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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 **PRE-HEARING MEMORANDUM BY POLY MET MINING, INC.**

Poly Met Mining, Inc. ("PolyMet") submits this Pre-Hearing Memorandum to address the following legal points related to the evidentiary hearing: (1) Relators bear the burden of proof; (2) Whether "irregularities in procedure" exist turns on whether the agency adhered to procedures defined by statutes or by the agency's own rules and regulations on procedures; (3) Federal statutes and regulations do not require EPA to provide written comments on a proposed state NPDES permit; (4) EPA possessed legal authority to object to the permit, but chose not to exercise that discretionary authority; and (5) Questioning of PolyMet witnesses should be limited in scope.

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BACKGROUND

This case began when Relators filed a certiorari appeal challenging MPCA's December 20, 2018 decision to grant the NPDES Permit to PolyMet. Here is a brief timeline of events before MPCA's decision:

- **July 11, 2016**: PolyMet submits initial NPDES permit application to MPCA. (EX. 2023 at 2023-002, ¶ 3.)
- **October 23, 2017**: PolyMet submits revised NPDES permit application to MPCA. (EX. 2004.)
- **January 31, 2018**: MPCA issues public notice of intent to issue draft NPDES permit. (EX. 2023 at 2023-004, ¶ 20.)
- **January 31, 2018**: Public comment period opens on PolyMet NPDES permit. (EX. 2023 at 2023-004, ¶ 21.)
- **March 16, 2018**: Public comment period ends on PolyMet NPDES permit. (EX. 2023 at 2023-005, ¶ 23.)
- **March 16, 2018**: Emails between K. Thiede and S. Lotthammer reflect their "understanding of what EPA and MPCA have agreed to. . . . [and Thiede states that EPA is] hopeful our discussions and the additional review will allow us to come to an agreement and avoid objections." (EX. 63; EX. 64.)
- **September 25, 2018**: Meeting between EPA, MPCA, and PolyMet. (EX. 2015; EX. 1.)
- **September 26, 2018**: Meeting between EPA and MPCA. (EX. 2; EX. 1109.)
- **October 25, 2018**: MPCA provides to EPA the pre-proposed final NPDES permit for the negotiated 45-day review. (EX. 2018.)
- **December 3-4, 2018**: EPA notifies MPCA that its "pre-final" 45-day review is complete. (EX. 19; EX. 571 at ¶ 11.)
- **December 4, 2018**: MPCA provides to EPA the proposed final NPDES permit and supporting documents for 15-day final review. (Exs. 2020, 318.)
- **December 19, 2018**: EPA's 15-day final review ends without EPA objections.
- **December 20, 2018**: MPCA issues NPDES Permit to PolyMet. (EX. 2022.)

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LEGAL POINTS

1. Relators bear the burden of proof.

Relators bear the burden of proving procedural irregularities in the permit process. This matter is a certiorari appeal under Minnesota Statutes section 14.69, and the court of appeals transferred this matter to this Court under section 14.68 "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure."[1] Relators challenging an agency decision under section 14.69 bear the burden of proof. *See, e.g.*, *Matter of RS Eden/Eden House*, 928 N.W.2d 326, 333 (Minn. 2019) ("[A]ppellant bears the burden of establishing that the agency findings are not supported by the evidence in the record.") (quoting *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 118 (Minn. 2009)); *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 660 N.W.2d 427, 433 (Minn. 2003) ("[R]elator has the burden of proof when challenging an agency decision.").

Under Minnesota law, "[a]dministrative proceedings are presumed procedurally regular, and the party alleging otherwise bears the burden of proof." *Thiel v. Indep. Sch. Dist. No. 803*, No. A16-0753, 2017 WL 74390, at *3 (Minn. Ct. App. Jan. 9, 2017); *see also Metro Bar & Grill, Inc. v. City of St. Paul*, No. C6-00-1156, 2001 WL 436087, at *3 (Minn. Ct. App. May 1, 2001) ("On appeal, the party seeking review bears the burden of proving the agency's decision violates one or more provisions of Minn. Stat. § 14.69."); *Montella v. City of Ottertail*, 633 N.W.2d 86, 89 (Minn. Ct. App. 2001) ("Relators have not satisfied their

[1] Transfer Order at 4 (June 25, 2019).

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burden of showing that the city council erred when it denied their request for a liquor-license application without locating their conditional-use permit or conducting an investigation."); *In Matter of Appeal City of La Crescent*, No. C4-97-303, 1997 WL 370475, at *1-2 (Minn. Ct. App. July 8, 1997) ("Relator has the burden of proof on appeal when challenging an agency decision under Minn. Stat. § 14.69. . . . Relator . . . contends that the agency proceedings were tainted by a number of procedural irregularities. . . . The record, however, does not support relator's allegations."); *REM-Canby, Inc. v. Minnesota Dep't of Human Servs.*, 494 N.W.2d 71, 76 (Minn. Ct. App. 1992) ("There is a presumption of administrative regularity, and the party claiming otherwise has the burden of proving the commissioner reached a decision improperly.").

This burden of proof is not changed by the transfer from the court of appeals to this Court because the matter is still a certiorari appeal from the agency's decision. Therefore, Relators bear the burden of proving irregularities in procedure during the permit process.

2. Whether "irregularities in procedure" exist turns on whether the agency adhered to procedures defined by statutes or by the agency's own rules and regulations on procedures.

This matter is a certiorari appeal challenging MPCA's December 2018 decision to grant PolyMet a permit. 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 of appeals may transfer the case to the district court 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*.

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The court of appeals' order transferred this matter to this Court "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure."[2]

a. The Minnesota Supreme Court's trilogy of decisions in *Mampel*, *PEER*, and *Lecy* demonstrate that violations of statutorily defined procedures or the agency's own rules and regulations on procedures are necessary to establish irregularities in procedure.

In a trilogy of cases, the Minnesota Supreme Court explained that "irregularities in procedure" means violations of statutorily defined procedures or the agency's own rules and regulations.

First, in *Mampel*, the Supreme Court explained that the inquiry in the district court was "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 N.W.2d 375, 378 (Minn. 1977). The Supreme Court stated that the district court's inquiry was "narrow" because the question was "whether there was compliance with Minn. St. 1974 § 15.0421, and whether any materials, communications or other information outside the record were relied upon in reaching the commission's decision." *Id.* In *Mampel*, the parties challenging the commission's decision alleged that "certain procedural requirements of Minn. St. 15.01 to 15.43 had been violated." *Id.* at 377. Specifically, they alleged that a majority of commissioners did not hear or read the evidence as required by the statute, and that the challengers did not receive the opportunity to file exceptions and present arguments to the commission as required by the statute. *Id.*

[2] Transfer Order at 4 (June 25, 2019).

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Second, in *People for Environmental Enlightenment and Responsibility, Inc. (PEER)*, the Minnesota Supreme Court reaffirmed its holding in *Mampel* that the inquiry is limited to "'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.'" *People for Envt'l Enlightenment and Responsibility, Inc. v. Minn. Envt'l Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978) (quoting *Mampel*). The Supreme Court explained that the inquiry in the district court is "limited to information concerning the procedural steps that may be *required by law*." *Id.* (emphasis added). For example, the Supreme Court observed that "when a statute requires specified persons to make decisions," the district court must determine "whether the officials themselves actually made the decisions as the APA requires." *Id.*

Third, in *Lecy*, the Minnesota Supreme Court again reaffirmed its holding in *Mampel* that the district court's inquiry is limited to "'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.'" *In re Application of Lecy*, 304 N.W.2d 894, 900 (Minn. 1981) (quoting *Mampel*). Again, the Supreme Court stated that the inquiry was "narrow" because the question was "'whether there was compliance with Minn. St. 1974 § 15.0421, and whether any materials, communications or other information outside the record were relied upon in reaching the commission's decision.'" *Id*. (quoting *Mampel*). In *Lecy*, the parties challenging the commission's decision claimed that "the commissioners should be required to hold a collegial discussion on each of their objections or to discuss those objections in a written memorandum." *Id.* at 899. The Supreme Court

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rejected this claim because "nothing in the statutory requirements applicable to the Commission requires a collegial discussion between the commissioners prior to a final decision." *Id*. The Supreme Court determined that the applicable law did not require the procedures that the objectors wanted: "Nowhere in the statute is it required that the commissioners discuss the merits of the application before a decision is made." *Id*. The Supreme Court reasoned that "[t]o require the commissioners to orally discuss in public a decision on which they have reached an independent judgment just for the sake of form is absurd." *Id*. In sum, the Supreme Court "agree[d] with the trial court's determination that no procedural deficiencies occurred." *Id*.

The Minnesota Supreme Court in *Lecy* concluded by providing guidance to cases in the future. The Supreme Court identified two key questions: "(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?" *Id.* at 900. The Court also identified the question: "Did the commissioner rely on information outside of the record in making the decision?" *Id*. And if the question about information outside the record was answered in the affirmative, then this follow-up question applies: "what information outside of the record was relied upon in making the decision?" *Id*.

The trilogy of cases starting with *Mampel* and ending with *Lecy* demonstrate that to establish "irregularities in procedure," there must be proven violations of statutorily defined procedures or violations of the agency's own rules and regulations. The key question is whether the agency adhered to all statutory and administrative procedural rules in reaching its decision. Where "nothing in the statutory requirements applicable" required

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the procedures that the objectors wanted, *Lecy* expressly rejected their procedural irregularities claim. 304 N.W.2d at 899.

b. Decisions by the Minnesota Court of Appeals require violations of statutorily defined procedures or rules and regulations on procedures to establish "irregularities in procedure."

Like the trilogy of Minnesota Supreme Court cases, the court of appeals' decision in *Hard Times Cafe, Inc. v. City of Minneapolis*, holds that "irregularities in procedure" must be violations of statutorily defined procedures or violations of the agency's own rules and regulations. 625 N.W.2d 165 (Minn. Ct. App. 2001). In that case, the relator argued that the city's "decision was improper because the city council utilized unlawful procedures in making its decision." *Id.* at 173. The court of appeals agreed with the relator that the only way to "determine whether the procedures were unlawful is to consider the extra-record materials submitted by relator." *Id*. The court of appeals found substantial evidence of irregularities because the city was required to make decisions according to its manual, which "prohibited the council from allowing or initiating ex parte contacts, forming an opinion as to sanctions until after the close of all hearings, and considering material outside the record." *Id.* at 174. Based on the materials submitted, the court of appeals found that "the city council violated both the procedures set forth in the Manual and the explicit instructions of the city attorney," who had advised the council not to consider material outside the record. *Id*. As a result, the court of appeals transferred the case to the district court under section 14.68 to take testimony and "determine the alleged irregularities in procedure." *Id*. To sum up, the "irregularities in procedure" question that *Hard Times Cafe* identified was "whether the procedures were unlawful" in light of extra-record evidence.

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Id. at 173; *see also Matter of Dakota Cty. Mixed Mun. Solid Waste Incinerator*, 483 N.W.2d 105, 106 (Minn. Ct. App. 1992) (stating that the inquiry into "irregularities in procedure" under Minn. Stat. § 14.68 before the district court is "limited to information concerning the procedural steps required by law").

Another decision by the court of appeals shows that no procedural irregularities exist without violations of established rules. In *In re North Metro Harness, Inc*., the relator requested remand to the district court to determine alleged procedural irregularities. 711 N.W.2d 129, 138 (Minn. Ct. App. 2006). The relator suggested that *Hard Times Cafe* supported the motion for remand. *Id.* at 139. But the court of appeals rejected the relator's argument, pointing out that in *Hard Times Cafe* "the city council was to make its decision in accordance with its manual, which prohibited ex parte contacts." *Id.* (citing *Hard Times Cafe*, 625 N.W.2d at 174). The court of appeals easily distinguished *Hard Times Cafe* because in *North Metro Harness* the relator had offered "no similar guidelines that the commission is required to use in making its decisions." *Id.*

Yet another decision by the court of appeals underscores this point. In *In re Koochiching County*, the relator argued that "procedural irregularities" had occurred similar to the activities at issue in *Hard Times Cafe*. No. A09-381, 2010 WL 273919, at *9 (Minn. Ct. App. Jan. 26, 2010). But the court of appeals rejected the relator's argument. The court reasoned that the activities in *Hard Times Cafe* were "in direct violation of the manual governing license adverse action proceedings, which specifically instructed the council members to 'avoid ex parte contacts, base [their] decision[s] solely on the record, and not make [their] final decision until after the hearing.'" *Id.* (quoting *Hard Times Cafe*, 625

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N.W.2d at 170). Unlike the *Hard Times Cafe* circumstances, in *Koochiching*, the relator had "provided no similar rules governing the [agency] or the commissioner." *Id.*

The lesson from *North Metro Harness* and *Koochiching* is that absent a rule violation, there are no irregularities in procedure.

c. The text of the statute supports the Minnesota appellate decisions interpreting the meaning of "irregularities in procedure."

The foregoing Minnesota appellate decisions are consistent with the plain and ordinary meaning of the phrase "irregularities in procedure" in Minnesota Statutes section 14.68. When interpreting statutes, the courts "give words and phrases their plain and ordinary meaning." *Gilbertson v. Williams Dingmann, LLC*, 894 N.W.2d 148, 151 (Minn. 2017) (quoting *In re Welfare of J.J.P.*, 831 N.W.2d 260, 264 (Minn. 2013)). At the outset, the statute is not concerned with simply any "irregularity," but rather, it is concerned with one "in procedure." So "irregularity" must not be read in isolation from "in procedure." "A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Martin v. Dicklich*, 823 N.W.2d 336, 345 (Minn. 2012). The word "procedure," in a legal context like this, is defined as "the steps taken in a legal action." XII Oxford English Dictionary 543(2nd ed. 1989). The word "procedure," also is defined as "[a] particular action or course of action, a proceeding; a particular mode of action" or "[a] set of instructions for performing a specific task." *Id.* The word "irregularity" is defined as "[t]he quality or state of being irregular," or "[w]ant of conformity to rule; deviation from or violation of a rule, law, or principle; disorderliness in action; deviation from what is usual or normal; abnormality,

anomalousness," or "a breach of rule or principle; an irregular, lawless, or disorderly act." VIII Oxford English Dictionary 93 (2nd ed. 1989).

If these definitions were not enough, the phrase "irregularities in procedure" also must be read in the full context of Minnesota Statutes sections 14.63–14.69, which provide for judicial review of final decisions and orders of agencies. Minn. Stat. § 14.63. When interpreting statutory text, a court must read the statute "as a whole so as to harmonize and give effect to all its parts." *Matter of Restorff*, 932 N.W.2d 12, 19 (Minn. 2019) (quoting *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 93 N.W.2d 690, 698 (1958)). "The statutory language in dispute is not examined in isolation; rather, all provisions in the statute must be read and interpreted as whole." *State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019) (citation omitted). "[V]arious provisions of the same statute must be interpreted in the light of each other, and the legislature must be presumed to have understood the effect of its words and intended the entire statute to be effective and certain." *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015) (quoting *Van Asperen*, 93 N.W.2d at 698). Section 14.69 provides that, in a judicial review under sections 14.63 to 14.68, the court of appeals "may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are . . . made upon unlawful procedure," or "affected by other error of law." Minn. Stat. § 14.69. Thus, the phrase "irregularities in procedure" in section 14.68 must be read in light of section 14.69, which identifies "unlawful procedure" or "other error of law" as grounds under which the court of appeals may reverse or modify a final agency decision. Minn. Stat. § 14.69.

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Thus, this Court should reject Relators' argument that a definition of "irregularity" does not require a violation of law. Relators' oversimplified interpretation ignores the phrase "in procedure" that follows "irregularities" in section 14.68, fails to consider that phrase in section 14.68 in the context of section 14.69, and is contrary to Minnesota caselaw.

d. Consistent with the Minnesota caselaw and the text of the statute, this Court already properly recognized that the legal issue is what statutes or rules set forth the proper procedures.

At the August 7 hearing, this Court explained that its task was to identify (1) a specific procedural requirement, (2) the legal basis for the procedure, and (3) how MPCA may have violated it. And Relators' counsel agreed with those three points:

> THE COURT: So the task before me by the court of appeals is to, one, make a finding as to what the proper procedures for the consideration of this type of permit are.
> MS. MACCABEE: Yes, sir.
> THE COURT: And what are the statutes and rules that set forth those procedures. That would be part of what I need to do, right?
> MS. MACCABEE: Yes, sir.
> THE COURT: And then I would need to make a determination through findings and conclusions as to whether those procedural statutes and rules were followed, did something happen that shouldn't have happened, or did something not happen that should have happened, right?
> MS. MACCABEE: Yes, sir.
> THE COURT: So all those things you would agree the court of appeals is asking me to do.[3]

[3] Aug. 7, 2019 Hr'g Tr. at 24.

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3. Federal statutes and regulations do not require EPA to provide written comments on a proposed state NPDES permit.

Relators admit that the federal Clean Water Act "establishes the procedures for NPDES permitting, including requirements for responses to comments."[4] But the Clean Water Act does not require EPA to provide written comments on a proposed state NPDES permit. *See* 33 U.S.C. §§ 1341, 1342, 1344. Relators also admit that the EPA review process is "governed by regulations promulgated by EPA for its 'review of and objections to State permits.'"[5] But those federal regulations do not require EPA to provide written comments on a proposed state NPDES permit. *See* 40 C.F.R. § 123.44(b)(1). Federal regulations do not prohibit oral comments. *See id*. Federal regulations concerning public disclosure focus on responses to "***written*** comments," not oral ones. 40 C.F.R. § 124.11 (emphasis added).

In 1974, MPCA and EPA entered into a Memorandum of Agreement ("Agreement"),[6] which governs Minnesota's authority to implement its NPDES permit program. *See* 40 C.F.R. § 123.24. Like the Clean Water Act and related regulations, the Agreement contemplates that EPA may—but is not required to—provide written comment on a particular application.[7] The Agreement does not prohibit oral comments.

It appears that EPA did not submit written comments to MPCA.[8] MPCA thus had no obligation to draft written responses. Although Relators may contend that federal

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[4] EX. 2024, at 2024-005 (citing 33 U.S.C. § 1342, 40 C.F.R. §§ 124.17, 123.25).

[5] EX. 2029, at 2029-011-12, ¶ 41 (quoting 40 C.F.R. § 123.44).

[6] EX. 2001.

[7] EX. 2001, at 2001-009–2001-011.

[8] EX. 2029, at 2029-040, ¶ 146.

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regulations require states issuing NPDES permits to provide written responses to comments accessible to the public, citing 40 C.F.R. §§ 124.17(a)(2), (c); 123.25(a)(31), those regulations do not require written responses to comments that are not submitted in writing.

MPCA did not need to consider or include in the administrative record a draft letter that EPA did not submit to MPCA. Minnesota law is clear that an agency need not "consider or include in the administrative record documents ***never submitted to*** or ***received by*** it." *Nat'l Audubon Soc. v. Minn. Pollution Ctrl. Agency*, 569 N.W.2d 211, 216 (Minn. App. 1997) (emphasis added). Further, an agency is "not required to look beyond the official comment issued by another commenting agency" in making its permitting decision, even if that commenting agency's staff is "divided." *Id.* Minnesota law thus prohibits Relators from pointing to EPA's alleged "internal debate" about the permit as evidence that might support its claims. *Id.*

4. EPA possessed legal authority to object to the permit, but chose not to exercise that discretionary authority.

EPA had the legal authority to object to the NPDES permit, and even to compel revisions or a denial. *See* 42 U.S.C. § 1342; 40 C.F.R. § 123.44 (describing EPA authority to review and object to state NPDES permits).[9] But EPA chose not to do so. EPA did not object to—or otherwise prevent the implementation of—the final permit that MPCA issued on December 20, 2018. EPA had the final opportunity to review the permit in December 2018

[9] *See also* EX. 2029 at 2029-011, ¶ 40 (stating that "EPA has the authority to object to MPCA's issuance of an NPDES permit").

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just before MPCA issued it.[10] When EPA reviewed the final permit, it did not exercise its discretionary authority to object. *See American Paper Inst. v. U.S. E.P.A.*, 890 F.2d 869, 871, 875 (7th Cir. 1989); *Friends of Crystal River v. U.S. E.P.A.*, 35 F.3d 1073, 1078-79 (6th Cir. 1994); *Menominee Indian Tribe of Wisconsin v. U. S. E.P.A*, 360 F. Supp. 3d 847, 853-55 (E. D. Wis. 2018).

5. Questioning of PolyMet witnesses should be limited in scope.

Broad questioning of *PolyMet* witnesses is not necessary for the Relators to attempt to prove irregularities in procedure. The only areas of dispute identified by the court of appeals related to the interactions between *MPCA and EPA*.[11] Relators' ten unanswered questions in their reply memo to the court of appeals do not mention PolyMet.[12] 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. Because Relators may not now expand their arguments to include PolyMet's activities, the questions to PolyMet's witnesses will necessarily be narrow.

This Court should reject Relators' attempt to litigate the substantive merits of the NPDES permit through questioning of PolyMet witnesses. Relators may not litigate the merits of their certiorari appeal before this Court because only the court of appeals has

[10] *See* EX. 2029 at 2029-041, ¶ 153.

[11] Transfer Order at 3-4 (June 25, 2019) (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.").

[12] WaterLegacy Reply Memorandum (June 5, 2019) at 19–20 (McGhee Declaration Ex. 2 (Aug. 6, 2019).

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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."). The court of appeals' order transferred this matter to this Court "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure."[13] And Minnesota law limits the scope of a district court's jurisdiction after 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' attempt to litigate the substantive merits of the NPDES permit.

This Court already recognized that the evidence at the hearing must be limited to what is necessary to resolve the questions about irregularities in procedure:

> I am going to limit myself to what the court of appeals told me to do, and that is, what are the alleged irregularities, what are the proper procedures for consideration of a permit of this nature, what statutes and rules set forth the proper procedures. To the extent there's a claim that the proper administrative procedures were not followed, what happened that should not have happened, and what did not happen that should have happened. And the information that I accept in evidence at a hearing is going to be limited to what is needed to resolve those issues.[14]

Consistent with this limitation on the evidence at the hearing, this Court has stated that this proceeding does not have "anything to do with PolyMet or what PolyMet did or what PolyMet said."[15]

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[13] Transfer Order at 4.

[14] Aug. 7, 2019 Hr'g Tr. at 95–96.

[15] Sept. 16, 2019 Hr'g Tr. at 49.

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With respect to PolyMet's place in the hearing, this Court has emphasized that "there is nothing in the court of appeals' decision and nothing in [Relators'] brief that suggests that anything that PolyMet said constitutes a procedural irregularity or even led to a procedural irregularity."[16] Even Relators' counsel has admitted that "it is not irregular or improper or anything else for the permittee to communicate about its own permit."[17]

This Court has thus directed that questions to PolyMet in discovery "need to be focused on what PolyMet knows that pertains to the procedural irregularities between the EPA and the MPCA."[18] The Court observed that "appropriate" inquiries to PolyMet would be "about PolyMet's status as a witness to events between the agencies at issue."[19] The Court stated that "this is not an investigation of whether PolyMet unduly influenced the permitting process."[20] These same basic rules should apply during the evidentiary hearing.

In sum, expansive questioning of PolyMet witnesses will not assist this Court in its "determination of the alleged irregularities in procedure" identified in the transfer order. The Court should properly limit the scope of Relators' questions to PolyMet witnesses during the hearing.

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[16] *Id.* at 48.

[17] *Id.* at 46.

[18] *Id.* at 49.

[19] *Id.* at 58.

[20] *Id.* at 50.

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Dated: January 10, 2020

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