Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

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

Court File No. 62-CV-19-4626
Judge John H. Guthmann

RELATORS' MOTION *IN LIMINE* FOR SPOLIATION SANCTIONS

Relators Center for Biological Diversity, Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy ("MCEA"), WaterLegacy, and the Fond du Lac Band of Lake Superior Chippewa (collectively, "Relators") submit this motion *in limine* for a pretrial ruling that Respondent Minnesota Pollution Control Agency ("MPCA") destroyed relevant physical and electronic evidence during anticipated litigation and Relators are entitled to adverse evidentiary inferences pertaining to physical and electronic data MPCA destroyed.

FACTUAL BACKGROUND

MPCA "anticipated litigation as soon as" PolyMet Mining Inc. ("PolyMet") proposed the NorthMet Project (the "Project"). (Telephone Conference to Discuss Disc. Disputes Tr. ("Sept. Conf. Tr.") 97:2-3, *In re Denial of Contested Case Hearing Request*, No. 62-CV-19-4626 (Minn. Dist. Ct. Sept. 16, 2019)).[1] MPCA requested the Minnesota Attorney General appoint outside counsel for the Project in September 2015, stating:

[1] MPCA made concessions on the record that it anticipated litigation since PolyMet proposed the Project and the Court did not require MPCA to answer deposition questions about anticipating litigation because of those concessions. The following exchange occurred on the record:

> THE COURT: I think you could have anticipated litigation as soon as someone proposed a mine.
> MR. SCHWARTZ: Yeah. That may be the case actually.

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

> [MPCA had] an immediate need for highly experience environmental lawyers to provide sound, timely legal advice as well as effective representation *in the likely event of the legal challenge* to . . . [M]PCA's decision making during both the Final Environmental Impact Statement (FEIS) and potentially the permitting process, should the FEIS be determined adequate.

(RELATORS_62492 (emphasis added); *see also* MPCA_18996 (Commissioner Myron Frans from Minnesota Management and Budget stating "[r]egardless of the final decision on the NorthMet project, the state will likely be in litigation"). MPCA signed its contract with outside counsel, John Martin and Crowell & Moring, LLP, on December 1, 2015, with a scope of service

---

> . . . .
>
> MS. MACCABEE: . . . Relators wanted to ask this question because Mr. Schmitz, who is an attorney, in his declarations said that there was no need to preserve the notes of April 5 because Relators -- or WaterLegacy's Data Practices Act had come in before that. And the question was raised, if the PCA knew that this was a matter of subject for litigation, would that have affected their motive or their propriety in restoring or failing to preserve those written records. So that is the reason why Relators were interested in terms of asking when litigation was anticipated.
> THE COURT: I think you can presume that at any relevant point litigation was anticipated. And PCA, if you're going to oppose that or push back against that, then you better withdraw your objection to the question.
> MR. SCHWARTZ: No. We assumed that litigation was anticipated. The problem is there's no -- MPCA, as far as I know, it would be -- just as we all assumed that litigation was anticipated from the moment PolyMet filed its permit application at least, we can also understand that there's no point in MPCA making an agency decision about anticipating litigation. I would be astonished if MPCA or any agency ever made an agency decision saying today we anticipate litigation. So I just think the whole – it's not a question that will have an answer.
> THE COURT: No, but it's a position that has a consequence. In other words, I don't expect to hear this ever again out of the PCA or any of its witnesses: "Oh, we did this because we never dreamed there would be a lawsuit." I don't expect you'll be doing that, and neither should the Relators.
> MR. SCHWARTZ: Yeah, I hope we meet your expectation, your Honor. I would be astonished if we took that position.
> THE COURT: All right.

(Sept. Conf. Tr. 97:2-98:25).

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

including: "defense, in litigation or administrative proceedings, of any decision by the Agencies concerning the review and permitting of the NorthMet Project." (RELATORS_62496).[2]

During permitting, the public exhibited high interest in the Project. (*See* RELATORS_45495 (MPCA responding to the public's comments on the PolyMet water pollution permit)). MPCA anticipated DPA requests regarding permitting documents even before placing the draft permit on public notice. (*See* MPCA_20389 (January 18, 2018 email referring to MPCA's "attempt to be prepared for DPA requests" for permitting documents).). More particularly, MPCA knew the public had an interest in public data regarding EPA's comments on the PolyMet water pollution permit because WaterLegacy submitted numerous requests for documents under the Minnesota Government Data Practices Act ("DPA"), dated March 26, 2018, April 5, 2018, September 20, 2018, December 12, 2018, January 1, 2019, January 8, 2019, and February 3, 2019.[3] In the DPA requests, WaterLegacy sought all data pertaining to written or oral communication between EPA and MPCA regarding the PolyMet water pollution permit. (*See id.*)

MCEA also exhibited the public's interest in data regarding EPA and MPCA communications. On December 17, 2018, MCEA sent an email to MPCA asking whether MPCA heard anything from EPA regarding the PolyMet water pollution permit. (RELATORS_34665). MPCA's attorney responded, "[w]e did not get any feedback from EPA on the PolyMet permit." (*Id.*) MCEA also submitted a DPA request for information from Assistant Commissioner Shannon Lotthammer on June 19, 2019, one day after the EPA union leaked an email between Ms.

[2] Citations to documents do not include the proceeding zeroes. The documents cited herein are voluminous. They have been provided to Respondents in discovery. Relators will hand deliver a binder of the documents cited herein to the Court upon request.

[3] *See* RELATORS_62542; RELATORS_62543; RELATORS_62548; RELATORS_62549; RELATORS_62559; RELATORS_62560; RELATORS_62585; RELATORS_62586; RELATORS_62587; RELATORS_62588; RELATORS_62592; RELATORS_62594; RELATORS_62601; RELATORS_62602

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

Lotthammer and EPA officials showing MPCA pressured EPA to suppress staff comments regarding the PolyMet water pollution permit.[4] (RELATORS_61762; RELATORS_63685).

MPCA issued the final PolyMet water pollution permit on December 20, 2018. (RELATORS_61228). Relators timely appealed the PolyMet water pollution permit on January 18, 2019 (RELATORS_64388) and January 22, 2019 (RELATORS_64395; RELATORS_64405). During motion practice to transfer the appeals to this Court, MPCA first admitted that it destroyed information reflecting communications between MPCA and EPA. Michael Schmidt, an MPCA staff attorney, admitted he took handwritten notes at numerous meetings and destroyed the handwritten notes because he would "integrate those notes into . . . typed legal work product." (RELATORS_63880). Stephanie Handeland, a permit writer, admitted that she recycled notes from a conversation that occurred between MPCA and EPA on April 5, 2018. (RELATORS_63913). Richard Clark, the mining sector supervisor, admitted to taking notes reflecting conversations between MPCA and EPA and "discard[ing] the notes shortly after the call or meeting." (RELATORS_63871).

After the Minnesota Court of Appeals transferred the PolyMet water pollution permit appeals to this Court, MPCA made further admissions that it destroyed both physical and electronic information regarding the communications between MPCA and EPA. With regard to physical notes, MPCA's designated representative testified under oath that MPCA had failed to retain "Mr. Schmidt's original handwritten notes . . . [and] his typed document,"[5] and that it had "no

[4] MPCA failed to disclose the leaked email in response to MCEA's DPA request. (*See* RELATORS_61763-805). MPCA claims the MPCA did not provide the email to MCEA in response to the DPA request because Ms. Lotthammer deleted the email. (RELATORS_65145).

[5] Through extensive motion practice over MPCA's privilege log, Relators learned MPCA had, in fact, retained Mr. Schmidt's typed notes. (MPCA_19594). These notes remain the subject of motion practice.

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

documents" kept by former mining sector director Ann Foss. (RELATORS_65145). Ms. Handeland conceded that she discarded notes from the April 5, 2018 call with EPA even though the notes "would have memorialized the fact that a call between MPCA and EPA" occurred on that date. (RELATORS_64917). Mr. Clark admitted to taking notes at "more than half" the calls and meetings with EPA and that he "discarded [those notes] shortly after [each] meeting." (RELATORS_64805).

MPCA also conceded that it destroyed significant electronic data. Relators filed a letter with this Court asking for a forensic search of MPCA computers and servers. Relators explained that MPCA's responses to Relators' Requests for Production for documents from former Commissioner John Linc Stine, Ms. Foss, and Ms. Lotthammer between July 2016 and December 2018 were incomplete. (Letter from Relators to Judge Guthmann 2-3 (Nov. 11, 2019)). Relators noted that MPCA's designee admitted Ms. Lotthammer "regularly managed [her] emails" and that MPCA had no documents prepared or kept by Ms. Foss. (*Id.* (citing RELATORS_65145)). Relators emphasized that MPCA did not produce a critical email string between EPA, Mr. Stine, and Ms. Lotthammer in March 2018 when MPCA asked EPA not to send EPA's written comments on the PolyMet water pollution permit. (Letter from Relators to Judge Guthmann, *supra*, at 2-3 (discussing the March 13, 2018 email from Ms. Lotthammer to EPA)). Relators learned the email existed through a leak from the EPA union (RELATORS_63685), and EPA provided the email string, and other relevant documents, to Relators in response to Freedom of Information Act requests, (RELATORS_64191-203).

In response, MPCA admitted to the following practices regarding electronic data:

- MPCA only retained Ms. Lotthammer's computer because the computer was subject to a different litigation hold. (Motion Hr'g Tr. ("Nov. Hr'g Tr.") 95:12-20, *In re Denial*

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

of Contested Case Hearing Request, No. 62-CV-19-4626 (Minn. Dist. Ct. Nov. 13, 2019)).

- MPCA failed to retain Mr. Stine's or Ms. Foss's computer because the computers were not subject to a litigation hold. (*Id.* at 96:3-11). Instead, MPCA wiped both computers 30 days after they left MPCA. (*Id.*) Ms. Foss left MPCA in January 2018 and Mr. Stine left MPCA in January 2019. Steve Karnowski, *Judge Orders Search of Agency Computers in PolyMet Challenge*, Star Trib. (Nov. 11, 2019, http://www.startribune.com/judge-orders-search-of-mpca-computers-in-polymet-challenge/565166132/).

- Ms. Lotthammer managed her emails "and unless there was a data practices request . . . she discarded emails on a regular basis." (Nov. Hr'g Tr. 95:1-4).

- Deleted data is available on MPCA computers for 30 days. (*Id.* at 95:4-8, 96:7-8).

- Deleted data is available on MPCA servers for 30 days. (*Id.*)

After the Court ordered a forensic search, Relators learned additional information regarding MPCA's retention of relevant information. Specifically, MPCA retained one tablet for Ms. Lotthammer and one hard drive for Ms. Foss. (Declaration of Vanessa L. Ray-Hodge ("Ray-Hodge Decl.") ¶ 4 (Dec. 27, 2019)). MPCA completely destroyed Mr. Stine's computer. (*Id.*).

In inspecting the shared drive, MPCA found backup files for Ms. Lotthammer and Mr. Stine, but Mr. Stine's backup file only contained one document. (*Id.* ¶ 5). MPCA had no backup files for Ms. Foss on the shared drive. (*Id.*) Minnesota Information Technology explained that all this information had been destroyed because there was not a litigation hold for any of the information. (*Id.* ¶ 6). Relators also learned that MPCA stored data on a storage area network ("SAN"). (*Id.* ¶ 7). The SAN maintained data for 28 days and 2 full cycles. (*Id.* ¶ 9).

On the same day Relators asked this Court for a forensic search, Relators asked MPCA's counsel whether MPCA had a litigation hold in place and, if so, the litigation hold's timing and content. (Declaration of Elise L. Larson ("Larson Decl.") ¶ 5 (Dec. 25, 2019)). MPCA's counsel refused to provide that information to Relators. (*Id.*) In response, MCEA submitted a DPA request on November 14, 2019. (*Id.* ¶¶ 6-7). MPCA responded on December 17, 2019, attaching

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

documents showing: (1) a litigation hold email sent to MPCA staff on June 26, 2019; and (2) a form dated November 27, 2019 indicating a litigation needed to be placed on data from Rebecca Flood, Ms. Foss, Ms. Lotthammer, and Mr. Stine. (*Id.* ¶¶ 8-9 & Ex. A-B).[6] The data Relators received shows MPCA did not place any litigation hold on relevant information until June 2019 and did not put a litigation hold on former employee data until November 2019. (*See id.*).

ARGUMENT

MPCA's admitted destruction of both physical and electronic information constitutes spoliation of evidence subject to sanctions. Particularly in a matter where MPCA anticipated litigation since 2015, that MPCA allowed employees to destroy physical and electronic evidence should not be permitted. This Court ruled that the Minnesota Rules of Civil Procedure do not govern this matter. (Rule 16 Conference Tr. ("Aug. Conf. Tr.") 92:10-13, *In re Denial of Contested Case Hearing Request*, No. 62-CV-19-4626 (Minn. Dist. Ct. Aug. 7, 2019)). The Court, however, has inherent authority to sanction MPCA for its destruction of evidence. *See Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993); *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). Under its inherent authority, this Court need not find intent in order to impose negative inference sanctions; rather, the Court need only assess the impact of the spoliation—the prejudice to the opposing party. *Dillon*, 986 F.2d at 267; *Patton*, 538 N.W.2d at 119.

I. SPOLIATION OF EVIDENCE – INHERENT AUTHORITY

Under Minnesota law, where a spoliation of evidence claim is not governed by a statute or a rule, the Court has the inherent authority to sanction a party that breaches its duty to preserve evidence. *Miller v. Lankow*, 801 N.W.2d 120, 128 (Minn. 2011). In fact, Minnesota law requires

[6] Relators simultaneously submit an informal letter motion asking the Court to amend Relators' Exhibit List to include the litigation hold documents MPCA did not provide to Relators until after the Exhibit List deadline.

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

that, even where "a breach of the duty to preserve evidence is not done in bad faith, the district court *must* attempt to remedy any prejudice that occurs as a result of the destruction of evidence." *Id.* (emphasis added). Here, MPCA admittedly destroyed both physical and electronic evidence long after the duty to preserve was triggered in this matter. MPCA's conduct severely prejudiced Relators ability to prosecute this case; unique emails and notes reflecting critical conversations between MPCA and EPA have been wholly destroyed. For these reasons, Relators submit sanctions in the form of a negative inferences are appropriate in this case.

A. MPCA Destroyed and Discarded Records and Notes Documenting Communications Between MPCA and EPA.

MPCA destroyed, discarded, and failed to preserve documentary evidence in a manner that amounts to spoliation. Spoliation is the destruction of evidence or the failure to preserve property for another's use in pending or future litigation. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990); *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. App. 1998). "Spoliation encompasses both intentional and negligent destruction of evidence." *Patton*, 538 N.W.2d at 118. Therefore, regardless of intent, "disposing of evidence constitutes spoliation where a party knows or should know that the evidence should be preserved for pending or future litigation." *Id.* at 118. Whether a party has sufficient notice such that they should preserve evidence depends upon the foreseeability of litigation. *Id.* at 118-19.

As set forth above, MPCA conceded that it anticipated litigation since PolyMet proposed the Project and MPCA's retention of outside counsel in 2015 confirms that fact. (Sept. Conf. Tr. 97:2-98:25; RELATORS_62492, RELATORS_62496). The Court already made such a finding on the record. (Sept. Conf. Tr. 98:2-5 ("[Y]ou can presume that at any relevant point litigation was anticipated.")).

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

MPCA also admitted that it destroyed significant physical evidence in the form of handwritten notes from numerous meetings between MPCA and EPA. In particular, MPCA admitted through declarations and deposition testimony that Mr. Schmidt, Ms. Handeland, and Mr. Clark destroyed handwritten notes, including notes from the April 5, 2018 meeting where EPA read its written comments on the draft PolyMet water pollution permit aloud to staff.[7] MPCA further admitted that it destroyed or discarded all files[8] pertaining to Ms. Foss after she retired in January 2018. (RELATORS_65145).

MPCA also acknowledged both before the Court and in a phone call with our forensic expert that MPCA wiped and destroyed Mr. Stine's computer. (Nov. Hr'g Tr. 95:12-20, 96:3-11; Ray-Hodge Decl. ¶ 4). MPCA further retained only one document in Mr. Stine's backup file (Ray-Hodge Decl. ¶ 5). MPCA indicates it wiped Mr. Stine's computer following its policy to remove data 30 days after an employee leaves MPCA. (Nov. Hr'g Tr. 96:5-11). This means that MPCA wiped Mr. Stine's computer in February 2019—after litigation over the PolyMet water pollution permit had already begun. (*Compare* RELATORS_64388, RELATORS_64395, RELATORS_64405 (Relators appeal permits on January 18, 2019 and January 22, 2019), *with* Karnowski, *supra* (stating Mr. Stine left MPCA in January 2019)).

MPCA also conceded it completely wiped Ms. Foss's computer (Nov. Hr'g Tr. 95:12-20, 96:3-11), and MPCA failed to retain a backup file for Ms. Foss (Ray-Hodge Decl. ¶ 5). MPCA indicates it wiped Ms. Foss's computer following the 30-day policy, meaning MPCA wiped Ms.

---

[7] *See* RELATORS_191, RELATORS_65145 (Mr. Schmidt discards notes); RELATORS_194, RELATORS_64917 (Ms. Handeland discards notes); RELATORS_63871, RELATORS_64805 (Mr. Clark discards notes).

[8] MPCA responded that "[t]he agency has no documents responsive to this request or the question" when Relators asked MPCA to "[i]dentify all documents, including journals or notebooks, under MPCA's possession or control regarding MPCA mining permits prepared or kept by former Mining Sector Director Ann Foss." (RELATORS_65145; RELATORS_65150).

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

Foss's computer in February 2018—more than two years after MPCA retained litigation counsel. (*See* Nov. Hr'g Tr. 95:4-8, 96:7-8).

MPCA further acknowledged that Ms. Lotthammer "managed her email" and "unless there was a data practices request . . . she discarded emails on a regular basis." (Nov. Hr'g Tr. 95:1-4; RELATORS_64191-203). Yet, the records shows Ms. Lotthammer deleted emails relevant to EPA and MPCA conversations regarding the PolyMet water pollution permit even when there was a pending DPA request. (*See* RELATORS_62543 (WaterLegacy's March 26, 2018 DPA request)). Plainly, Ms. Lotthammer also deleted emails relevant to EPA and MPCA conversations regarding the Project during a time when litigation was anticipated.

Several of the March 2018 emails that MPCA turned over to Relators in discovery were obtained from EPA regional counsel and came from the desk of Kurt Thiede, chief of staff to the EPA's Regional Administrator.[9] Relators have no way to assess whether their investigations along with documents EPA provided have fully uncovered all relevant emails Ms. Lotthammer deleted or discarded regarding MPCA and EPA conversations.

Clearly, MCPA staff would have been required to retain such information if MPCA – a sophisticated party with corporate litigation counsel – placed a litigation hold on relevant data. (*See, e .g.*, Ray-Hodge Decl. ¶ 6; Larson Decl., Ex. A). In circumstances such as this, MPCA's "failure to instigate an adequate litigation hold 'threatens the integrity of the judicial process.'" *Browder v. City of Albuquerque*, 187 F. Supp. 3d 1288, 1300 (D.N.M. 2016) (instituting spoliation sanctions where a city government failed to place an adequate litigation hold and comply with its duty to ensure city employees preserved relevant evidence).

[9] *See, e.g.*, MPCA_8480, MPCA_8484, MPCA_8488, MPCA_8492, MPCA_8498, MPCA_8499 (email printouts from EPA employee Kurt Thiede); MPCA_19879, MPCA_19880 (emails to EPA regional counsel to secure missing documents).

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

Under these straightforward facts, MPCA breached its duty to preserve evidence pertaining to conversations between EPA and MPCA regarding the PolyMet water permit.

B. Relators Are Entitled to Sanctions, Including a Negative Presumption, as a Result of MPCA's Spoliation of Evidence.

Because MPCA breached its duty to preserve evidence, this Court "must attempt to remedy any prejudice that occurs as a result of the destruction of the evidence." *Miller*, 801 N.W.2d at 129. The Court must find an appropriate remedy, even if MPCA destroyed the information through "inadvertence or negligence." *Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 471 (Minn. App. 1997). If spoliation is found, "the trial court is not only empowered, but is obligated to determine the consequences of [the] evidentiary loss." *Patton*, 538 N.W.2d at 119. Factors the court considers to determine whether a spoliation sanction is appropriate are:

> (1) the degree of fault of the party who altered or destroyed the evidence;
> (2) the degree of prejudice suffered by the opposing party; and
> (3) whether there is a lesser sanction that will avoid the substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Id. at 132.

1. Degree of MPCA's Fault

MPCA and its attorneys bear the fault for destroying relevant evidence in spite of anticipated litigation. Here, MPCA anticipated litigation since the time PolyMet proposed the Permit. (Sept. Conf. Tr. 97:2-98:25; RELATORS_62492, RELATORS_62496). MPCA is a sophisticated party with in-house attorneys, accustomed to litigation regarding their decision making. (*See, e.g.*, Nov. Hr'g Tr. 95:12-20 (indicating MPCA placed a litigation hold in other litigation preserving relevant information on Ms. Lotthammer's computer)). MPCA specifically hired outside counsel because of their "depth of legal expertise in the environmental, natural

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

resource, mining, administrative, environmental review, and financial assurance issues posed by the NorthMet project." (MPCA_18996).

Further, a government agency is culpable for the conduct of its employees where "the record is . . . devoid of any effort taken by counsel or the [government entity] to preserve . . . evidence as part of an adequate and continuing litigation hold, as was their duty." *Browder*, 187 F. Supp. 3d at 1298. Yet, in spite of MPCA's and counsel's litigation experience, MPCA failed to place any relevant litigation hold on information until June 26, 2019—almost four years after MPCA first sought outside counsel. (*See* RELATORS_62492; RELATORS_62496). Under the circumstances of this high-profile and controversial case, MPCA is fully culpable for its failure to retain relevant data.

Although Relators need not prove intent for the Court to exercise its inherent authority to impose a negative presumption sanction for spoliation,[10] there is strong evidence that MPCA intended to destroy specific unfavorable records. MPCA's responses to Relators' DPA requests and the administrative record provided to the Minnesota Court of Appeals contained handwritten notes from meetings between MPCA and EPA on January 31, 2018, February 13, 2018, March 5, 2018, and April 30, 2018, (RELATORS_49782; RELATORS_60970), but conspicuously lacked any notes from the March 12, 2018 call – the conference where EPA planned to tell MPCA whether EPA would send written comments – or from April 5, 2018 – when EPA read its comments aloud to MPCA.

MPCA's responses to Relators' DPA requests and the administrative record included emails between Ms. Lotthammer and Mr. Thiede on March 16, 2018, euphemistically discussing

[10] Minnesota Rules of Civil Procedure 37.05 requires a party to show intent in order to obtain a negative presumption sanction for electronically stored information, but allows remedial sanctions even without proof of intent.

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

"continued dialogue and cooperation." (RELATORS_9595). However, neither MPCA's responses to DPA requests nor the administrative record contained the email string from March 8, 2018 through March 15, 2018 showing communications between Mr. Stine and Ms. Lotthammer with EPA political appointees to ensure that EPA's written comments on the PolyMet permit would not become part of MPCA's record. (*See, e.g.*, RELATORS_60910). The specific destruction or removal of the most salient evidence is sufficient to infer intent. *Morris v. Union Pac. R.R.*, 373 F.3d 896, 901 (8th Cir. 2004) ("Intent rarely is proved by direct evidence, and a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other factors.").

Failure to implement a litigation hold may also be sufficient to show intent. In *Sekisui American Corp. v. Hart*, 945 F. Supp. 2d 494, 508 (S.D.N.Y 2013), the Southern District of New York found a plaintiff intended to destroy evidence where the plaintiff did not implement a litigation hold for fifteen months, did not inform its IT vendor about the litigation hold for another six months, and the information from two former employees was destroyed. More egregiously than in *Sekisui*, MPCA did not implement a litigation hold for forty-five months, did not inform its IT vendor about the litigation hold for yet another five months, and allowed the data from at least three former employees to be destroyed.[11] (Larson Decl., Exs. A-B; Nov. Hr'g Tr. 95: 1-20, 96:3-

[11] Relators do not have conclusive evidence that MPCA directed the deletion of certain evidence outside a normal retention policy as in *Sekisui American Corp.*, Relators reserve the right to file an additional spoliation motion after the conclusion of the forensic search. (*See* Rule 115.04(d) Order ¶ 1(k), *In re Denial of Contested Case Hearing Request*, No. 62-CV-19-4626 (Minn. Dist. Ct. Dec. 19, 2019) ("Any motions in limine arising out of the forensic search and related document production issues shall be filed . . . no later than January 10, 2020)). Relators also reserve the right to bring a motion for sanctions for both the spoliation of electronic information and motion practice regarding the forensic expert until after the forensic search is complete and Relators can effectively evaluate their attorneys' fees for the relevant motion practice. (*See id.*).

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

11; Ray-Hodge Decl. ¶¶ __; RELATORS_64191-203). Such conduct is sufficient to show intent as well as to establish a high degree of fault on the part of the MPCA.

2. Degree of Prejudice to Relators

Relators are severely prejudiced by MPCA's breach of its duty to preserve relevant evidence. The Court of Appeals has asked this Court to examine whether procedural irregularities occurred in the creation of the administrative record for the Project's water pollution permit. (Order at 1-5, *In re Denial of Contested Case Hearing Request*, Nos. A19-0112, A19-0118, A19-0124 (Minn. App. June 25, 2019)). At its core, this transfer proceeding is intended for this Court to uncover whether MPCA suppressed facts or withheld critical information from the public regarding EPA's concerns with the PolyMet water pollution permit and whether such conduct was an irregular procedure. (*Id.* at 3-4; *see also* Relators List of Alleged Procedural Irregularities ¶¶ 1-21, *In re Denial of Contested Case Hearing Request*, No. 62-CV-19-4626 (Minn. Dist. Ct. Aug. 14, 2019)). Many of Relators claims seek to address whether MPCA failed to preserve relevant information and include that information in the administrative record to allow for full judicial review. (*Id.* ¶¶ 4-5, 18- 20).

MPCA indisputably allowed its employees to destroy some of the only contemporaneous evidence of conversations with EPA regarding the PolyMet water pollution permit. Although Relators, with much assistance from FOIA requests and litigation, have put together many pieces of the puzzle, but many puzzle pieces are still missing. (*See* Aug. Conf. Tr. 61:1-5). Relators have a strong suspicion based on from EPA records (RELATORS_64275) that MPCA staff met with Mr. Stine on March 5, 2018, as soon as they learned that EPA intended to submit written comments, but Relators do not have a single document from that strategic meeting. Relators have various documents suggesting that MPCA and EPA had scheduled a staff phone conference on

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

March 12, 2018, (*see, e.g.*, RELATORS_49782, RELATORS_64237), but no notes confirming what took place at that meeting. For the April 5, 2018 meeting at which EPA read its highly critical comments aloud, all contemporaneous notes were destroyed, and Relators have only a subsequent curated record from MPCA's staff attorney, Mr. Schmidt. (MPCA_020521). Emails among EPA staff, (*see, e.g.*, RELATORS_60979, RELATORS_64249), suggest that additional phone conferences between MPCA and EPA took place in the summer and fall of 2018 regarding the PolyMet water pollution permit. But Relators cannot yet determine when these communications took place or if MPCA prepared emails, memos, or notes of their content only to discard them.[12]

MPCA's total destruction of Mr. Stine's computer, wiping of Ms. Foss's computer and share drive, and tacit acceptance of Ms. Lotthammer's selective culling of emails during anticipated litigation have tied Relators' hands. Relators have no access to a record from Mr. Stine and Ms. Lotthammer as to their actions or intentions in urging EPA to withhold written comments by EPA scientists and program staff criticizing the weaknesses in the PolyMet water pollution permit. The failure to preserve any written or electronic evidence from Ms. Foss – the former Metallic Mining Sector Director – also prejudices Relators. The few documents in the record Ms. Foss authored show that, since at least 2015, she opposed written documentation of EPA concerns about the PolyMet Project and sought EPA's agreement to have "conversations instead." (RELATORS_61909). The complete destruction of her journals, papers, and electronic records

[12] This is not intended to be a concession by Relators about the lack of sufficient evidence to prove their claims of alleged irregularities. Relators have and continue to gather what they believe is sufficient evidence to show irregularities in procedure, however, to the extent that there are gaps or MPCA disputes the facts presented, Relators are entitled to have inferences drawn against MPCA in favor of Relators. And MPCA should not receive the benefit of defenses based on lack of evidence or missing information.

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

prejudices Relators in determining what steps Ms. Foss took to try and pressure EPA not to submit written comments in the course of PolyMet water pollution permitting.

Under these facts, Relators have shown prejudice. *Wajda v. Kingsbury*, 652 N.W.2d 856, 860 (Minn. App. 2002) (holding a district court properly sanction a party for spoliation where credible evidence established that "a recording or recordings were likely to have existed").

3. Appropriate Remedy

Thus, the relevant question is the appropriate remedy for MPCA's spoliation. Where evidence is under the exclusive control of the party who destroyed or suppressed it, Minnesota law permits the Court to create a presumption that "the evidence, if produced, would have been unfavorable to that party." *Kmetz v. Johnson,* 113 N.W.2d 96, 100-01 (Minn. 1962); *Federated Mut.*, 456 N.W.2d at 437; *see also Wajda,* 652 N.W.2d at 861. Here, Relators submit that a negative presumption is the appropriate remedy.

This case is similar to *Houston v. MOAC Mall Holdings, Inc.*, No. 27-CV-16-15639, 2017 WL 6627669, at *1 (Minn. Dist. Ct. Oct. 9, 2017). There, a court adopted a negative presumption jury instruction where a defendant failed to retain video surveillance footage from before an accident occurred. *Id.* The court determined the sanction was appropriate because the video "would have shown what caused the conditions where the accident occurred," the defendant was "an experienced corporate party," keeping the video would not have been "prohibitively expensive," and the defendant should have known destroying the video "may have eliminated helpful evidence. *Id.*; *see also Wajda*, 652 N.W.2d at 862 (negative presumption appropriate where "(1) the city had exclusive possession of the tapes, (2) testimony established that the evidence likely existed, and (3) the law permits an adverse inference to be drawn from the failure to produce evidence").

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

Sekisui American Corp.[13] is also instructive. There, a plaintiff failed to implement appropriate document retention policies to protect electronically stored information. 945 F. Supp. 2d at 508. The Court found the plaintiff acted with gross negligence because: (1) the plaintiff did not issue a litigation hold until fifteen months after litigation was anticipated; (2) after issuing the litigation hold, the plaintiff waited six months to inform the IT vendor; and (3) the defendants showed the electronically stored information from two significant former employees were destroyed. *Id.* The Court found the plaintiffs actions prejudiced defendants because of the "untold amount of contemporaneous evidence" that the plaintiff destroyed, *id*. at 509, and sanctioned the plaintiff in the form of a jury instruction allowing the jury to presume "such lost evidence would have been favorable to" the defendant. *Id*. at 510.

Here, MPCA is a sophisticated party represented by outside lawyers from top law firms in the United States retained no doubt due to their experience representing the mining industry. MPCA and their lawyers should have known that destroying evidence that meetings occurred and the content of those meeting could eliminate helpful evidence to any party wishing to challenge MPCA's permitting decision. Yet, MPCA, acting under the watch of these outside attorneys, destroyed, discarded and failed to preserve paper and electronic records and even the computer of MPCA's Commissioner. MPCA failed to retain documents in light of anticipated litigation and did not issue a litigation hold to staff *until June 26, 2019—nearly four years after MPCA hired outside litigation counsel for the Project.* (Larson Decl., Ex. A; RELATORS_62492). Even after issuing a litigation hold to staff, *MPCA waited five more months – until November 27, 2019* – to place a litigation hold with Minnesota Information Technology for information from Ms. Foss,

[13] *Sekisui American Corp.* predates changes to the Federal Rules of Civil Procedure requiring a showing of intent to sanction a party for spoliating electronically stored information. *See* Fed. R. Civ. P. 37, comm. n. on rules 2015.

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

Ms. Lotthammer, Mr. Stine, and Rebecca Flood. (Larson Decl., Ex. B). Further, discovery has shown that MPCA destroyed information from former employees—Ms. Foss, Ms. Lotthammer, and Mr. Stine—with access to an "untold amount of contemporaneous evidence" of the procedures used to approve the PolyMet water pollution permit and the factors not disclosed in the administrative record that formed the basis of MPCA's decision to approve the PolyMet water pollution permit.

For these reasons, Relators ask this Court to sanction MPCA's breach of its duty to preserve evidence and draw a negative presumption that the notes, emails, and electronic data would have documented procedural irregularities in the relationship between MPCA and EPA in the Project's water permitting process.

II. SANCTIONS FOR MPCA'S SPOLIATION OF EVIDENCE.

Relators have established that, under the inherent authority of the Court, an appropriate sanction for MPCA's spoliation of evidence would be for the Court to draw negative presumptions that the notes, records, emails, and electronic data MPCA destroyed would have documented procedural irregularities in MPCA's issuance of the PolyMet water pollution permit. Relators request that the following negative inferences be drawn:

- Ms. Foss's destroyed physical documents and eradicated[14] electronic information would have shown that Ms. Foss actively sought to prevent the creation of a written record at MPCA of EPA's concerns about the PolyMet Project and water pollution permit.

- Mr. Stine's, Ms. Lotthammer's, Mr. Clark's, and Mr. Schmidt's destroyed physical documents and eradicated electronic information from March 5, 2018 through March 15, 2018 would have documented MPCA's efforts and intent to prevent EPA from sending EPA's written comments on the draft PolyMet water pollution permit to MPCA.

[14] The term "eradicated" includes deletion, erasure, and wiping of individual documents or the contents of a computer or server and/or MPCA's actual discarding of a computer which is no longer available for forensic review.

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

- Mr. Stine's, Ms. Lotthammer's, Mr. Clark's, and Mr. Schmidt's destroyed physical documents and eradicated electronic information from March 5 through 15, 2018 and from April 5, 2018 would have shown MPCA sought to prevent EPA from sending its comments on the draft PolyMet water pollution permit in order to conceal EPA's criticisms of the draft permit from the public and from the court on appellate review.

- Mr. Stine's, Ms. Lotthammer's, Mr. Clark's, Mr. Schmidt's, and Ms. Handeland's destroyed physical documents and eradicated electronic information would have shown and do show MPCA sought to conceal EPA's criticisms of the draft permit in order to make it harder for EPA to formally object to conditions raised by EPA in comments read to MPCA on April 5, 2018 that were not corrected by the time the final water pollution permit was proposed.

- Mr. Stine's, Ms. Lotthammer's, Mr. Clark's, Mr. Schmidt's, and Ms. Handeland's destroyed physical documents and eradicated electronic information would have shown MPCA sought to keep the substance of the comments read by EPA on April 5, 2018 hidden from the public and from the court on appellate review.

- Mr. Stine's, Ms. Lotthammer's, Mr. Clark's, and Mr. Schmidt's destroyed physical documents and eradicated electronic information would have shown MPCA had conversations with EPA in the summer and fall of 2018 during which EPA communicated to MPCA that concerns raised by EPA in the comments read aloud on April 5, 2018 had not been resolved.

- Mr. Stine's, Ms. Lotthammer's, and Ms. Foss's destroyed physical documents and eradicated electronic information would have shown MPCA intended to destroy relevant information and conceal documents pertaining to MPCA's conversations with EPA regarding the PolyMet water pollution permit.

- Mr. Stine's and Ms. Lotthammer's eradicated electronic documents would have shown MPCA's failure to include MPCA's communications with EPA from March 12 through 15, 2018 or regarding the call from EPA to MPCA staff on April 5, 2018 in either responses to DPA requests or in the administrative record were intended to conceal that EPA had prepared written comments critical of the draft PolyMet water pollution permit and that MPCA had persuaded EPA political leadership to withhold those comments.

- Any other such negative inferences against MPCA that the Court deems just and proper.

Even if the full range of negative inferences that could be drawn from the missing records are not ordered, remedial sanctions are needed to prevent prejudice to Relators. The Advisory Committee Comment amending Rule 37.05 in 2018 provides: "[i]f prejudice does occur, the

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

amended rule requires that a remedial sanction be implemented - one that is designed and limited to curing the prejudice. Most often, this would be an order precluding evidence or limiting claims or defenses affected by the missing ESI." Relators request that the Court limit MPCA's claims or defenses as follows:

- MPCA cannot claim that communications by Ann Foss with EPA regarding the PolyMet Project were not intended to prevent the creation of a written record of EPA's concerns about the project.

- MPCA cannot assert as a defense that MPCA did not seek to prevent EPA from submitting comments on the draft PolyMet water pollution permit.

- MPCA cannot claim that Ms. Lotthammer or Mr. Stine sought to prevent EPA from submitting comments on the draft PolyMet water pollution permit because it was "more efficient" or more consistent with the 1974 Memorandum of Agreement with EPA.

- MPCA cannot assert as a defense that EPA failed to object to the proposed final PolyMet water pollution permit because EPA was satisfied that the permit resolved the concerns raised by EPA in commenting on the draft PolyMet permit.

- MPCA cannot assert as a defense the absence or lack of contemporaneous notes, emails, or other documentary evidence to support Relators claims of alleged procedural irregularities.

- MPCA cannot assert as a defense that the failure to provide to Relators under the Data Practices Act or in the administrative record for the PolyMet water pollution permit appeal the email chain from March 8 through March 15, 2018 involving Mr. Stine and Ms. Lotthammer was inadvertent or resulted from routine document retention practices.

- Any other such limitations on defenses that the Court deems just and proper.

Relaters assert that such limitations on MPCA's defenses are necessary to remedy the prejudice caused by MPCA's spoliation of evidence.

CONCLUSION

MPCA had a duty to preserve relevant evidence in the face of anticipated litigation. MPCA's destruction, deletion, and failure to preserve physical and electronic evidence is a classic and serious case of spoliation. In these circumstances, the appropriate remedy is to apply negative

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

presumptions against MPCA, including not allowing MPCA to benefit from a defense that the lack of evidence undercuts Relator's claims. In addition, or in the alternative, remedial sanctions limiting MPCA's defenses should be ordered. An order applying negative inferences will remedy the prejudice to Relators and create an incentive for Minnesota state agencies to protect relevant evidence concerning controversial projects, particularly when litigation is anticipated.

[Signature block on next page]

Filed in District Court
State of Minnesota
12/27/2019 3:49 PM

DATED: December 27, 2019

MASLON LLP

/s/ Evan A. Nelson
WILLIAM Z. PENTELOVITCH (#0085078)
MARGARET S. BROWNELL (#0307324)
EVAN A. NELSON (#0398639)
90 South Seventh Street
3300 Wells Fargo Center
Minneapolis, MN 55402-4140
Phone: (612) 672-8200
Email: bill.pentelovitch@maslon.com
margo.brownell@maslon.com
evan.nelson@maslon.com

MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY

/s/ Elise L. Larson
ELISE L. LARSON (#0393069)
KEVIN REUTHER (#0266255)
1919 University Avenue West
Saint Paul, MN 55105
Phone: (651) 223-5969
Email: elarson@mncenter.org
kreuther@mncenter.org

NILAN JOHNSON LEWIS PA

/s/ Daniel Q. Poretti
DANIEL Q. PORETTI (#185152)
MATTHEW C. MURPHY (#0391948)
120 South Sixth Street, Suite 400
Minneapolis, MN 55402-4501
Phone: (612) 305-7500
Email: dporetti@nilanjohnson.com
mmurphy@nilanjohnson.com

Attorneys for Relators Center for Biological Diversity, Friends of the Boundary Waters Wilderness, and Minnesota Center for Environmental Advocacy

JUST CHANGE LAW OFFICES

/s/ Paula Maccabee
PAULA G. MACCABEE (#0129550)
1961 Selby Avenue
Saint Paul, MN 55104
Phone: (651) 646-8890
Email: pmaccabee@justchangelaw.com

Attorneys for Relator WaterLegacy

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

/s/ Sean Copeland
SEAN W. COPELAND (#0387142)
1720 Big Lake Road
Cloquet, MN 55720
Phone: (218) 878-2607
Email: seancopeland@fdlrez.com

VANESSA L. RAY-HODGE (*pro hac vice)*
500 Marquette Avenue NW, Suite 660
Albuquerque, NM 87102
Phone: (505) 247-0147
Email: vrayhodge@abqsonosky.com

MATTHEW L. MURDOCK (*pro hac vice*)
1425 K Street N.W., Suite 600
Washington, D.C. 20005
Phone: (202) 682-0240
Email: mmurdock@sonosky.com

Attorneys for Relators Fond du Lac Band of Lake Superior Chippewa