API 6 and API 7 "exceed the scope of this matter," such that Relators should not be allowed to present testimony and evidence on those APIs. (*See* APIs ¶¶ 1, 6-7). Although framed using words like "relevance," "undue delay," and "confusing the issues," PolyMet seeks to eliminate three

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claims—arguments which would be appropriately set forth in a motion for summary judgment or other dispositive motion.

"The purpose of a motion in limine is to prevent 'injection into trial of matters which are irrelevant, inadmissible and prejudicial.' " *Hebrink v. Farm Bureau Life Ins. Co*., 664 N.W.2d 414, 418 (Minn. App. 2003) (quoting *Motion in Limine*, Black's Law Dictionary (6th ed.1991)). Courts have held that, due to the "abbreviated consideration given to evidentiary rulings, in comparison to the detailed consideration normally given a dispositive motion," parties are not justified to use motions *in limine* to substitute for a dispositive motion. Robert A. Matthews, 7 *Annotated Patent Digest* § 44:5 (2008) (listing relevant patent cases); *see also* 75 Am. Jur. 2d Trial § 42 & ns.10-14 (listing cases showing "[t]he use of motions in limine to summarily dismiss a portion of a claim has been condemned"); Conlin et al., 2 *Litigating Tort Cases*, § 19:20 & n.7 (listing cases showing that a motion *in limine* should not "be used as a substitute for a motion for summary judgment").

Here, PolyMet seeks to have this Court rule API 1, API 6, and API 7 "exceed the scope of the Court of Appeals' transfer" as a matter of law. Thus, the nature of PolyMet's motion is not one *in limine* but rather one for summary judgment. *Legacy Rests., Inc. v. Minn. Nights, Inc.*, No. A11-1730, 2012 WL 3023397, at *5 (Minn. App. July 23, 2012) (noting that when assessing whether a motion *in limine* is a disguised summary judgment motion, the Court must focus "on the nature of the motion, not the effect").[1] This is shown by the fact that the evidence PolyMet seeks to exclude is *only* irrelevant if the Court rules the APIs exceed the scope of the Court of Appeals' transfer. Without that legal finding, PolyMet has no basis to exclude Relators' claims properly set forth to both the Court of Appeals and this Court in their APIs. As such, this Court should consider this

[1] Relators have provided copies of all unpublished cases as exhibits to the Declaration of Evan A. Nelson in Support of Relators' Responses to Respondents' Motions *in Limine*, and Relators' Pre-trial Brief.

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motion to be one for summary judgment. *Mille Lacs Power Sports, Inc. v Langerman*, No. 48-CR-11-1657, 2013 WL 10154648, at *3 (Minn. Dist. Ct. Nov. 13, 2013) (finding a motion *in limine* tantamount to a motion for summary judgment).

**B. For the Same Reasons this Court Struck MPCA's Summary Judgment Motion this Court Should Strike PolyMet's Disguised Summary Judgment Motion.**

At the January 10, 2020 informal conference, this Court granted Relators' Motion to Strike MPCA's Motion for Partial Summary Judgment on the grounds that the motion was improper. (*See* Letter to Judge Guthmann from Relators (Dec. 30, 2019)). The Court ruled its pretrial orders did not contemplate dispositive motions, MPCA did not request a dispositive motion deadline, and MPCA's motion was untimely. For the same reasons, this Court should dismiss PolyMet's disguised summary judgment motion.

In cases where a motion *in limine* functions as a motion for summary judgment, the moving party must comply with the summary judgment rules. *See Hebrink*, 664 N.W.2d at 419. Here, PolyMet's disguised summary judgment motion does not comport with this Court's pre-trial order or the Minnesota Rules of General Practice, and prejudices Relators. As the Court reminded the parties at the January 10, 2020 informal hearing, the Court did not authorize dispositive motions. (*See* Am. Order Setting Evidentiary Hr'g ¶¶ 2, 11 (Minn. Dist. Ct. Nov. 19, 2019)). PolyMet also did not ask the Court to set a dispositive motion schedule or ask for a hearing prior to filing its disguised summary judgment motion. PolyMet also failed to cite any authority under which it asserts the Court can grant summary judgment, *see* Minn. R. Gen. Prac. 115.03(d)(4), and did not comply with the timing requirements in Minn. Gen R. Prac. 115.03(a). Finally, PolyMet's untimely, disguised summary judgment motion prejudices Relators who responded to this

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summary judgment motion on an abbreviated schedule without the full panoply of evidence that will be developed at the evidentiary hearing.

Like MPCA's Motion for Partial Summary Judgment, the Court should dismiss PolyMet's improper and untimely disguised summary judgment motion.

### C. Granting PolyMet's Disguised Summary Judgment Motion Is Inconsistent with the Court of Appeals' Transfer Order.

In asking this Court to dismiss Relators' claims, PolyMet seeks judgment on APIs WaterLegacy submitted to the Court of Appeals. The Court of Appeals directed this Court to conduct an evidentiary hearing and determine the irregularities as alleged in WaterLegacy's Motion to Transfer ("Motion to Transfer"). (Transfer Order at 4). As this Court succinctly stated, the scope of the evidentiary hearing is "[w]hat happened, and was it irregular." (Telephone Conf. to Discuss Discovery Disputes Tr. ("Sept. Conf. Tr.") 24:3 (Sept. 16, 2019)).

As set forth in the APIs, WaterLegacy's submissions supporting the Motion to Transfer included explicit claims about MPCA's conduct during environmental review, (Transfer Reply at 3-4; Maccabee Decl., Ex. A, H), failure to put evidence in the administrative record that EPA sent a letter stating PolyMet's application deficiencies were resolved, (Transfer Reply at 4, 20; Maccabee Decl., Ex. H), and a concerted effort to hide EPA's substantive comments from the public, (Transfer Motion at 2-5; Maccabee Decl. Exs. A, C, F-G, H). (APIs ¶¶ 1, 6-7). In the evidentiary hearing, this Court is reopening "an otherwise closed appellate record so extra record materials may be developed" on WaterLegacy's allegations to determine "whether there actually were procedural irregularities." (Rule 16 Conf. Tr. 94:8-12 (Aug. 7, 2019)).

PolyMet asks for judgment as a matter of law on the very claims that caused the Court of Appeals to reopen the administrative record and transfer the matter to this Court. This Court should

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decline to issue summary judgment before Relators are offered an opportunity to develop the record.

**D. PolyMet's Disguised Summary Judgment Motion Does Not Comport With Due Process.**

Dismissing Relators' claims at this juncture also does not comport with due process. As this Court noted, "[t]he purpose of the Administrative Procedures Act and the appeal right itself is to create a due process for the parties to have the matter fully and fairly heard." (Rule 16 Conf. Tr. 97:11-13). And where "the parties are not allowed to have access to the information that they allege they need to prove that has been hidden, there isn't any due process." (*Id.* at 13-17).

If this Court effectively issues summary judgment on Relators' claims before the evidentiary hearing, Relators will be denied access to the information needed to support their claims. Relators have not been allowed to serve interrogatories, conduct oral depositions, or secure any pre-hearing inquiry from several key MPCA witnesses, including Shannon Lotthammer, Ann Foss, John Linc Stine, Michael Schmidt, and Rebecca Flood. Relators' access to information has been further constrained by MPCA's destruction and deletion of records. Moreover, for the witnesses who sat for written depositions, including Jeff Udd, Stephanie Handeland, and Richard Clark, Relators have not had any opportunity to cross-examine or ask clarifying questions for the answers given.

Even in proceedings where the Minnesota Rules of Civil Procedure govern, Minnesota law prohibits the granting of summary judgment when an opposing party has been allowed only minimal discovery and the information the party needs to defend against summary judgment is in the moving party's sole possession. *U.S. Bank Nat'l Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 433-34 (Minn. App. 2000). In these proceedings where the Court seeks to "create a due process

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for the parties to have the matter fully and fairly heard," (Rule 16 Conf. Tr. 97:11-12), this Court must reject PolyMet's motion for summary judgment on claims prior to the evidentiary hearing.

## II. THE EVIDENCE POLYMET SEEKS TO EXCLUDE IS RELEVANT

In addition to seeking summary judgment prior to the evidentiary hearing, PolyMet requests this Court prohibit all testimony and evidence that regards environmental review, which pre-dates the October 2017 update, and that regards EPA's substantive comments on the PolyMet Permit. This evidence is relevant to this proceeding and is needed for this Court to evaluate "[w]hat happened, and was it irregular," (Sept. Conf. Tr. 24:3).

The Administrative Rules of Evidence provide that "irrelevant" and "immaterial" evidence must be excluded. Minn. Stat. § 14.60; Minn. R. 1400.7300. In a Minnesota Administrative Procedures Act ("MAPA") hearing, the Minnesota Rules of Evidence and court decisions are used to determine whether evidence is "irrelevant" or "immaterial." *Sinner v. E. Cent. Sch. Dist. (ISD) #2580*, No. 4-3100-17253-2, 2006 WL 3488835, at *2 (OAH Sept. 21, 2006). Evidence is relevant "when it logically or reasonably tends to prove or disprove a material fact in issue, or tends to make such a fact more or less probable, or affords a basis for or supports a reasonable inference or presumption regarding the existence of a material fact." *State v. Henderson*, 620 N.W.2d 688, 699 (Minn. 2001) (internal quotation marks omitted), *see also* Minn. R. Evid. 401.

### A. The Scope of Relevant Information Is Broader than PolyMet's Interpretation.

PolyMet asks this Court to interpret the scope of the evidentiary hearing far too narrowly. PolyMet avers that "[t]he only question before the Court of Appeals is whether the 'decision of the agency' to issue an NPDES Permit . . . was lawful." (Mem. to Exclude at 7). According to PolyMet, only evidence related to "lawfulness" is relevant. But that is not the scope of review as set forth in the MAPA.

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When a party appeals a permit under MAPA, the Court of Appeals evaluates much more than just whether the decision was "lawful." (*See* Mem. to Exclude at 7). Rather, MAPA's judicial review statute provides that:

> the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
>
> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) unsupported by substantial evidence in view of the entire record as submitted; or
> (f) arbitrary or capricious.

Minn. Stat. § 14.69. The reopening of the record allows this Court "to take testimony and to hear and determine the alleged irregularities in procedure" as they relate to the scope of review in section 14.69. *See* Minn. Stat. § 14.68; (*see also* Transfer Order at 2). The substantive cases stayed at the Court of Appeals raise more than challenges to unlawful procedure. (*See* Exs. 664-66). On appeal, the Court of Appeals must also evaluate whether the PolyMet Permit was affected by an error of law, unsupported by substantial evidence[2] or arbitrary and capricious.[3] (*Id.*)

[2] Substantial evidence means: (1) "[s]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion"; (2) "[m]ore than a scintilla of evidence"; (3) "[m]ore than some evidence"; "[m]ore than any evidence"; and "[e]vidence considered in its entirety." *Cable Commc'ns Bd. v. Nor-W. Cable Commc'mns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984). "The substantial evidence test requires a reviewing court to evaluate the evidence relied upon by the agency in view of the entire record as submitted." *Id.* The Court should affirm only if the agency "engage[d] in reasoned decisionmaking," but should reverse where there is a " 'combination of danger signals which suggest the agency has not taken a "hard look" at the salient problems' " and the decision lacks " 'articulated standards and reflective findings.' " *Id.* (quoting *First Nat'l Bank of Long Prairie v. Dep't of Commerce*, 350 N.W.2d 363, 368 (Minn. 1984)).

[3] "An agency's decision is arbitrary or capricious if the agency (a) relied on factors the legislature never intended it to consider, (b) entirely failed to consider an important aspect of the problem, (c) offered an explanation for the decision that runs counter to the evidence, or (d) rendered a decision so implausible that it could not be ascribed to a difference in view or the result of agency

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Relators' APIs relating to MPCA's duty of candor, duty to encourage public participation, common law obligations to create an adequate record, and common law requirement to follow prior norms and practices, along with other claims, go directly to whether MPCA's decision to issue the PolyMet Permit was unsupported by substantial evidence, arbitrary, and capricious. (*See* APIs ¶¶ 1-21). At the conclusion of the evidentiary hearing, these will be questions of "consequence" to the Court of Appeals. *See, e.g.*, *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999) (reversing a county's decision where the county failed to "take seriously their responsibility to develop and preserve a record that allows for meaningful review by appellate courts"); *White v. Minn. Dep't of Nat. Res.*, 567 N.W.2d 724, 735 (Minn. App. 1997) ("If the evidence submitted outside the administrative record demonstrates that the agency's effort was clearly inadequate . . . the court's proper function is to remand to the agency for correction of the agency's errors."); *Peoples Nat. Gas Co.*, 342 N.W.2d at 352 (analyzing whether an agency's departure from prior norms made its decision arbitrary and capricious); *Sec'y of Agric. v. United States*, 347 U.S. 645, 653 (1954) (remanding an agency decision where the "Commission ha[d] not adequately explained its departure from prior norms"); *McHenry v. Bond*, 668 F.2d 1185, 1192 (11th Cir. 1982) (remanding an agency decision where the agency abandoned its own precedent); *Citizens for a Better Env't v. E.P.A.*, 596 F.2d 720, 725 (7th Cir. 1979) (invalidating EPA' approval of the Illinois NPDES program for failing to encourage public participation); *Miss. Dep't of Envtl. Quality v. Weems*, 653 So. 2d 266, 281 (Miss. 1995) (quoting 2 Am. Jur. 2d § 530 (1994) ("[F]ailure of an agency to abide by its rules is per se arbitrary and capricious as is the failure of an administrative body to conform to prior procedure without adequate explanation for the change.").

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expertise." *Watab Twp. Citizen Alliance v. Benton Cnt'y Bd. of Comm'rs*, 728 N.W.2d 82, 89 (Minn. App. 2007).

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Relators are entitled to develop the record of all APIs to support their claims regarding deficiencies in the PolyMet Permit.

**B. Evidence Beginning in Environmental Review Is Relevant to Show MPCA's Pattern of Conduct, as well as, Motive, Intent, Preparation, and Plan.**

PolyMet's request to exclude evidence that MPCA sought to prevent the creation of a record of EPA concerns with the PolyMet Permit during environmental review must be denied. (Mem. to Exclude at 8). PolyMet's proposed limitation is inconsistent with MAPA and the evidence is wholly relevant to whether MPCA engaged in irregular procedures during the permitting process. Namely, the evidence shows a pattern of conduct, motive, opportunity, preparation, and plan.

Under MAPA, the Court of Appeals reviews the record before the agency " 'at the time it made its decision.' " *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 173 (Minn. App. 2001). The administrative record MPCA submitted to the Court of Appeals included numerous documents from the environmental review period, including the Final Environmental Impact Statement, (*see* Relators Ex. 568 at 32), and over 85 documents dated between 2011 and 2015, (*see id.* at 1-65). Thus, MPCA itself determined that information received during environmental review was considered when MPCA made the PolyMet Permit decision. Limiting Relators from developing the administrative record for this time period is, therefore, improper.

Further, evidence during environmental review of the project is relevant to show MPCA's pattern of conduct to prevent EPA from creating a written record. In particular, evidence shows that, beginning in at least 2015, MPCA sought to prevent written EPA comments. In particular, in April 2015 EPA submitted written concerns regarding the project during environmental review and MPCA chastised EPA for submitting written comments rather than having a meeting or

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conference call. (Relators Ex. 685). This evidence shows that MPCA sought to avoid making EPA comments part of the public record for the Project before permitting even began.

Minnesota courts have admitted evidence of past acts showing patterns of conduct when it was related to a party's intent or a material question of fact. For example, in a child removal proceeding, the Court admitted evidence of pre-removal intakes and workgroups involving a mother and child to demonstrate a pattern of questionable conduct with regard to her children. *See In re Welfare of Child of D.L.D.*, 865 N.W.2d 315, 320–21 (Minn. App. 2015). Here, evidence from environmental review similarly shows MPCA's pattern of questionable conduct attempting to prevent EPA from creating a written record of concerns regarding the Project.

Furthermore, even if MPCA's conduct during environmental review is considered remote to the permitting process, "[r]elevancy concerns . . . are lessened if . . . there are intervening acts that show a repeating or ongoing pattern of very similar conduct." *State v. Ness*, 707 N.W.2d 676, 689 (Minn. 2006). Here, the record shows repeated efforts to prevent the creation of a written record regarding EPA's concerns with the PolyMet project, beginning in 2015 and through permit issuance. (*See* Relators Exs. 370, 498, 685). Under these circumstances, MPCA's pattern of conduct is relevant to whether MPCA engaged in irregular procedures during the permitting process.

Additionally, in Minnesota evidence of another wrong or act is admissible to prove "motive, opportunity, intent, preparation, [or] plan." Minn. R. Evid. 404(b). Here, MPCA's conduct during environmental review shows MPCA had a motive to prevent EPA written comments—preventing EPA concerns from becoming part of the public record. MPCA's conduct illustrates an intent to prevent the creation of a written record, and further shows MPCA's preparation and plan to influence EPA to stop providing written comment. MPCA's conduct

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during environmental review also corroborates other evidence showing MPCA's intent to hide EPA's concerns from the public. *See, e.g.*, *State v. Harris*, 560 N.W.2d 672, 677 (Minn. 1997) (admitting prior bad acts testimony under Rule 404(b) to corroborate other evidence).

Under these circumstances, evidence MPCA sought to prevent the creation of a written record of EPA concerns dating back to 2015 is within the scope of this hearing and wholly relevant to show MPCA's pattern of conduct, motive, intent, preparation, and plan to engage in irregular procedures during the permitting process. This Court should deny PolyMet's motion *in limine* to exclude such evidence.

### C. PolyMet's 2016 Application and the Permitting Process Leading to the October 2017 Update Are Wholly Relevant to this Proceeding.

PolyMet also seeks to exclude all evidence of procedural irregularities predating the October 2017 update, indicating that October 2017 update somehow "replaced" the July 2016 application. (Mem. to Exclude at 9). PolyMet's limitation is not supported by the law or the facts.

First, revising a permit application after an EPA objection does not constitute a "replacement" to the original application. Take, for example, a wetland permit application a road commission submitted in *Marquette County Road Commission v. U.S. Environmental Protection Agency*, 726 F. App'x 461 (6th Cir. 2018). There, EPA rejected the road commission's initial application for failure to comply with the Clean Water Act. *Id.* at 464. The road commission revised its application "numerous times," but the "EPA remained unsatisfied." *Id.* While continuing attempts to resolve EPA's concerns, authority to process the permit transferred from the state agency to the U.S. Army Corps of Engineers ("the Corps"). *Id.* at 465. The Corps required the road commission to re-submit its application, which the road commission declined to do. *Id.* On appeal, the road commission claimed that the transfer of authority from the state agency to the Corps and the need to re-submit the application constituted a new application process. *Id.* at 467.

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The Sixth Circuit disagreed, holding that "[t]he shift of the review authority from [the state agency] to the Corps *is a midpoint, not a new, separate,* and *distinct application process*." *Id.* (emphasis added).

The circumstances here are far more straightforward. PolyMet submitted its initial application in July 2016. (Relators Ex. 568 at 29). PolyMet "updated" the permit in October 2017. (Relators Ex. 568 at 31). Contrary to "replac[ing]" the July 2016 permit, the October 2017 update was but a "midpoint" in the application process, "not a new, separate, and distinct application." *See Marquette Cty. Road Comm'n*, 726 F. App'x at 467.

Second, it was not until this matter was transferred to this Court that either MPCA or PolyMet indicated the October 2017 update started a new application process.[4] The administrative record includes PolyMet's July 2016 application (*See* Relators Ex. 568 at 31) and over 50 documents from between the July 2016 application and the October 2017 update (*see id.* at 1-65). As this Court found, "the administrative record dates back to the original permit application."[5] (Sept. Conf. Tr. 57:14-58:6). As such, limiting Relators from developing the administrative record for an admittedly relevant time period is improper. *See Hard Times Cafe, Inc.*, 625 N.W.2d at 173.

[4] PolyMet cites the MPCA Designee's deposition testimony to support its claim that the October 2017 update "superseded" the July 2016 application. That testimony is nothing more than a post-hoc rationalization unsupported by the administrative record. Minnesota courts disfavor post-hoc rationalizations for administrative decisions. *See, e.g.*, *In re Welfare of A.A.M.*, No. A04-1296, 2005 WL 757873, at *3 n.3 (Minn. App. Apr. 5, 2005); *Five Star Trucking, Inc. v. Minn. Transp. Regulation Bd.*, 370 N.W.2d 666, 668 (Minn. App. 1985). And federal courts consistently hold that "[t]he best evidence of why a decision was made . . . is usually an explanation, however brief, rendered at the time of the decision," not in submissions after the fact. *Ponte v. Real*, 471 U.S. 491, 509 (1985). Further, the Court should not give great weight to MPCA's deposition at this stage where Relators have not had the opportunity to cross-examine or ask clarifying questions for the answers given at the deposition.

[5] In fact, when questioned by the Court as to whether "the submission of the [October 2017] application wipe[d] out everything that[] occurred in connection with the application before it," PolyMet admitted "I don't think I could say that it wiped out." (Sept. Conf. Tr. 18:17-24).

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Further, the administrative record is replete with references to the October 2017 application as "updat[ing]" the July 2016 application. (Relators Exs. 19; 348 at 5 (PolyMet Permit fact sheet), 350 ¶ 3 (PolyMet Permit Findings of Fact)). In fact, contrary to PolyMet's repeated statement that "MPCA did not grant any permit under the" July 2016 application (*see* Mem. to Exclude at 5-6), the PolyMet Permit explicitly refers to the July 2016 application together with the October 2017 update as "the permit application." (Relators Ex. 349 at 3 (describing the July 2016 permit and October 2017 update as "collectively, permit application")). As Relators appealed the PolyMet Permit (Relators Exs. 664-66) and the PolyMet Permit relies on the July 2016 application (Relators Ex. 349 at 3), PolyMet's limitation is not supported by the record.

Third, this Court should not dismiss a valid procedural irregularity claim where material facts exist to support Relators' claim. No one disputes the EPA sent a deficiency letter regarding the July 2016 application in November 2016. (*See* Relators Exs. 107, 306). In so doing, EPA exercised its right under the MOA to determine "the application [was] not complete." (Realtors Ex. 704 at 3-4). Once EPA sent a deficiency letter, MPCA *could not process* the application "until all deficiencies identified by EPA [were] corrected *and* [MPCA] receive[d] a letter from the EPA concurring with the Director that the application [was] complete." (*Id.* at 4 (emphasis added)). In API 6, Relators claim a procedural irregularity exists because the record does not include a "letter from EPA stating that deficiencies in the [July 2016] application were resolved." (APIs ¶ 6). No such letter has been uncovered during discovery and Richard Clark, MPCA Metallic Mining Sector Unit Supervisor, admitted that EPA never sent such a letter. (Relators Ex. 572 ¶ 13). As such, direct evidence exists that an irregular procedure occurred when MPCA processed PolyMet's application without receiving a letter from EPA stating that the application was complete.

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Finally, evidence from the period between July 2016 and October 2017 is wholly relevant to whether MPCA engaged in irregular procedures during the permitting process. The permitting process began when MPCA received the July 2016 application (*see* Relators Exs. 349, 568) and all evidence of alleged irregularities during that period is relevant to this proceeding.

For this reason, this Court should deny PolyMet's motion to exclude evidence of alleged irregularities in the permitting process before October 2017.

**D. Evidence that MPCA Disregarded EPA's Substantive Concerns with the Permit Are Wholly Relevant to this Proceeding.**

Finally, PolyMet seeks to exclude all evidence regarding EPA's substantive concerns with the PolyMet Permit on the ground that such claims are irrelevant because this hearing is solely about procedure. (Mem. to Exclude at 10). But Relators allege that both MPCA's disregard for EPA's concerns (API 7, 10) and hiding EPA's concerns from the public (API 3-4, 8, 21) constitute irregular procedures. As such, EPA's substantive concerns about the PolyMet Permit are relevant.

For example, Relators allege MPCA interfered with its duty to respond to comments in 40 C.F.R. § 124.17 when MPCA asked EPA to submit its comments orally. (API 15). To prove this claim, Relators will show EPA made substantive comments on the draft NPDES permit, that those comments were "significant," that MPCA made substantial changes to the PolyMet Permit because of those substantive comments, and that MPCA did not make public disclosures regarding those substantive comments. *See* 40 C.F.R. § 124.17. Evidence of EPA's substantive concerns is relevant (and necessary) to prove each of these elements. By way of another example, Relators allege MPCA violated its duty of candor in Minn. R. 7000.0300. (API 16). To prove this claim, Relators will show MPCA took efforts to keeps EPA's substantive concerns regarding the PolyMet Permit from the public record. Evidence of EPA's substantive concerns and whether those particular concerns were disclosed the public is relevant to proving that claim. And a third example, Relators

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allege MPCA violated the Official Records Act, Minn. Stat. § 15.17. To prove this claim, Relators will show MPCA failed to create government records necessary to preserve a full and accurate knowledge of the NPDES permitting process. *See id.* EPA's substantive concerns – and their absence from the public record – is relevant to proving that element of the claim.

In addition to relevance to prove material facts, EPA's substantive concerns are also relevant to show MPCA's motive to hide EPA concerns from the record. *See* Minn. R. Evid. 404(b). The fact that EPA's substantive concerns are substantial creates a motive to prevent such information from being provided to the public where it would make permitting the project more difficult. (*See, e.g.*, Relators Exs. 128 (in a different matter MPCA indicating frustration that EPA review could "potentially delay[] permit issuance"); 139 (in a different matter MPCA indicating EPA's "comment letter disagreeing with [MPCA's] mercury approach will put [MPCA] in a tough position when responding to comments from Water Legacy")).

As such, this Court should deny PolyMet's motion *in limine* to exclude evidence of EPA's substantive concerns as they are relevant to Relators' claims.

## III. THE EVIDENCE POLYMET SEEKS TO EXCLUDE IS NOT CONFUSING AND WILL NOT RESULT IN UNDUE DELAY

Finally, PolyMet's request to exclude evidence predating the October 2017 update and EPA's substantive concerns because of the risks of "undue delay" and "confusing the issues" is without merit. First, under Minn. R. Evid. 403, the "danger" of confusing the issues "involve[s] the risk that a jury will be improperly influenced by the evidence." Clifford S. Fishman & Anne T. McKenna, 2 *Jones on Evidence* § 11:10 (7th ed. 2019). The law assumes judges have the expertise to deal with confusing issues and, as such, exclusion of evidence on this ground "has no logical application to bench trials." *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981). Second, to exclude the evidence for "undue delay" the "probative value of the

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evidence must be 'substantially' outweighed by prejudice." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). As set forth above, the evidence PolyMet seeks to exclude is highly probative to Relators' claims. Further, this Court has set a rigid schedule for no more than a ten-day evidentiary hearing and Relators fully intend to complete the evidentiary hearing in the time the Court allotted. Thus, the weight given for any undue delay for PolyMet is small in this matter.

## CONCLUSION

For the foregoing reasons, Relators respectfully request this Court deny PolyMet's Motion to Exclude Evidence of Alleged Irregularities that Exceed the Scope of this Matter.

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DATED: January 10, 2020

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## CERTIFICATION

The undersigned hereby acknowledges that sanctions may be imposed under Minn. Stat. § 549.211.

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