

STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT  
Case Type: Civil Other/Misc.

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

Plaintiffs,

vs.

Minnesota Pollution Control Agency and  
PolyMet Mining Inc.,

Defendants.

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

**MOTION FOR FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER**

Pursuant to Rule 7.02 of the Minnesota Rules of Civil Procedure, Plaintiffs Center for Biological Diversity (“CBD”), Friends of the Boundary Waters Wilderness (“FBWW”), Minnesota Center for Environmental Advocacy (“MCEA”), WaterLegacy, and the Fond du Lac Band of Lake Superior Chippewa (the “Band”) (collectively, “Plaintiffs”) move this Court for Findings of Fact, Conclusions of Law and an Order that the decision of Defendant Minnesota Pollution Control Agency (“MPCA”) to issue a National Pollutant Discharge Elimination System/State Disposal System Permit (“NPDES Permit”) to Defendant Poly Met Mining, Inc. (“PolyMet”) for the NorthMet copper-nickel mine project (“Project”) was in excess of MPCA’s authority, made upon unlawful procedure, affected by legal error, unsupported by substantial evidence, and arbitrary and capricious, in violation of the Minnesota Administrative Procedure Act (“MAPA”), and substantially prejudiced Plaintiffs in this case, and therefore should be reversed or remanded.

In support of their Motion, Plaintiffs<sup>1</sup> state and allege as follows:

### INTRODUCTION

1. The Project, located in the Lake Superior watershed, would be Minnesota's first copper-nickel mine.

2. Under the federal Clean Water Act ("CWA") and a Memorandum of Agreement between MPCA and the U.S. Environmental Protection Agency ("EPA"), MPCA exercises federally-delegated authority to control water pollution and issue NPDES permits under EPA oversight.

3. Courts show deference to EPA's interpretation of the CWA and its regulations.

4. When EPA has concerns about an NPDES permit's compliance with the CWA, and has invested resources in review of that permit, EPA's practice is to provide written comments. These comments create a record for public and judicial review as well as improving environmental outcomes.

5. Even before PolyMet applied for an NPDES permit for its Project, at least as early as April 2015, MPCA discouraged EPA from documenting its concerns pertaining to the NPDES Permit.

6. During the permitting process, MPCA and EPA engaged in multiple telephone conferences and in-person meetings regarding the NPDES Permit, some of which were not reflected in the administrative record.

7. MPCA and EPA failed to produce notes and emails documenting critical communications between MPCA and EPA during the NPDES Permit process, despite multiple

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<sup>1</sup> Plaintiffs will seek to submit joint filings to the extent practicable, but reserve the right to file or otherwise participate separately in these proceedings if circumstances so require.

requests under the Minnesota Government Data Practices Act (“MGDPA”). MPCA admitted that MPCA employees destroyed some data, leaks from EPA whistleblowers disclosed portions of missing documents, and some documents have yet to be discovered.

8. In particular, near the end of the public comment period on the draft NPDES Permit – the time when EPA customarily provides public comments on Minnesota NPDES permits – MPCA’s Commissioner asked the politically-appointed EPA Region 5 Administrator to direct EPA program staff not to send a written comment letter that EPA program staff had already prepared.

9. The request departed from customary procedure, is highly improper, and serves to conceal the nature and extent of the EPA’s concerns about the NPDES Permit and EPA oversight from the public and the courts.

10. WaterLegacy engaged in communications with EPA Region 5 counsel and learned that EPA program staff had prepared written comments on the draft NPDES Permit. WaterLegacy requested these comments under the Freedom of Information Act (“FOIA”) and filed suit under FOIA for EPA to produce these written comments.

11. As a result of the litigation, EPA admitted that its comments had been read aloud over the phone on April 5, 2018, and released the written comments in an annotated form showing that EPA program staff read significant portions of its written comments to MPCA during the April 5, 2018 telephone conference (“EPA Comments”).

12. MPCA took two sets of notes during the April 5, 2018 telephone conference, but admitted MPCA staff destroyed both sets of notes.

13. The EPA Comments were detailed, substantive, and highly critical of the draft NPDES Permit, stating that the permit “appears to authorize discharges that would exceed

Minnesota's federally-approved human health and/or aquatic life water quality standards for mercury, copper, arsenic, cadmium, and zinc.”

14. Although MPCA represented that MPCA resolved EPA's concerns before issuing the final NPDES Permit, a December 18, 2018 file memorandum authored by EPA Region 5 NPDES Program Chief, and leaked in July 2019 by whistleblowers, established that this was not the case (“December 2018 File Memo”). The December 2018 File Memo describes twenty-nine concerns EPA raised regarding the NPDES Permit and EPA's conclusion that MPCA only fully resolved six of these concerns in the final permit.

15. Plaintiffs have depended on whistleblowers, five MGDPA requests, the efforts of a retired EPA attorney, leaks from the EPA program staff union, and FOIA litigation to discover the EPA Comments, the December 2018 File Memo, and other evidence demonstrating EPA's extensive concerns with the NPDES Permit and MPCA's and EPA's irregular procedures.

16. Despite more than a year of effort to uncover EPA's concerns with the NPDES Permit and the nature of MPCA's and EPA's irregular and unlawful procedures, the administrative record remains incomplete, and little is known either about outside influences on MPCA's NPDES Permit decisions or the communications between MPCA and EPA management.

#### **JURISDICTION AND VENUE**

17. This Court has jurisdiction over this matter pursuant to the Minnesota Court of Appeals June 25, 2019 Order transferring *In re Denial of Contested Case Hearing Requests and Issuance of NPDES/SDS Permit No. MN0071013 for the Proposed Northmet Project St. Louis County Hoyt Lakes and Babbitt Minnesota*, Case Nos. A19-0112, A19-0118, A19-0124 to this Court pursuant to Minn. Stat. § 14.68.

18. This matter is properly venued in Ramsey County where MPCA has its principal office. *See* Minn. Stat. § 14.68.

19. Section 14.68 provides that this Court has “jurisdiction to take testimony and hear and determine the alleged irregularities in procedure.”

20. In transferring this matter to this Court, the Minnesota Court of Appeals set forth that MPCA’s decision to issue the NPDES Permit was subject to judicial review under Minn. Stat. § 14.69(a)-(f) and concluded that WaterLegacy “has provided substantial evidence of procedural irregularities not shown in the administrative record.”

21. The Minnesota Court of Appeals determined the following issues are undisputed for the purpose of this Court’s decision-making:

- a. “MPCA and EPA departed from typical procedures in addressing the [NPDES Permit], engaging in multiple telephone conferences and in-person meetings, some of which are not reflected in the administrative record”;
- b. “EPA prepared written comments on the draft [NPDES Permit]”;
- c. “those [EPA] written comments were never submitted to the MPCA and are not part of the administrative record”;
- d. “instead the [EPA] written comments were read to MPCA during an April 5, 2018 telephone call”; and
- e. “notes taken during that call have not been included in the administrative record, and are believed to have been discarded.”

22. The Minnesota Court of Appeals determined the following issues are disputed for the purpose of this Court’s decision-making:

- a. Whether it is unusual for EPA not to submit written comments; and

b. Whether MPCA sought to keep EPA's comments out of the public record.

23. The Minnesota Court of Appeals charged this Court with holding an evidentiary hearing to determine "alleged irregularities in procedure" and conferred this Court with jurisdiction to issue an order "that *includes* findings of fact on the alleged irregularities." (Emphasis added).

24. Section 14.68 states: "Appeal from the district court determination may be taken to the court of appeals as in other civil cases." The Minnesota Court of Appeals' transfer order also indicated this Court's decision will be a final, appealable order.

### **THE PARTIES**

25. CBD is a national non-profit, public-interest organization with more than 52,000 members. CBD uses science, law, and creative media to protect lands, waters, and climate that plant and animal species need to survive. CBD has an office in Duluth, Minnesota, and has many members who reside within and/or regularly use, enjoy, and recreate on public lands and waters in northeastern Minnesota.

26. FBWW is a Minnesota non-profit, public-interest organization who, since 1976, has been a leading voice for the ongoing protection, preservation, and restoration of the Boundary Waters Canoe Area Wilderness, as well as the areas immediately surrounding the Boundary Waters. FBWW has members who live and recreate on or near lands the Project has the potential to impact, particularly the Boundary Waters Canoe Area.

27. MCEA is a Minnesota non-profit, public-interest organization whose mission is to use law, science, and research to preserve and protect Minnesota's natural resources, wildlife, and the health of its people. MCEA has members who live and recreate on or near lands the Project will impact.

28. WaterLegacy is a Minnesota non-profit, public-interest organization formed to protect Minnesota waters, wetlands, and habitats from pollution and destruction, particularly resulting from copper-nickel mining in northern Minnesota. WaterLegacy's membership includes individuals who own lakefront and riparian property and live on lands the Project will impact, and who fish, recreate, gather wild rice and rely for sustenance on waters and lands the Project will impact.

29. The Band is a federally-recognized Indian tribe and a member band of the Minnesota Chippewa Tribe. The Band retains hunting, fishing, and other usufructuary rights that extend throughout the entire northeast portion of the State of Minnesota ("1854 Ceded Territory") under the 1854 Treaty of LaPointe with the United States, 10 Stat. 1109 (Sept. 30, 1854). The Band retains these treaty rights to hunt, fish, and gather natural resources for subsistence and cultural and religious purposes. The Project is located within the Band's 1854 Ceded Territory. The Band also holds and occupies the Fond du Lac Reservation, which was established as the Band's permanent home by the Treaty of LaPointe. The Reservation lies downstream from the Project and its proposed discharges and releases of polluted wastewater. The Band has Treatment-as-State status under the CWA and federally-approved water quality standards. *See* 33 U.S.C. § 1377(e).

30. MPCA is a governmental department of the State of Minnesota created and empowered by Minn. Stat., chs., 115 and 116 and other laws. MPCA acts pursuant to delegated powers subject to EPA oversight and, as a result, has the authority to implement the federal CWA in Minnesota—including issuing NPDES permits. MPCA issued the NPDES Permit for the Project.

31. PolyMet is a wholly-owned subsidiary of PolyMet Mining Corp., a publicly-traded mine development company. As of June 2019, PolyMet Mining Corp.'s majority shareholder (with nearly seventy-two percent ownership) is Glencore, a Swiss-based global commodities company. MPCA issued the NPDES Permit for the Project to PolyMet.

### **FACTUAL ASSERTIONS COMMON TO ALL CLAIMS**

#### *Project Proposal, Environmental Review, and PolyMet's Permit Application*

32. PolyMet first proposed the Project in 2005.
33. The Project underwent ten years of environmental review.
34. Environmental review took ten years, in part, because in 2010 EPA found the draft environmental impact statement "environmentally unsatisfactory" due to its impacts on wetlands and water quality.
35. EPA had many conversations with MPCA during environmental review.
36. During environmental review, EPA staff also provided written comments detailing expectations for the future NPDES Permit.
37. Even prior to PolyMet's application for the NPDES Permit, MPCA sought to prevent EPA from communicating its concerns in writing.
38. On April 9, 2015, Ann Foss, then MPCA Metallic Mining Sector Director, admonished Kevin Pierard, EPA Region 5 NPDES Program Chief, for memorializing in writing EPA's understanding of agreements between EPA and MPCA about permitting approaches for the NPDES Permit, rather than scheduling "conversations."
39. Prior to PolyMet's application for the NPDES Permit, EPA and MPCA agreed to hold twice-monthly conference calls throughout the NPDES Permit's development. MPCA declared these calls occurred at least monthly from August 2016 to August 2017.



40. MPCA did not include any notes from the August 2016 to August 2017 phone calls with EPA in the administrative record to the Minnesota Court of Appeals.

41. In July 2016, PolyMet submitted its first application for a NPDES permit authorizing discharges from the Project.

42. On November 3, 2016, EPA staff wrote to MPCA citing deficiencies in PolyMet's NPDES permit application, and highlighting EPA's oversight role. EPA further emphasized that "it is important that the content of the application be fully documented and the record before the permitting Agency be complete and transparent."

43. Under the Memorandum of Agreement between MPCA and EPA, once EPA comments that an NPDES application is deficient, no NPDES application can be processed until MPCA receives a letter from EPA concurring that all deficiencies EPA identified have been corrected and the application is complete.

44. The administrative record contains no letter from EPA stating that all deficiencies EPA identified on November 3, 2016, were corrected or concurring that the application is complete.

45. MPCA handwritten notes in November 2017 reflect that EPA had two calls with MPCA regarding PolyMet's NPDES Permit application. Among other concerns, EPA highlighted:

- a. the lack of water quality based effluent limits ("WQBELs") limiting metals and other pollutants discharged from the project – the primary mechanism to control discharges to surface waters exceeding water quality standards;
- b. potential effects of mercury downstream on the Band; and
- c. using operating limits to avoid the enforceability of WQBELs.

46. In the calls, EPA expressed the need for MPCA to make all materials MPCA considered in its decision-making process available to the public.

47. In the calls, EPA requested an advance copy of the draft NPDES Permit several weeks before MPCA placed the draft NPDES Permit on public notice.

48. In the calls, EPA also informed MPCA that EPA would send a written letter to MPCA prior to the time of public notice.

49. On November 20, 2017, EPA accepted MPCA's proposal to receive the draft NPDES Permit at the same time as impacted tribes.

*Draft NPDES Permit*

50. EPA received a copy of the draft NPDES Permit on January 18, 2018.

51. MPCA released the draft NPDES Permit to the public on January 31, 2018.

52. MPCA handwritten notes from calls with EPA staff on January 31, 2018, February 13, 2018, and March 5, 2018 reflect EPA's concerns about the draft NPDES Permit, including:

a. the lack of WQBELs limiting pollutants discharged from the Project, particularly mercury, and the insufficiency of the analysis that MPCA relied on to reject WQBELs;

b. that the NPDES Permit could be used as a "permit shield" to protect PolyMet from liability for exceedance of Minnesota water quality standards;

c. impacts of the Project on downstream users, particularly the Band, as a result of mercury; and

d. seepage and migration of pollutants from the mine site.

53. MPCA handwritten notes from March 5, 2018 reflect that Kevin Pierard, EPA Region 5 NPDES Program Chief, stated “EPA wants to submit comments – make clear what EPA concerns are,” that “EPA will submit comments during [public notice] period,” and that “EPA will discuss draft comments.” MPCA’s notes reflect that EPA and MPCA would set up a call on Monday morning the following week (March 12, 2018) to discuss EPA’s draft comments. The administrative record contains no notes from a March 12, 2018 call or any other communications between MPCA and EPA from March 5, 2018 to the close of the public comment period on March 16, 2018.

54. In June 2019, the union representing career EPA employees leaked a portion of an email dated March 13, 2018 – three days before the end of the public comment period and one day after the date on which the call was proposed for EPA to discuss EPA’s draft comments with MPCA.

55. The March 13, 2018 email was sent by Shannon Lotthammer, MPCA’s Assistant Commissioner, to Kurt Thiede, Chief of Staff to EPA Region 5 Regional Administrator Cathy Stepp.

56. Assistant Commissioner Lotthammer’s March 13, 2018 email includes the subject line “FW: Minnesota Speaker’s Office,” suggesting that it was also forwarded to the office of Representative Kurt Daudt, then Speaker of the Minnesota House of Representatives.

57. The March 13, 2018 email referenced notes “below” from MPCA Commissioner John Linc Stine. Those notes were not included in the document leaked by the EPA staff union.

58. Assistant Commissioner Lotthammer wrote in the March 13, 2018 email: “We have asked that EPA Region 5 not send a written comment letter during the public comment period. . . .”

59. The public comment period for the draft NPDES Permit ended March 16, 2018.

60. During the comment period, Plaintiffs commented extensively that the draft NPDES Permit was insufficient to protect the public and environment under the CWA.

61. On information and belief, EPA did not submit a letter or any other written comments before or during the public comment period for the draft NPDES Permit.

62. On March 26, 2018, WaterLegacy filed the first of five MGDPA requests to MPCA seeking all documents, including handwritten notes, pertaining to written or oral communications or phone or in-person meetings with EPA regarding the draft NPDES Permit.

63. WaterLegacy received documents in response to the March 26, 2018 request, including handwritten notes from folders bearing the names of various MPCA staff. However, MPCA failed to provide any of the following in response to any of WaterLegacy's MGDPA requests:

- a. any notes of conversations between EPA and MPCA prior to November 2017;
- b. any notes between March 5, 2018 and March 16, 2018, in particular MPCA notes from the proposed March 12, 2019 phone call (within the public notice period) when EPA would inform MPCA of the substance of its comments on the draft NPDES Permit;
- c. any emails between March 5, 2018 and March 16, 2018, including the March 13, 2018 email chain the EPA union partially leaked; and
- d. any data from folders bearing the names of MPCA managers, including but not limited to Commissioner John Linc Stine, Assistant Commissioner Shannon Lotthammer, Metallic Mining Sector Director Ann Foss, Assistant Commissioner Rebecca Flood, Industrial Division Director Jeff Smith, and Water and Mining Sector Manager Jeff Udd.

64. Under federal regulations, MPCA is required to respond in writing to comments received during the public comment period on a draft NPDES Permit. MPCA failed to include any of the comments from EPA in MPCA's publicly-available response to comments for the draft NPDES Permit. MPCA's responses to Plaintiffs' comments, particularly to those of the Band, stated that the "permit complies with Clean Water Act requirements identified by EPA."

65. WaterLegacy also filed a broad FOIA request to EPA in March 2018 regarding the draft NPDES Permit.

66. In follow-up discussions with EPA Region 5 counsel regarding the FOIA request, WaterLegacy learned that EPA staff had prepared final written comments on the draft NPDES Permit that were not sent to MPCA, and that a simple FOIA request would produce this document.

67. WaterLegacy made a FOIA request to EPA for the final written comments on the draft NPDES Permit on October 19, 2018.

68. EPA failed to produce the written comments or otherwise respond to the FOIA request.

69. WaterLegacy filed a FOIA lawsuit in federal court on January 31, 2019 to secure EPA's written comments on the draft NPDES Permit.

70. WaterLegacy also sought assistance from Congressional leadership to obtain EPA's written comments on the draft NPDES Permit.

71. On June 12, 2019, EPA relented and WaterLegacy received a copy of the EPA Comments which were identified as having been read to MPCA on April 5, 2018. The actual date when the EPA Comments were prepared by staff was not shown on the document.

72. The first page of the cover letter attached to the EPA Comments included a handwritten note, stating:

The information underlined in the attachment to this letter was conveyed verbally to MPCA on April 5, 2018. This was read word for word to PCA participants Richard Clark, Mike Schmidt, Jeff Udd, and Stephanie Handeland. EPA participants Mark Compton, Krista McKim, Barbara Wester, Candice Bauer, Mark Ackerman & Kevin Pierard. [signed] Kevin Pierard 4.5.18

73. Most of the comments in the EPA Comments were read verbatim to MPCA, as the EPA Region 5 NPDES Program Chief underlined most of the memorandum.

74. The EPA Comments expressed serious concerns with the draft NPDES Permit, including lack of WQBELs, concerns that the draft NPDES Permit was unenforceable, and problems with MPCA's decision-making process. Specifically, the EPA Comments stated that "the permit does not include WQBELs for key parameters and appears to authorize discharges that would exceed Minnesota's federally-approved human health and/or aquatic life water quality standards for mercury, copper, arsenic, cadmium, and zinc." The EPA Comments further stated that EPA's "concerns must be addressed to ensure that the permit will achieve compliance with all applicable requirements of the CWA, including water quality requirements of Minnesota and of all affected states."

75. Although WaterLegacy had a pending MGDPA request, MPCA failed to provide WaterLegacy with any handwritten notes from the critical April 5, 2018 phone call between MPCA and EPA in which the EPA Comments were read to MPCA.

76. MPCA admitted in declarations to the Minnesota Court of Appeals that MPCA staff attorney Michael Schmidt and MPCA staff member Stephanie Handeland both, in fact, took notes during the April 5, 2018 phone call and destroyed these notes.

*Final NPDES Permit and Appellate Review*

77. After the close of the public comment period, EPA continued to have phone conversations and in-person meetings with MPCA, but EPA did not provide written comments to MPCA.

78. On September 25, 2018, MPCA hosted a meeting with EPA and PolyMet to discuss the draft NPDES Permit. MPCA then met with EPA in a second meeting on September 26, 2018.

79. MPCA's emails of the agenda reflect EPA's continuing concerns about the lack of WQBELS in the NPDES Permit and permit enforceability. In addition, MPCA's email prior to the meeting between EPA and MPCA includes as a discussion item "Plan for responding to comments from EPA (given verbally prior to public notice)."

80. Neither the documents WaterLegacy received under the MGDPA nor the administrative record reflect EPA's and MPCA's substantive discussion of *any* plan for responding to EPA's multiple verbal comments nor any explanation for why MPCA provided no such responses.

81. MPCA's handwritten notes from September 25 and 26, 2018 indicate EPA continued to have serious concerns that MPCA's NPDES Permit would serve "as a shield" to protect PolyMet from liability, that MPCA's operating limits, unlike WQBELS, may not be enforceable, and that mercury in stormwater would have potential downstream impacts.

82. MPCA's handwritten notes from October 22, 2018 emphasize EPA's continued concern about the lack of WQBELS in the NPDES Permit and state "EPA will focus review on proposed language re WQBELS."

83. No documents in the administrative record reflect MPCA's response to EPA's continued assertions that the NPDES Permit should include WQBELS to create enforceable limits on water pollution.

84. On information and belief, MPCA told EPA that the NPDES Permit did not contain WQBELs because PolyMet would not accept them as a condition of its Permit.

85. On December 17, 2018, MCEA sent an email to MPCA asking whether MPCA had heard anything from EPA on the PolyMet permit. MPCA's attorney Michael Schmidt responded, "We did not get any feedback from EPA on the PolyMet permit."

86. On July 16, 2019, Plaintiffs received the December 2018 File Memo. It is dated December 18, 2018, *two days* before MPCA issued the final NPDES Permit to PolyMet.

87. The December 2018 File Memo documents in detail the EPA Region 5 NPDES Program Chief's continued substantive concerns about the lack of WQBELs in the NPDES Permit, permit enforceability, various pollutants and Project features for which MPCA set no limits, tailings basin seepage, and unregulated mercury discharges.

88. The December 2018 File Memo set forth twenty-nine issues EPA identified with the draft NPDES Permit. Of the twenty-nine issues, EPA indicates MPCA fully resolved six identified issues as of December 18, 2018.

89. MPCA issued the NPDES Permit to PolyMet on December 20, 2018.

90. Plaintiffs timely appealed in January 2019.

91. On May 17, 2019, WaterLegacy – supported by the other Plaintiffs – filed a motion for transfer to this Court or, in the alternative, for stay due to irregular procedure and missing documents from the administrative record.

92. On June 6, 2019, the Band joined WaterLegacy's motion.

93. On June 13, 2019, WaterLegacy and Band withdrew the motion to stay – leaving only the motion to transfer – on the grounds that the EPA Comments on the draft NPDES Permit



were provided to WaterLegacy in the FOIA litigation. WaterLegacy and the Band attached a copy of the EPA Comments to their notice.

94. On June 25, 2019, the Minnesota Court of Appeals transferred Plaintiffs' appellate cases challenging the NPDES Permit to the Ramsey County District Court for an evidentiary hearing and determination of "alleged irregularities in procedure," and conferred this Court with jurisdiction to issue an order "that includes findings of fact on the alleged irregularities."

95. Even after the Minnesota Court of Appeals transferred Plaintiffs' appellate cases to this Court, MPCA continued its attempts to hide information. In a June 2019 MGDPA request, MCEA asked MPCA for all Assistant Commissioner Lotthammer's emails and underlying or associated emails from other recipients between March 1, 2018 and April 6, 2018. In its July 24, 2019 response to MCEA's MGDPA request, MPCA failed to provide the March 13, 2018 Lotthammer email and the underlying email string.

*Evidence that MPCA and EPA Management Colluded  
to Prevent Transparency and Hide EPA Staff Concerns from the Public*

96. On January 31, 2019, a retired EPA attorney – Jeffry Fowley – filed a complaint with the EPA Office of Inspector General ("OIG") alleging "Possible Waste, Fraud or Abuse in EPA Region V: Suppression of Comments on the Poly Met Mining Company State Water Permit and other Permit Actions by Minnesota, and the Region Making Comments Off the Record in a Way that Hides Them From the Public."

97. Citing credible information from sources within EPA, Mr. Fowley alleged that "planned EPA staff written comments on the permit were suppressed by the Region V Regional Administrator Cathy Stepp." Mr. Fowley explained that:

after [Ms. Stepp] reportedly was called by the State Commissioner, John Linc Stine, who reportedly complained about the planned comments, I have been told that the

EPA Regional Administrator for Region V, Cathy Stepp, directed in March 2018, that the EPA staff not send any written comments to the State.

98. Mr. Fowley's OIG complaint stated that EPA staff written comments prepared for transmittal to MPCA raised serious issues about whether the State was complying with the CWA.

The complaint stated:

[W]hile significant EPA concerns about the permit reportedly were instead communicated to the State by telephone, I also have been advised that the Region cooperated with the State in helping to keep such comments off the state record, in ways that seem designed to hide the concerns from the public and even from the Minnesota state appeals court that is expected to review the permit.

99. Emails WaterLegacy obtained from MGDPA requests confirm Mr. Fowley's allegations that MPCA had a "plan" with EPA to avoid creating a written record of EPA's comments, including a meeting "the first week of April to walk through what the comment letter would have said if it were sent."

100. Mr. Fowley's OIG complaint asserted that "state personnel then agreed to have EPA staff read key parts of their written comments to the state personnel over the telephone" in April 2018, just after the close of the public comment process.

101. Mr. Fowley's allegation was confirmed when EPA relented and turned over the EPA Comments as a result of WaterLegacy's federal FOIA litigation.

102. Mr. Fowley's allegations were further confirmed by Shannon Lotthammer's March 13, 2018 email leaked by the EPA union indicating MPCA asked EPA not to submit written comments.

103. MPCA has neither disputed nor submitted evidence contrary to allegations in Mr. Fowley's complaint and in the transfer motion to the Minnesota Court of Appeals on the following issues:

a. MPCA provided no evidence disputing that MPCA Commissioner John Linc Stine called EPA Regional Administrator Cathy Stepp to complain about EPA staff's planned written comments on the NPDES Permit.

b. MPCA has not disputed that EPA's appointed Regional Administrator Cathy Stepp directed EPA program staff not to send any written comments to MPCA after this call by MPCA's Commissioner.

c. MPCA has not disputed that EPA staff stated during the public comment period for the draft NPDES Permit that they intended to submit written comments to make clear EPA concerns, which included the lack of WQBELs.

d. MPCA admitted that two MPCA employees took written notes of the April 5, 2018 call when EPA read the EPA Comments. Neither set of notes were provided to WaterLegacy under the MGDPA or placed in the administrative record before the Minnesota Court of Appeals.

e. MPCA has not disputed that WaterLegacy's first MGDPA request for documents, including "meeting notes" and "phone conversation notes" pertaining to "written or oral communications" with EPA, was made on March 26, 2018, before the April 5, 2018 call and notetaking.

f. MPCA admitted that, as of April 5, 2018, issues raised by EPA had not been resolved. MPCA admitted that EPA and MPCA met in September 2018 to resolve outstanding issues.

g. MPCA admitted that neither the EPA Comments nor the content of the EPA Comments read aloud to MPCA on April 5, 2018 were contained in the administrative record before the Minnesota Court of Appeals.

h. MPCA admitted “the only way that WaterLegacy was aware of those documents – and of the existence of the non-record document it seeks – is because of MPCA’s disclosures under the [MGDPA].”

104. MPCA stated that MPCA resolved all EPA’s concerns regarding the NPDES Permit at the September 25 and 26, 2018 meetings, although MPCA has admitted that EPA did not send any written confirmation to MPCA of this “resolution.”

105. There are no documents in the administrative record and WaterLegacy received no documents under the MGDPA confirming that all of EPA’s concerns regarding the NPDES Permit were resolved in September 2018 or at any other time.

106. MPCA’s statement that all issues of concern to EPA were resolved in September 2018 is belied by the December 2018 File Memo describing the EPA Region 5 NPDES Program Chief’s unresolved concerns two days before MPCA issued the NPDES Permit.

107. On information and belief, MPCA discussed EPA’s concerns about the NPDES Permit with PolyMet throughout the permitting process, PolyMet informed MPCA that EPA’s proposed conditions for the NPDES Permit were unacceptable to PolyMet, MPCA deferred to PolyMet, rather than EPA, in making decisions on the provisions of the NPDES Permit, and MPCA improperly allowed PolyMet to influence MPCA’s decision to reject EPA’s comments and proposed conditions for issuance of the NPDES Permit.

108. MPCA’s conduct as described herein is anomalous, irregular, improper, unlawful, concealed critical information from the public, and would have concealed EPA’s concerns about the NPDES Permit from the courts in judicial review but for a series of whistleblower communications, document leaks, engagement of a retired EPA attorney, aggressive pursuit of MGDPA and FOIA document requests, and FOIA litigation.

109. MPCA's conduct reflects a bias favoring PolyMet and is antithetical to the public purposes of the CWA and associated federal regulations and renders any MPCA interpretation of law or fact pertaining to the NPDES Permit suspect, entitling MPCA's decisions on the NPDES Permit to no deference and supporting Plaintiffs' claims that MPCA's NPDES Permit decision was made on unlawful procedure, erroneous, unsupported by substantial evidence, and arbitrary and capricious.

110. Upon information and belief, MPCA and EPA engaged in other irregular or unlawful procedures.

111. MPCA's positions taken during the permitting proceeding and judicial review are not substantially justified and have prejudiced Plaintiffs in their claims that the NPDES Permit does not comply with the CWA and applicable water quality standards.

**FIRST CLAIM FOR RELIEF**  
**VIOLATION OF THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT**  
**MINN. STAT. § 14.68-14.69**

112. Plaintiffs restate and reallege all preceding paragraphs.

113. Minnesota Statutes § 14.69 provides the scope of judicial review for claims arising under MAPA. Section 14.69 provides:

In a judicial review under sections 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it 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:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

114. Minnesota Statutes § 14.68 provides for the procedure on review and states:

The review shall be confined to the 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 for the county in which the agency has its principal office or the county in which the contested case hearing was held. The district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure. Appeal from the district court determination may be taken to the court of appeals as in other civil cases.

115. MPCA's conduct set forth in detail in the preceding paragraphs constitutes irregularities in procedure under section 14.68 and, as such, constitutes a violation of MAPA as follows:

a. MPCA's issuance of the NPDES Permit based on irregular procedures, such as persuading EPA political appointees not to submit written comments from EPA program staff, exceeded MPCA's statutory authority;

b. MPCA's decision to issue the NPDES Permit was made upon irregular and unlawful procedure;

c. MPCA's decision to issue the NPDES Permit constitutes a legal error under the CWA and implementing regulations;

d. MPCA's irregular procedures in issuing the NPDES Permit demonstrate that MPCA exercised its will, not its judgement, and that its decision to issue the NPDES Permit was entitled to no deference, unsupported by substantial evidence, and arbitrary and capricious.

116. Plaintiffs' substantial rights were prejudiced by MPCA's irregular procedures and by the resulting issuance of the NPDES Permit.

117. Due to MPCA's irregular procedures, MPCA's issuance of the NPDES Permit was in excess of MPCA's authority, made upon unlawful procedure, affected by legal error,

unsupported by substantial evidence, and arbitrary and capricious in violation of MAPA, and substantially prejudiced Plaintiffs in this case, and should be reversed or remanded.

**SECOND CLAIM FOR RELIEF**  
**VIOLATION OF THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT**  
**MINN. STAT. § 14.68**

118. Plaintiffs restate and reallege all preceding paragraphs.

119. MPCA's conduct enumerated above constitutes irregular procedures not shown in the administrative record.

120. MPCA's conduct constituting irregular procedures includes, but is not limited to the following:

- a. Concerted efforts to prevent EPA staff from submitting written comments pertaining to the NPDES Permit prior to and throughout the permitting process;
- b. Convincing EPA management not to send MPCA the EPA Comments written during the public comment period on the draft NPDES Permit;
- c. Destroying handwritten notes taken during meetings with EPA;
- d. Restricting MGDPA compliance to documents maintained by MPCA staff without disclosing documents retained by MPCA senior management;
- e. Failing to produce government data, including critical emails between MPCA and EPA; and
- f. On information and belief, rejecting permit requirements identified by EPA as needed to comply with the CWA on the basis that the permittee refused such permit conditions.

121. Information remaining outside the administrative record despite Plaintiffs' concerted efforts to secure documents and disclosures includes, but is not limited to, the following:

a. Documents reflecting when and if EPA ever confirmed that the deficiencies EPA had identified in PolyMet's NPDES Permit application in November 2016 were resolved so that the application was complete;

b. Information as to what actions were taken and communications made by senior MPCA management, including but not limited to Ann Foss, Jeff Smith, Shannon Lotthammer, Rebecca Flood, and John Linc Stine pertaining to the NPDES Permit and the irregular procedures described in the preceding paragraphs;

c. Information as to the nature and source of advice used to encourage or allow pertinent MPCA official records and government data to be destroyed, concealed, forwarded, or not released despite MGDPA requests, which actions are inconsistent with Minnesota laws providing for preservation and production of such records and data;

d. Information as to the nature, extent, and reasons for the involvement of MPCA management and other individuals in efforts to prevent EPA from submitting written comments on the Project, including comments on the NPDES Permit; and

e. Information as to why MPCA rejected permit conditions EPA stated were required under the CWA, including but not limited to WQBELs, and as to why MPCA failed to provide public responses to comments of EPA, including the EPA Comments read over the phone on April 5, 2018.

122. MPCA's procedural irregularities require that this Court authorize such reasonable discovery as is necessary to make findings of fact determining the nature and scope of the procedural irregularities based on evidence both within and outside the administrative record.

123. Due to MPCA's irregular procedures, MPCA's issuance of the NPDES Permit was in excess of MPCA's authority, made upon unlawful procedure, affected by legal error,



unsupported by substantial evidence, and arbitrary and capricious in violation of MAPA, and substantially prejudiced Plaintiffs in this case, and should be reversed or remanded.

**THIRD CLAIM FOR RELIEF**  
**VIOLATION OF THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT**  
**FAILURE TO COMPLY WITH 40 C.F.R. § 124.17**

124. Plaintiffs restate and reallege all preceding paragraphs.

125. CWA implementing regulation 40 C.F.R. § 124.17 provides that:

(a) . . . At the time that any final permit decision is issued under § 124.15, the Director shall issue a response to comments. States are only required to issue a response to comments when a final permit is issued.

This response shall:

(1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(2) Briefly describe and respond to all significant comments on the draft permit or the permit application (for section 404 permits only) raised during the public comment period, or during any hearing. . . .

(c) . . . The response to comments shall be available to the public.

126. MPCA issued the NPDES Permit subject to its delegated authority under the CWA.

127. MPCA issued a final NPDES Permit to PolyMet for the Project.

128. In its response to comments, MPCA did not include any reference to EPA's numerous comments reflected in MPCA notes or to the EPA Comments on the draft NPDES Permit read aloud to MPCA on April 5, 2018.

129. MPCA made some changes to the final NPDES Permit as a result of EPA's comments. MPCA did not specify either in responses to comments or in any other record available to the public that provisions had been changed as a result of EPA comments.

130. MPCA failed to describe all significant comments raised during the public comment period for the draft NPDES Permit, as EPA's comments were excluded.

131. MPCA failed to respond to all significant comments on the draft NPDES Permit, as MPCA did not respond to EPA's comments.

132. MPCA failed to describe to the public that it changed provisions to the draft NPDES Permit because of EPA comments.

133. MPCA's failure to cite EPA's comments in the response to comments was an irregular procedure.

134. MPCA's requests to EPA to withhold EPA written comments in order to avoid the requirement in 40 C.F.R. § 124.17 that MPCA provide public written responses to all comments was in excess of MPCA's statutory authority.

135. MPCA's failure to include EPA's comments in the response to comments was an unlawful procedure under 40 C.F.R. § 124.17.

136. MPCA's failure to include EPA's comments in the response to comments was a violation of 40 C.F.R. § 124.17 and, therefore, an error of law.

137. MPCA issued the NPDES Permit using an irregular procedure showing MPCA exercised its will, not its judgment and, therefore, MPCA made a decision unsupported by substantial evidence, and which was arbitrary and capricious.

138. Plaintiffs were prejudiced by MPCA's failure to comply with 40 C.F.R. § 124.17.

139. Due to MPCA's failure to comply with 40 C.F.R. § 124.17, MPCA's issuance of the NPDES Permit was in excess of MPCA's authority, made upon unlawful procedure, affected by legal error, unsupported by substantial evidence, and arbitrary and capricious in violation of MAPA, and substantially prejudiced Plaintiffs in this case, and should be reversed or remanded.

**FOURTH CLAIM FOR RELIEF**  
**VIOLATION OF THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT**  
**FAILURE TO COMPLY WITH MGDPA, MINN. STAT § 13.03**

140. Plaintiffs restate and reallege all preceding paragraphs.

141. The MGDPA, Minn. Stat. §13.03 requires that:

Subd. 1. . . . All government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute, or temporary classification pursuant to section 13.06, or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential. The responsible authority in every government entity shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use. . . .

Subd. 2. . . . (a) The responsible authority in every government entity shall establish procedures, consistent with this chapter, to ensure that requests for government data are received and complied with in an appropriate and prompt manner. . . .

Subd. 3. . . . (a) Upon request to a responsible authority or designee, a person shall be permitted to inspect and copy public government data at reasonable times and places. . . .

(c) The responsible authority or designee shall provide copies of public data upon request.

142. WaterLegacy submitted five MGDPA requests between March 26, 2018 and February 3, 2019 seeking all documents, including handwritten notes, pertaining to written or oral communications or phone or in-person meetings with EPA regarding the NPDES Permit.

143. MPCA violated the MGDPA when it failed to comply with WaterLegacy's requests for critical data – including emails between MPCA and EPA on March 13, 2018, handwritten notes from the April 5, 2018 phone call, and other notes, documents and data yet to be specifically identified as missing.

144. MCEA submitted a June 19, 2019 MGDPA request to MPCA seeking “all email communication sent and/or received by . . . Shannon Lotthammer, as well as any and all associated

or underlying email from or to other recipients, during the period from March 1, 2018 to April 6, 2018.”

145. MPCA violated the MGDPA when in its July 24, 2019 response to MCEA’s request, MPCA turned over only five emails and failed to disclose the March 13, 2018 email leaked by the EPA union wherein Assistant Commissioner Lotthammer asked that EPA Region 5 not send a written comment letter during the public comment period and the accompanying email string.

146. On information and belief, MPCA violated the MGDPA in other ways, such as taking notes of official meetings on permitting matters in “private” notebooks, and excluding MPCA senior management from MGDPA government data maintenance and/or production.

147. The effect of MPCA’s violations of the MGDPA was to conceal from the public, Plaintiffs, and the courts the most salient information regarding EPA’s criticisms of the NPDES Permit and MPCA’s efforts to conceal those criticisms.

148. MPCA’s decision to withhold government data properly requested under the MGDPA, and to hide that data from the public, was in excess of its statutory authority.

149. MPCA’s MGDPA violations constitute an irregular procedure.

150. MPCA’s MGDPA violations constitute an unlawful procedure.

151. MPCA’s MGDPA violations constitute legal errors.

152. MPCA’s MGDPA violations show that MPCA’s issuance of the NPDES Permit was unsupported by substantial evidence, and arbitrary and capricious.

153. Plaintiffs were prejudiced by MPCA’s failure to comply with the MGDPA.

154. Due to MPCA’s failure to comply with the MGDPA, MPCA’s issuance of the NPDES Permit was in excess of MPCA’s authority, made upon unlawful procedure, affected by

legal error, unsupported by substantial evidence, and arbitrary and capricious in violation of MAPA, and substantially prejudiced Plaintiffs in this case, and should be reversed or remanded.

**FIFTH CLAIM FOR RELIEF**  
**VIOLATION OF THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT**  
**FAILURE TO COMPLY WITH OFFICIAL RECORDS ACT, MINN. STAT § 15.17**

155. Plaintiffs restate and reallege all preceding paragraphs.

156. The Official Records Act provides:

All officers and agencies of the state, counties, cities, towns, school districts, municipal subdivisions or corporations, or other public authorities or political entities within the state, hereinafter “public officer,” shall make and preserve all records necessary to a full and accurate knowledge of their official activities. Government records may be produced in the form of computerized records. All government records shall be made on a physical medium of a quality to insure permanent records.

Minn. Stat. § 15.17, subd. 1.

157. MPCA violated section 15.17, subdivision 1 when public officers destroyed notes from the April 5, 2018 phone conference between MPCA and EPA and, on information and belief, other official government records pertaining to the NPDES Permit and MPCA and EPA communications.

158. MPCA violated section 15.17, subdivision 1 when it actively negotiated with EPA management to avoid making records that provide a full and accurate report of their official activities.

159. MPCA’s violation of section 15.17, subdivision 1 constitutes an irregular procedure.

160. MPCA’s violation of section 15.17, subdivision 1 by persuading EPA not to send written comments and, on information and belief, by authorizing or endorsing various methods to keep “private” records or otherwise avoid making official records that provide full and accurate

knowledge of MPCA activities related to NPDES permitting of the Project, was in excess of MPCA's statutory authority.

161. MPCA's violation of section 15.17, subdivision 1 was an unlawful procedure.

162. MPCA's violation of section 15.17, subdivision 1 was an error of law.

163. MPCA's violation of section 15.17, subdivision 1 shows MPCA's issuance of the NPDES Permit was unsupported by substantial evidence, and arbitrary and capricious.

164. Plaintiffs were prejudiced by MPCA's failure to comply with section 15.17, subdivision 1.

165. Due to MPCA's failure to comply with section 15.17, subdivision 1, MPCA's issuance of the NPDES Permit was in excess of MPCA's authority, made upon unlawful procedure, affected by legal error, unsupported by substantial evidence, and arbitrary and capricious in violation of MAPA, and substantially prejudiced Plaintiffs in this case, and should be reversed or remanded.

**SIXTH CLAIM FOR RELIEF**  
**VIOLATION OF THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT**  
**FAILURE TO COMPLY WITH THE DUTY OF CANDOR, MINN. R. 7000.0300**

166. Plaintiffs restate and reallege all preceding paragraphs.

167. Under Minn. R. 7000.0300, MPCA has the following duty:

In all formal or informal negotiations, communications, proceedings, and other dealings between any person and any member, employee, or agent of the board or commissioner, it shall be the duty of each person and each member, employee, or agent of the board or commissioner to act in good faith and with complete truthfulness, accuracy, disclosure, and candor.

168. MPCA's efforts to keep EPA Comments about the NPDES Permit out of the written record violated the duty of candor.

169. MPCA's failure to disclose EPA's verbal comments to the public violated the duty of candor.

170. MPCA's failure to provide responses to EPA's oral comments, MPCA's misrepresentations that the NPDES Permit complied with CWA requirements identified by EPA, and MPCA's omission of references to EPA's criticisms of the NPDES Permit from notices, responses, and findings violated the duty of candor.

171. MPCA's violation of the duty of candor constitutes an irregular procedure.

172. MPCA's violation of the duty of candor was in excess of MPCA's statutory authority.

173. MPCA's violation of the duty of candor was an unlawful procedure.

174. MPCA's violation of the duty of candor was an error of law.

175. MPCA's violation of the duty of candor shows MPCA's issuance of the NPDES Permit was erroneous, unsupported by substantial evidence, and arbitrary and capricious.

176. Plaintiffs were prejudiced by MPCA's failure to comply with the duty of candor.

177. Due to MPCA's failure to comply with its duty of candor, MPCA's issuance of the NPDES Permit was in excess of MPCA's authority, made upon unlawful procedure, affected by legal error, unsupported by substantial evidence, and arbitrary and capricious in violation of MAPA, and substantially prejudiced Plaintiffs in this case, and should be reversed or remanded.

**SEVENTH CLAIM FOR RELIEF**  
**VIOLATION OF THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT**  
**FAILURE TO COMPLY WITH MINN. R. 7000.0755**

178. Plaintiffs restate and reallege all preceding paragraphs.

179. MPCA set forth rules for the Commissioner's records and final decision-making. Under Minn. R. 7000.0755, subp. 4:

The record upon which the commissioner shall make a final decision in all matters other than rulemaking and contested case hearings consists of the following:

- A. relevant written materials submitted to the commissioner or agency staff within an established comment period, including requests for an informational meeting and petitions for contested case hearings;
- B. written materials submitted to the commissioner or agency staff within a time period established by the commissioner; and
- C. written documents containing relevant information, data, or materials referenced and relied upon by agency staff in recommending a proposed action or decision.

180. MPCA made a final decision when it issued the NPDES Permit to PolyMet for the Project.

181. The administrative record which, presumably, contains the record upon which the Commissioner made his final decision on the NPDES Permit, did not include various documents described in preceding paragraphs, including but not limited to any letter from EPA finding that deficiencies in PolyMet's NPDES permit application had been corrected or emails between MPCA and EPA between March 12 and March 16, 2018.

182. The administrative record includes no documents summarizing EPA's criticisms of the draft NPDES Permit, explaining how or when EPA's concerns were resolved, or otherwise documenting the basis on which the Commissioner issued the NPDES Permit in light of EPA's concerns that the NPDES Permit would not prevent violations of Minnesota water quality standards or comply with the CWA.

183. On information or belief, MPCA failed to include all relevant written materials submitted to the Commissioner or MPCA staff prior to and during the permitting process for the NPDES Permit.

184. MPCA failed to include written documents containing relevant information, data, or materials referenced and relied upon by agency staff in recommending the issuance of the



NPDES Permit, including but not limited to destroyed notes and other relevant information excluded from the administrative record described in preceding paragraphs.

185. MPCA's failure to include relevant documents in the record and final decision-making violated Rule 7000.0755.

186. MPCA's violation of Rule 7000.0755 constitutes an irregular procedure.

187. MPCA's violation of Rule 7000.0755 was in excess of MPCA's statutory authority.

188. MPCA's violation of Rule 7000.0755 was an unlawful procedure.

189. MPCA's violation of Rule 7000.0755 was an error of law.

190. MPCA's violation of Rule 7000.0755 shows MPCA's issuance of the NPDES Permit was unsupported by substantial evidence, and arbitrary and capricious.

191. Plaintiffs were prejudiced by MPCA's failure to comply with Rule 7000.0755.

192. Due to MPCA's failure to comply with Rule 7000.0755, MPCA's issuance of the NPDES Permit was in excess of MPCA's authority, made upon unlawful procedure, affected by legal error, unsupported by substantial evidence, and arbitrary and capricious in violation of MAPA, and substantially prejudiced Plaintiffs in this case, and should be reversed or remanded.

**EIGHTH CLAIM FOR RELIEF**  
**VIOLATION OF MINNESOTA ADMINISTRATIVE PROCEDURE ACT**  
**FAILURE TO COMPLY WITH 40 C.F.R. § 25.3**

193. Plaintiffs restate and reallege all preceding paragraphs.

194. Federal CWA public participation rules in 40 C.F.R. § 25.3 provide:

(a) EPA [and] State . . . agencies carrying out activities described in §25.2(a) shall provide for, encourage, and assist the participation of the public. The term, "the public" in the broadest sense means the people as a whole, the general populace. . . .

(b) Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their

views. Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official. Disagreement on significant issues is to be expected among government agencies and the diverse groups interested in and affected by public policy decisions. Public agencies should encourage full presentation of issues at an early stage so that they can be resolved and timely decisions can be made. In the course of this process, responsible officials should make special efforts to encourage and assist participation by citizens representing themselves and by others whose resources and access to decision-making may be relatively limited.

(c) The following are the objectives of EPA [and] State . . . agencies in carrying out activities covered by this part:

- (1) To assure that the public has the opportunity to understand official programs and proposed actions, and that the government fully considers the public's concerns;
- (2) To assure that the government does not make any significant decision on any activity covered by this part without consulting interested and affected segments of the public;
- (3) To assure that government action is as responsive as possible to public concerns;
- (4) To encourage public involvement in implementing environmental laws;
- (5) To keep the public informed about significant issues and proposed project or program changes as they arise;
- (6) To foster a spirit of openness and mutual trust among EPA, States, substate agencies and the public; and
- (7) To use all feasible means to create opportunities for public participation, and to stimulate and support participation.

195. By requesting that EPA withhold written comments and concerns of EPA staff regarding the NPDES Permit, and concealing the existence of those concerns through document destruction and false statements, MPCA failed to ensure the public had an opportunity to fully understand the Project.

196. By requesting that EPA withhold written comments and concerns of EPA staff regarding the NPDES Permit, and concealing the existence of those concerns through document

destruction and false statements, MPCA failed to ensure MPCA fully considered public concerns regarding the Project.

197. By requesting that EPA withhold written comments and concerns of EPA staff regarding the NPDES Permit, and concealing the existence of those concerns through document destruction and false statements, MPCA failed to assure it did not make a significant decision regarding the NPDES Permit without consulting interested and affected parties regarding EPA's concerns.

198. By requesting that EPA withhold written comments and concerns of EPA staff regarding the NPDES Permit, and concealing the existence of those concerns through document destruction and false statements, MPCA failed to assure issuing the NPDES Permit was as responsive as possible to public concerns.

199. By requesting that EPA withhold written comments and concerns of EPA staff regarding the NPDES Permit, and concealing the existence of those concerns through document destruction and false statements, MPCA failed to encourage public involvement in implementing environmental laws.

200. By requesting that EPA withhold written comments and concerns of EPA staff regarding the NPDES Permit, and concealing the existence of those concerns through document destruction and false statements, MPCA failed to keep the public informed about significant issues with the Project.

201. By requesting that EPA withhold written comments and concerns of EPA staff regarding the NPDES Permit, and concealing the existence of those concerns through document destruction and false statements, MPCA failed to foster a spirit of openness and mutual trust between MPCA and the public.

202. By requesting that EPA withhold written comments and concerns of EPA staff regarding the NPDES Permit, and concealing the existence of those concerns through document destruction and false statements, MPCA failed to use all feasible means to create opportunities for public participation, and to stimulate and support participation.

203. MPCA's failure to follow the public participation rules constitutes an irregular procedure.

204. MPCA's failure to follow the public participation rules was an unlawful procedure.

205. MPCA's failure to follow the public participation rules was an error of law.

206. MPCA's failure to follow the public participation rules shows MPCA's issuance of the NPDES Permit was unsupported by substantial evidence, and arbitrary and capricious.

207. Plaintiffs were prejudiced by MPCA's failure to follow the public participation rules.

208. Due to MPCA's failure to comply with the public participation rules, MPCA's issuance of the NPDES Permit was in excess of MPCA's authority, made upon unlawful procedure, affected by legal error, unsupported by substantial evidence, and arbitrary and capricious in violation of MAPA, and substantially prejudiced Plaintiffs in this case, and should be reversed or remanded.

**NINTH CLAIM FOR RELIEF**  
**VIOLATION OF THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT**  
**COMMON LAW**

209. Plaintiffs restate and reallege all preceding paragraphs.

210. Under Minnesota law, an agency must conform to its prior norms and decisions or explain the reason for its departure from such precedent. *Peoples Nat. Gas Co. v. Minn. Pub. Utils. Comm'n*, 342 N.W.2d 348, 353 (Minn. App. 1983).

211. A failure to conform to prior norms without explanation is direct evidence that an agency's decision is not based on substantial evidence, and/or is arbitrary and capricious. *Id.*

212. Minnesota courts also require an agency to provide specific findings of fact to allow the appellate court to exercise its function. *Bryan v. Community State Bank*, 172 N.W.2d 771, 775 (Minn. 1969).

213. Without clear and complete facts and conclusions essential to an agency's decision, judicial review is not possible. *People for Env'tl. Enlightenment & Responsibility (PEER), Inc. v. Minn. Env'tl. Quality Council*, 266 N.W.2d 858, 871 (Minn. 1978).

214. MPCA's steps to avoid placing EPA comments in the record violate MPCA's prior norms.

215. MPCA's negotiation with EPA management to prevent EPA Comments on the draft NPDES Permit violates MPCA's prior norms.

216. EPA's willingness, upon MPCA's request, to suppress written comments already prepared by EPA staff violates prior norms for MPCA and EPA practices and procedures in issuing and overseeing NPDES permits.

217. MPCA and EPA did not explain their departure from prior norms.

218. MPCA's failure to comply with these common law principles constitutes an irregular procedure.

219. MPCA's departure from prior norms, and EPA's collusion to violate these norms upon MPCA's request, show that MPCA exercised its will and not its judgment in issuing the NPDES Permit, in a decision that is unsupported by substantial evidence, and arbitrary and capricious.

220. MPCA also failed to include clear and complete facts and conclusions in the record regarding EPA program staff concerns with the NPDES Permit to allow for judicial review.

221. Due to MPCA's failure to conform to prior norms, explain its reason for not conforming to prior norms, and create a clear and complete set of facts for judicial review, MPCA's issuance of the NPDES Permit was in excess of MPCA's authority, made upon unlawful procedure, affected by legal error, unsupported by substantial evidence, and arbitrary and capricious in violation of MAPA, and substantially prejudiced Plaintiffs in this case, and should be reversed or remanded.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray for this Court to grant this Motion as follows:

I. Making Finding of Facts and Conclusions of Law determining that due to MPCA's irregular procedures, its issuance of the NPDES Permit was in excess of MPCA's authority, made upon unlawful procedure, affected by legal error, unsupported by substantial evidence, and arbitrary and capricious in violation of Minn. Stat. § 14.69, and substantially prejudiced Plaintiffs in this case;

II. Entering an Order reversing the MPCA's decision to issue the NPDES Permit or remanding the NPDES Permit to MPCA for further proceedings, pursuant to Minn. Stat. § 14.69;

III. Alternatively, entering an Order recommending that the Minnesota Court of Appeals reverse or remand MPCA's NPDES Permit decision on the grounds that MPCA's issuance of the NPDES Permit was in excess of MPCA's statutory authority, made upon unlawful procedure, affected by legal error, unsupported by substantial evidence, and arbitrary and capricious in violation of Minn. Stat. § 14.69;

IV. Finding MPCA's decision was not substantially justified and awarding Plaintiffs their reasonable costs and attorney fees pursuant to Minn. Stat. § 15.472;

V. Awarding to Plaintiffs such other, further, or different relief as the Court deems just and equitable.

Dated: August 1, 2019

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY**

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**ACKNOWLEDGEMENT**

Plaintiffs, by their attorneys, acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties pursuant to Minn. Stat. § 549.211 (2018).

Dated: August 1, 2019

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