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STATE OF MINNESOTA	)	IN THE DISTRICT COURT
	)	
COUNTY OF RAMSEY	)	SECOND JUDICIAL DISTRICT

Court File Number: 62-CV-19-4626

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	)	**MEMORANDUM IN SUPPORT OF MOTION TO COMPEL**

Respondent Minnesota Pollution Control Agency ("MPCA"), moves the Court for an order compelling WaterLegacy, Minnesota Center for Environmental Advocacy, Center for Biological Diversity, Friends of the Boundary Waters, and Fond du Lac Band of Lake Superior Chippewa (collectively "Relators") to provide a complete privilege log and to respond to MPCA's written deposition questions. In support of their motion, MPCA offers the following.

BACKGROUND

This proceeding stems from Relators' appeal of MPCA's issuance of a water quality permit for the NorthMet Mining Project. 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." Sept. 9, 2019 Order at 1 (quoting June 25, 2019 Order). Thus, the evidentiary hearing is limited to the discrete alleged procedural irregularities that Relators raised before the Court of Appeals. This approach is consistent with Minn. Stat. § 14.68, which vests the district court with narrow jurisdiction "to take testimony and to hear and determine the alleged irregularities in procedure." All substantive issues remain to be

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determined by the Court of Appeals in a review that "shall be confined to the record." Minn. Stat. § 14.68.

Against this backdrop, this Court has emphasized that the purpose of discovery is to avoid "surprise" and "ambush." To that end, MPCA's written deposition questions asked Relators to "describe with particularity the basis" for specific allegations, and the Court affirmed the validity of these requests. As this Court explained,

> This is exactly what the Court ordered. The Court ordered a Rule 30.02 type witness to be produced by Relators as a group to answer these kinds of questions so the MPCA is not surprised at this hearing. So you're going to have to do it, and you're going to designate somebody, and they're going to *talk* about the answers to these questions supported by whatever documents you have that create the basis for the positions that have been taken. *And it's going to need to be with particularity. These are all reasonable requests.*

Sept. 16, 2019 Tr. at 110:11-20 (emphasis added).[1]

Despite this instruction, Relators' designated witness provided *no* response to any of the questions. *See* Oct. 16, 2019, Deposition of Chris Knopf by Written Questions Tr. (Attach. 1). Instead, Relators dumped a list of documents, comprising thousands of pages of text on MPCA. MPCA was left with the hopeless task of sifting through these documents looking for clues to the particularities of Relators' claims.[2]

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[1] During the September 16th Status Conference, the Court also devoted significant time to Relators' concerns that providing any explanation of the basis of their claims would necessarily involve revealing attorney work-product. Sept. 16, 2019 Tr. at 104:12-18, 108:17-22. The Court explained the distinction between an attorney's mental impressions and the "basis for a claim," and reiterated that work product and documents subject to privilege or other protections could be included on a Privilege Log rather than being produced. *Id.* at 104:19-22, 108:23-109:3, 112:15-113:6.

[2] By way of illustration, when MPCA asked simply that Relators describe the basis for Relators' claim that MPCA or EPA sought to prevent EPA's comments from becoming part of the

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The documents display no readily discernible relationship to the Relators' procedural irregularity claims. For example, their production includes a lengthy technical report on air dispersion modeling, copies of pages from public hearing transcripts, and numerous non-substantive emails relating to Data Practices Act requests. These documents certainly do not describe (with or without "particularity") the bases for Relators' claims.

With respect to Relators' Privilege Log, despite having raised many concerns about protecting work-product and privileged documents, their Privilege Log spans less than a page. It lists twenty-one documents, only two of which (for whom the custodian is the Fond du Lac Band) are identified as work-product and privileged. Relators' Privilege Log (Attach. 3). The remaining documents are identified only as "confidential source" documents. For none of these documents do Relators identify an author or recipient, nor do they provide any other basis for discerning the nature of the document or evaluating the validity of the claim. Moreover, Relators provide no basis in law for their claim that a particular individual is a "confidential source" or that the individual's identity is exempt from discovery.

Relators provided only one document with a redaction. To the extent that Relators are withholding most of the documents for which they claim protection based on their "confidential

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(cont'd.)..
administrative record, Relators threw down a list of 245 separate documents, as the entirety of Relators' "response" to the question. *See* Oct. 16, 2019 Deposition of Chris Knopf by Written Questions Tr. at 14:5-10 (Attach. 1) ("Based on the information Relators currently possess, and considering that discovery and investigation are ongoing, Relators have prepared a list of documents by Bates number that are responsive to this question.") and Exhibits to Deposition of Chris Knopf by Written Question (Attach. 2). Relators made no attempt to testify as to where, within these documents, a passage might tell MPCA what Relators believe to be the "irregularities" at issue in this litigation. Indeed, one might reasonably conclude that Relators are incapable of identifying procedural irregularities because they just do not exist.

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source" claim, it is unclear why those other documents could not be produced by simply redacting the name and any other identifying information. Indeed, for the one document that Relators did redact and produce, this is precisely what was done.

SCOPE OF DISCOVERY

The objective of discovery is "to encourage the exchange of relevant information by the parties prior to trial and to discourage and prevent unjust surprise and prejudice at trial[.]" *Gale v. Cty. of Hennepin*, 609 N.W.2d 887, 891 (Minn. 2000) (quoting *Shymanski v. Nash,* 251 N.W.2d 854, 856 (Minn. 1977)). This Court provided MPCA the same means of discovery as it did for Relators, allowing "a Rule 30.02 style set of 25 document requests and 25 written depositions to be directed to the Relators as a whole." Aug. 8, 2019 Tr. 115:13-16. The Court explained that the purpose of allowing MPCA this discovery was "the same due process purpose that is behind the discovery that the court permitted . . . by the Relators towards the Respondents, that is, the lack of litigation by ambush and surprise." Aug. 8. 2019 Tr. 115:17-21. As the Minnesota Supreme Court has explained, "trial by ambush fell out of favor in the courts of this state over 50 years ago." *Gale*, 609 N.W.2d at 891 (quoting *Am. Standard Ins. Co. v. Le,* 551 N.W.2d 923, 925 n. 3 (Minn. 1996)).

ARGUMENT

I. RELATORS' RESPONSES TO MPCA'S DEPOSITION QUESTIONS VIOLATE THIS COURT'S ORDER.

This Court instructed that the parties could "file Rule 30.02 style" written deposition questions. For each question, Relators' responded by handing over a list of documents. These lists contain references to hundreds of documents comprising thousands of pages of text.

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Relators provided no explanation of the contents of the lists, except that the listed documents were "responsive."

The lists alone do not adequately respond to MPCA's written deposition questions. Although the Court permitted Relators to answer some questions by providing documents, the identification of documents must still answer the question. The Court explained that Relators must "designate these questions supported by whatever documents you have that create the basis for the positions that have been taken. And it's going to need to be with particularity. These are all reasonable requests." Sept. 16, 2019 Tr. 110:15-20.

Relators' lists of documents plainly are insufficient responses to MPCA's written deposition questions. Minnesota Rule of Civil Procedure 33.03 and its federal counterpart, Federal Rule of Civil Procedure 33(d),[3] which allow identification of business records in response to interrogatories, are instructive. Rule 33.03 provides:

> Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail as to permit the

[3] Minnesota Rule of Civil Procedure 33.03 is substantially similar to its federal counterpart, Federal Rule of Civil Procedure 33(d). *See T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 787 n. 3 (Minn. 2009) ("Where the language of the Federal Rules of Civil Procedure is similar to language in the Minnesota civil procedure rules, federal cases on the issue are instructive.").

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> interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

In order to properly invoke this rule, the producing party must affirm that the information sought by the interrogatory is in fact available in the specified records. *FM Generator, Inc. v. MTU Onsite Energy Corp.*, No. 14-14354-DJC, 2016 WL 8902603, at *5 (D. Mass. Aug. 25, 2016). Thus, to rely on this rule in an interrogatory answer, an answering party "must specify the information that the requesting party should review in sufficient detail to enable the requesting party to locate and identify the information in the documents [at least] as readily as an answering party could." *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 579 (N.D. Tex. 2018) (quoting *McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, No. 3:14-cv-2498-B, 2016 WL 2997744, at *9 (N.D. Tex. May 25, 2016)) (cleaned up).

Here, the documents do not answer the deposition questions, and Relators have not said where or how the information sought is available in the identified documents. In response to each question, Relators' designated witness testified only that "Based on the information Relators currently possess and considering that discovery and investigation are ongoing, Relators have prepared a list of documents by Bates number that are responsive to this question." *See, e.g.*, Oct. 16, 2019 Deposition of Chris Knopf by Written Questions Tr. at 15:8-13 (Attach. 1). Relators identify hundreds, sometimes thousands, of documents in answer to MPCA's written deposition questions, including many duplicative documents. Relators' make no attempt to identify where the answer to the written deposition questions can be found in the identified documents, forcing MPCA to comb through the thousands of pages for potential answers to its questions. Relators have given MPCA no hints about where to look in these documents. As

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explained in more detail below, Relators' answers are insufficient and do not prevent surprise and prejudice to MPCA at trial.

1. **<u>Written Deposition Question No. 1</u>: Describe with particularity any Procedural Irregularities that Relators allege occurred regarding the NPDES Permit.**

Relators respond to this question by identifying two documents filed in this case: (1) Relators' List of Alleged Procedural Irregularities and (2) Relators' Motion for Findings of Fact, Conclusions of Law, and an Order. Neither of these documents describe the alleged procedural irregularities with particularity. Further, by including the Motion for Findings of Fact, Conclusions of Law, and an Order, Relators seek to expand the basis for their claims beyond their designated List of Alleged Procedural Irregularities.[4]

At the August 7, 2019 hearing, the Court ordered Relators to provide a List of Alleged Procedural Irregularities, noting that it will likely be taken from Relators' brief, Aug. 7, 2019 Tr. 103:4-11, and that Relators' "alleged irregularities are pretty broadly stated," Aug. 7, 2019 Tr. 110:4-5. Unsurprisingly, the Relators' List of Alleged Procedural Irregularities broadly states the alleged irregularities, and not with particularity.

Relators' Motion for Findings of Fact, Conclusions of Law and an Order provides even broader statements as to the alleged procedural irregularities. It does not describe the irregularities with particularity such that MPCA would not be surprised or prejudiced at trial.

[4] As MPCA has previously noted, Relators' List of Alleged Procedural Irregularities is broader than the allegations Relators raised before the Court of Appeals and broader than the issues identified by the Court of Appeals in its Transfer Order. *See* Sept. 16, 2019 Tr. at 9:13-25, 109:11-17. This Court has limited the scope of this proceeding to these issues. MPCA understands that this Court has deferred consideration of the precise scope of the issues before it under the Transfer Order. *See* Aug. 7, 2019 Tr. at 17-18; Sept. 16, 2019 Tr. at 10:2-9.

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See, e.g., Motion for Findings of Fact, Conclusions of Law and an Order ¶ 120. Indeed, it expands rather than diminishes the likelihood of surprise at trial.

2. **Written Deposition Question No. 2: Describe with particularity the basis for Relators' allegation that MPCA and/or EPA sought to prevent EPA's comments from becoming part of the administrative record for the NPDES Permit.**

In response to Written Deposition Question Number 2, Relators identify 245 documents without any explanation as to how these documents answer MPCA's question. The identified documents include the Declaration of Seth Bichler asserting that Fond du Lac Band of Lake Superior Chippewa would be "severely prejudiced if this Court denies the Transfer Motion" (RELATORS_0063991 (Attach. 4)), copies of Relators' non-substantive emails regarding Relators' requests under the Data Practices Act and non-substantive emails regarding such requests (*see, e.g.*, RELATORS_0062543 (Attach. 5), 0062544 (Attach. 6), 0062545 (Attach. 7)), and numerous other documents that provide no discernable response or explanation as to the basis for Relators' allegation that MPCA and/or EPA sought to prevent EPA's comments from becoming part of the administrative record for the NPDES Permit.

3. **Written Deposition Question No. 3: Describe with particularity the basis for Relators' allegation that MPCA's issuance of the NPDES Permit was based on communications or documents that are not reflected in the administrative record.**

In response to Written Deposition Question Number 3, Relators list 169 documents including, for example, numerous non-substantive emails regarding Relators' requests under the Data Practices Act (*see, e.g.*, RELATORS_0062585 (Attach. 8), 0062587 (Attach. 9), 0062589 (Attach. 10)), numerous Data Practices Act request forms, which appear not to bear on allegations about the content of the Administrative Record (*see, e.g.*, RELATORS_0062591

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(Attach. 11), 0062594 (Attach. 12), 0062608 (Attach. 13)), and many other documents that do not appear to clarify the basis for Relators' claims regarding communications or documents not in the Administrative Record. Relators make no representation that these documents actually answer the deposition question, nor do they identify documents with sufficient specificity, given the volume of documents they produce and the non-specific nature of many of those documents. If, for example, Relators purport to put MPCA on notice that some otherwise unspecified document that might have fallen within the scope of one of these Data Act Requests was improperly excluded from the Administrative Record, providing a copy of their various request forms and related non-substantive emails does not adequately identify the basis for any such claims.

4. **Written Deposition Question No. 4: Describe with particularity the basis for Relators' allegation that MPCA sought to prevent documents or communications from being fully and fairly reviewed by the Court of Appeals.**

   Written Deposition Question No. 5: Describe with particularity each instance in which Relators allege that MPCA failed to act with truthfulness, accuracy, disclosure, or candor in connection with the NPDES Permit.

Despite the Court's directive to specify documents for each question, Relators fail to respond to Written Deposition Question Numbers 4 and 5 individually. *See* Sept. 16, 2019 Tr. at 114. Instead Relators identify 2,046 documents as responsive to both Questions. These questions are not interchangeable and must be answered individually. Moreover, identification of over 2,000 documents fails to adequately respond to either written deposition question. The identified documents include many documents that appear entirely irrelevant to the written

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deposition question. For example, Relators identify the following documents as answering this question:

- RELATORS_0000001 - 40-page "Mining Truth Report" from the Conservation Minnesota, Friends of Boundary Waters Wilderness, & Minn. Center for Environmental Advocacy, date May 2012 (Attach. 14);
- RELATORS_0000041 - 52-page EPA Technical Document on Acid Mine Drainage Prediction, dated December 1994 (Attach. 15);
- RELATORS_0006659 - MPCA's 120- page MPCA Air Dispersion Modelling Manual (Attach. 16); and
- RELATORS_0007075 - 436-page Stationary and Mobile Source Emission Calculations for the NorthMet Project Combined Report, dated November 2008 (Attach. 17).

Additionally, many of the 2,046 documents Relators identify are duplicates. For example, of the 276 documents identified on the 2nd and 3rd pages of Relators' response, at least 242 of these documents are duplicates representing only 21 unique documents. All of these duplicate documents are excerpts from public hearing transcripts that do not appear to have any bearing on the basis for Relators' allegation that MPCA sought to prevent documents from being fully and fairly reviewed by the Court of Appeals or instances in which Relators allege that MPCA failed to act with truthfulness, accuracy, disclosure, or candor.

5. **Written Deposition Question No. 6: Describe with particularity each instance in which Relators allege that MPCA improperly destroyed, discarded, or failed to retain written records of communications with EPA regarding the NPDES Permit.**

Similarly, in response to Written Deposition Question Number 6, Relators identify 2,046 documents without any explanation. All but 135 of those documents are the same documents as those identified in response to Question Numbers 4 and 5. Relators cannot cite to a mass of documents and simply leave MPCA to cull through them for the relevant information. Nor can

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Relators provide thousands of pages in the hopes of later pointing to a cited reference or a footnote buried in a lengthy report as disclosure of otherwise unidentified claims or evidence. Rather, Relators must "specify where in the records the answers [can] be found." *Cambridge Elects. Corp. v. MGA Elecs., Inc.*, 227 F.R.D 313, 323 (C.D. Cal. 2004); *see also Pulsecard, Inc. v. Discover Card Servs.*, 168 F.R.D. 295, 305 (D. Kan. 1996) (under FRCP 33(d), parties must "identify in their answers to the interrogatories specifically which documents contain the answer.").

Here, Relators should provide MPCA with a direct answer listing the documents that they allege were improperly discarded and the circumstances that made the actions improper.

6. **Written Deposition Question No. 7: Describe with particularity how Relators allege that they were prejudiced by the alleged Procedural Irregularities associated with the NPDES Permit.**

Relators produced a small number of documents in response to this Question, including certain of their pleadings and declarations relating to the Motion to Transfer before the Court of Appeals, and their Proposed Findings of Fact and Conclusions of Law[5] filed with this Court. They make no attempt to say, with particularity, how they have been prejudiced. Those Proposed Findings of Fact and Conclusions of Law do not identify Relators' claims of alleged procedural irregularities, or the basis of those claims, with sufficient particularity to put MPCA on reasonable notice and to avoid surprise and prejudice at the hearing.

7. **Written Deposition Question No. 8: For each document that Relators allege was improperly excluded from the administrative record for the NPDES Permit, describe with particularity why Relators allege the document should be included in the administrative record.**

[5] This document reads like a complaint – presumably by design. It contains broad contentions and arguments but does not describe with any particularity the basis for Relators contention that they are prejudiced.

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In response to Written Deposition Question Number 8, Relators identify 166 documents. The identified documents include numerous Data Practices Act and Freedom of Information Act requests pertaining to PolyMet/NorthMet, emails concerning those requests and declarations submitted by MPCA in this proceeding. None of these documents describe with particularity why Relators allege specific documents should be included in the administrative record.

II. RELATORS' PRIVILEGE LOG IS INADEQUATE.

In the August 7, 2019 hearing, this Court ordered that "[i]f any party who is the subject of this discovery objects to disclosing a document arguably within the scope of discovery, they have to provide a privilege log describing anything that was withheld and setting forth the privilege that is being asserted." Aug. 7, 2019 Tr. 102:4-8; *see also* Minn. R. Civ. P. 26.02(f) ("When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, ***will enable other parties to assess the applicability of the privilege or protection***.") (emphasis supplied). The party asserting the attorney-client privilege or the work-product doctrine bears the burden to provide a factual basis for its assertions. *Triple Five of Minn., Inc. v. Simon*, 212 F.R.D. 523, 527 (D. Minn. 2002).

Relators' Privilege Log identifies only two documents as work product and/or subject to attorney-client privilege. Relators' Privilege Log (Attach. 3). Relators identify another 19 documents as being withheld to protect a confidential source. It strains credulity that Relators, collectively, possess only two responsive documents that Relators would claim are subject to

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work-product or attorney-client protection. Relators have repeatedly voiced their need to protect their many work-product or privileged documents. *See, e.g.*, Sept. 16, 2019 Tr. at 104:12-18. Further, the Privilege Log identifies only emails. Relators must log all responsive, privileged documents on its Privilege Log or waive the privilege as to these documents. *See Universal Standard Inc. v. Target Corp.*, 331 F.R.D. 80, 85 (S.D.N.Y. 2019) ("Withholding privileged materials without including the material in a privilege log 'may be viewed as a waiver of the privilege or protection.'") (quoting *Dey, L.P. v. Sepracor, Inc.*, No. 07-Civ-2353, 2010 WL 5094406, at *2 (S.D.N.Y. Dec. 8, 2010)).

Moreover, Relators fail to adequately describe even the handful of documents they include. Relators must describe each of the documents in the Privilege Log to provide MPCA the ability to assess the applicability of the privilege or protection. *See Chevron Corp. v. Weinberg Grp.*, 286 F.R.D. 95, 98 (D.D.C. 2012) (the opposing party and the judge "should be able to tell that the information not being disclosed is properly claimed as privileged" from the privilege-log entry itself). For example, for the two documents that are withheld on the basis of attorney-client privilege and the work-product doctrine, the log does not specify who sent or received the withheld email. This information is critical in assessing whether the attorney-client privilege applies to the communication. *See Friends of Hope Valley v. Frederick Co.*, 268 F.R.D. 643, 651-52 (E.D. Cal. 2010) (holding that privilege log was deficient that failed to include titles or positions of some creators of communications and only contained the subject line of an email or letter, which was not enough description to identify why the communications were privileged).

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Nor do Relators describe the subject matter of the withheld documents sufficiently to support a claim of privilege. Relators' descriptions of withheld emails simply describe them as either being "from confidential source" or "regarding the confidential source." This is insufficient to show that the attorney-client privilege or work-product doctrine attaches. *See Hynix Semiconductor Inc. v. Rambus Inc.*, Case No. 00-cv-20905-RMW, 2008 WL 350641, at *3 (N.D. Cal. Feb. 2, 2008) ("A vague declaration that states only that the document 'reflects' an attorney's advice is insufficient to demonstrate that the document should be found privileged.").

Also unclear in the Privilege Log is why Relators cannot produce redacted versions of the documents identified as "confidential source"-related materials. If information on the identity of the confidential source is redacted, presumably the remainder of the document can be produced. Indeed, Relators logged and produced one such "confidential source" document with the name of the author redacted. To the extent that documents identified on the Privilege Log contain information other than the identity of Relators' "confidential source," this information should be revealed.

Finally, Relators' Privilege Log is inadequate in that it fails to identify documents that the Fond du Lac Band has withheld based on "sovereign immunity."[6] At the September 16, 2019 hearing, Fond du Lac Band indicated that it is immune from discovery by virtue of its sovereignty. *See* Sept. 16, 2019 Tr. 121:4-20. Fond du Lac Band explained that it "has had lots of internal discussions or discussions with the RBC, the governing body of the Band" regarding

[6] Although MPCA disputes that the Fond du Lac Band may withhold documents on this basis, and reserves the right to contest this issue, for the present the Court has directed the Band to include documents as to which it asserts such protection in the Privilege Log. *See, e.g.*, Sept. 16, 2019 Tr. at 122.

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alleged procedural irregularities and was claiming sovereign immunity as to those documents and other general files. *Id.* at 121:13-20. The Court did not definitively address the issue of whether Fond du Lac Band may withhold documents based on a claim of sovereign immunity. Rather, the Court explained that "[a]ny claims of sovereign immunity we'll treat as a privilege" and directed Fond du Lac Band to create a privilege log "that documents the fact that you've withheld something claiming sovereign immunity." *Id.* at 122:20-23. Despite having indicated that it has numerous documents that are responsive to MPCA's discovery requests, and despite the Privilege Log including an abbreviation for "sovereign immunity" in the key at the bottom, Fond du Lac Band has not identified any documents that it withheld on the basis of sovereign immunity. The Fond du Lac Band must identify in the Privilege Log any responsive documents withheld on the basis of sovereign immunity.

III. FOND DU LAC BAND HAS WAIVED ANY CLAIM THAT IT MAY WITHHOLD DOCUMENTS BASED ON SOVEREIGN IMMUNITY.

Courts have long recognized that a Tribe's voluntary participation in litigation waives sovereign immunity for that litigation. *See Confederated Tribes of the Colville Reservation Tribal Credit. v. White*, 139 F.3d 1268, 1271 (9th Cir. 1998); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995). The limited waiver of sovereign immunity extends to discovery requests directed at the Tribe in this suit, which the Tribe has brought. As the United States Court of Appeals for the Eighth Circuit explained in *Alltel Communications, LLC v. DeJordy*:

> [T]he question is not whether sovereign immunity, as applied by the Supreme Court to Indian tribes as a matter of federal law, limits discovery under the Federal Rules of Civil Procedure in cases in which the tribe is a party. *In those cases [where the tribe is a party], the threshold immunity question has been answered—by tribal consent or waiver when the tribe is a plaintiff, or by a valid waiver or abrogation of immunity when it is a defendant.*

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> "The Government as a litigant is, of course, subject to the rules of discovery." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958). As the Court observed in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986), *tribal immunity "does not extend to protection from the normal processes of the state court in which [the tribe] has filed suit*."

675 F.3d 1100, 1102-03 (8th Cir. 2012) (emphasis added). Thus, in a case where the Tribe has either brought the case or voluntarily agreed to participate in the defense of the case, the Tribe cannot claim immunity from discovery solely by virtue of its sovereignty.

In this case, the Fond du Lac Band affirmatively filed its Writ of Certiorari challenging the MPCA water permit in the Minnesota Court of Appeals, effecting a limited waiver of sovereign immunity this litigation. The case has now been transferred to the district court at the request of the Relators, and the Fond du Lac Band continues to participate voluntarily in the proceedings. Because tribal immunity cannot "extend to protection from the normal processes of the state court in which [the tribe] has filed suit," Fond du Lac Band is equally subject to the district court's order on discovery as all other parties.

CONCLUSION

MPCA respectfully requests that the Court enter its order (i) requiring Relators to produce a witness who will respond with particularity to each of MPCA's written deposition questions, and (ii) provide a log that identifies documents it has withheld in sufficient detail so that this Court and MPCA can assess whether documents are properly withheld. In addition, MPCA asks that the Court rule that Fond du Lac Band may not withhold documents based upon a claim of sovereign immunity.

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