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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
Case Type: Civil Other/Misc.
Judge: John H. Guthmann

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

Case No. 62-CV-19-4626

MEMORANDUM BY POLY MET MINING, INC. IN OPPOSITION TO MOTION FOR SCHEDULING ORDER

Center for Biological Diversity, Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy, WaterLegacy, Fond du Lac Band of Lake Superior Chippewa

v.

Minnesota Pollution Control Agency, Poly Met Mining, Inc.

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INTRODUCTION

Relators are trying to remake this certiorari appeal—transferred to this Court for a "limited purpose"—into a full-scale civil litigation, rebranding themselves as "plaintiffs" with "claims." This Court should reject their efforts for at least three reasons. First, Relators are ignoring the rules by filing their motions less than 14 days prior to the August 7 hearing date, in violation of Minnesota Rule of General Practice 115.04. Second, Relators are ignoring the court of appeals' order, which "transferred" this matter "to Ramsey County District Court for the limited purpose of an evidentiary hearing and findings on specific "alleged irregularities in procedure." Third, Relators are ignoring Minnesota Statutes section 14.68, which provides that when an Administrative Procedure Act certiorari appeal is transferred to a district court, "[t]he district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure." Neither the court of appeals' order nor section 14.68 authorizes discovery in this transferred proceeding, much less a year-long process to resolve the brand-new claims raised in Relators' pseudo-complaint. Poly Met Mining, Inc. ("PolyMet") seeks what the court of appeals ordered: an "evidentiary hearing" set "as soon as practicable," followed by "findings of fact on the alleged irregularities."

BACKGROUND

Under the Minnesota Administrative Procedure Act, parties aggrieved by an agency decision may seek judicial review by filing a petition for a writ of certiorari in the court of appeals. Minn. Stat. § 14.63. The court of appeals' review is "confined to the [agency] record, except that in cases of alleged irregularities in procedure, not shown in the record, the court

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of appeals may transfer the case to the district court for the county in which the agency has its principal office." Minn. Stat. § 14.68. After such a transfer, "[t]he district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure." *Id.*

This case began when Relators filed a certiorari appeal challenging the Minnesota Pollution Control Agency (MPCA)'s December 2018 decision to grant PolyMet a water quality permit. Several months later, Relators moved the court of appeals for a transfer to district court "based on allegations that 'MPCA's Commissioner and political leaders at the United States Environmental Protection Agency (EPA) developed a plan to keep EPA criticism of the NorthMet permit out of the public record and the record for judicial review.'"[1]

Considering the declarations and documents before it, the court of appeals found "substantial evidence of procedural irregularities not shown in the administrative record."[2] In particular, the court of appeals found "undisputed evidence" that (1) MPCA and EPA "departed from typical procedures" by "engaging in multiple telephone conferences and in-person meetings, some of which are not reflected in the administrative record"; (2) EPA "prepared written comments" on PolyMet's draft permit; (3) "those written comments were never submitted to MPCA"; (4) "instead the written comments were read to MPCA during

[1] Minnesota Court of Appeals, Case Nos. A19-0112, A19-0118, A19-0124, Order at 3, (June 25, 2019).

[2] Court of Appeals Order at 4.

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an April 5, 2018 telephone call"; and (5) "notes taken during that call have not been included in the administrative record, and are believed to have been discarded."[3]

The court of appeals identified "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."[4] As a result, the court of appeals transferred the matter to this Court "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure."[5] The court of appeals further directed that "[t]he hearing shall be scheduled as soon as practicable."[6] Following the hearing, the district court must "issue an order that includes findings of fact on the alleged irregularities."[7] Relators' counsel must file that order with the court of appeals "within three days of it being filed in the district court."[8]

On July 16, this Court scheduled a Rule 16 Conference for August 7, and instructed the parties to come "prepared to discuss what issues need to be addressed by the Court, how long the evidentiary hearing will take, and identity of witnesses that will be asked to testify at any hearing."

On August 1, at 5:55 PM, Relators brought the instant motion for scheduling order.

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[3] Court of Appeals Order at 3.

[4] Court of Appeals Order at 3-4.

[5] Court of Appeals Order at 4.

[6] Court of Appeals Order at 4.

[7] Court of Appeals Order at 4-5.

[8] Court of Appeals Order at 5.

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ARGUMENT

1. Relators' motion is procedurally improper.

Minnesota Rule of General Procedure 115.04 provides that "[n]o [non-dispositive] motion shall be heard until the moving party . . . serves the [moving papers] on all opposing counsel . . . and files the [moving papers] with the court administrator at least 14 days prior to the hearing[.]" To comply with this Rule, Relators had to file and serve their motion no later than July 24—14 days prior to August 7 and eight days after the Court's July 16 notice.

As of July 24, no moving papers had been filed with this Court and no moving papers had been served upon PolyMet. Relators waited an additional eight days—until after regular business hours on August 1—to bring their motion. Yet their motion makes no mention of this procedural insufficiency. Rule 115.04 mandates the outcome under these circumstances—Relators' motion "shall" not be heard. *See, e.g.*, *Coker v. Piper*, No. A15-1439, 2016 WL 281420, at *7 (Minn. Ct. App. Jan. 25, 2016) (finding that the panel did not err when it found that a non-dispositive motion filed one day before the hearing was untimely and stated that it need not reach the merits of the untimely motion).

2. "Pre-hearing discovery" is not authorized by the court of appeals' "limited" transfer order.

The court of appeals' order transferred this matter "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure."[9] By its plain terms, that order does not authorize any discovery, let alone the wide-ranging and time-consuming discovery requested by Relators.

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[9] Court of Appeals Order at 4.

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The narrow scope of the court of appeals' transfer order stands in stark contrast with Relators' reply memorandum in support of the transfer motion, which asked for both written discovery and depositions.[10] By specifying that its transfer to district court was for "the limited purpose of an evidentiary hearing,"[11] the court of appeals implicitly rejected Relators' discovery request. Put differently, Relators asked the court of appeals to transfer this matter to the district court for broad purposes, including discovery and depositions. The court of appeals instead transferred it for a "***limited*** purpose."

Underscoring the limited scope of its transfer, the court of appeals also ordered that "[t]he [evidentiary] hearing shall be scheduled as soon as practicable."[12] Again, if the court of appeals had contemplated the extensive discovery sought by Relators (or any discovery, for that matter) it presumably would not have emphasized the importance of an expeditious hearing.

3. The court of appeals' order specifically defines the issues transferred to this Court.

In addition to describing the type of proceeding it expected after transfer, the court of appeals specified the issues that Relators can raise. Having sorted through the declarations and documents Relators submitted to support their transfer motion, as well as evidence from MPCA, the court of appeals identified two issues in dispute: "whether (1) it was unusual for EPA not to submit written comments; and (2) the MPCA sought to keep

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[10] WaterLegacy Reply Memorandum (June 5, 2019) at 20 [Ex. 2 to McGhee Declaration].

[11] Court of Appeals Order at 4.

[12] Court of Appeals Order at 4.

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the EPA's comments out of the public record."[13] Its transfer "for a hearing and determination of the alleged irregularities" is limited to those issues.[14]

This Court should not exceed the scope of the court of appeals' "limited" transfer order. A matter transferred from the court of appeals under section 14.68 is akin to a remand from an appellate court, not a newly filed civil action. And the Minnesota Supreme Court has cautioned district courts not to exceed the scope of a remand order, in part because of the danger that "the parties might consider the remand proceedings to be a 'second bite at the apple' and attempt to further litigate all issues in the case." *State v. Roman Nose*, 667 N.W.2d 386, 395 (Minn. 2003). Relators' attempt to litigate as many issues as possible in this transferred certiorari appeal invites that same danger.

In *State v. Roman Nose*, the Minnesota Supreme Court had remanded for a hearing on whether a method for testing DNA had gained general acceptance within the relevant scientific community. The district court broadened the scope of proceedings on remand to consider DNA statistical testimony and additional DNA statistical evidence. Explaining that "the trial court has no power to alter, amend, or modify this court's mandate," the Supreme Court held the district court's broader scope improper. *Id.* at 394 (quoting *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982)). The Court also disregarded the evidence that exceeded the scope of the remand, stating that it had "in the past refused to consider findings made by a district court that exceeded the scope of remand even if such findings were supported by the record." *Id.* at 395 (citing *Interstate*

[13] Court of Appeals Order at 4.

[14] Court of Appeals Order at 4.

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Power Co., Inc. v. Nobles County Bd. of Comm'rs, 617 N.W.2d 566, 580 (Minn. 2000) (concluding that additional reasons for a permit denial not raised in the initial proceedings could not be used because they were beyond the scope of remand); *Sefkow v. Sefkow*, 427 N.W.2d 203, 213 (Minn. 1988) (concluding that the district court erred in determining the custody of a sibling because it was beyond the scope of remand)).

The same principles apply here with even more force. The court of appeals transferred this matter to district court for the "limited purpose of an evidentiary hearing" on a specific, narrow set of questions. It ordered that the hearing take place "as soon as practicable." Relators' effort to expand the scope of this proceeding ignores both of those mandates. What is more, Relators are not entitled to litigate the merits of their certiorari appeals before this Court because only the court of appeals has jurisdiction to decide violations of the Minnesota Administrative Procedure Act. Minn. Stat. § 14.63 ("A petition for a writ of certiorari . . . for judicial review under sections 14.63 to 14.68 must be filed with the Court of Appeals").[15] The only issues that are properly before this Court are "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."[16] Once this Court makes findings on those issues, the court of appeals will decide how they affect Relators' certiorari appeal.

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[15] *See Ctys. of Blue Earth v. Minnesota Dep't of Labor & Indus.*, 489 N.W.2d 265, 268 (Minn. Ct. App. 1992) ("[A]ppeals under the Administrative Procedure Act are to be heard by the court of appeals, not the district court."); *Hennepin Cty. v. Civil Rights Comm'n of City of Minneapolis*, 355 N.W.2d 458, 459 (Minn. Ct. App. 1984) (stating that appeals under the Administrative Procedure Act must be heard by the court of appeals, not the district court).

[16] Court of Appeals Order at 3-4.

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4. Section 14.68 grants district courts jurisdiction to hear testimony and determine alleged irregularities; it does not authorize "pre-hearing discovery."

Relators' concept of this case hinges on their claim that this matter before this Court is like "any other civil action"[17] governed by the Minnesota Rules of Civil Procedure. That premise is demonstrably false. Relators are not "Plaintiffs" with "claims." This matter is in district court solely because the court of appeals *transferred* it here under Minnesota Statutes section 14.68. That statute defines the district court's jurisdiction when it is on the receiving end of such a transfer: "The district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure." Minn. Stat § 14.68. That statutory, jurisdictional limit is irreconcilable with Relators' motions.

This matter remains a certiorari appeal of an administrative agency's decision, even though the court of appeals temporarily transferred it to district court. "Constitutional principles of separate governmental powers require that the judiciary refrain from a de novo review of administrative decisions." *Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671, 674 (Minn. 1990). To protect these constitutional principles, a reviewing court exercises only limited jurisdiction over administrative decisions through certiorari. *Id*. In Minnesota, certiorari is a statutory remedy, not a common-law writ, and the statutory provisions governing it are strictly construed. *Matter of Midway Pro Bowl Relocation Benefits Claim*, 930 N.W.2d 7, 9 (Minn. Ct. App. 2019) (citing *State ex rel. Ryan v. Civil Serv. Comm'n*, 154 N.W.2d 192, 196 (Minn. 1967)). Those strictly construed provisions include section 14.68. So when section 14.68 gives district courts "jurisdiction to take testimony and to hear and

[17] Relators' Memorandum in Support of Motion for Scheduling Order at 2.

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determine the alleged irregularities in procedure," it should be read as defining the entire scope of the district court's powers in a transferred proceeding.

The history of section 14.68 underscores these jurisdictional limits. Originally, the Minnesota Administrative Procedure Act authorized district courts to review "alleged irregularities in procedure" by conducting "proceedings . . . according to the rules of civil procedure." Minn. Stat. 15.0424, subd. 6 (now-deleted).[18] But when the Legislature amended the Act to require that challenges to agency action be brought directly in the court of appeals, it repealed that language. In its stead, the Legislature enacted the more limited transfer jurisdiction now contained in section 14.68.

5. The Minnesota Supreme Court has never allowed broad discovery in proceedings to determine alleged procedural irregularities.

Even under the old "according to the rules of civil procedure" statutory language that used to govern these types of proceedings, courts imposed strict limits on discovery. In a trilogy of cases, the Minnesota Supreme Court established that—under the broader and now extinct version of the statute—discovery should be limited to written interrogatories directed at the agency.

First, in *Mampel*, the Supreme Court held that discovery in MAPA cases must be "appropriately limited" to "determine whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process." *Mampel v. E. Heights State Bank of St. Paul*, 254

[18] In 1982, Minn. Stat. § 15.0424, subd. 6, was renumbered to Minn. Stat. § 14.68. In 1983, section 14.68 was revised to the language that exists today. *See* 1983 Minn. Laws, Ch. 247, Sec. 14.

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N.W.2d 375, 377-78 (Minn. 1977). The Supreme Court further held that "the most appropriate method by which discovery should be accomplished is through depositions of witnesses upon written questions." *Id.* at 377-78.[19]

Second, in a case decided the following year, the Supreme Court reaffirmed its holding in *Mampel*. Again, the court limited discovery to "information concerning the procedural steps that may be required by law[.]" *People for Envt'l Enlightenment and Responsibility, Inc. v. Minn. Envt'l Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978).

Finally, in *Lecy*, the Supreme Court established clear and specific "limitations" that must be "imposed upon the doctrine of discovery enunciated in *Mampel*" after the district court allowed relators to "subpoena[] the agency commissioners before the trial court to render testimony." *In re Application of Lecy*, 304 N.W.2d 894, 900 (Minn. 1981). Those limits included a strict timetable for submitting "written interrogatories" to the agency, a list of five specific questions that those interrogatories could contain, and an absolute prohibition on deposing or requiring trial court testimony from the Department of Commerce commissioners. *Id.*[20] At the same time, the Supreme Court expressed "deep

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[19] Relators acknowledged *Mampel* in their motion to the court of appeals. *See* WaterLegacy Motion for Transfer at 10 (May 17, 2019) [Ex. 1 to McGhee Declaration]. Yet they failed to address *Mampel* in their motion to this Court. If Relators file a reply to this opposition belatedly addressing *Mampel*, PolyMet requests permission to submit a sur-reply.

[20] Those five written interrogatories were: "(1) Did the commissioner adhere to all statutory and administrative procedural rules in reaching his decision? (2) If the answer to question one is no, what deviations took place? (3) Did the commissioner read the entire record prior to rendering a decision? (4) Did the commissioner rely on information outside of the record in making the decision? and (5) If the answer to question four is yes, what information outside of the record was relied upon in making the decision?" *Lecy*, 304 N.W.2d at 900.

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concern over the inordinate length of time this matter has been in the court system," *id.* at 899, a concern that should apply equally to Relators' request to delay the evidentiary hearing to May 2020 in this matter.

In sum, "*Mampel* and subsequent cases demonstrate an exception to the general principle of wide-ranging discovery." *Ellingson & Assocs., Inc. v. Keefe*, 396 N.W.2d 694, 696 (Minn. Ct. App. 1986); *see also Matter of Dakota Cty. Mixed Mun. Solid Waste Incinerator*, 483 N.W.2d 105, (Minn. Ct. App. 1992) (observing that *Mampel* limited discovery to "information concerning the procedural steps required by law."). Significantly, *Mampel* recognized that "the legislature may provide for broader discovery." 254 N.W.2d at 377. But the legislature took the opposite tack. Following the *Mampel* trilogy of cases, section 14.68 was revised to strike the "proceedings shall be conducted according to the rules of civil procedure" language and replace it with the current language specifying that the district court shall have "jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure." 1983 Minn. Laws, Ch. 247, Sec. 14. By making this change, the legislature eliminated discovery in transferred proceedings. 1983 Minn. Laws, Ch. 247, Sec. 14.

6. Discovery against PolyMet is beyond the pale.

Even if discovery were permitted under the court of appeals' order and section 14.68, no basis exists for discovery against PolyMet. Relators seemed to agree when they presented their transfer motion to the court of appeals, because they made no mention of discovery

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against PolyMet.[21] Even when they made a long list of "unanswered" questions in their reply memo to the court of appeals, they did not mention PolyMet.[22] Now, however, Relators argue that "[d]iscovery from . . . PolyMet is necessary to fully determine the extent and scope of the irregularities that occurred pertaining to the NPDES Permit."[23]

Relators cannot show that discovery of *PolyMet* is necessary to prove allegations that ***EPA*** should have submitted written comments or that ***MPCA and EPA*** somehow conspired to keep the EPA's comments out of the public record. Those are the only areas of dispute identified by the court of appeals.[24] Indeed, the court of appeals' order does not even mention PolyMet by name, implicitly recognizing that the issues for the evidentiary hearing are unrelated to PolyMet. Relators should not be allowed to engage in a bait-and-switch maneuver in this Court given what they said to the court of appeals and what the court of appeals ordered.

Simply put, even if this Court allows limited discovery against MPCA, discovery directed at PolyMet will not assist this Court in its "determination of the alleged irregularities in procedure" identified in the transfer order.

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[21] WaterLegacy Motion for Transfer (May 17, 2019) [Ex. 1 to McGhee Declaration]; WaterLegacy Reply Memorandum (June 5, 2019) [Ex. 2 to McGhee Declaration].

[22] WaterLegacy Reply Memorandum (June 5, 2019) at 19–20 [Ex. 2 to McGhee Declaration].

[23] Relators' Memorandum in Support of Motion for Scheduling Order at 4.

[24] Court of Appeals Order at 3-4 (stating that disputed evidence exists 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.").

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CONCLUSION

Relators' motion for scheduling order and "pre-hearing discovery" is procedurally deficient, at odds with the court of appeals' mandate, and unauthorized by statute. This Court recognized the limitations in its jurisdiction, and the court of appeals' clear instructions, when it ordered the parties to come to the Rule 16 conference "prepared to discuss what issues need to be addressed by the Court, how long the evidentiary hearing will take, and identity of witnesses that will be asked to testify at any hearing." Relators' motions, which attempt to explode the narrow scope of the court of appeals' transfer, should be denied.

Dated: August 6, 2019

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ACKNOWLEDGMENT

The undersigned hereby acknowledges that pursuant to Minn. Stat. § 549.211, Subd. 3, sanctions may be imposed if, after notice and a reasonable opportunity to respond, the Court determines that the undersigned has violated the provisions of Minn. Stat. § 549.211, Subd. 2.

/s/ Monte A. Mills
Monte A. Mills