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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

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, Babbitt, Minnesota.

Court File Number: 62-CV-19-4626

Honorable Judge John H. Guthmann

MINNESOTA POLLUTION CONTROL AGENCY'S POST-HEARING REPLY

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I. INTRODUCTION

Relators' claims arise from EPA's decision to delay formal written comments on a draft permit that EPA knew would be changed. Relators argue that MPCA "suppressed" EPA's comments, but MPCA had no power to prevent EPA from commenting. EPA could have commented in writing before, during, or after the public comment period or during the agreed-upon 45-day review period. It could have made a "general" objection during the 15-day objection period, giving EPA an extra 75 days to submit detailed comments. EPA retained ample opportunity to comment formally—but EPA decided not to do so.

Relators argue that EPA's decision to delay comment on the draft permit impeded judicial review of the PolyMet Permit. But courts do not review *draft* permits, only *final* permits. And EPA never relinquished its power to provide formal comments. MPCA complied with the rules for judicial review concerning EPA input. The controlling regulations provide that an NPDES administrative record shall contain documents formally submitted to MPCA or documents it relied upon. EPA never submitted its April 5 draft letter to MPCA. MPCA never even saw a copy of the draft letter until well after it had filed the administrative record with the court. MPCA had no duty to add to the record a document it never received.

Relators argue that MPCA obstructed EPA input to the PolyMet Permit. In fact, the extensive EPA-MPCA interaction (including twice monthly calls and a two-day in-person meeting) was unprecedented. Measured against the evidence, Relators' argument falls well short of demonstrating any impediment to EPA's participation.

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Finally, Relators accuse MPCA of trying to conceal EPA's views from the public. MPCA witnesses testified, however, that they never gave or received instructions to destroy documents or not to create them. No contrary evidence exists. Moreover, nothing in the testimony or exhibits suggests that MPCA employees unlawfully destroyed documents or unlawfully withheld them from the administrative record. Throughout the permitting process, MPCA employees followed MPCA's regulations and procedures. Relators argue in essence that MPCA should have gone beyond its own regulations. Relators' novel claims are not based on violations of law but on unfounded accusations of bad faith. They should be rejected.

II. ARGUMENT

A. Relators' Definition Of "Irregularities In Procedure" Has No Support.

"There is a presumption of administrative regularity, and the party claiming otherwise has the burden of proving a decision was reached improperly." *Buchwald v. Univ. of Minn.*, 573 N.W.2d 723, 727 (Minn. Ct. App. 1998). Relators have failed to meet their burden.

1. Minn. Stat. Sections 14.68 and 14.69 Should Be Interpreted Consistently.

Relators ultimately seek to have the PolyMet Permit reversed or remanded by the Court of Appeals under Minn. Stat. § 14.69, but they attempt to define the phrase "irregularities in procedure" in Section 14.68 without reference to Section 14.69. Unless an alleged "irregularity in procedure" falls within the purview of Section 14.69, however, it is of no consequence.

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Specifically, nothing in Section 14.69 authorizes the Court of Appeals to provide relief based on Relators' proposed test: that the agency action was not "regular or general practice." *See* Relators' Br. at 20. That an agency action was not a "regular or general practice" does not make it unconstitutional, unlawful, "made upon unlawful procedure," "unsupported by substantial evidence," or "arbitrary or capricious," the tests for relief in § 14.69. Relators' proposed test, therefore, cannot inform the Court of Appeals' decision. Relators' proposed test is too broad and ambiguous to make sense, and it is contrary to bedrock requirements for courts to harmonize related statutory provisions. *See In re Annexation of Certain Real Prop. to City of Proctor from Midway Twp.*, 925 N.W.2d 216, 218 (Minn. 2019) ("We interpret a statute as a whole so as to harmonize and give effect to all its parts, and where possible, no word, phrase, or sentence will be held superfluous, void, or insignificant." (quotations omitted)); *Matter of Restorff*, 932 N.W.2d 12, 19 (Minn. 2019); *People for Envtl. Enlightenment & Responsibility, Inc. v. Minn. Envtl. Quality Council (PEER)*, 266 N.W. 2d 858, 866 (Minn. 1978). The Court should, therefore, interpret the phrase "irregularities in procedure" in Section 14.68 consistently with Section 14.69 to mean action that is contrary to statute, regulation or rule, or otherwise unlawful.

2. There is No Support in Minnesota Case Law for Relators' Broad Interpretation of "Irregularities in Procedure."

Relators urge this Court to find that MPCA committed a "procedural irregularity" if it did something that was not completely consistent with some amorphous concept of "regular or general practice." Relators' Br. at 20. Relators do not cite one case, however,

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where an agency has been found to have committed an "irregularity in procedure" because it deviated from "regular or general practice" or did something that was atypical, not customary or unusual. To the contrary, an irregularity in procedure requires a violation of statute, regulation, rule, or an agency's own policies or manual. *See Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977) (discovery limited to statutorily defined procedures, rules and agency regulations); *PEER*, 266 N.W. at 873 (affirming *Mampel*); *In re Application of Lecy*, 304 N.W.2d 894, 900 (Minn. 1981) (quoting and applying *Mampel*). Relators have yet to address this precedent. Relators' proposed test for "procedural irregularity" would thwart procedural innovations. There is no indication that this is what the Legislature intended.

B. This Court Has No Authority To Add Documents To The Administrative Record.

Relators demand (Relators' Br. at 21-22) that this Court "must" add documents to the administrative record in the Court of Appeals. But, the Court of Appeals' transfer order provides no such direction. Rather, it provides that the transfer is "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure." Transfer Order at 4. This Court is directed to "issue an order that includes findings of fact on the alleged irregularities." *Id*. at 5. The transfer order contains no suggestion that this Court should add documents to the administrative record. Relators' citation to *In re Livingood*, 594 N.W. 2d 889, 895 (Minn. 1999), and *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 241 (Minn. 1984), is unavailing; neither

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case supports having the district court add documents to the record being reviewed by the Court of Appeals.

Nor do the relevant statutes authorize this Court to supplement the administrative record. Minn. Stat. § 14.66 explicitly provides that the Court of Appeals may supplement the record before it. Minn. Stat. § 14.67 also provides that, after a remand to an agency from the Court of Appeals, the *agency* may appropriately supplement the administrative record. In contrast, Minn. Stat. § 14.68 provides only that "[t]he district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure." Unlike cases remanded for agency hearings, district court transfer hearings do not confer authority to add documents to the appellate court's administrative record.

C. MPCA Did Not Commit Procedural Irregularities in Processing PolyMet's Application.

Relators claim that MPCA committed a procedural irregularity by (i) failing to transmit PolyMet's initial permit application to EPA, and (ii) processing the application without a written EPA completion letter. Relators' Br. at 23-24. The MOA, however, does not provide a specific deadline for transmitting an application to EPA. Rather, it states that MPCA shall transmit copies of the application materials when the State determines that the application forms are complete. Ex. 328 at 4 (§ 124.23(1)). There is no evidence that MPCA determined completion prior to August 2, 2016. Ex. 306 at 1; Tr. 152:6-7 (Mr. Pierard). Just three days later, EPA notified MPCA that EPA would be

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reviewing the application, thereby indicating that EPA had a copy.[1] Ex. 290. There was no reason, therefore, for MPCA to transmit another copy of the application. Moreover, once MPCA received PolyMet's updated application in October 2017, MPCA notified EPA and provided a link. Ex. 32. Thus, there is no procedural irregularity regarding MPCA's transmission of PolyMet's application to EPA.

Relators next argue that MPCA improperly processed PolyMet's application after receiving a deficiency letter from EPA on November 3, 2016. But, in the opening paragraph of its letter, EPA stated: "[W]e hope you find this letter useful as you continue to review and *process the application materials by Polymet*." Ex. 306 at 1 (emphasis added). Similarly, in the final paragraph, EPA stated: "Again, we appreciate MPCA's efforts in reviewing the Polymet application and we look forward to working with you to resolve the issues identified in this review *as MPCA moves forward to draft the NPDES permit for this proposed facility*." *Id.* at 4 (emphasis added). These statements demonstrate that EPA intended for MPCA to continue processing the application. Indeed, EPA worked extensively with MPCA throughout the permit development process. Ex. 708. EPA clearly did not view its own letter as prohibiting MPCA from processing the application, and Relators provide no basis for this Court to conclude otherwise.

In any event, EPA provided written confirmation that the application was suitable for processing. After PolyMet submitted its revised permit application in October 2017,

[1] Indeed, EPA may have received the initial application directly from MPCA. *See* Tr. 152:6-11.

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Ex. 1069, Chris Korleski (Water Division Director of EPA Region 5) emailed Rebecca Flood (MPCA's Assistant Commissioner for Water) and accepted MPCA's proposal for providing a pre-public notice draft of the permit to EPA for comment. Ex. 372. EPA did not oppose MPCA's development of a draft permit based on PolyMet's application and EPA did not regard its November 3, 2016 letter as precluding MPCA from processing the permit application.

D. MPCA Did Not Commit Procedural Irregularities When It Provided EPA Advance Notice of the Draft Permit.

Relators claim that MPCA committed a procedural irregularity by not providing EPA 60 days to review a draft permit prior to the public comment period. Relators' Br. at 24-26. Relators, however, have not pointed to any statute, regulation, or MOA provision that requires MPCA to give EPA a draft permit *one* day prior to the public comment period, let alone 60 days beforehand.[2]

In addition, there is no evidence to support Relators' unfounded assertion that MPCA "reject[ed]" EPA's requests for an advance copy of the draft permit. Relators' Br. at 25. Rather, MPCA accommodated EPA's wish: on November 20, 2017, EPA's Chris Korleski emailed MPCA's Rebecca Flood that EPA "accept[s] your proposal of MPCA providing [EPA] with a draft of the permit at the same time you provide it to impacted tribes." Ex. 372. MPCA did precisely that by sending EPA and the tribes the draft permit on January 17, 2018, two weeks before the public notice period. Court Ex. B,

[2] Relators' reference to the EPA Permit Review Policy (Ex. 83) is unavailing given that that document is dated October 15, 2018, well after the events at issue. Moreover, there is no evidence that this document is a binding authority.

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Stipulation No. 5; Ex. 34; Tr. 159:15-17, 331:24 – 332:5 (Mr. Pierard). Thus, MPCA accommodated EPA's request.

E. MPCA's Request that EPA Delay Written Comments Was Not a Procedural Irregularity.

Similarly, Relators have identified no statute, regulation, or MOA provision prohibiting MPCA from requesting that EPA delay written comments until MPCA revised the permit to address public comments. Indeed, Mr. Pierard, Relators' sole witness, testified that he was aware of no such prohibition. Tr. 337:14-338:15. Because MPCA's request was not unlawful, it cannot constitute a procedural irregularity.

Even if the Court adopts an expansive interpretation of "procedural irregularities," the evidence shows that MPCA's request was appropriate. This permitting process was extraordinarily complex, and it required an unprecedented level of review. *See, e.g.*, Tr. 945:17-18 (Mr. Udd: "[T]here's not really anything to compare it to for prior projects."); Tr. 660:11-13 (Ms. Lotthammer: "This permit was much more extensive in many ways compared to the typical discharge permit.").

The unusual difficulties presented by this project confirm MPCA managers' testimony that MPCA's request was motivated by their desire to be efficient. Tr. 557:10-13, 557:25 – 558:10, 578:12-21, 586:3 – 587:17, 666:5-16 (Ms. Lotthammer); Tr. 418:1-17, 511:9 – 512:10, 419:14 – 420:3 (Mr. Stine). Relators brush off these explanations as "misleading and pretextual" (Relators' Br. at 28) and ask this Court to accept their unsupported alternative theory that the request was intended to hide EPA's views from the public and the Court of Appeals. Relators' Br. at 26. MPCA's witnesses were

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credible. Indeed, Mr. Pierard corroborated their testimony when he admitted that Ms. Lotthammer said "it would be inefficient for EPA to submit written comments on a permit that MPCA already knew it was going to change". Tr. 310:12-15.[3] The Court should make its findings based on the record evidence, not Relators' pejorative speculation. *State v. Costello*, 646 N.W.2d 204, 210 (Minn. 2002); *Vroman v. City of Austin*, 169 N.W.2d 61, 62 (Minn. 1969).

F. EPA's Decision Not to Send Written Comments Was Not a Procedural Irregularity.

After requesting that EPA delay its written comments on the first draft of the permit, MPCA encouraged EPA to submit written comments on the revised draft. Ex. 64A. EPA, however, made its own decision not to submit written comments. This EPA decision distinctly is not an MPCA procedural irregularity. MPCA's Br. at 18-21.

G. MPCA Was Not Required to Document or Respond to Mr. Pierard's Oral Phone Statements.

Relators make much of the fact that the administrative record does not explicitly document Kevin Pierard's statements during the April 5, 2018 phone call. Yet Relators identify no legal requirement for such documentation. To the contrary, neither the Official Records Act, the Minnesota Government Data Practices Act, nor the Minnesota Administrative Procedure Act requires MPCA to create documents memorializing calls with EPA during the permit development process.

[3] Whether the requested approach ultimately proved more or less efficient is irrelevant to Relators' accusations about motive. Thus, Relators' arguments about the actual efficiency of this approach do not support their claim.

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Likewise, neither federal nor state law requires MPCA to prepare formal responses to statements of EPA personnel made over the phone. Despite extensive opportunity to provide written comments, *see* Ex. 64A, EPA chose not to comment formally on the PolyMet Permit. Since EPA never submitted comments, there were never any EPA comments to which MPCA could, much less should, respond. *Nat'l Audubon Soc. v. MPCA*, 569 N.W.2d 211, 216 (Minn. Ct. App. 1997) ("A reviewing agency . . . is not required to consider or include in the administrative record documents never submitted to or received by it."). The legal status of Mr. Pierard's oral telephone comments is not changed because he read them. His oral statements, made outside the public comment period and without a transcript, do not trigger an obligation for MPCA to respond under 40 C.F.R. § 124.17 or Minn. R. 7001.1070, subp. 3.[4]

Finally, the fact that Mr. Schmidt took notes during the April 5 phone call does not trigger any requirement to formally respond to Mr. Pierard's oral statements. No legal authority supports the novel notion that the existence of notes that MPCA had no duty to take in the first place somehow triggers an obligation to respond.

[4] Indeed, Relators implicitly admit that no response was required: "If EPA had submitted its written comments on the draft PolyMet permit during the public comment period MPCA would have been required to describe and respond to EPA comments in writing . . . ." Relators' Proposed Findings of Fact ("FOF") at ¶ 206 (emphasis added).

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H. There Is No Evidence that MPCA Violated Its Duty of Candor under Minn. R. 7000.0300.

Relators assert that MPCA violated its duty of candor by issuing "permit decision documents that did not reflect complete truthfulness, accuracy, disclosure, and candor." Relators' Br. at 45. This claim is unavailing for several reasons.

First, there is no evidence that, when deciding to issue the permit, MPCA relied on any documents that it did not include in the administrative record. Second, MPCA included in the administrative record an email chain confirming the understanding between MPCA and EPA regarding EPA's review of a pre-proposed permit, thus negating any claim that MPCA sought to conceal its agreement with EPA. Ex. 64A. Third, there is no basis for the accusation that MPCA tried to conceal EPA's concerns from the public given that MPCA invited EPA to "provide written comments on the [revised pre-proposed permit] to MPCA." Ex. 64A. Those comments would have been included in the administrative record regardless of when they were submitted. Tr. 1040:5 – 1041:1 (Ms. Handeland).[5] Fourth, MPCA included in the administrative record (a) emails showing the April 5 call occurred, Exs. 307A, 2039, and (b) handwritten notes from various telephone calls with EPA documenting EPA's concerns, many of which overlapped with the concerns raised on the April 5 call. Exs. 324A, 325A. The inclusion of these notes went well beyond MPCA's normal disclosure practices, because notes

[5] Relators note that, for the PolyMet and other permits, MPCA has formally responded to comments submitted after the public notice period. Relators' Br. at 34. This is further evidence that MPCA's request that EPA merely delay the timing of its comments was not an attempt to evade a response.

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from meetings with EPA are typically not included in the permitting record. Tr. 1071:24 – 1072:3 (Ms. Handeland).

Finally, Relators accuse MPCA of misleading the public and state and federal legislators regarding MPCA's request that EPA delay written comments. Relators' Br. at 29-30. As a threshold matter, these alleged mischaracterizations occurred in 2019—well after the permit was issued—and therefore cannot constitute a procedural irregularity in the permitting process. Tr. 1050:1 – 1052:10. More importantly, MPCA distinctly did *not* hide its request to EPA to delay written comments. On February 1, 2019, MPCA sent emails to EPA, Ex. 267, the Iron Range delegation of the Minnesota Legislature, Ex. 268, and Minnesota's federal congressional delegation, Exs. 150-51. Each of these emails stated, in relevant part: "The [MPCA] did not, at any time, ask EPA to suppress or withhold comments on the Polymet NPDES permit. We knew that following the public comment process our permitting staff would be making revisions to the draft permit based on public comments, *so we recommended that EPA share their comments after that revision*." Exs. 151, 267-68 (emphasis added). Thus, MPCA publicly acknowledged its request to EPA. MPCA was never on a mission to mislead the public.

I. MPCA Was Not Required to Preserve Ms. Lotthammer's March 12-15 emails.

Relators mistakenly claim that MPCA had a duty to preserve Ms. Lotthammer's March 12-15 emails (Exs. 58, 60, 61, 62, 333, and 591[6]) under the Official Records Act,

[6] Exhibits 58, 60, 61, 62, 333 are all emails within the same email chain. Most of the individual communications within this email chain are not substantive and relate to scheduling. The only individual email of substance is Ms. Lotthammer's March 13 email

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its management policy implementing the Official Records Act, and the Minnesota Government Data Practices Act ("MGDPA").

In regard to the Official Records Act, Relators claim that any email between MPCA and EPA relating to the PolyMet permitting process is an official record regardless of content. Relators' Br. at 35-36. Relators' only support for this assertion is testimony from Mr. Stine in response to questions that refer to no actual documents. *See* Relators' Br. at 35-36 and Relators' FOF at ¶ 379-86 (variously citing to Tr. 388:15 – 391:23). For example, Mr. Stine was given the definition of a "record" from MPCA's Records and Data Management Manual (Ex. 77) and asked, without reference to any particular communication, whether written communications between MPCA and EPA constituted a record under that definition. Tr. 388:4 – 389:9. These were general questions, and Mr. Stine gave general answers; neither the questions nor the answers addressed Ms. Lotthammer's emails.

Relators' broad interpretation of the scope of the Official Records Act contradicts the Minnesota Supreme Court's controlling interpretation of the Act's record-keeping requirements. *See Kottschade v. Lundberg*, 160 N.W.2d 135, 137-38 (Minn. 1968) (interpreting the Act's record-keeping requirements, limited to "information pertaining to an official decision, and *not information relating to the process by which such a decision was reached*" (emphasis added)); MPCA Br. at 22-23.

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to Mr. Thiede (Ex. 333) in which she requests that EPA delay its comments until after the public comment period.

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MPCA's records management policy similarly focuses on retention of records evidencing MPCA's decisions and does not require retention of working documents or drafts that are otherwise incorporated into a final decision document. *See* Ex. 77 at 11 (defining non-records); Ex. 76 at 2 (emails that document "significant MPCA *decisions and commitments* reached orally… and not otherwise documented in MPCA files" may constitute records) (emphasis added); Tr. 487:14 – 488:10, 726:18 – 727:15. Consistent with these policies, Ms. Lotthammer retained, and MPCA included in the administrative record, the March 16, 2018 email exchange with Mr. Thiede documenting the final agreement between EPA and MPCA. Ex. 64A. Ms. Lotthammer testified that she deleted the March 13-15 emails because they were not a decision of the agency, but merely a preliminary communication leading up to that agreement. Tr. 611:16-22.[7]

Finally, Relators have not shown that MPCA violated the MGDPA by failing to preserve Ms. Lotthammer's March 12-15 emails or even that such a violation would amount to a procedural irregularity. *See* MPCA Br. at 27-28 (alleged MGDPA violations cannot constitute a procedural irregularity); PolyMet Br. at 30-32 (same). Moreover, there is no evidence that MPCA violated the MGDPA regarding Relators' requests for records. *See* Tr. 623:19-25. Indeed, Relators appear to concede as much and ask the Court to infer a violation of the MGDPA. Relators' Br. at 41. As explained below, there is no basis for the Court to make the requested inference.

[7] Ms. Lotthammer testified that the March 13 email (Ex. 333) was "in a kind of a correspondence nature that isn't a decision of the agency, [] doesn't document a decision or a practice or a final document of the agency." It "was something that I didn't need to keep. And that's what I felt this was." Tr. 611:16-22.

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J. Relators Are Not Entitled to Spoliation Sanctions.

Relators' spoliation argument is unfounded. As previously explained, when administrative agencies anticipate litigation based on an administrative record, they do not impose litigation holds; rather, they assemble the information required to be maintained as part of the administrative record. *See* MPCA Resp. to Mot. for Spoliation Sanctions and attached Decls., Exs. 2, 11 and 12. MPCA had no reason to implement a litigation hold until this matter was transferred to this Court on June 25, 2019 for a hearing that could extend beyond the administrative record. *Id*., Ex. 2 at ¶ 3 (Decl. of Adonis Neblett). MPCA promptly issued a litigation hold order at that time. *Id.* at ¶ 8. MPCA's actions were timely and proper. This Court should not upend well-settled law requiring agencies to maintain the administrative record for judicial review, rather than imposing litigation holds. *See* Minn. Stat. § 14.66; *Shaw v. Bd. of Regents of Univ. of Minn.*, 594 N.W.2d 187, 190 (Minn. Ct. App. 1999). Against this backdrop, Relators' only available argument is that a document was improperly excluded from the administrative record. But no evidence suggests that MPCA excluded a document on which it relied or that was submitted to the agency. *See* Minn. R. 7000.0755, subp. 4.

More fundamentally, it is essential to a claim for spoliation that material evidence actually has been destroyed or lost. *See Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995) (component parts and photographs of allegedly defective motor home were lost or destroyed); *Wajda v. Kingsbury*, 652 N.W.2d 856, 864; (Minn. Ct. App. 2002) (audio recording of siren erased). But, here, Relators obtained the Lotthammer and Stine

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email chain, (Exhibits 58, 60, 61, 62, 333 and 591), from EPA and they were admitted at trial. They were not missing or unavailable, so the spoliation doctrine does not apply.

Additionally, "the doctrine of spoliation applies where the party responsible for the evidence's destruction had exclusive control and possession of the evidence." *Wajda*, 652 N.W.2d at 861. The Lotthammer/Stine emails that Relators claim were destroyed were never exclusively in the control of MPCA, as evidenced by the fact that Relators obtained them from EPA. As a result, the doctrine of spoliation does not apply. *Id.*

Further, because the documents at issue were admitted at trial, Relators suffered no prejudice. Without a showing of prejudice because of the missing evidence, spoliation sanctions cannot be entered. *Patton*, 538 N.W.2d at 119 (test of spoliation is prejudice to opposing party); *Foss v. Kincade*, 766 N.W.2d 317, 323 (Minn. 2009) (holding "sanction is only appropriate if the unavailability of the evidence results in prejudice to the opposing party"); *The Valspar Corp. v. Millennium Inorganic Chemicals, Inc.*, No. 13-CV-3214, 2016 WL 6902459, at *6 (D. Minn. Jan. 20, 2016) (express finding of prejudice to requesting party required to impose a sanction for destruction of evidence).

Relators argue that they "are prejudiced because they are unable to prove when Lotthammer deleted her March 13-15 emails, or what other files she deleted,"[8] and ask for adverse inferences to establish both. Because they have failed to establish the essential elements of a claim for spoliation, however, Relators are not entitled to any

[8] Relators have also admitted that they "do not have conclusive evidence that MPCA directed the deletion of certain evidence outside a normal retention policy." Relators' Mot. for Spoliation Sanctions at 13, n. 11.

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adverse inferences. Moreover, because there is no evidence that the emails Relators refer to would have shown when they were deleted or provide any evidence that Ms. Lotthammer deleted any other emails, Relators' requested adverse inferences are wholly unrelated to the evidence they claim is missing and are improper for that reason, as well. Accordingly, Relators' request for spoliation sanctions and adverse inferences should be denied.

K. MPCA Did Not Prevent Creation or Retention of Notes of the April 5 Call with EPA.

Relators assert that Ms. Handeland committed a procedural irregularity because she did not keep notes of the April 5 call with EPA. Relators' Br. at 41-42. Relators do not allege that any statute, regulation or policy required her to take notes, or that anyone at MPCA instructed her not to take or keep notes, of this or any other call or meeting. Nor could they. The evidence overwhelmingly shows that no one at MPCA was instructed not to take or keep notes. *See* Tr. 1331:11-18; 1044:2-10; 1128:10-13; 939:18-24; 1044:2-4; 1234:9-15.

Relators allege that Ms. Handeland's decision to stop taking notes during the April 5 call was a procedural irregularity because she normally took notes and she knew of a pending MGDPA request. Ms. Handeland, however, reasonably explained that she was unable to take notes because Mr. Pierard was reading too quickly,[9] Tr. 979:17 – 980:16,

[9] Relators' attempt to call Ms. Handeland's testimony into question as to her ability to take notes because Mr. Schmidt was able to take notes is nonsensical and disingenuous. *See* Tr. 915:16-21. (Mr. Udd also did not take notes during the April 5 call, stating he "wouldn't have been able to write that fast anyway."); *see also* Tr. 195:14-24. (Mr. Pierard testified that Mr. Clark asked him to slow down).

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982:16 – 983:12, and she had no duty under the MGDPA or otherwise to take notes. The MGDPA does not require production of documents not in existence, nor does it require retention or creation of records. *See Scheffler v. City of Anoka*, 890 N.W.2d 437, 448 n.1 (Minn. Ct. App. 2017) (The MGDPA generally governs access to information, not "[d]ata retention"). Ms. Handeland's minimal notes from the April 5 conference call were not in existence at the time of WaterLegacy's March 26 request, nor did that request create a post-request obligation for her to take notes. Accordingly, that Ms. Handeland did not take or keep notes of the April 5 call was not a procedural irregularity.

L. Alleged Violations of the MGDPA Are Not an Irregular Procedure.

Relators claim that MPCA's failure to produce attorney notes from meetings with EPA in response to MGDPA requests was an irregular procedure. Relators' Br. at 42-44. Because the MGDPA does not prescribe procedures for permit approval that enter "into the fundamental decision-making process," *Mampel*, 254 N.W.2d at 378, alleged statutory violations of the MGDPA cannot constitute procedural irregularities under Section 14.68. *See also* MPCA Br. at 27-28; PolyMet Br. at 30-32.

Moreover, Relators have failed to show that MPCA violated the MGDPA by not producing Mr. Schmidt's notes or disclosing their existence in response to Relators' MGDPA requests. Relators now claim that because the Court ultimately ordered much of Mr. Schmidt's notes to be produced at trial, MPCA was required to produce them in response to MGDPA requests. Relators selectively cite this Court's Order attempting to depict the issue of privilege as clear cut, but it was not. *See* Order on Relators' Mot. to Compel, at 9-10 (Jan. 17, 2020) (also finding Relators "made the required showing of

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substantial need and undue hardship" for work product). Moreover, Relators previously acknowledged that Mr. Schmidt's notes were attorney work-product, only asserting substantial need for the April 5 and September 27 notes in *this* litigation. Nov. 13, 2019 Tr. at 82:23 – 84:20 ("Relators are not saying this is not work product."). [10]

As a government attorney, Minn. Stat. § 13.393 provides that Mr. Schmidt's "use, collection, storage, and dissemination" of his notes was governed by statutes, rules, and professional standards, not the MGDPA. *See Scheffler*, 890 N.W.2d at 450–51.

Finally, Relators' claim that MPCA "misrepresented that it had no 'not public' documents responsive to WaterLegacy's DPA requests," (Relators' Br. at 42) misconstrues the record. Relators' assertion is based solely on a February 5, 2019 email from Lenny Richards stating he was "not aware of anything saved in the not public subfolder on the X drive" and "there is nothing in 'Not Public' involving communication

[10] Relators allege that MPCA "denied in sworn testimony that Schmidt's April 5, 2018 notes existed." See Relators' Br. at 11. At the time of Jeff Udd's deposition (as MPCA designee), Udd and counsel representing MPCA believed that statement to be true. Udd was on the phone but not present with others from MPCA during the April 5 call, so he did not see anyone take notes, nor did he know of any such notes. Tr. 916:7-11; 943:21-23. Schmidt did not share his notes with anyone; rather, he put them in a file which he left at MPCA when he departed. Tr. 1199:4-17; 1202:12-19; 1203:11 – 1204:16. No one involved in Udd's written deposition was aware any notes existed until after Udd's deposition. MPCA promptly added Schmidt's notes to its Privilege Log. Priv. Log #301. After conferring with MPCA, Relators then asked this Court to order their production based on substantial need. *See* Relators' Nov. 11, 2019 Letter to the Court (asserting substantial need for Schmidt's notes from April 5 and September 26 (Priv. Log # 301)). At the November 13, 2019 hearing, the parties acknowledged the notes were work product, but MPCA agreed to produce the notes from the two days for which Relators claimed a substantial need and believed the issue was resolved. Nov. 13, 2019 Tr. 82:24 – 84:22; 88:22 – 92:19 (attached).

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with EPA, etc." Ex. 419. Although Mr. Schmidt's notes from meetings existed at the time of Mr. Richards's email, they were not maintained in MPCA's "Not Public" records; they were maintained in MPCA's Legal Department files, and Mr. Schmidt testified that prior to these transfer proceedings he did "not recall ever sharing [his notes] with anyone." Tr. 1148:13-18; 1191:3-5.

M. MPCA Did Not Keep Evidence Out of the Administrative Record.

Relators claim that MPCA conspired to keep EPA's views and MPCA's delay request out of the administrative record. But there is no evidence that MPCA omitted any EPA or other documents on which MPCA relied. *See* Minn. R. 7000.0755, subp. 4. Moreover, Ms. Handeland's notes and other documents in the administrative record evidence the concerns EPA expressed to MPCA, including those that Mr. Pierard spoke of over the phone on April 5. *Compare* Ex. 337 *with* Ex. 324A at 1-2 ("EPA not comfortable with lack of WQBELS … Limits provide degree of assurance WQS will be met. EPA would establish limits….'Concerned about downstream users'").

MPCA had no plan to conceal EPA's concerns with the public draft of the permit. Tr. 940:10-13; 513:16-18; 522:3-14; 1343:13-16. If EPA had decided to submit comments, before, during or after the public notice period, these comments would have been included in the administrative record. *See* Tr. 1040:12 – 1041:1; 1232:8-15.

III. CONCLUSION

This Court should enter an order determining that MPCA committed no procedural irregularities. This Court should also deny Relators' motion for spoliation sanctions.

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