

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' RESPONSE TO  
MINNESOTA POLLUTION CONTROL  
AGENCY AND POLYMET MINING  
INC'S MOTIONS *IN LIMINE* TO  
EXCLUDE CERTAIN WITNESSES AND  
EVIDENCE BASED ON RELEVANCE  
AND FOUNDATION**

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Relators 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 (collectively, "Relators") hereby respond in opposition to the Motion *in Limine* filed by the Minnesota Pollution Control Agency ("MPCA") to exclude certain witnesses and evidence, as well as the following three Motions *in Limine* filed by PolyMet Mining, Inc. ("PolyMet"):

1. Motion *in Limine* to Exclude Testimony of Brian Branfireun, Emily Onello and Margaret Saracino;
2. Motion *in Limine* to Exclude Testimony of Catherine Kuhlman; and
3. Motion *in Limine* to Exclude Certain Exhibits for Which No Witness Has Foundation to Testify.

MPCA's and PolyMet's (collectively, "Respondents") motions present overlapping or similar issues regarding Relators' witnesses and exhibits. For ease of the Court, Relators respond in

opposition to Respondents' motions in this single consolidated brief. For the reasons discussed below, Relators respectfully request that the Court deny Respondents' motions.

### INTRODUCTION

Relators' position is that the Minnesota Administrative Procedure Act ("MAPA") governs evidentiary matters in this proceeding. *See* Relators' Motion *in Limine* to Admit Evidence Pursuant to the Minnesota Administrative Procedure Act (Dec. 27, 2019).<sup>1</sup> This Court has indicated that it would entertain objections to witnesses "as these witnesses are being questioned." Telephone Conf. Tr. ("Dec. Conf. Tr.") 14:4-5 (Dec. 6, 2019). The Court stated it was not "going to be making broad rulings of that nature in advance," and that it did not "make any sense to bring a motion *in limine* in that regard because it will all depend on the context of the witnesses' testimony at the time." *Id.* at 14:10-15.

Despite the Court's direction, Respondents have brought broad motions *in limine* seeking to exclude wholesale the testimony of important witnesses and entire categories of evidence. This Court should reject Respondents' improper attempts to limit the scope of this proceeding prior to testimony and trial.

### ARGUMENT

"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. Ct. App. 2003) (citing Black's Law Dictionary 1013 (6th ed.1991)). "A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context." *Luce v. United States*, 469 U.S. 38, 41 (1984). Evidence should be excluded on a motion *in limine*

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<sup>1</sup> There is a typographical error in Relators' motion which references the "Minnesota Administrative Protective Act" when it should reference the Minnesota Administrative Procedure Act.

“only when the evidence is clearly inadmissible *on all potential grounds.*” *United States v. Tartaglione*, 228 F. Supp. 3d 402, 406 (E.D. Pa. 2017) (emphasis added). Otherwise, “evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context.” *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004). In fact, a motion *in limine* that is “not directed toward specific evidence” should be denied “on that basis.” *Roa, Inc. v. Nicholson*, No. 62-CV-10-1734, 2012 WL 7659116 (Minn. Dist. Ct. Feb. 13, 2012).

### **I. This Court Should Deny Respondents’ Requests to Exclude Witnesses.**

MPCA seeks to exclude the testimony of seven witnesses identified by Relators. PolyMet also seeks to exclude the testimony of four of the same witnesses identified by MPCA. The witnesses that both MPCA and PolyMet seek to exclude are:

- Brian Branfireun, Ph.D., Professor of Ecohydrology, Biogeochemistry and Wetland Ecosystem Science, Western University London;
- Emily Onello M.D., Assistant Professor, Department of Family Medicine and Behavioral Health, University of Minnesota Duluth, Duluth Minnesota;
- Margaret Saracino, M.D., Staff Psychiatrist, Human Development Center Duluth, Minnesota; and
- Catherine Kuhlman, former EPA water program manager.

The additional witnesses that only MPCA seeks to exclude are:

- Kevin Pierard, former NPDES Program Branch EPA Chief;
- Krista McKim, EPA Scientist; and
- Mike Gallegos, XACT Data Discovery.

Under MAPA, “[a]ny party may be a witness and may present witnesses on the party’s behalf.” Minn. R. 1400.7200. “[T]he Minnesota Rules of Evidence do not actually govern administrative . . . hearings.” *See, e.g., Sinner v. E. Cent. Sch. Dist. #2580*, No. 4-3100-17253-2, 2006 WL 3488835, at 2 (OAH Sept. 21, 2006).<sup>2</sup> Further, “compliance with the Minnesota Rules of Evidence may demonstrate admissibility in an administrative proceeding,” but “it is not necessarily a requirement of admissibility.” *In re Risk Level Determination of Morris*, No. 1-1100-11701-2, 1998 WL 879166, at \*2 (OAH Sept. 1998). Nevertheless, “it is appropriate for the [administrative law judge] to at least seek guidance from those rules and decisions” construing the Minnesota Rules of Evidence to determine the admissibility of expert opinion evidence. *Sinner*, 2006 WL 3488835 at 2.

**A. MPCA Improperly Attempts to Limit the Scope of the Evidentiary Hearing Through Its Motion to Exclude Witness Testimony.**

At the outset, MPCA improperly attempts to interject legal issues into its motion to exclude witness testimony related to the water permitting process and MPCA’s issuance of National Pollutant Discharge Elimination System/State Disposal System (“NPDES”) Permit No. MN0071013 (“PolyMet Permit”). This Court should focus “on the nature of the motion, not the effect” when assessing whether MPCA’s motion *in limine* is actually a disguised summary judgment motion. *See, e.g., Legacy Rests., Inc. v. Minn. Nights, Inc.*, No. A11-1730, 2012 WL 3023397, at \*5 (Minn. App. July 23, 2012).<sup>3</sup> MPCA acknowledges that the scope of the

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<sup>2</sup> 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.

<sup>3</sup> MPCA raises similar legal arguments in its Motion for Partial Summary Judgment (“Motion PSJ”) filed on December 27, 2019. During a telephone conference on January 10, 2020, the Court rules to strike MPCA’s Motion for Partial Summary Judgment because this proceeding did not contemplate dispositive motions and the motion was untimely. This Court should similarly deny

evidentiary hearing is based on the Court of Appeals Transfer Order, MPCA Mot. at 4, but then attempts to limit the Transfer Order in ways that would significantly hinder this Court's ability to find facts that directly relate to whether MPCA engaged in procedural irregularities during the permitting process.

Specifically, MPCA acknowledges that this Court must determine "whether it was unusual for EPA not to submit written comments." MPCA Mot. at 3. Nevertheless, MPCA asserts that there is no "jurisdictional basis for testimony about . . . EPA's internal procedures; [or] . . . whether EPA followed its own procedures." *Id.* at 5. MPCA's contention would effectively preclude the Court from receiving the very evidence needed to make its determinations regarding procedural irregularities.

At the initial Rule 16 Conference, Relators explained that the Court of Appeals' Transfer Order did not enumerate all procedural irregularities alleged in the briefing on the Transfer Motion. *See* Rule 16 Conf. Tr. 29:11-25 (Aug. 7, 2019); *see also id.* at 30:1-17. As a result, the Court required Relators to file "a list of . . . alleged administrative irregularities . . . that was submitted to the court of appeals in its briefing." *Id.* at 96:10-15; *see also id.* at 103:12-25, 104:1-3. Relators submitted their list of APIs to this Court, including claims related to interactions between EPA and MPCA during the PolyMet permitting process. *See* Relators' List of Alleged Procedural Irregularities ("APIs") ¶¶ 1, 6-7 (Aug. 14, 2019) ("Relators' APIs"). At the September discovery conference, the Court stated:

I'm not going to entertain any objections to the itemization of procedural irregularities. Each of the procedural irregularities cited by the Relators was accompanied by a footnote. The footnote cited to the record of the court of appeals where the procedural irregularity was derived from.

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MPCA's motion to exclude witness testimony because it is, in fact, a request for a dispositive ruling that is improper and untimely.

Telephone Conf. Tr. (“Sept. Conf. Tr.”) 8:22-9:2 (Sept. 16, 2019).

To prove their APIs, Relators must call witnesses who have knowledge of the regular manner in which MPCA *and* EPA interact during a water permitting process in order to establish whether MPCA departed from those regular procedures or requested that EPA depart from its regular procedures in issuing the PolyMet Permit. MPCA’s attempt to exclude any witness testimony regarding EPA procedures or whether those procedures were followed is tantamount to requesting a dispositive ruling on Relators’ API that MPCA sought to keep EPA comments out of the administrative record.

The Court of Appeals transferred this proceeding to this Court for a hearing and determination of, among other things, whether “EPA departed from typical procedures” and whether “it was unusual for EPA not to submit written comments.” Transfer Order at 4. The Court should deny MPCA’s improper requests to preclude Relators, as a matter of law, from having their APIs heard and determined by this Court under the guise of excluding witness testimony.<sup>4</sup>

**B. Doctors Brian Branfireun, Emily Onello and Margaret Saracino Are Qualified Expert Witnesses that Will Provide Relevant Testimony as to the Materiality of Relators’ Alleged Procedural Irregularities.**

Relators are entitled to call Drs. Branfireun, Onello and Saracino as expert witnesses. Under Minnesota Administrative Practice and Procedure, expert witnesses may testify “if their specialized knowledge will assist the administrative law judge in developing an understandable and complete record.” 21 William J. Keppel, *Minnesota Practice—Administrative Practice and Procedure* § 9.36 (2d ed. 2019); *see also* Minn. R. of Evid. 702.

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<sup>4</sup> This Court should also deny MPCA’s request for many of the same reasons set forth in Relators’ Response to PolyMet’s Motion *in Limine* to Exclude Evidence of Alleged Irregularities that Exceed the Scope of the Matter (filed Jan. 10, 2020).

MPCA argues that these individuals do not qualify as experts because they have no personal knowledge of the procedures surrounding MPCA's approval of the PolyMet Permit. MPCA Mot. at 8, 10-11. Similarly, PolyMet argues that Drs. Branfireun, Onello and Saracino do not qualify as fact witnesses based because they were never employed by either MPCA or EPA and have no first-hand knowledge of the non-public interactions between MPCA and EPA. PolyMet Mot. at 6. PolyMet also disputes that these witnesses are qualified as experts but argues that, even if they were, "they are not qualified to opine of the procedures that MPCA uses to issue water quality permits." PolyMet Mot. at 7.

Expert witnesses are not required to have personal knowledge of the facts. *See, e.g., Sanchez v. Waldrup*, 136 N.W.2d 61, 64 (Minn. 1965) ("An expert witness may have, but usually does not have, any personal knowledge of the facts." (quoting *Miller v. United States*, 192 F. Supp. 218, 221 (D. Del. 1961))). But, as PolyMet acknowledged, Drs. Branfireun, Onello and Saracino do have some first-hand knowledge of the PolyMet permitting process. PolyMet Mot. at 2-4. Each individual participated in the PolyMet permitting process by submitting substantive comments or reports on the PolyMet Permit as experts either individually or on behalf of Relator WaterLegacy. *See* Relators' Exs. 660, 661, 662, 681. Dr. Onello also wrote an article pertaining to sulfide mining and human health risks for the journal of the Minnesota Medical Association. Relators' Ex. 585.

Relators do not seek to call these witnesses to testify as to the procedures MPCA or EPA should have followed during the permitting process. Rather, Relators will call these experts to assist the Court in developing an understandable and complete record. The expertise of these witnesses is critical to aiding the court in understanding the materiality of various EPA comments made during the permitting process. This record is necessary to assist the Court of Appeals in determining whether APIs resulted in substantive violations of Minn. Stat. § 14.69. *See, e.g., State*

by *Khalifa v. Hennepin Cty.*, 420 N.W.2d 634, 639 (Minn. App. 1988) (the reviewing court may reverse a decision made upon unlawful procedure on the basis that it prejudices appellant's substantial rights).

Dr. Branfireun is an international expert on wetlands ecohydrology and biogeochemistry, including the formation, fate and transport of methylmercury in wetland ecosystems. He serves as a full-time professor in the Department of Biology and Canada Research Chair in Environment and Sustainability the University of Western Ontario, London, Ontario, Canada. Relators' Ex. 660. Dr. Branfireun has authored numerous scientific articles related to his specialty. *Id.* Comments submitted by Dr. Branfireun during the permitting and 401 certification process relate to potential environmental impacts of the PolyMet Project as a result of mercury and sulfate discharges and hydrologic changes including methylmercury formation, bioaccumulation and transport. Relators Ex 681. Dr. Branfireun is expected to testify as to the effects of mitigation of mercury and sulfate discharge from the Project on methylmercury formation, fate and transport. Dr. Branfireun has expertise to provide testimony that will aid the Court in understanding statements in EPA's comments on the draft Permit pertaining to aquatic life and human health, *see* Relators' Ex. 337, and the significance of Relators' APIs.

EPA's comments on the draft PolyMet Permit expressly referred to human health concerns. Dr. Onello is expected to testify as to the medical and public health implications of the concerns raised by EPA. Dr. Emily Onello is an assistant professor at the University of Minnesota Medical School in Duluth. Relators' Ex. 682. She graduated from Mayo Medical School and completed her Family Medicine Residency at Mayo. *Id.* Dr. Onello has years of academic teaching, clinical practice and leadership in medical associations affecting the Lake Superior and northern Minnesota rural area. *Id.*

Dr. Margaret Saracino is a child, adolescent and adult psychiatrist at the Human Development Center in Duluth. Relators' Ex. 662. She received her medical degree from the University of Minnesota and completed her residency training at Mayo. *Id.* Ms. Saracino's opinion on the PolyMet Project focused on the human health impacts of methylmercury and other chemical releases. *Id.* Dr. Saracino is expected to testify about medical, neurological, psychiatric and related community impacts of methylmercury exposure, primarily as a result of consumption of fish contaminated with elevated levels of methylmercury.

PolyMet also argues that any testimony these witnesses would offer would be public information based on hearsay or duplicative of other testimony and therefore they should be excluded. PolyMet Mot. at 6. PolyMet's arguments are without merit. First, hearsay is not excluded from administrative proceedings when it possesses probative value. *In re Denial of the Foster Care License of Downwind*, No. 8-1800-9466-2, 1995 WL 937546, at \*1 (OAH Apr. 25, 1995). Second, Drs. Branfireun, Onello, and Saracino will each testify to different aspects of how MPCA's procedural irregularities materially harmed or prejudiced Relators. No other witnesses will provide this type of testimony. Lastly, it would be more appropriate for the Court to rule on objections to specific aspects of these witnesses' testimony during the evidentiary hearing. *See, e.g., Ind. Ins.*, 326 F. Supp. 2d at 846 (discussing that evidentiary rulings should be deferred until trial so that questions like foundation, relevancy and potential prejudice may be resolved in proper context).

**C. Kevin Pierard, Krista McKim and Catherine Kuhlman Are Proper Lay Witnesses and Should be Permitted to Testify During the Evidentiary Hearing.**

Relators are entitled to call Kevin Pierard, Krista McKim, and Catherine Kuhlman as lay witnesses who are either former or current EPA employees. "Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Minn. R. Evid. 602.

Additionally, witnesses may provide lay opinion testimony. Minn. R. Evid. 701. And “the mere fact that a witness could be qualified as an expert based on education, training or experience does not preclude that witnesses from expressing lay opinion testimony.” *In re Matter of Hibbing Taconite Mine*, No. 11-2004-31655, 2015 WL 3922873, at \*4 (OAH June 19, 2015).

**1. Kevin Pierard is a relevant lay witness with personal knowledge of both EPA procedures and what occurred between EPA and MPCA during the PolyMet and other NPDES permitting processes.**

Kevin Pierard is a former EPA employee with 36 years of experience and was the Region 5 Section Chief for the NPDES permitting program. Mr. Pierard personally participated in environmental review of the PolyMet Project and the PolyMet permitting process. Hundreds of the parties’ exhibits reflect his participation in meetings, conference calls, and important events regarding the PolyMet permitting process. Mr. Pierard’s testimony is directly relevant to Relators’ APIs, such as whether EPA followed its usual procedures. As the former Region 5 NPDES Section Chief, Mr. Pierard is certainly competent to testify to EPA’s water permitting procedures. In seeking to preclude his testimony, MPCA simply speculates on unlikely areas of inquiry, such as whether Mr. Pierard personally disagrees with EPA’s decision not to veto the PolyMet Permit. *See* MPCA Mot. at 10.

MPCA’s motion also appears to question the credibility of Mr. Pierard’s testimony without providing any basis for such assertions. MPCA Mot. at 10. MPCA’s erroneous speculation is no basis to exclude Mr. Pierard’s testimony. To the extent MPCA is inferring that Mr. Pierard’s testimony involves personal bias, those objections go to credibility and the weight of his testimony that are within the exclusive province of this Court as the factfinder. *See, e.g., State v. Engle*, 731 N.W.2d 852, 859-860 (Minn. 2007) (“Assessing the credibility and weighing their testimony are

within the exclusive provide of the factfinder, and the factfinder is ‘free to accept and reject part of a witness’s testimony.’”) (internal citation omitted).

**2. Krista McKim is a relevant lay witness with personal knowledge of what occurred during the PolyMet permitting process.**

Relators are entitled to call Krista McKim as a witness if EPA grants her permission to appear and testify at the evidentiary hearing. Ms. McKim is a current career Environmental Engineer in EPA Region 5 and actively participated in meetings and conference calls with MPCA as a member of EPA’s permitting team during the PolyMet permitting process, as documented in dozens of emails, meeting notes, and other records listed in the parties’ exhibits. As such, she has direct personal knowledge of the PolyMet permitting process. On September 19, 2019, Relators requested permission from EPA pursuant to 40 C.F.R. Part 2, subpt. C (“*Touhy* Request”) to allow Ms. McKim to testify at the evidentiary hearing.<sup>5</sup> Relators’ *Touhy* Request explained that Ms. McKim’s testimony as a fact witnesses is necessary due to her “technical expertise with NPDES permitting and years of communication with MPCA regarding the development of the [PolyMet Permit].” *Touhy* Request Ltr. at 2 (Sept. 19, 2019) (attached). Relators have diligently pursued their *Touhy* Request with EPA but still have not received confirmation as to whether EPA will make Ms. McKim available to testify.

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<sup>5</sup> Relators are surprised that MPCA seeks to exclude Ms. McKim because MPCA also submitted a request for an EPA representative to testify at the evidentiary hearing. *See* Rule 16 Conf. Tr. at 73:10-15. At that time, MPCA did not know who EPA would make available but noted it could be “Kurt Thiede . . . or someone on his staff.” *Id.* at 73:16-22. Mr. Thiede is a political appointee who at the time of this filing is the Chief of Staff to the Region 5 Administrator. Mr. Thiede is listed on MPCA’s witness list but Relators do not know whether EPA has granted him permission to testify.

MPCA argues that Ms. McKim should be prohibited from testifying for the same reasons as Mr. Pierard. *Compare* MPCA Mot. at 9 *with id.* at 10. As with Mr. Pierard, this Court should deny MPCA's attempt to exclude or limit Ms. McKim's testimony.

**3. Catherine Kuhlman is a relevant lay witness with personal knowledge on EPA procedures and process for interacting with state agencies.**

Catherine Kuhlman is a former EPA manager in Region 9. Relators' Ex. 721. During her tenure at EPA, Ms. Kuhlman interacted with state agencies that had delegated authority to implement the NPDES program. *Id.* Ms. Kuhlman has personal knowledge of EPA process and procedures for interacting with and commenting on state issued NPDES permits and the reasons supporting these customary procedures. Ms. Kuhlman has also worked for state agencies and has interacted with EPA as a state regulator developing and enforcing NPDES permits. *Id.* MPCA argues that Ms. Kuhlman should be excluded from testifying at the evidentiary hearing because she has no personal knowledge of MPCA's approval of the PolyMet Permit. MPCA Mot. at 9. However, Ms. Kuhlman is not being called to testify as to MPCA's procedures or the PolyMet permitting process, but to the nature and rationale for EPA's regular oversight procedures, including reviewing and commenting on state draft NPDES permits.

Ms. Kuhlman's testimony is both relevant and helpful to the Court and MPCA's attempt to exclude or limit her testimony should be rejected.

**D. Mike Gallegos Is a Court Neutral Expert Qualified to Provide Opinion and Factual Testimony Related to the Forensic Search of Documents within MPCA's Possession.**

Relators are surprised by MPCA's request to exclude Mike Gallegos from testifying at the evidentiary hearing. Mr. Gallegos is employed by Xact Data Discovery. He was retained pursuant to this Court's order to conduct a forensic search of MPCA's computers and servers as a neutral expert. *See* Rule 115.04 Order at 1-2 (Dec. 19, 2019). MPCA does not dispute Mr. Gallegos'

knowledge of forensic search experience but seeks to exclude him as an expert on the basis that testimony related to the forensic search “is irrelevant and outside the scope of this hearing.” *See* MPCA Mot. at 8-9.<sup>6</sup> To the contrary, Relators’ API Number 4 includes the allegation that MPCA “improperly destroyed, discarded, and failed to retain portions of the written record of communications with EPA regarding the [PolyMet] Permit . . . .” Relators API’s at 2. Relators APIs also relate to compliance with record keeping practices such as the Official Records Act. *See* Relators’ APIs at 5 (API number 14). Mr. Gallegos performed the forensic search conducted by Xact and Relators may need to call him to testify about that work.

This Court should deny MPCA’s request to exclude Mr. Gallegos’ testimony.

## **II. Respondents’ Motions to Exclude Exhibits in Their Entirety Are Improper and Premature.**

Respondents also seek to exclude many of Relators’ exhibits in their entirety, despite this Court’s indication that it was not “going to be making broad rulings of that nature in advance.” Dec. Conf. Tr. 14:10-15. Relators ask this Court to deny Respondents’ motions to exclude broad categories of evidence outside the context and circumstances under which Relators will offer this evidence at trial. Respondents’ motions are premature, vague, not limited to specific evidence, and ask the Court to speculate in a pretrial vacuum without the benefit of context of trial and testimony.

### **A. Relators’ Exhibits are Admissible Under MAPA’s Rules of Evidence.**

This Court should deny Respondents’ motions because they fail to show that Relators’ exhibits are “incompetent, irrelevant, immaterial, or unduly repetitious” under MAPA’s Rules of

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<sup>6</sup> MPCA also seeks to exclude Mr. Gallegos as a lay witness, MPCA Mot. at 8-9. However, Mr. Gallegos would be qualified to testify as a lay witness based on his experience and any personal knowledge gained by working with MPCA on the forensic search. *In re Matter of Hibbing Taconite Mine*, No. 11-2004-31655, 2015 WL 3922873, at \*4.

Evidence. Minn. Stat. § 14.60; Minn. R. 1400.7300. Consistent with Relators' Motion *In Limine* to Admit Evidence Pursuant to MAPA's Rules of Evidence, this Court should apply MAPA's "loose evidentiary standards." *Lee v. Lee*, 459 N.W.2d 365, 369 (Minn. App. 1990). MAPA's Rules of Evidence are appropriate for this extra-record administrative proceeding because they are applied to err on the side of admissibility "in order to create a complete record for thorough review and accurate, reliable decisions." *In re Further Investigation of Env'tl. & Socioeconomic Costs Under Minn. Stat. 216B.2422, Subdiv. 3*, No. 80-2500-31888, 2015 WL 6456257, at \*8 (OAH Sept. 15, 2015).

Under MAPA's Rules of Evidence, the threshold for admissibility is whether the evidence "possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 1400.7300, subp. 1. 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.

Respondents' motions seek to exclude many of Relators' exhibits that fall into six broad categories: (1) public records obtained from EPA under the Freedom of Information Act ("FOIA"); (2) public records obtained from MPCA regarding other NPDES permits; (3) news articles regarding the PolyMet NPDES permitting process; (4) documents obtained from MPCA that post-date issuance of the PolyMet NPDES permit; (5) documents that demonstrate the foundation of EPA's public records; and (6) a few miscellaneous documents. Relators intend to use the exhibits

in these categories for various purposes that are relevant to Relators' APIs, and will establish at the hearing that the exhibits introduced have probative value.

Relators will use public records obtained from EPA under FOIA to establish the sequence of events and the discussions probative of Relators' APIs. Due to MPCA's failure to retain or make records regarding the PolyMet permitting process, Relators have built their case in some measure from documents obtained from EPA. This Court should receive these relevant documents into evidence.

For instance, Respondents seek to exclude Relators' Exhibit 600, which is an email authored by Ms. McKim to other EPA staff, forwarding MPCA's public notice when it issued the PolyMet Permit on December 20, 2018. In that email, Ms. McKim wrote to "[n]ote the highlighted text," which referred to a sentence she highlighted in MPCA's public statement. The highlighted sentence asserted that "[t]he EPA had no comments during the period allotted." Relators' Ex. 600. Ms. McKim was a principal member of EPA's permitting team and present for meetings with MPCA, including the call on April 5, 2018 when EPA staff read its comments aloud to MPCA staff. Ms. McKim's email supports an inference that MPCA's public statement was misleading and part of the plan to conceal EPA's comments.

MPCA and PolyMet also attempt to exclude MPCA's records regarding other NPDES permits. These documents are especially relevant to Relators' APIs to show that what occurred during the PolyMet permitting process was indeed irregular. At the September discovery conference, this Court recognized that,

unless you have a base of comparison derived from past practice, it's hard for anybody, including the Court, to determine what's typical and what's atypical, because someone is going to say, well, these things are never written down, this is the way it's always been done.

Sept. Conf. Tr. 25:4-8. The Court accordingly rejected MPCA's objections to Relators' discovery requests that sought documents reflecting MPCA's past practices for other NPDES permits. Sept. Conf. Tr. 37:13-15. MPCA simply seeks another opportunity to keep proof of its process and practice out of a proceeding that is to determine "[w]hat happened, and was it irregular?" Sept. Conf. Tr. 24:3.

Relators will also use news articles and other documents that post-date permit issuance that include statements by current and former MPCA officials as to MPCA's conduct relevant to Relators' APIs.

This Court should reject any hearsay objections to Relators' exhibits under MAPA's evidentiary rules. Minnesota Rules 1400.7300 provides that hearsay is admissible "if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." This Court is "in the best position to judge the trustworthiness" of hearsay evidence. *In re Ball*, No. A10-359, 2011 WL 977606, at \*3 (Minn. App. Mar. 22, 2011).

To the extent Relators offer hearsay, it will mostly be in the form of statements made by government officials in the course of their official duties. These statements are in emails and correspondence among agency staff, between agencies, and to the public. There is simply no reason to question the trustworthiness of such evidence and it is the type of evidence agencies "rely in the conduct of their serious affairs." Minn. R. 1400.7300. In fact, MPCA's administrative record contains the same types of documents and communications that MPCA itself relied on in issuing the permit. *See, e.g., In re Grain Buyer's Bond No. MTC 182*, No. CX-95-298, 1995 WL 365400, at \*3 (Minn. App. June 20, 1995) (finding hearsay "presented through documentary

evidence” admissible because agency personnel relied on that type of evidence “in the due course of their affairs”).<sup>7</sup>

Finally, Relators’ exhibits are not “unduly repetitious.” Minn. R. 1400.7300. PolyMet complains that Relators have listed over 760 exhibits. PolyMet Mot. at 2.<sup>8</sup> However, the Court recognized that this proceeding “would be treated as a complex case” if it had originated in this Court. Rule 16 Conf. Tr. 91:4-7. Relators have an extensive exhibit list due to the number of relevant documents they have uncovered. Relators also have not been permitted to serve interrogatories, conduct oral depositions, or secure any pre-hearing inquiry from several key MPCA witnesses. Relators’ exhibit list reflects the complexity of this matter and the likely dynamic nature of the hearing as it progresses. As the hearing proceeds, the Court will determine whether exhibits or testimony proposed by all parties has become unduly repetitious.

In short, Relators’ exhibits are relevant and probative to Relators’ APIs and therefore admissible in this proceeding. *See, e.g., In re Resident Agency License of Nw. Title Agency, Inc.*, No. A13-1643, 2014 WL 2013436, at \*4 (Minn. App. May 19, 2014) (finding evidence properly admitted under MAPA because it had “probative value” to the issues); *Lee v. Lee*, 459 N.W.2d 365, 369 (Minn. App. 1990) (rejecting foundation and hearsay objections, as MAPA’s evidence rules provide “[t]he judge may admit *all evidence which possesses probative value*” (quoting Minn. R. 1400.7300, subpt. 1)).

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<sup>7</sup> Relators will also offer corroborating testimony to support hearsay evidence. *See Matter of Abu-Gyamfi*, No. A17-1425, 2018 WL 2470353, at \*3 (Minn. App. June 4, 2018) (holding board’s findings that relied on hearsay were supported by substantial evidence because “the hearsay evidence was corroborated” by testimony).

<sup>8</sup> PolyMet also complains about Relators’ document descriptions. PolyMet Mot. at 2. Relators described all documents on their exhibit list by beginning and ending bates number. PolyMet should have conferred with Relators and this issue could have easily been accommodated.

Should this Court agree that the MAPA rules apply to this proceeding, the resolution is simple and requires no further argument. Respondents' motions to exclude entire classes of documents prior to the evidentiary hearing should be summarily denied.

**B. Even if the Court Applies Minnesota's Rules of Evidence, the Court Should Reject MPCA's Wholesale Attempt to Exclude Broad Categories of Evidence.**

Even if this Court applies Minnesota's Rules of Evidence, the Court should still deny MPCA's motion because it offers conclusory objections to broad categories of evidence based on relevance, foundation, hearsay, and prejudice. MPCA Mot. at 1, 11-12. MPCA provides no legal argument or justification for its contentions beyond conclusory statements. *See* MPCA Mot. at 11-12.

Relators intend to use post-permit MPCA documents for multiple purposes relevant to Relators' APIs. It is axiomatic that evidence of a cover up is evidence that the original action was irregular and improper. Post-permit statements may also be used for impeachment and to support Relators' API that MPCA violated its ongoing duty of candor. Relators' exhibits showing the process used for other NPDES permits and the comments in those permits about the nature of the usual process are particularly relevant in a proceeding to determine procedural irregularity.

MPCA makes one fleeting reference to hearsay but does not elaborate or cite to the rule against hearsay, Minn. R. Evid. 802. *See* MPCA Mot. at 1. To be sure, MAPA's Rules of Evidence explicitly permit the admissibility of hearsay, as discussed above. Minn. R. 1400.7300. If this Court were to apply hearsay rules, however, Relators intend to offer statements in the challenged exhibits that are non-hearsay or, to the extent they are hearsay, fall under exceptions to the rule against hearsay. For example, many exhibits consist of documents obtained from MPCA and EPA that qualify as public records. Rule 803(8) excludes from hearsay "records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . the activities of the

office or agency.”<sup>9</sup> MPCA has alleged no reason to question the trustworthiness of exhibits from MPCA’s own records or from EPA’s records obtained under FOIA. Indeed, the “disadvantages of failing to administer the oath or to subject the witness to cross-examination are offset by the probable trustworthiness of a report which is likely to be accurate if made in the regular course of the official’s duties.” *Sabes v. City of Minneapolis*, 120 N.W.2d 871, 876-77 (Minn. 1963); *see also Schmutte v. Resort Condominiums Intern., LLC*, No. 1:05-cv-0311-LJM-WTL, 2006 WL 3462656, at \*15 (S.D. Ind. Nov. 29, 2006) (finding document obtained from the Department of Labor under FOIA admissible under Fed. R. Evid. 803(8) and properly authenticated under Fed. R. Evid. 901(b)(7) and 902(5)).

Further, Relators will offer documents that are non-hearsay party admissions under Rule 801(d)(2). And Relators will use some exhibits for purposes other than to prove the truth of their contents, which will pose no issue of hearsay.

MPCA also asserts a vague foundation objection. MPCA Mot. at 1, 11. MPCA appears to challenge the foundation of 126 public records obtained from EPA because they were “not sent or received by a witness to this proceeding.” MPCA Mot. at 11. Relators surmise that MPCA is asserting that EPA’s public records lack foundation because no witness with personal knowledge will testify as to matters in the documents. As discussed *infra* with regard to PolyMet’s motion, MPCA’s contentions on this point are equally misplaced.

MPCA’s broad and conclusory objections are especially inappropriate for a pretrial motion *in limine*. MPCA’s nonspecific objections should be denied on the basis that they lack specificity, *Roa, Inc.*, 2012 WL 7659116, and rejected in their entirety as baseless and premature.

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<sup>9</sup> These exhibits also qualify under the business records exception. Minn. R. Evid. 803(6).

**C. Even if the Court Applies Minnesota’s Rules of Evidence, PolyMet’s Foundation Objections Have No Merit.**

PolyMet’s motion asserts two potential grounds regarding foundation to exclude 135 of Relators’ exhibits “in their entirety.” PolyMet Mot. at 1. PolyMet seeks to exclude 135 exhibits for lack of personal knowledge under Rule 602, and four exhibits for lack of authentication under Rule 901. These exhibits consist of the following categories of evidence: (1) public records obtained from EPA under FOIA; (2) public records from MPCA regarding other NPDES permits; (3) documents that demonstrate the foundation of EPA’s public records; and (4) a few miscellaneous documents. These exhibits are hardly inadmissible “in their entirety,” much less subject to exclusion under Rules 602 or 901 for the purposes Relators intend to offer.

Contrary to PolyMet’s contention, Rule 602 does not require a witness to have authored or received a document in order to acquire personal knowledge.<sup>10</sup> A witness may testify to matters if he or she otherwise has personal knowledge of the matters contained in the document and the hearsay statement qualifies as an exception to the hearsay rule. *See, e.g., Portfolio Recovery Assocs., LLC v. Staeheli*, Nos. A13-1793, A13-1795, 2014 WL 1408082, at \*3 (Minn. App. 2014). The committee comment to Rule 602 clarifies that, “[t]he requirement of firsthand knowledge does not preclude a witness from testifying as to a hearsay statement which qualifies as an exception to the hearsay rule.” *Id.*, 1977 comm. cmt.

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<sup>10</sup> PolyMet cites to cases that involved individuals who had no independent personal knowledge of a matter contained in a document. *See Kemp v. Balboa*, 23 F.3d 211, 213 (8th Cir. 1994) (witness had no independent personal knowledge of plaintiff’s activities because witness was not present); *SDS Korea Co. v. DSD USA, Inc.*, 732 F. Supp. 2d 1062, 1073-74 (S.D. Cal. 2010) (witness had no independent personal knowledge of purchases described in a forwarded email). These cases do not support a dubious evidentiary rule that would limit a witness to testifying to matters in a document only if he or she is “the sender” or “the recipient” of correspondence. *See PolyMet Mot.* at 9.

Relators may also use exhibits to refresh a witness's recollection under Minn. R. Evid. 612. "Rule 612 does not require that the individual whose memory is being refreshed be the same individual who authored the document." *Janice Kaunas Samsing Revocable Trust v. Walsh*, No. A14-1529, 2015 WL 4523580, at \*6-7 (Minn. App. June 29, 2015).

In addition, Rule 602 by its terms does not apply to the admissibility of documentary evidence. This proceeding will not consist solely of live testimony. The Court's Amended Order Setting Evidentiary Hearing ("Am. Order") clearly contemplates receiving documentary evidence for the hearing. Am. Order ¶ 14. In fact, the Court's Amended Order provided that, "[a]ll objections to the admissibility of documentary evidence based on foundation shall be served and filed" no later than December 27, 2019 "or they shall be deemed waived." Am. Order ¶ 14. PolyMet did not raise an objection based on foundation to documentary evidence in accordance with the Court's Amended Order. Accordingly, the Court should find that PolyMet has waived any objections based on foundation to documentary evidence.

### **1. EPA public records obtained under FOIA.**

PolyMet seeks to exclude 13 exhibits under Rule 602 that are public records obtained from EPA under FOIA.<sup>11</sup> PolyMet presumes Relators "intend to attempt to introduce these exhibits using witnesses with no personal knowledge of them." PolyMet Mot. at 7. First, as explained previously, these are all public records of official activities kept and released under regular government procedure. No additional foundation may be required. In addition, Relators intend to introduce some public records through the testimony of Kevin Pierard, who has personal knowledge of matters described in the documents.<sup>12</sup>

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<sup>11</sup> PolyMet Mot. at 5 (Relators' Exs. 600, 603-06, 608, 610-11, 619, 623, 627, 656, 659).

<sup>12</sup> Relators believe that Mr. Pierard has reviewed records online as a result of their release by EPA under the FOIA, and his "personal knowledge can come from review of the contents of files and

Other exhibits include matters that are within the personal knowledge of more than one witness and may be used in the testimony of either. One example is an email string between Mr. Pierard and other EPA staff, in which he recounts a conversation he had in May 2018 with Jeff Udd, MPCA Mining Director. In that email, Mr. Pierard recounts that he explained to Mr. Udd that PolyMet had recently “seem[ed] less interested in working through issues” with regulators and that PolyMet could not be relied on “to ‘do the right thing’ if the permit requirements are not explicit.” Relators’ Exs. 604-05.

The remaining exhibits are other EPA public records documenting EPA’s activities in interacting with MPCA during the PolyMet NPDES permitting process.<sup>13</sup> For example, Relators’ Exhibit 608 is an Outlook calendar appointment for a “follow-up call with MPCA” on November 28, 2018. Relators’ Ex. 608. MPCA has provided no records regarding a call with EPA in November 2018 and EPA records provided under FOIA provide the only evidence that such a meeting occurred.

## **2. MPCA public records regarding other NPDES permits**

Relators may introduce MPCA’s records regarding other NPDES permits either through testimony of Mr. Pierard or through the testimony of MPCA witnesses familiar with permits as they occurred. In addition, these permits may be discussed through the testimony of Jeff Udd, who was MPCA’s designee in deposition testimony.<sup>14</sup> *See, e.g., Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434-35 (5th Cir. 2006) (finding that corporation had “a duty to prepare” corporate

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records.” *Wash. Cent. R. Co. v. Natl Mediation Bd.*, 830 F. Supp. 1343, 1353 (E.D. Wash. 1993) (“Based on personal knowledge of the files and records, a declarant may testify to acts that she or he did not personally observe but which are described in the record, including requests or statements by third persons made to someone other than the declarant.”).

<sup>13</sup> *E.g.*, Relators’ Exs. 600, 603, 606, 608, 623, 656, 659.

<sup>14</sup> PolyMet Mot. at 3 (Relators’ Exs. 171, 176, 180, 181, 182, 183, 184, 194, 205, 207, 209, 215, 216, 224, 226, 227).

designee for deposition and such designee “should be allowed to testify [at trial] as to matters within corporate knowledge to which he testified in deposition”). Even if Mr. Udd is not testifying as MPCA’s designee during the evidentiary hearing, he has retained the personal knowledge he gained when he was prepared to testify as MPCA’s designee at its deposition.

Exhibits regarding other NPDES permits issued by MPCA may also be introduced as documentary evidence to demonstrate the permitting processes typically followed by MPCA and the permitting records customarily prepared by the agency.

### **3. Foundation documents for EPA public records**

Many of the exhibits that PolyMet seeks to exclude are documents Relators listed in the event a foundation issue was raised regarding the authenticity of public records obtained from EPA under FOIA. PolyMet’s contention that these documents lack foundation under Rule 602 is misplaced because they are intended to prove the foundation for other documents. Relators likely do not need to use many of these documents now that Respondents failed to object to the foundation of an EPA FOIA document as a public record. Thus, it would be a waste of time to require any party to provide proof to authenticate EPA FOIA documents. *See also* Minn. R. Evid. 901(b)(7) (authentication of public records); 902 (certified copies of public records self-authenticating). EPA FOIA documents are stamped with an official tracking number that can be easily verified if necessary.<sup>15</sup> Nevertheless, Relators reserve the right to use foundation documents should such a question be raised regarding EPA FOIA documents.

Relators may use some of the public records pertaining to FOIA official activities, including logs of documents withheld as evidence of the sequence of events related to the APIs. In addition, Relators may use some of the public records pertaining to FOIA itself as evidence of

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<sup>15</sup> *See* FOIA Online, <https://foiaonline.gov/foiaonline/action/public/home>.

the efforts employed by Relators to secure documents not contained in MPCA's responses to Data Practices Act requests and not contained in the administrative record.

#### 4. Miscellaneous documents

PolyMet challenges four of Relators' exhibits on authenticity grounds, asserting that they cannot be authenticated under Rule 901, "since no person on Relators' witness list will be able to testify as to their contents from personal knowledge." PolyMet Mot. at 13. Rule 901 requires only such evidence as needed to "to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). This Court has broad discretion "[w]ith respect to sufficiency of foundation." *State v. Wiley*, 205 N.W.2d 667, 674 (Minn. 1973). This Court should reject PolyMet's spurious challenges to the authenticity of these four exhibits because the possibility that they are not what Relators claim "is, at best, very remote." *Id.*

Two of the four exhibits are public records obtained from MPCA during discovery regarding other NPDES permits. Relators' Exs. 171, 216. As such, Exhibits 171 and 216 are authenticated simply by the fact that MPCA produced the document in response to Relators' discovery request. *See, e.g., United States v. Lawrence*, 934 F.2d 868, 871-72 (7th Cir. 1991) (noting that documents produced by corporate officer "was implicit authentication"); *Schmutte*, 2006 WL 3462656, at \*14 ("When a party has produced the document in question in response to a subpoena or discovery request, he has implicitly authenticated the document."). These exhibits could also be authenticated as public records. *See* Minn. R. Evid. 901(b).<sup>16</sup>

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<sup>16</sup> PolyMet asserts there is "no evidence" that Exhibits 171 and 216 were "filed in a public office." PolyMet Mot. at 13. To the contrary, these documents were produced from MPCA's files. In fact, Exhibit 171 is an attachment to Relators' Exhibit 170, which is a transmittal letter to Ann Foss, former MPCA Mining Director.

Exhibit 722 is a PowerPoint presentation by Scott Kyser, staff at MPCA, who is on Relators' witness list. Relators intend to authenticate Exhibit 722 through Mr. Kyser's testimony if he is called to testify.

Finally, Exhibit 353 is Jeffrey Fowley's complaint to the EPA Office of Inspector General. PolyMet cannot seriously dispute this document's authenticity. WaterLegacy put this same document before the Court of Appeals as part of the Transfer Motion. WaterLegacy Mot. to Transfer to Dist. Ct. or Stay, Ex. F (May 17, 2019). Relators' exhibit list is replete with other evidence referring to this document. *E.g.*, Relators' Ex. 534 (*Star Tribune* article from February 6, 2019 reporting on Mr. Fowley's "letter to the EPA's inspector general"). Mr. Fowley's complaint was part of many important developments that brought this proceeding before the Court. Indeed, MPCA reacted to press coverage of Mr. Fowley's complaint in February 2019 by issuing statements that it "did not, at any time, ask EPA to suppress or withhold comments on the PolyMet NPDES permit." *E.g.*, Relators' Exs. 150, 151, 267, 268. Those statements are now directly relevant to Relators' APIs regarding MPCA's lack of candor during and after the PolyMet permitting process.

Accordingly, based on the evidence and argument in all preceding sections of Part III.C. of this Court should reject all of PolyMet's attempt to exclude evidence for lack of foundation. This pretrial motion is improper and premature.

### **CONCLUSION**

For these reasons, Relators respectfully request that this Court to deny in all respects MPCA and PolyMet's motions *in limine* to exclude certain witnesses and evidence from being presented during the evidentiary hearing.

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**CERTIFICATION**

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

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