

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Court File Number: 62-CV-19-4626

Honorable Judge John H. Guthmann

MINNESOTA POLLUTION CONTROL AGENCY'S MOTION IN LIMINE

Pursuant to Minn. R. Evid. 103, 402, and 403, Minnesota Pollution Control Agency (MPCA) moves for an order *in limine* to exclude certain testimony and evidence that is irrelevant, immaterial, lacks foundation, is hearsay, is far more prejudicial than probative or is otherwise inadmissible under the Minnesota Rules of Evidence or Civil Procedure in this limited-scope hearing. Similarly, under the Minnesota Administrative Procedure Act, “incompetent, irrelevant, immaterial and repetitious evidence” may be excluded from contested case hearings. Minn. Stat. § 14.60. Specifically, MPCA seeks to exclude, in whole or in part, the testimony of the following witnesses:

- Brian Branfireun, Ph.D., Professor of Ecohydrology, Biogeochemistry and Wetland Ecosystem Science, Western University, London, Ontario;
- Mike Gallegos, XACT Data Discovery;
- Catherine Kuhlman, former U.S. Environmental Protection Agency (“EPA”) manager;
- Krista McKim, EPA scientist;

- Emily Onello, M.D., Assistant Professor, Department of Family Medicine and BioBehavioral Health, University of Minnesota Duluth, Duluth, Minnesota;
- Kevin Pierard, EPA scientist; and
- Margaret Saracino, M.D., Staff Psychiatrist, Human Development Center, Duluth, Minnesota.

In addition, MPCA seeks to exclude four (4) categories of exhibits identified in Relator's December 17, 2019 Exhibit List: (1) exhibits that are or contain newspaper articles describing the NorthMet permitting process and challenges thereto; (2) exhibits that relate to entirely separate permits or permitting applications and processes; (3) exhibits that post-date the NorthMet permit approval that do not show that any procedural irregularity occurred or did not occur; and (4) exhibits lacking foundation, including 126 EPA documents not sent or received by a witness to this proceeding. As an example, but not as an all inclusive list of documents that fall in these categories on Relators' list of 760 exhibits, the following exhibits should be excluded:

(1) Newspaper Articles, i.e.:

Exhibit Nos.: 3, 10, 127, 144, 236, 237, 534-567, 600, 667, 669, 703, 723;

(2) Separate, Unrelated Permits, Applications and Permitting Processes, i.e.:

Exhibit Nos.: 129-140, 144, 161-171, 174, 175, 178-227, 263, 527-533,
719, 720;

(3) Exhibits Which Post-Date The NorthMet Permit Approval That Do Not Show The Existence or Absence of Any Procedural Irregularity;

(4) Exhibits Lacking Foundation, Including All EPA Documents Not Sent or Received by a Witness to this Proceeding, i.e.:

Exhibit Nos.: 127, 171, 176, 180-184, 194, 205, 207, 209, 215-216, 224, 226-227, 353, 443-474, 477, 480, 484-485, 487-488, 490-491, 493, 495-499, 504-524, 526, 600, 603-606, 608, 610-611, 619, 623, 627, 656, 659, 722, 724-758;

CERTIFICATE OF CONFERRAL

MPCA conferred with Relators' counsel and they oppose this motion.

INTRODUCTION

On June 25, 2019, the Court of Appeals transferred this matter to this Court “for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure” regarding the NorthMet Permit permitting process which occurred between July 2016 and early 2019. Court of Appeals’ Sept. 9, 2019 Order at 1 (quoting Court of Appeals’ June 25, 2019 Order).

The scope of this transfer proceeding is governed by the following statutes and transfer order:

- a) Minn. Stat. §14.68, which establishes the procedures for review of the challenged permit;
- b) Minn. Stat. §14.69, which defines the scope of judicial review of the permit; and
- c) The Court of Appeals’ June 25, 2019 transfer order.

Minn. Stat §14.68 confines judicial review to the administrative record except for “alleged irregularities in procedure” that are not shown in the record. This Court has jurisdiction to take testimony and to hear and determine whether there have been alleged irregularities in procedure. The meaning of “irregularity” in §14.68 should be interpreted in accordance with the scope of judicial review set forth in §14.69, which authorizes judicial relief regarding procedural defects only for administrative action “made upon *unlawful* procedure.” (emphasis added). The court of appeals is not authorized to provide relief from unusual or uncustomary procedures, but only “unlawful” ones upon which the agency’s administrative action is based. Section 14.68 should be interpreted accordingly.

Second, §14.69 applies only to the administrative agency whose decision is being challenged—here, MPCA. MPCA has no authority or control over EPA’s actions, nor does Section 14.69 give the Court of Appeals (or this court) jurisdiction over actions by the U.S. Environmental Protection Agency, which is not a named party herein. In other words, MPCA is accountable in this Court only for its own actions, not EPA’s. If Relators object to EPA’s actions, Relators may bring suit against EPA.

Third, this Court’s jurisdiction derives from, and is limited by, the Court of Appeals’ June 25, 2019 transfer order.¹ That order (at 3-4) describes the subject of this hearing. It quotes WaterLegacy’s allegation that MPCA’s Commissioner and “political leaders” at EPA “developed a plan to keep EPA criticism of the NorthMet permit out of the public record and the record for judicial review.” June 25, 2019 Order at 3. It then recites “undisputed evidence” that the administrative record was missing documentation of: (a) some of the MPCA and EPA “multiple telephone conferences and in-person meetings” about the permit; (b) EPA written comments on the draft permit that it did not submit but instead read to MPCA; and (c) notes taken during that call. *Id.* Finally, it cites “disputed evidence on the issues of whether “(1) it was unusual for EPA not to submit written comments; and (2) the MPCA sought to keep the EPA’s comments out of the public record.” *Id.* at 4.

The Court of Appeals’ order thus identifies the scope of this hearing as whether any alleged procedural irregularities by MPCA prevented EPA commenting about the NorthMet permit or

¹ Although the pleadings on the motion to transfer provide context that could help interpret the Court of Appeals order, those pleadings cannot override the jurisdiction limited by Sections 14.68 or 14.69 and the order itself. Here, the Court of Appeals was careful to describe the scope of the jurisdiction it was conferring on this Court. It is the scope defined by Sections 14.68 and 14.69 and the Court of Appeals’ Order—not the scope of Relators’ numerous irrelevant allegations—that should control the scope of this hearing.

otherwise prevented EPA's concerns about the permit from being made a part of the record. It does not describe anything else.

In particular, the governing statutes and the June 25 order do not provide a jurisdictional basis for testimony about: (a) MPCA procedural actions other than those the order describes; (b) EPA's internal procedures; (c) whether EPA followed its own procedures; or (d) whether EPA's decision not to object to the permit was a wise choice.

Accordingly, through this Motion, MPCA respectfully moves the Court to exclude all testimony and evidence that is not relevant to the Court's limited inquiry under Minn. Stat. § 14.68 into whether MPCA's challenged permitting decision was based upon any alleged procedural irregularities occurred between July 2016 and early 2019 that prevented EPA's comments on the NorthMet Permit from being submitted to MPCA or otherwise made a part of the record. As discussed below, all other testimony and evidence is irrelevant, inadmissible, or far more prejudicial than probative.

STANDARD OF REVIEW

The Court has inherent authority 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) (quotations omitted). This includes authority to preclude a party from raising a particular argument. *See State v. Benniefield*, 678 N.W.2d 42, 45 (Minn. 2004) (court granted motion in limine to prevent defendant from arguing that particular intent or knowledge was element of crime). The exclusion of evidence for immateriality or lack of foundation rests primarily in the discretion of the trial court. *Hiedeman v. Hiedeman*, 290 Minn. 210, 217, 187 N.W.2d 119, 124 (1971).

Minn. R. Evid. 103 provides that the Court may “make[] a definitive ruling on the record admitting or excluding evidence, either at or before trial[.]” There is no requirement that a motion *in limine* be supported by “anything other than persuasive legal arguments and authority.” *State v. Gillespie*, 710 N.W.2d 289, 299 (Minn. Ct. App. 2006) (finding no error in granting motion *in limine* that was “unaccompanied by affidavits [or] testimony”).

ARGUMENT

I. Testimony From the Witnesses Listed Below Should be Excluded.

Relators’ global Witness List does not specify whether their witnesses are being called as lay or expert witnesses. In any event, the witnesses listed below should be excluded from testifying as either lay or expert witnesses. Their testimony is irrelevant to the limited scope of the hearing, unsupported by first-hand knowledge of the facts or events surrounding the MPCA’s permitting process at issue and without foundation for expert testimony to assist the Court.

A. If Lay Witnesses, The Witnesses Listed Below Lack Personal Knowledge to Support their Testimony.

Minn. R. Evid. 701 provides that, if the witness is not testifying as an expert, the witness’ testimony should be limited to those opinions or inferences which are “rationally based on the perception of the witness” or “helpful to a clear understanding of the . . . determination of a fact in issue[.]” Under Rule 701, “[t]he key question is whether the witness personally knows what he or she is talking about and whether the testimony will be helpful to the fact-finder.” *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 93 (Minn. Ct. App. 2012) (internal quotations and brackets omitted). Where a lay witness lacks “first-hand knowledge” of the events at issue, the Court should exclude the witness’ testimony. *Steiner v. Beaudry Oil & Serv., Inc.*, 545 N.W.2d 39, 44 (Minn. Ct. App. 1996) (affirming exclusion of testimony from lay witnesses that clean-up costs of oil spill

would have been less if spill was reported earlier, where neither “witness possessed first-hand knowledge of the cleanup and costs involved in this particular spill”).

In addition, “witnesses may not offer bald legal conclusions.” *In re Welfare of Child of J.K.T.*, 814 N.W.2d at 94; *see also Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 873 (Minn. Ct. App. 1995) (“opinions regarding legal issues are ordinarily not admissible”).

Where, as discussed below, a witness lacks any personal knowledge or experience with the NorthMet permitting procedure at issue or about the existence, or lack thereof, of any procedural irregularities, the witness should be precluded from offering lay opinion testimony. *See Steiner*, 545 N.W.2d at 44. Furthermore, any testimony where a witness purports to offer an opinion that there were “procedural irregularities” in the NorthMet permitting process, such testimony should be excluded as an improper legal conclusion and testimony about the ultimate legal issues before the Court.

B. If Expert Witnesses, The Witnesses Listed Below Lack Specialized Knowledge Relevant to the Issue of Procedural Irregularities in the MPCA Permitting Process.

Expert testimony is “only admissible if the testimony will help the trier of fact in evaluating evidence or resolving factual issues.” *State v. Ali*, 855 N.W.2d 235, 251–52 (Minn. 2014). Further, expert testimony must be relevant and have a “reasonable basis.” *State v. Edstrom*, 792 N.W.2d 105, 111 (Minn. Ct. App. 2010); *State v. Pirsig*, 670 N.W.2d 610, 616 (Minn. Ct. App. 2003).

As discussed below, Relators have identified certain professionals, including doctors and professors, that presumably will be presented as expert witnesses because they have no first-hand information about the NorthMet permitting process. However, based on their identified education, professions, and experiences, none of the witnesses listed below are qualified to offer expert testimony on the procedures or practices employed by MPCA during its permitting review process, or to opine about the facts or events surrounding the NorthMet permit. Moreover, as the

scope of these proceedings are limited to ascertaining whether MPCA's permitting decision was made upon "unlawful" procedures, expert or opinion testimony as to the adequacy of MPCA's procedures is inappropriate and impermissible. No expert may testify to the legal conclusions the Court is required to make in this proceeding. Accordingly, these witnesses must be excluded.

1. Brian Branfireun, Ph.D., Professor of Ecohydrology, Biogeochemistry and Wetland Ecosystem Science, Western University, London, Ontario

Dr. Branfireun should not be permitted to testify as a lay or expert witness. Dr. Branfireun was not involved in the NorthMet permitting process. Accordingly, he has no personal knowledge of the procedures surrounding MPCA's approval of the NorthMet permit and should not be permitted to testify. *See Steiner*, 545 N.W.2d at 44.

In addition, as a Professor Ecohydrology, Biogeochemistry and Wetland Ecosystem Science, at Western University in London, Ontario, Dr. Branfireun lacks knowledge of or experience with MPCA's permitting process or Minnesota Administrative Procedure in general. Therefore, he cannot offer relevant or reliable expert testimony. *Edstrom*, 792 N.W.2d at 111; Minn. R. Evid. 402 and 702.

2. Mike Gallegos, XACT Data Discovery

Similarly, Mr. Gallegos should not be permitted to testify as a lay or expert witness. Mr. Gallegos was in charge of XACT's forensic data search. He has no knowledge about MPCA, EPA or the permitting process at issue. He also knows nothing about the documents that were produced pursuant to the Minnesota Government Data Practices Act, to the extent that is viewed as a procedural irregularity. His knowledge is limited to the forensic search and document production

in this litigation. Therefore, he lacks the “first-hand knowledge” of the procedures surrounding the NorthMet permit required to offer lay testimony. *See Steiner*, 545 N.W.2d at 44.

To the extent Mr. Gallegos intends to testify as an expert on forensic data searches, such testimony is irrelevant and outside the scope of this hearing. *Edstrom*, 792 N.W.2d at 111; Minn. R. Evid.402 and 702.

3. Catherine Kuhlman, Former EPA Manager

Ms. Kuhlman should not be permitted to testify as a lay or expert witness. Ms. Kuhlman was not involved in the NorthMet permitting process on behalf of EPA or any other interested party. Accordingly, she has no personal knowledge of the procedures surrounding MPCA’s approval of the NorthMet permit and should not be permitted to testify. *See Steiner*, 545 N.W.2d at 44.

To the extent Ms. Kuhlman intends to offer testimony about the permitting procedures or processes that were in place years or decades ago when she was at EPA, such testimony is irrelevant to the NorthMet permitting process that took place between July 2016 and early 2019. *See State v. Yang*, 774 N.W.2d 539, 554 (Minn. 2009) (finding lay witness testimony about past experiences with a different gang was not relevant where it did not inform the jury about the activities of the gang at issue).

4. Krista McKim, EPA Scientist

Ms. McKim should not be permitted to testify about such irrelevant matters as whether EPA followed its usual internal procedures or whether she disagrees with EPA’s decision not to veto the NorthMet permit. Ms. McKim is a current EPA scientist who may have been involved in the decision to approve the NorthMet permit. Because EPA approved the permit, Ms. McKim should not be permitted to testify to offer a contrary view from that of EPA as a whole; she does not represent the agency concerning its decision and her personal view about EPA’s choice is

irrelevant here. Additionally, as stated above, this proceeding concerns alleged procedural irregularities on the part of MPCA, not EPA.

5. Emily Onello, M.D., Assistant Professor, Department of Family Medicine and BioBehavioral Health, University of Minnesota Duluth, Duluth, Minnesota

Dr. Onello should not be permitted to testify as a lay or expert witness. Dr. Onello was not involved in the NorthMet permitting process. Accordingly, she has no personal knowledge of the procedures surrounding MPCA's approval of the NorthMet permit and should not be permitted to testify. *See Steiner*, 545 N.W.2d at 44.

In addition, as a Professor in the Department of Family Medicine and BioBehavioral Health at University of Minnesota Duluth, Dr. Onello lacks knowledge of or experience with MPCA's permitting process or Minnesota Administrative Procedure in general. There are no psychological, medical or health issues in this case. Therefore, she cannot offer relevant or reliable expert testimony and her testimony should be excluded. *Edstrom*, 792 N.W.2d at 111; Minn. R. Evid. 402 and 702.

6. Kevin Pierard, EPA Scientist

Mr. Pierard should not be permitted to testify about such irrelevant matters as whether EPA followed its usual internal procedures or whether he disagrees with EPA's decision not to veto the NorthMet permit. Mr. Pierard is a retired EPA scientist who may have been involved in the decision to approve the NorthMet permit. Because EPA approved the permit, Mr. Pierard should not be permitted to testify to offer a contrary view from that of EPA as a whole; he does not represent the agency and his personal view is irrelevant here. Additionally, as stated above, this proceeding concerns alleged procedural irregularities on the part of MPCA, not EPA.

7. Margaret Saracino, M.D., Staff Psychiatrist, Human Development Center, Duluth, Minnesota

Dr. Saracino should not be permitted to testify as a lay or expert witness. Dr. Saracino was not involved in the NorthMet permitting process. Accordingly, she has no personal knowledge of the procedures surrounding MPCA's approval of the NorthMet permit and should not be permitted to testify. *See Steiner*, 545 N.W.2d at 44.

In addition, as a Psychiatrist at the Human Development Center, Duluth, Minnesota, Dr. Saracino lacks knowledge of or experience with MPCA's permitting process or Minnesota Administrative Procedure in general. There are no psychological, medical or health issues in this case. Therefore, she cannot offer relevant or reliable expert testimony and her testimony should be excluded. *Edstrom*, 792 N.W.2d at 111; Minn. R. Evid. 402 and 702.

II. The Below Listed Exhibits Should be Excluded.

MPCA respectfully moves the Court to issue an order excluding four (4) categories of exhibits as irrelevant and unfairly prejudicial: (1) exhibits that are or contain newspaper articles describing the NorthMet permitting process and/or challenges thereto; (2) exhibits that relate to entirely separate, unrelated permits or permitting applications and processes; (3) exhibits that post-date the NorthMet permit approval that do not show that any procedural irregularity occurred or did not occur; and (4) exhibits lacking foundation, including 126 EPA documents not sent or received by a witness to this proceeding. Such exhibits are irrelevant to the Court's limited inquiry under Minn. Stat. § 14.68 into whether any alleged procedural irregularities occurred between July 2016 and early 2019 that prevented EPA's comments on the NorthMet Permit from being submitted to MPCA or otherwise made a part of the record. As such, the following categories of exhibits, including but not limited to the specific exhibit numbers below, should be excluded:

(1) Newspaper Articles, i.e.:

Exhibit Nos.: 3, 10, 127, 144, 236, 237, 534-567, 600, 667, 669, 703, 723;

(2) Separate, Unrelated Permits, Applications and Permitting Processes, i.e.:Exhibit Nos.: 129-140, 144, 161-171, 174, 175, 178-227, 263, 527-533,
719, 720;(3) Exhibits Which Post-Date The NorthMet Permit Approval That Do NotShow The Existence or Absence of Any Procedural Irregularity;(4) Exhibits Lacking Foundation, Including All EPA Documents Not Sent orReceived by a Witness to This Proceeding, i.e.:Exhibit Nos.: 127, 171, 176, 180-184, 194, 205, 207, 209, 215-216, 224,
226-227, 353, 443-474, 477, 480, 484-485, 487-488, 490-491, 493, 495-499, 504-524, 526, 600,
603-606, 608, 610-611, 619, 623, 627, 656, 659, 722, 724-758.**CONCLUSION**

For the foregoing reasons, MPCA moves the court for an order excluding all, or the improper portions of, the testimony of Brian Branfireun, Ph.D., Mike Gallegos, Catherine Kuhlman, Krista McKim, Emily Onello, M.D., Kevin Pierard, and Margaret Saracino, M.D. and the above-identified categories of exhibits from admission at the hearing commencing on January 20, 2020.

DATED: December 27, 2019.

/s/ John C. Martin

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