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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 BRIEF

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I. INTRODUCTION

The Minnesota Pollution Control Agency ("MPCA") did not commit any procedural irregularities with respect to the PolyMet National Pollutant Discharge Elimination System ("NPDES") permit for the NorthMet project. To the contrary, MPCA's dedicated public servants worked tirelessly to properly develop this technically complex, intensely scrutinized permit. That work included an unprecedented degree of interaction with the U.S. Environmental Protection Agency ("EPA"), which had the power to veto the permit that MPCA wrote. MPCA did not violate any statute, rule or regulation in the permitting process. Rather, it processed the PolyMet permit properly from the application through its final approval by EPA in December 2018.

Despite alleging a litany of "procedural irregularities" in the Court of Appeals and in this Court, by the time of hearing, Relators appeared to focus their efforts on two alleged irregularities: (1) MPCA's request to EPA to delay submitting written comments on the PolyMet permit until after the public comment period, and (2) Relators' allegations that MPCA covered up efforts to "suppress" EPA's comments. The undisputed evidence, however, demonstrates no basis for finding that these or any other procedural irregularities occurred.

MPCA had no power or incentive to prevent EPA from submitting written comments: MPCA's request was about timing. Indeed, MPCA had been soliciting EPA input all along. It requested only that EPA submit its comments *after* MPCA had a chance to assemble and respond to the public comments and incorporate the resulting changes into a new draft permit. That sequence would enable both MPCA and EPA to

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focus on remaining issues, rather than wasting effort on matters that the public had already raised and MPCA had already addressed. MPCA also sought to avoid overwhelming MPCA staff with EPA comments that were likely to be duplicative, or at least outdated, at the same time the staff was responding to an extremely large volume of public comments. At EPA's request, MPCA even gave EPA an extra 45 days to submit written comments on the next draft of the permit. EPA's decision not to submit written comments was EPA's choice, and EPA's choice alone.

Nor did MPCA "cover up" its actions. In fact, MPCA placed into the administrative record an email documenting the agreement between EPA and MPCA to extend EPA's comment period by 45 days. If EPA had wanted its April 5, 2018 draft written comment letter to be a part of that record, it could have submitted it to MPCA at any time before December 19, 2018. EPA chose not to. Neither EPA's decision not to submit comments in writing nor EPA's decision not to submit its April 5, 2018 comment letter for inclusion in the administrative record constitutes a "procedural irregularity" on MPCA's part.

Relators accuse current and former MPCA employees of violating the Agency's regulations to conceal information from the public. These public servants have spent their careers protecting Minnesota's environment. Former MPCA Commissioner John Linc Stine and staff attorney Michael Schmidt now work at environmental advocacy groups. Former Assistant Commissioner Shannon Lotthammer works at the Minnesota Department of Natural Resources. Jeff Udd, Manager of MPCA's Water and Mining

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Section, Supervisor Richard Clark, and Permit Writer Stephanie Handeland still work at MPCA. They have worked there for more than 18, 33, and 24 years respectively.

In short, Relators failed to prove that MPCA tried to keep EPA comments out of the record. They also failed to support their unfounded accusations of conspiratorial attempts to conceal public information. And they have no evidence of political influence—or of any other undue influence—on MPCA's permitting work or EPA's decision not to submit written comments. This Court should enter an order that finds no procedural irregularities and that enables the Court of Appeals to review the 453-page PolyMet permit on its legal and technical merits.

II. FACTUAL BACKGROUND

A. The PolyMet Permit Presented Uniquely Complex Challenges For MPCA.

From the start, MPCA knew that this NPDES permit was going to be exceptionally complicated and controversial: the environmental review process for the NorthMet Project had been ongoing for ten years when PolyMet applied for an NPDES permit. *See* Tr. 495:11-24 (Mr. Stine). In 2015, during the Project's environmental review, the public submitted "thousands, tens of thousands" of comments. Tr. 931:4-9 (Mr. Udd).

In addition to being the first copper-nickel mine project to go through the permitting process in Minnesota history, the NorthMet Project has other features that raise complex permitting issues. *See* Tr. 931:15 – 932:7 (Mr. Udd); 382:1-7 (Mr. Stine). For example, the NorthMet Project involves three distinct sites—a mining site, a plant

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site, and transportation and utility corridors that connect them. Ex. 350 (NorthMet FOF) at ¶ 1. There are also several different wastewater streams and several seepage collection areas. Ex. 350 at ¶¶ 6-7. The NorthMet Project "was more complex than what [MPCA had] worked on before." Tr. 932:12-13 (Mr. Udd); *see also* 660:11-13 (Ms. Lotthammer).

The Project was also subject to exceptionally intense public scrutiny. Between the environmental review process and the permitting process itself, the Permit involved significantly more public attention than other NPDES permits. Tr. 660:14-19 (Ms. Lotthammer); *see also* Tr. 1058:17 – 1059:25 (Ms. Handeland).

B. MPCA And EPA Engaged In Unprecedented Interaction Due To The Complexity Of The Project.

Consistent with the complexity of the project, MPCA collaborated extensively with EPA regarding the NorthMet NPDES permit. This interaction exceeded, by a wide margin, any interaction between the agencies on any other NPDES permit. Tr. 503:3 – 504:1 (Mr. Stine); 660:19-23 (Ms. Lotthammer); 1041:12-19 (Ms. Handeland). For much of the first year and a half of the permitting process, MPCA and EPA technical staff held twice-monthly telephonic meetings to discuss the permit development process. Tr. 660:22-24 (Ms. Lotthammer); 961:19 – 962:1 (Ms. Handeland); Ex. 708. Through these twice-monthly meetings, MPCA informed EPA of the steps MPCA was taking in permit development, and MPCA received EPA's feedback. Tr. 504:3-15 (Mr. Stine); 661:7-15 (Ms. Lotthammer); 962:15-24 (Mr. Udd); 1041:14-18 (Ms. Handeland). Both

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agencies sought to identify potential permitting issues early and to work through mutually acceptable resolutions. *See id.*; Tr. 330:11-16 (Mr. Pierard).

MPCA recognized that EPA could veto the permit and that MPCA had no power to prevent one. But both MPCA and EPA wanted to develop a permit that would avoid a veto. Tr. 498:11-18 (Mr. Stine). MPCA also recognized that EPA had the power to criticize or comment on any draft of the permit—publicly and in writing—whenever EPA wanted: before, during, or after the public comment period. Tr. 320:20 – 321:21, 322:10-13, 326:2-10 (Mr. Pierard); *see also* Tr. 1063:24 – 1064:10 (Ms. Handeland).

C. MPCA Provided The Public With Unprecedented Access To Information About The PolyMet Project.

MPCA's interaction with the public about the PolyMet permit was unprecedented. All of the key documents were placed on its website; MPCA held public meetings accompanied by open houses; and MPCA received extensive comments at those meetings. Tr. 1058:17 – 1059:25 (Ms. Handeland); 661:16-23 (Ms. Lotthammer). MPCA held open the public comment period for 45 days, rather than the normal 30 days, to ensure that, given the Project's complexity, "the public and the interested stakeholders had plenty of time to review the public notice permit and provide their comments as a part of that process." Tr. 661:16 – 662:8 (Ms. Lotthammer).

Throughout the permitting process, MPCA facilitated public input. And even before PolyMet filed this permit application, the Minnesota Department of Natural Resources ("DNR") released an Environmental Impact Statement describing the ten-year environmental review of the NorthMet Project. Ex. 350 (NorthMet FOF) at ¶ 2. In

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addition, MPCA created a public web portal for the NorthMet Project—the first time such a step has been taken for an NPDES permit in Minnesota—that provided a dedicated phone number and email address for questions or comments from the public. Ex. 350 at ¶ 16; Tr. 1058:20-25 (Ms. Handeland). MPCA also held two public meetings during the public comment period, one in Aurora and another in Duluth—both of which had hundreds of attendees. Tr. 929:5-7 (Mr. Udd). Those meetings were accompanied by lengthy open houses, where the entire permit team spoke with the public one on one, or in small groups, and answered detailed questions. Tr. 929:11-17 (Mr. Udd); 1059:5-10 (Ms. Handeland). MPCA also held a meeting with tribes during the public comment period, during which tribal members provided specific information about their concerns. Tr. 930:2-19 (Mr. Udd).

The public filed extensive comments on the draft NorthMet Permit—686 comment submittals made up of approximately 1600 individual comments. Ex. 350 at ¶ 23. Many of these comments were very technical in nature. Tr. 1230:8-16 (Mr. Schmidt). MPCA carefully considered and responded to all of these comments—a process that consumed almost eight months. Ex. 1133 (MPCA Resp. to Comments); Tr. 1061:24 – 1062:1 (Ms. Handeland). MPCA revised the draft permit in response to some comments and specified the reasons for such changes. Ex. 350 at ¶ 262; *see also* Tr. 495:25 – 496:10 (Mr. Udd).

D. While Providing Ongoing *Informal* Advice, EPA Proposed Also To Submit Formal Written Comments During The Public Comment Period.

MPCA and EPA continued informal discussions during the public notice period, including calls on January 31, February 13, and March 5, 2018. *See* Ex. 708. During the

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March 5 call, Mr. Udd learned that, in addition to the year of twice-monthly meetings and the ongoing discussions with EPA, EPA was also considering submitting formal written comments during the public comment period. Tr. 872:17-20 (Mr. Udd). Those EPA comments would have required Mr. Clark, Ms. Handeland, and Mr. Schmidt to prepare a formal written response to the subjects they had been discussing with EPA, while at the same time responding, in writing, to public comments, which were expected to be voluminous.[1] *See*, *e.g.*, Tr. 901:16-25, 928:18-19 (MPCA was "expecting a lot of public comments"), 931:10-14 (Mr. Udd).

Following that call, Mr. Udd spoke with Shannon Lotthammer to inform her that EPA expected to submit written comments during the public comment period, and thus would not be following the process outlined in the MOA. Tr. 874:1-3 (Mr. Udd). Mr. Udd expressed concern that the extra burden of having to respond to written EPA comments during the public comment period, in addition to all of the other public comments, would overwhelm MPCA staff. Tr. 900:12-17 (Mr. Udd was concerned that MPCA staff would be "overwhelmed with comments because [they] were expecting a high volume."); 556:18 – 557:9 (Ms. Lotthammer). Mr. Udd also explained that they would be revising the draft permit based on public comments and the input MPCA had already received from its meetings with EPA. Tr. 557:7-9 (Ms. Lotthammer). Ms. Lotthammer questioned the efficiency of EPA commenting on a version of the permit

[1] Responding to the public comments on the draft permit turned out to be a "dramatic amount of work," (Tr. 507:25) and strained MPCA's resources (Tr. 508:3 – 509:25) (Mr. Stine).

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that MPCA knew it would be changing substantially. Tr. 557:10-12, 557:25 – 558:10 (Ms. Lotthammer).

E. MPCA Requested That EPA Delay Formal Comment Until MPCA Could Provide EPA A Revised Draft Of The PolyMet Permit.

Based on concerns regarding (i) the inefficiency of EPA commenting on an outdated draft permit and (ii) the significant burden on MPCA staff of responding simultaneously to both EPA's comments and the public's comments, Ms. Lotthammer called EPA's Kevin Pierard to ask if EPA would consider holding off on providing written comments until MPCA had had a chance to make changes to the permit based on public comments and the feedback it had already received from EPA. Tr. 558:1-10, 559:7-23 (Ms. Lotthammer). Ms. Lotthammer then followed up with Mr. Pierard's supervisor, EPA's Chris Korleski. Tr. 562:6-10 (Ms. Lotthammer).

Ms. Lotthammer explained to Mr. Korleski that she understood that EPA could comment whenever it wanted, but in this instance, it made more sense for EPA to wait to comment until after MPCA made anticipated changes to the permit. Tr. 562:15-18 (Ms. Lotthammer). Mr. Korleski expressed concern about when EPA would receive the subsequent draft permit: he wanted to ensure that EPA would have sufficient time for meaningful review. Ms. Lotthammer responded that MPCA also wanted to ensure that EPA had plenty of time to review and comment on the updated permit. Tr. 564:4-25 (Ms. Lotthammer).

Ms. Lotthammer also spoke with John Linc Stine regarding the heavy workload placed on MPCA staff. Both Commissioner Stine and Ms. Lotthammer wanted MPCA

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staff to proceed in the most efficient way. Tr. 506:2-8, 511:9 – 512:10 (Mr. Stine). Neither Commissioner Stine nor Ms. Lotthammer ever suggested that EPA should not comment, only that EPA wait to submit its written comments. Tr. 513:16-18; 522:3-14 (Mr. Stine); 678:14 – 679:9; 703:19 – 704:6 (Ms. Lotthammer). Following his discussion with Ms. Lotthammer, Commissioner Stine called EPA's Regional Administrator Cathy Stepp on March 12, 2018. Tr. 505:13-24 (Mr. Stine). Mr. Stine suggested that EPA wait before commenting in writing until MPCA had revised the draft Permit. Tr. 511:14-21 (Mr. Stine). He supported this suggestion by pointing out that it would promote MPCA staff efficiency and ease the burden of responding. Tr. 418:1-17, 511:12 – 512:10 (Mr. Stine). Mr. Stine recalls telling Ms. Stepp that the permit would be "more efficiently reviewed by the EPA team if MPCA could provide it to them after the comments were incorporated and modifications made to the draft permit." Tr. 511:15-21 (Mr. Stine). Mr. Stine and Ms. Stepp agreed to leave resolution of the timing issue to Ms. Lotthammer and to Kurt Thiede, Ms. Stepp's Chief of Staff. *See* Ex. 333 at RELATORS_0060909.

Ms. Lotthammer then emailed Mr. Thiede to explain the reasons for her request and offered to give EPA more time to comment on a later draft of the permit. Ex. 333. Through her email and subsequent phone calls with Mr. Thiede, Ms. Lotthammer explained that having EPA delay its comments until after MPCA had revised the draft permit made "a lot of sense from a clarity standpoint and an efficiency standpoint" because it ensured that EPA had MPCA's best work product for formal review and comment. Tr. 578:12-21, 586:3 – 587:17 (Ms. Lotthammer). She also explained that this proposal conformed with the process laid out in the MOA. Tr. 578:16-21 (Ms.

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Lotthammer). And she made sure to clarify that it was *not* MPCA's position that the MOA prohibited EPA from commenting during the public comment period. Tr. 579:1-5, 586:14-25 (Ms. Lotthammer).

F. The Agencies Agreed Only That EPA Would Be Given An Extra 45 Days To Comment On A Subsequent Draft Of The PolyMet Permit

After Mr. Thiede spoke over the telephone with Ms. Lotthammer, he replied by email summarizing the agencies' agreement that EPA would have an extra 45 days to comment. Ex. 64A. Notably, Mr. Thiede's summary did *not* say that EPA would forego written comments during the public comment period. *Id*. Ms. Lotthammer replied that his email correctly described their understanding. *Id.*

In fact, Ms. Lotthammer viewed the extra comment period for EPA on an improved MPCA work product as a benefit to MPCA. Tr. 602:16 – 603:4 (Ms. Lotthammer). She did not know whether EPA would forego written comments during the public comment period until after that comment period had actually ended. Tr. 594:14 – 595:11 (Ms. Lotthammer).

G. EPA Decided To Read Its Previously Discussed Concerns To MPCA On April 5 But Not Submit Them In Writing.

Mr. Pierard arranged to call MPCA on April 5 to discuss EPA's views on the public notice draft of the PolyMet permit. Tr. 911:15 – 912:5 (Mr. Udd); Ex. 307. During that call, the MPCA participants (Jeff Udd, Richard Clark, Stephanie Handeland, and Michael Schmidt) were surprised that Mr. Pierard seemed to be reading from a document and that he sought no reaction from them during the call. Tr. 924:14-17 (Mr. Udd); Tr. 1192:3-12, 1194:17 – 1195:1 (Mr. Schmidt). Mr. Pierard's summary of EPA's

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views repeated the concerns it had voiced during its previous calls with MPCA. Tr. 233:19-22 (Mr. Pierard) ("A lot of the topics that were contained in the draft letter that we read to MPCA were topics that we brought up during calls that we had in early 2018").

Except for Michael Schmidt, the MPCA participants on the April 5 call saw no reason to keep their notes. Ms. Handeland attempted to take notes for a couple of minutes of the call, but stopped because Mr. Pierard was reading too quickly for her to take accurate notes. Tr. 980:4-16 (Ms. Handeland). Moreover, Ms. Handeland said the substance of the call appeared to be repeating concerns EPA had previously expressed to MPCA. Tr. 986:21-23 (Ms. Handeland). Because the limited notes Ms. Handeland took before she stopped "didn't say anything" and she did not intend to rely on them, she discarded them following the call. Tr. 982:16-24 (Ms. Handeland).

Jeff Udd, who listened to the call from Duluth, took no notes. Tr. 915:16-18 (Mr. Udd). Richard Clark does not remember whether he took any notes, but customarily he did not keep his meeting notes because they were taken only to jog his memory. Tr. 1300:1 – 1301:2 (Mr. Clark). Michael Schmidt, a former MPCA staff attorney, took handwritten notes during the meeting, which, consistent with his normal practice, he typed up shortly afterward, discarding the handwritten notes and retaining the typed copy. Tr. 1127:15 – 1128:1 (Mr. Schmidt). He kept his typed notes for later use in advising MPCA staff. *Id.*; *see also* Ex. 837.

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EPA chose not to submit to MPCA the draft letter Mr. Pierard was reading from on April 5 or to submit comments in writing to MPCA at any time. Tr. 337:6-13, 317:25 – 319:4 (Mr. Pierard); 701:1-14 (Ms. Lotthammer); 938:25 – 939:6 (Mr. Udd).

H. EPA Had No Comments On MPCA's Revised Draft Of The Permit

After the public comment period, MPCA responded to the public comments and continued discussions with EPA. Tr. 250:7-15 (Mr. Stine); Ex. 708; Court Ex. B, Stipulation Nos. 13, 15, 18-19. Those discussions included a two-day, face-to-face meeting with EPA on September 25-26, 2018 to resolve concerns raised by EPA about the public notice draft of the permit. Tr. 962:8-14 (Ms. Handeland). On October 25, 2018, about a month after the in-person meeting and after some additional post-meeting communications with EPA, MPCA sent EPA a revised draft of the permit for the 45-day review-and-comment period that EPA and MPCA had agreed to in March. Court Ex. B, Stipulation No. 26, Tr. 350:19-22 (M. Pierard); Ex. 674; Ex. 2010. MPCA had "a number of conversations" with EPA during this review period. Tr. 938:16-17 (Mr. Udd). Mr. Pierard never recommended to MPCA that there be a second public comment period based on the revisions to the permit. Tr. 367:11-15 (Mr. Pierard).

EPA had no comments on the new draft of the permit, so Mr. Pierard invited Mr. Udd to send EPA a proposed final permit for its 15-day review. Tr. 938:18-21 (Mr. Udd). MPCA sent the proposed final permit, fact sheet and response to comments to EPA on December 4, 2018. Tr. 318:19 – 319:4; 351:17-21; 352:8-15 (Mr. Pierard); Ex. 2021. On about December 18, Mr. Pierard called Mr. Udd to inform him that EPA had finished its review, and it was not going to object to issuance of the permit. Tr. 938:25 –

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939:9. On December 20, MPCA issued the final permit without EPA objection. Court Ex. B, Stipulation No. 28; Tr. 938:25 – 939:6 (Mr. Udd).

III. LEGAL STANDARD

This proceeding arises in the context of a certiorari appeal under Minnesota Statutes Section 14.69. The Court of Appeals transferred the matter to this Court pursuant to Section 14.68 "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure." Transfer Order at 4. Relators bear the burden of proof in challenging agency action such as that of MPCA here. *See Minn. Ctr. for Envtl. Advocacy v. Pollution Control Agency*, 660 N.W.2d 427, 438 (Minn. 2003).

IV. ARGUMENT

A. MPCA Did Not Commit Any Procedural Irregularities.

Despite turning over every stone, Relators have failed to establish any procedural irregularities. Relators examined everyone at MPCA with any responsibility for developing the PolyMet permit, obtained numerous documents from both MPCA and EPA, and obtained extensive testimony from former EPA employee Kevin Pierard. Yet in the end, Relators are left with the same facts that MPCA set forth in its briefs opposing a Section 14.68 proceeding:

1. In March 2018, MPCA was revising the permit to reflect public comments and prior EPA comments. MPCA realized that it would be inefficient and unproductive to respond to EPA written comments that largely repeated prior EPA comments and would likely overlap with public comments.

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2. At the same time, MPCA recognized that responding to a set of EPA's written comments at the same time that MPCA would be responding to public comments would have the potential to overwhelm MPCA staff.
3. MPCA asked that EPA wait for the revised permit before EPA would submit its written comments.
4. MPCA agreed to EPA's request for extra time to respond to the revised version of the permit.
5. EPA chose not to submit its comments during the public comment period.
6. MPCA provided a revised version of the permit to EPA.
7. Ultimately EPA chose not to submit written comments on this revised permit, and EPA chose not to object to MPCA's issuance of the permit.

Relators have not proven any procedural irregularities. MPCA complied with the applicable statutes, rules, and regulations and properly processed the PolyMet permit.

1. A procedural irregularity requires a violation of an applicable statute or rule.

The Transfer Order from the Court of Appeals requires this Court to hold an evidentiary hearing to determine if "irregularities in procedure" were committed by MPCA in the process of issuing a permit for the PolyMet mine. Transfer Order at 4. The Court of Appeals did not define the term "irregularities in procedure" as that term is used in Minnesota Statute §14.68. Tr. 27:12-17. Accordingly, the Court must look to statutory context and case law to determine the meaning of "irregularities in procedure." *Id*.

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Under Minnesota law, "[t]here is a presumption of regularity to the administrative acts of" an agency. *Reserve Min. Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) ("We . . . adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness"); *City of Moorhead v. Minn. Pub. Utilities Comm'n*, 343 N.W.2d 843, 849 (Minn. 1984) ("All agency decisions come to this court with the presumption of regularity."); *Larson v. Comm'r of Pub. Safety*, 405 N.W. 2d 442, 443 (Minn. Ct. App. 1987) ("There is a presumption of regularity to the administrative acts of the Commissioner."); *In re Koochiching Cnty.*, No. A09-381, 2010 WL 273919, at *7 (Minn. Ct. App. Jan. 2, 2010 ("Decisions of an administrative agency enjoy a presumption of correctness"). Relators bear the burden of establishing procedural irregularities sufficient to overcome this presumption. *See Minn. Ctr. for Envtl. Advocacy*, 660 N.W.2d at 438.

Relators have failed to meet their burden. They have attempted to show that conduct or statements of EPA and MPCA in the course of the PolyMet permitting process were "unusual" or "not customary," but their proposed test falls far short of establishing that anything they referred to was a "procedural irregularity." Moreover, the testimony upon which Relators rely in alleging that MPCA action was "unusual" or "not customary" consists of speculation and conjecture. This testimony was not based on a systematic assessment (as opposed to some examples selected by Relators) of the ways in which MPCA has processed an NPDES permit. Relators' proffer of selected examples does not meet their burden of proof. *State v. Costello*, 646 N.W.2d 204, 210 (Minn.

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2002) ("[W]e have condemned arguments that invite the [fact finder] to speculate about the facts.").

Section 14.69 cabins the potential scope of "procedural irregularities" under its companion provision, Section 14.68. Under Section 14.69, a reviewing court can set aside agency action only if the agency employed "unlawful" procedures, not those that are merely "unusual" or "not customary." Section 14.69 provides that the Court of Appeals "may reverse or modify the [agency] decision if … the administrative finding, inferences, conclusion, or decisions are … made upon unlawful procedure" or "affected by other error of law." Necessarily, this limit on the Court of Appeals' review authority similarly limits the scope of cognizable "irregularities in procedure" under §14.68. *State v. Pakhnyuk*, 926 N.W. 2d 914, 920 (Minn. 2019) ("The statutory language in dispute is not examined in isolation; rather, all provisions in the statute must be read and interpreted as a whole.") (citation omitted); *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) ("A statute should be interpreted, whenever possible, to give effect to all of its provisions.").

Further, the Minnesota Supreme Court has determined that the term "irregularities in procedure" means violations of statutorily defined procedures or the agency's own rules and regulations. *Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977) (the district court's role was "to determine whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process"); *People for Envtl Enlightenment and Responsibility, Inc. v. Minn. Envtl Quality Council*, 266 N.W.2d 858,

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873 (Minn. 1978) (the district court's inquiry is "limited to information concerning the procedural steps that may be required by law") (quoting and reaffirming *Mampel*); *see also In re Application of Lecy*, 304 N.W.2d 894, 900 (Minn. 1981) (quoting *Mampel*). The Court of Appeals has similarly held that the question before the district court in a proceeding under Section 14.68 is whether the procedures were unlawful and is "limited to information concerning the procedural steps required by law." *Matter of Dakota Cnty. Mixed Mun. Solid Waste Incinerator*, 483 N.W.2d 105, 106 (Minn. Ct. App. 1992); *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165 (Minn. Ct. App. 2001); *see also In re Koochiching Cnty.*, No. A09-381, 2010 WL 273919 at *9 (finding *Hard Times Café* was distinguishable because there was no evidence that similar governing rules were violated and no evidence of a violation of statute, nor was there any evidence of bias, failure to hear and consider opposing points of view or a failure to make a reasoned decision).

Relators did not demonstrate that anything MPCA did was unlawful or violated its own rules and procedures. For example, during their examination of Kevin Pierard, Relators' counsel referred to the EPA NPDES Permit Writers' Manual but conceded that it has no force and effect of law, particularly as it relates to MPCA. Tr. 223:20 – 224:2. The Manual itself states that its recommendations are not binding. Mr. Pierard agreed that the manual merely provides "guidance." Ex. 679; Tr. 334:15 – 335:1.

Further, Mr. Pierard acknowledged that there is no statute or regulation that prohibits MPCA and EPA from agreeing that EPA would not submit written comments on the draft permit during the public notice period. Tr. 337:14 – 338:3. Nor was there

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any such prohibition in the Memorandum of Agreement ("MOA"). Tr. 338: 9-15 (Mr. Pierard). And there is no statute, regulation or provision of the MOA that prohibits MPCA from listening to EPA read its draft comment letter to MPCA during a conference call. Tr. 338:21 – 339:21 (Mr. Pierard). Moreover, as Mr. Pierard acknowledged, EPA can comment on any permit at any time, so EPA was free to submit written comments on the PolyMet permit whenever it wished. Tr. 326:2-10. Additionally, EPA could have objected to the permit or refused to approve it up until December 19, 2018. Tr. 318:19 – 319:4, 352:11-15 (Mr. Pierard); Ex. 2021.

Throughout this entire proceeding, Relators have failed to establish that MPCA did anything unlawful, violated any statute or rule, or committed a "procedural irregularity" of any kind.

2. EPA's conduct cannot constitute a procedural irregularity

Relators have conceded that "EPA's conduct or motives are not at issue or relevant to these proceedings …" Relators' Pre-Trial Brief at p. 3, ftn.3. "Relators are not claiming or asking [the Court] to decide was EPA right or wrong in letting this permit go through." Tr. 259:4-6. More importantly, this Court has specifically held that "the procedural and substantive actions of the federal EPA are beyond the scope of this hearing. If a party is unhappy with what the EPA did or didn't do, they can sue the EPA … The interface between the EPA and the MPCA must always be presented in the context of the duties and obligations of the MPCA." Tr. 52:15-22. The Court further held: "[P]rocedural irregularities by the EPA are not at issue in this case." Tr. 188:18-22. And, "[t]he EPA does what the EPA does for reasons of the EPA that aren't being

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reviewed in this case and are not the subject of review by the Court of Appeals, as far as I am aware." Tr. 190:14-18. Accordingly, MPCA cannot be found to have committed a procedural irregularity based on any conduct or statements of EPA.

Nonetheless, Relators have attempted to carry their burden of proving procedural irregularities by pointing to conduct, decisions and statements by EPA over which MPCA had no authority or control. For example, EPA has acted entirely pursuant to its own independent authority in the following respects:

- By its own choice, EPA has routinely spoken with the state about permits, big and small, and worked through things verbally. Tr. 146:9-13 (Mr. Pierard).

- EPA makes comments all the time, inside and outside the comment period. Tr. 177:12-14 (Mr. Pierard).

- Under the MOA, EPA may submit comments in writing at any time. Tr. 322:9-12; 326:2-10 (Mr. Pierard).

- EPA decided in March 2018, before the close of the public comment period, not to send its already completed written comments on the draft PolyMet permit to MPCA. Tr. 190:25 – 191:6; 192:5-7 (Mr. Pierard); *see also* 337:6-13 (Mr. Pierard); Ex. 2010.

- Kevin Pierard underlined portions of the draft comment letter that he wanted to speak to in his call with MPCA in order to identify the issues and the method MPCA could use to rectify EPA's concerns. Tr. 193:11 – 194:3 (Mr. Pierard).

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- Kevin Pierard read those underlined portions of EPA's draft comment letter to MPCA orally on April 5, 2018. Tr. 194:7-13 (Mr. Pierard).

- Because EPA chose not to send its written comments on the draft PolyMet permit to MPCA during the public comment period or at any other time, those oral comments were not in the administrative record. If EPA had sent its written comments to MPCA, they would have been in the administrative record. *See* Tr. 1040:5 – 1041:1 (Ms. Handeland); 235:10-18, 236:1-6 (Mr. Pierard).

- After April 5, 2018, when Kevin Pierard read EPA's comments aloud to MPCA staff, EPA continued to confer with MPCA to resolve those same concerns about the draft PolyMet permit. Tr. 250:7-15 (Mr. Pierard).

- A goal of EPA meeting with permitting agencies was to avoid permit terms that would elicit an EPA objection. Tr. 330:11-16 (Mr. Pierard).

- EPA met with MPCA on September 25-26, 2018 to attempt to resolve its remaining concerns about the permit. Court Ex. B, Stipulation Nos. 18, 19; Ex. 708; Tr. 962:8-14 (Ms. Handeland).

- Kevin Pierard never recommended to the MPCA that there be a second public comment period based on revisions to the permit following the original public notice period. Tr. 367:11-15 (Mr. Pierard).

- EPA entered into an agreement with MPCA that EPA would have a period of 45 days to comment on the draft pre-proposed permit in addition to the 15 days provided for in the MOA. Tr. 339:22 – 340:2 (Mr. Pierard); Ex. 2010.

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EPA had "a number of conversations" with MPCA during this 45-day review period. Tr. 938:16-17 (Mr. Udd).

- On December 4, 2018, EPA notified MPCA that its pre-final 45-day review was complete. Tr. 318:19 – 319:4, 352:11-15 (Mr. Pierard); Ex. 2021.
- When EPA receives the proposed final permit, it has the ability to object at that point. Tr. 341:24 – 342:3 (Mr. Pierard).
- Although EPA's 15-day final review period ended on December 19, 2018 (Tr. 318:19 – 319:4, 352:11-15 (Mr. Pierard); Ex. 2021), EPA did not submit objections to the permit—either based on any of the items Mr. Pierard read from the EPA draft comment letter to MPCA on April 5, 2018, or otherwise. Tr. 938:25 – 939:9 (Mr. Udd); *see also* Tr. 290:11-14 (Mr. Pierard).

As the Court has recognized and ruled, MPCA cannot be held to have committed procedural irregularities based on any of EPA's conduct above or based on anything EPA said or did.

B. MPCA Complied With The Official Records Act.

Relators argue that MPCA violated the Official Records Act ("ORA"), Minn. Stat. § 15.17, and MPCA's regulations by discarding notes and by not affirmatively making records of its meetings with EPA. Relators' Mot. for Finding of Facts and Conclusions of Law, ¶¶ 156-58.

The ORA does not, however, require MPCA to preserve informal notes taken during the process leading up to an agency decision or to affirmatively create documents evidencing collaborative meetings with EPA.

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1. MPCA's note retention complied with the Official Records Act.

The ORA governs all state agencies' obligations to preserve records, provides in relevant part that "[a]ll officers and agencies of the state . . . shall make and preserve all *records* necessary to a full and accurate knowledge of their official activities." Minn. Stat. § 15.17, subd. 1 (emphasis added). It is the "duty of each agency, and of its chief administrative officer, to carefully protect and preserve government *records* from deterioration, mutilation, loss, or destruction." *Id.* at subd. 2 (emphasis added).

The Minnesota Supreme Court has limited the scope of "records" that agencies must maintain to comply with the ORA. *Kottschade v. Lundberg*, 160 N.W.2d 135, 137-38 (Minn. 1968). The court explained that the statutory language, when "[r]ead literally, … seems to place no bounds on the information which must be made a public record." *Id.* at 137. However, the court found that the "legislature did not intend anything that sweeping" because such a broad reading "would fill official archives to overflowing." *Id.* at 138. Instead, the court found that the record-keeping requirement must be bound by "reasonable limits" and those limits are established by what constitutes "official activities." *Id.* Such "official activities" are "limited to official actions as distinguished from thought processes"; therefore, "*all that need be kept of record is information pertaining to an official decision, and not information relating to the process by which such a decision was reached*." *Id.* (emphasis added). Examples of such information that the court found to be outside the scope of "official activities" include "casual jotting [or] any tear-sheet observation." *Id.* at 137; *see also Zangs v. City of St. Paul*, 2006 WL 6639215 (Minn. Dist. Ct. Dec. 8, 2006) (holding agency has a duty only to create a

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record of what becomes an official transaction, which did not include notes or comments, because they are akin to the "thought processes" referenced in *Kottschade*).

Thus, the Official Records Act distinctly does not require that MPCA personnel retain informal notes that are not subsequently relied upon as part of the administrative decision-making process. MPCA was not required to keep notes of its informal meetings with EPA, because those meetings were only a stage in MPCA's process of reaching its permit decisions. MPCA was not required to take or keep notes of the April 5 call with EPA, because that call (like the other telephonic "meetings") was only a stage in MPCA's process of reaching its permit decision and any notes taken were not relied upon as part of the administrative decision-making process.

2. MPCA's documentation of its interactions with EPA was lawful.

As explained above, Minnesota law did not require MPCA to create a record of the April 5 call. Moreover, MPCA did not have a policy that required MPCA staff to take notes during their informal meetings (usually telephone calls) with EPA on the NorthMet Permit. *See* Tr. 939:18-24 (Mr. Udd); 1044:2-4 (Ms. Handeland); 1234:9-15 (Mr. Schmidt). Nor did anyone at MPCA ever instruct any of the MPCA staff not to take notes during the calls or meetings with EPA, or to discard notes that were taken. Tr. 1044:5-16 (Ms. Handeland); 1331:15 – 1332:1 (Mr. Clark).

Although not required to do so, Ms. Handeland, an MPCA Permit Writer, often took notes of her calls or meetings with EPA officials regarding the NorthMet Permit and included these notes in the administrative record. Exs. 324A, 325A.

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During the April 5, 2018 phone call during which Kevin Pierard read comments to MPCA, Ms. Handeland began taking notes but quickly stopped because (i) Mr. Pierard was reading the comments too quickly to take accurate notes, and (ii) it became apparent that Mr. Pierard was repeating comments that EPA had already expressed to MPCA. Tr. 980:4-16 (Ms. Handeland). Specifically, Ms. Handeland's notes from the prior calls—which were included in the administrative record—had already documented the concerns EPA was voicing during the April 5 call. Tr. 986:21-23 (Ms. Handeland); Ex. 324A; Tr. 1342:20-24 (Mr. Clark); Tr. 233:13-22 (Mr. Pierard). Because the notes she took for one to two minutes "didn't say anything" and she did not intend to rely on them, her decision to discard them was in compliance with the ORA and MAPA. Tr. 982:16-24 (Ms. Handeland).

Mr. Clark, Supervisor of MPCA's Metallic Mining Sector Unit, sometimes took notes on calls with EPA, but only to help him follow along, as opposed to providing a source of information going forward. Tr. 1300:1-18 (Mr. Clark). Mr. Clark did not retain his shorthand notes from these calls because he did not intend to rely on them in the future. Tr. 1300:19 – 1301:2, 1307:6-10 (Mr. Clark).

Mr. Schmidt, a former MPCA staff attorney, also took notes on a number of phone calls with EPA, including the April 5, 2018 call. Tr. 1128:14-21(Mr. Schmidt); Ex. 837. His practice was to transcribe his handwritten notes into typed work product, after which he would discard the handwritten version. Tr. 1127:15 – 1128:1 (Mr. Schmidt). Neither the ORA nor the MPCA regulations required Mr. Schmidt to keep any notes from the

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April 5 call. Regardless, Mr. Schmidt would not have been required to keep the handwritten version of his notes once he had typed them up.

C. MPCA Included All Required Documents In The Administrative Record.

MPCA's regulations define the required contents of the administrative record supporting the MPCA Commissioner's final decisions as follows:

> 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.

Minn. R. 7000.0755, subp. 4 (emphasis added). Thus, MPCA was not obligated to include in the administrative record any of its staff's informal notes that were not subsequently "referenced and relied upon" in the decision to issue the NorthMet Permit.

Finally, MPCA moved to supplement the administrative record with the actual written comments that EPA read to MPCA during the April 5, 2018 phone call. Motion to Supplement the Administrative Record with EPA Letter, Case Nos. A19-0112, A19-0118, and A19-0124 (July 26, 2019). These comments were not included in the initial administrative record because EPA did not submit them in writing to MPCA. Further, Relators objected to the motion and the Court of Appeals denied the motion. Thus, the

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fact that these comments were not in the record did not constitute a procedural irregularity by MPCA because it had no ability to include them. Had EPA chosen to submit written comments on the permit to MPCA at any time, MPCA would have included them in the administrative record. *See* Tr. 1040:5 – 1041:1 (Ms. Handeland); 235:10-18, 236:1-6 (Mr. Pierard). Finally, there is now what amounts to a public transcript of the April 5, 2018 phone call, thus negating any speculation regarding the contents of Mr. Pierard's statements during that call. Ex. 337.

1. All call or meeting notes that MPCA relied upon were included in the administrative record.

As explained above, MPCA had no duty to make a record of its informal calls with EPA for the administrative record. Nevertheless, MPCA did document many of its informal calls with EPA by placing notes and emails concerning those meetings in the administrative record. *See* 324A, 325A, 307A (email from Mr. Udd regarding EPA wanting a meeting the first week in April 2018 as well as future check-in meetings), 2039 (appointment for April 4, 2018 meeting). By adding Ms. Handeland's notes of calls or meetings with EPA to the administrative record, MPCA included greater documentation than the regulations required. *See* Tr. 1071:24 – 1072:3 (Ms. Handeland does not typically include handwritten notes in the administrative record).

Because Mr. Schmidt's typed notes of the EPA meetings were attorney work product, they were not included in the administrative record. Tr. 1129:4-13 (Mr. Schmidt).

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2. Other relevant documents of communications with EPA were included in the administrative record.

In addition, MPCA placed in the administrative record Mr. Thiede's March 16, 2018 email documenting the EPA/MPCA agreement to provide EPA an additional 45 days to comment and Ms. Lotthammer's response concurring in Mr. Thiede's summary of the agreement. Exs. 64A; 307A.

D. The Data Practices Act Is Not a Source of Procedural Irregularities Here.

Relators argue that MPCA's responses to Relators' data requests violated the Minnesota Government Data Practices Act ("MGDPA"), Minn. Stat. § 13.03. Relators' Mot. for Finding of Facts and Conclusions of Law, ¶ 143. Relators' argument is without merit.

First, MGDPA disclosure requirements are separate and distinct from MPCA's process for issuing an NPDES Permit. Second, regardless of its lack of relevance here, MPCA fully complied with the Relators' MGDPA requests.

1. The MGDPA is not a permitting procedure.

This Court is tasked with determining whether irregularities in procedure occurred in MPCA's process of reaching a decision on the NorthMet Permit. *See* Transfer Order at 4 (requiring this Court to hold an evidentiary hearing to determine if "irregularities in procedure" were committed by MPCA in the process of issuing the NorthMet Permit); *Mampel*, 254 N.W.2d at 378 (Minn. 1977) ("Persons seeking review may make inquiry through discovery to determine whether the agency adhered to statutorily defined

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procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process.").

MPCA's responses to MGDPA requests are separate from its process for developing an NPDES permit. A request by a member of the public for any particular document does not make that document a proper part of an administrative record. If a document should be in the administrative record, it should be included even if no one has asked to see it. If that document does not belong in the administrative record, it should not be added to the record even if there have been thousands of requests to see it.

Responding to an MGDPA request is not a permitting decision, or even part of a permitting decision. Indeed, the MGDPA provides specific remedies for noncompliance. *See* Minn. Stat. §§ 13.08 (civil remedies, including action for damages), 13.085 (administrative remedies). These remedies provide the appropriate means for addressing any alleged violation of the MGDPA. *See Becker v. Mayo Found*., 737 N.W.2d 200, 207 (Minn. 2007) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.") (alteration in original) (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979).

2. MPCA complied with the Relators' MGDPA requests.

The MGDPA, Minn. Stat. § 13.03, provides that "[a]ll government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified . . . as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential." The MGDPA's purpose "is to reconcile the rights

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of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing. The Act also attempts to balance these competing rights within a context of effective government operation." *KSTP-TV v. Ramsey Cnty.*, 806 N.W.2d 785, 788 (Minn. 2011) (quotation omitted).

Relators submitted their first DPA request on March 26, 2018, requesting:

> [A]ll *records* since January 2015 pertaining to any of the following: 1) Comments, letters, emails, memos, meeting notes, phone conversation notes or any other records a) from the U.S. EPA; or b) pertaining to written or oral communications or phone or in-person meetings with the U.S. EPA regarding any proposed or draft NPDES/SDS permit for the PolyMet NorthMet Project; and 2) Comments, letters, emails, memos, meeting notes, phone conversation notes or any other records a) from the U.S. EPA; or b) pertaining to written or oral communications or phone or in-person meetings with the U.S. EPA regarding the cross-media mercury analysis, antidegradation analysis or any other aspect of the MPCA's proposed or draft recommendation for 401 certification of the Poly Met NorthMet Project.

Ex. 334 (emphasis added). Relators submitted a second MGDPA request on April 5, 2018, requesting:

> [A]ll Comments received by MPCA pertaining to the draft NPDES/SDS permit and/or draft Section 401 certification for the PolyMet NorthMet Project, including Exhibits and expert reports, EXCEPT excluding any comments submitted by or on behalf of WaterLegacy.

Exs. 336, 437.

We note that Relators do not claim that there were any procedural irregularities after April 5, 2018, except that MPCA did not identify or respond to Kevin Pierard's April 5 oral comments. Tr. 1050:1-1052:10. Out of an abundance of caution, however, below we will also discuss Relators' subsequent MGDPA requests.

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Relators submitted a third request on September 20, 2018, which similarly requested "all *records*, including but not limited to comments, letters, emails, memos, meeting notes, phone conversation notes, draft permits, draft certifications, presentations, monitoring data, or technical materials since January 2018 pertaining" to draft permits and certifications for the NorthMet Projects. Ex. 340. Relators' subsequent requests contained the same language as the September 20, 2018 request except that they requested "paper records." Exs. 341, 346, 352. Relators' subsequent duplicative requests indicate that they understood that MPCA does not treat MGDPA requests as ongoing; once an agency responds to a request, it is not required to assemble further responsive documents that did not exist at the time the request was made. Tr. 1144:11-16 (Mr. Schmidt). Contrary to Relators' suggestions, MGDPA requests do not require agency responses in perpetuity. Unless a MGDPA request for a document is pending, the MGDPA does not prevent MPCA personnel from discarding that document.

Notably, except for the April 5 request seeking comments, all of Relators' MGDPA requests sought "records," rather than "data," the more expansive term used in the MGDPA. The MGDPA defines government data as "all data collected, created, received, maintained or disseminated by any government entity." Minn. Stat. § 13.02, subd. 7. By contrast, the term "record" as used in the ORA and MPCA guidelines is more limited. *See* Ex. 77 at MPCA_008740 (defining "record" as "all recorded information, regardless of medium or format, made or received by the agency or its agents under law in connection with the transaction of public business and either preserved or appropriate for preservation because of their administrative, evidential,

fiscal, historical, informational or legal value"). Thus, MPCA's responses were properly limited to "records" instead of the more encompassing "data."

MPCA responded to Relators' requests in a timely manner, following the same MGDPA procedures that it customarily uses. Tr. 822:6-13 (Mr. Richards). Thus, there was nothing procedurally irregular about MPCA's responses to Relators' MGDPA requests.

The purpose of MGDPA is to require document disclosure, not document preservation. Unless a MGDPA request for a document is pending, the MGDPA does not prevent MPCA personnel from discarding that document. Mr. Schmidt's notes were not provided under the MGDPA because he (reasonably) believed that his notes were privileged and thus not subject to MGDPA requests. *See* Tr. 1129:4-13 (Mr. Schmidt).

E. MPCA Complied With The Memorandum Of Agreement.

The Memorandum of Agreement provides no support for Relators' arguments that MPCA committed procedural irregularities during the PolyMet permitting process. In particular, as explained below, each of the following actions was consistent with the MOA: (i) MPCA's request that EPA wait to submit written comments until after the public comment period; (ii) MPCA's submittal of a pre-proposed permit for EPA review; (iii) MPCA's handling of EPA's November 3, 2016 letter regarding PolyMet's initial permit application; and (iv) the lack of an MOA amendment for the PolyMet Permit. Contrary to Relators' baseless accusations of malevolent conspiracy, MPCA acted properly during the development process for the PolyMet Permit.

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1. MPCA's request that EPA wait to submit written comments until after the public comment period was consistent with the MOA.

As discussed above, MPCA did not demand that EPA withhold comments during the public comment period, and no one at MPCA ever suggested that EPA lacks the authority to submit comments during the public comment period. Tr. 309:16-23 (Mr. Pierard); 1343:17 – 1344:2 (Mr. Clark); 1063:24 – 1064:10 (Ms. Handeland); 1232:1-7 (Mr. Schmidt). Indeed, EPA retains the authority to submit comments whenever it chooses—before, during, or after the public comment period. Tr. 320:20 – 321:21, 322:10-13, 326:2-10 (Mr. Pierard). MPCA simply requested that EPA hold off on commenting until after the public comment period, and EPA chose to do so.

Notably, the MOA expressly provides for EPA comments only on the proposed final NPDES permit that is developed *after* the public comment period and sent to EPA for "final approval." Ex. 328 at 10-11 (§ 124.46(5)). The MOA does not mention—let alone require—EPA comments on the public-comment draft permit. Tr. 320:20 – 321:16 (Mr. Pierard). Thus, MPCA's request that EPA provide comments after the public comment period fully accords with the procedures set forth in the MOA. Indeed, Mr. Pierard himself acknowledged that the MOA does not prohibit an agreement between MPCA and EPA whereby EPA waits to comment until after the public comment period. Tr. 338:9-15 (Mr. Pierard). Likewise, there is no statutory or regulatory provision prohibiting such an agreement. Tr. 337:14 – 338:3 (Mr. Pierard).

MPCA's compliance with the MOA is underscored by the transparent communications between MPCA and EPA regarding the request to delay comments until

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after the public comment period. In her March 13, 2018 email to Kurt Thiede, Ms. Lotthammer referenced specific pages from the MOA as support for the request. Ex. 333 (directing Mr. Thiede to "highlighted portions of page pp. 27-28 of the attached" MOA). EPA, fully aware of the MOA, subsequently agreed to a process whereby MPCA would provide EPA 45 days to comment on a pre-proposed permit, followed by 15 days to generally object to the subsequent proposed permit. Ex. 64A (Mar. 16, 2016 email from Kurt Thiede to Shannon Lotthammer); Tr. 313:3-11 (Mr. Pierard).

In the course of numerous communications describing this agreement, neither Mr. Pierard nor anyone else at EPA suggested that the agreement was unlawful or inconsistent with the MOA. Ex. 2014 (September 19, 2018 internal EPA email to "refresh our memories" regarding the agreement between MPCA and EPA); Ex. 2010 (June 26, 2018 email from Mr. Pierard to another EPA employee describing the agreement between MPCA and EPA). To the contrary, EPA subsequently considered using the same approach—commenting on a pre-proposed permit issued after the public comment period—for a different NPDES permit separate from the PolyMet Project. Ex. 2009 (May 15, 2018 email from Kevin Pierard to Jeff Udd regarding a permit for a different project and requesting confirmation that MPCA "intend[s] to follow the approach we worked out on the PolyMet permit which was to provide the pre-proposed permit for a 45 day review by EPA"); Tr. 332:12 – 333:7, 342:9 – 343:13 (Mr. Pierard).

2. The use of a pre-proposed permit was consistent with the MOA.

MPCA quadrupled the time EPA usually has to comment on or object to a proposed NPDES permit. Section 124.46(5) of the MOA calls for EPA comments or

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objections to the proposed permit within 15 days of receipt, but MPCA agreed to allow an additional 45 days for EPA to comment on a "pre-proposed permit" prior to the commencement of the normal 15-day period for reviewing the final proposed permit. MPCA's accommodation for additional EPA comments was consistent with the MOA.

Just as the MOA's silence does not prohibit EPA from commenting during the public comment period (or at any other time during the review process), so too does that silence allow enhanced EPA review through a pre-proposed permit. In fact, as noted above, MPCA and EPA later considered using a pre-proposed permit for a different project—further evidence that neither MPCA nor EPA viewed this approach as problematic. *See* Ex. 2009 (email from Mr. Pierard to confirm the use of a pre-proposed permit for a different project).

3. The handling of EPA's November 3, 2016 Letter was consistent with the MOA.

Relators sggest that the MOA was violated because EPA "never sent a resolution letter on the PolyMet Permit application" after sending a November 3, 2016 letter "detailing deficiencies in the PolyMet Permit application." Relators' Pre-Trial Br. at ¶¶ 10-12; Ex. 306 (Nov. 3, 2016 letter). This argument rings hollow for a number of reasons. First, the MOA itself provides that MPCA "may assume, after verification of receipt of the application, that no comment is forthcoming if [MPCA] has received no response from the [EPA] Regional Administrator at the end of 20 days." Ex. 328 at 4 (§ 124.22(7)). PolyMet submitted its initial application for the PolyMet Permit on July 11, 2016. Tr. 151:20-24 (Mr. Pierard). EPA neither commented within 20 days, nor

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requested additional time to comment. Tr. 1341:5-22 (Mr. Clark). Thus, MPCA was permitted to begin processing the application under the assumption that EPA had identified no deficiencies. That is not to say that MPCA ignored EPA's concerns. Once EPA sent its November 3, 2016, letter, MPCA worked together with EPA to discuss EPA's concerns and develop the permit accordingly. *See* Ex. 708 (listing numerous meetings and phone calls between MPCA and EPA regarding the PolyMet Permit).

Second, PolyMet submitted a revised application for the PolyMet Permit in October 2017. Ex. 1069. EPA did not identify deficiencies in this revised application. Thus, MPCA was also permitted to process this revised application.

Third, EPA clearly did not act as though MPCA was unlawfully processing PolyMet's application given that (i) EPA worked with MPCA throughout the development of the PolyMet Permit, (ii) EPA did not object to MPCA processing the permit application, and (iii) EPA did not object to permit issuance, although it had the authority to do so.

4. No amendment to the MOA was required.

At the hearing, Relators asked a number of questions about the process for amending the MOA and whether that process was followed for the PolyMet Permit. Such questions are wholly irrelevant. Because MPCA's actions were compliant with the MOA, there was no reason to amend it.

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5. The goal of the agreement between MPCA and EPA was to improve the permit development process.

Relators have argued that MPCA and EPA conspired to conceal EPA's concerns about the PolyMet Permit from the public. As a threshold matter, EPA's actions cannot form the basis of any procedural irregularity in this proceeding. Tr. 52:15-22; Tr. 188:18-22. Moreover, the subjective intent of MPCA and EPA personnel is irrelevant to the determination of procedural irregularities. If MPCA complied with its statutory and regulatory requirements, there is no procedural irregularity as a matter of law—regardless of what individual MPCA employees may have been thinking.

But even if the subjective intent of individual MPCA employees mattered, the testimony elicited at the hearing establishes that MPCA acted in good faith throughout the PolyMet permitting process. MPCA's request that EPA delay its written comments until after the public comment period arose from valid concerns about unusual demands on MPCA's resources. Mr. Udd informed Ms. Lotthammer of his concerns about the workload on MPCA staff, particularly given that MPCA was receiving an unusually large number of comments and MPCA's comment responses were being drafted by just three people—Richard Clark, Stephanie Handeland, and Michael Schmidt. Tr. 900:9-17 (Mr. Udd); Tr. 988:7-8, 990:7-12 (Ms. Handeland). Both Mr. Stine and Ms. Lotthammer discussed their concerns with EPA officials, and the two agencies voluntarily agreed that MPCA would provide EPA 45 days to comment on a pre-proposed permit, prior to the standard 15 days to comment on the final proposed permit. Ex. 64A.

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As part of these discussions, Ms. Lotthammer requested that EPA delay submitting comments until MPCA issued the pre-proposed permit. Ex. 333; Tr. 310:12-23 (Mr. Pierard acknowledging 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"). Neither Ms. Lotthammer nor anyone else at MPCA asked EPA to withhold comments altogether. To the contrary, Ms. Lotthammer explicitly stated that MPCA's concern "is the *timing* of EPA comments, not the ability for EPA to comment." Ex. 333 (emphasis in original). In short, there is no basis to conclude that either the request for delayed comments or the pre-proposed permit agreement was the result of any improper motive to suppress EPA comments.

F. MPCA Was Not Required To Respond In Writing To Mr. Pierard's Oral Statements On The April 5, 2018 Phone Call.

No statute, regulation, or provision of the MOA required that MPCA respond in writing to Mr. Pierard's April 5, 2018 telephone call. As a result, the lack of a written response to such statements cannot constitute a procedural irregularity.

40 C.F.R. § 124.17(a)(2) requires MPCA to "[b]riefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing." Similarly, Minnesota Rule 7001.1070, subp. 3, requires a response "to all significant comments received under part 7001.0110 during the public comment period."

Mr. Pierard's April 5 oral statements did not require a response because (i) these statements were not made during the public comment period, and (ii) there is no evidence

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that EPA intended to elicit a formal MPCA response to these statements. Despite the fact that no response was required, MPCA nonetheless responded to Mr. Pierard's statements both through permit revisions and through the numerous calls and meetings with EPA during the permitting process.

1. Mr. Pierard's April 5, 2018 statements were not made during the public comment period or during a hearing.

The public comment period ended on March 16, 2018, several weeks before the April 5 phone call. Tr. 182:1-4 (Mr. Pierard). Because MPCA was obligated to respond only to "significant comments . . . during the public comment period," (or during any hearing) 40 C.F.R. § 124.17, Minn. R. 7001.1070, subp. 3, Mr. Pierard's April 5 statements did not trigger any obligation to respond.

Notably, EPA chose not to submit written comments during the public comment period. That choice cannot be ascribed to MPCA and therefore cannot constitute the basis of a procedural irregularity under Minn. Stat. § 14.68. Tr. 52:15-22, 188:18-22.

2. There is no evidence that EPA intended to elicit a formal MPCA response to Mr. Pierard's April 5 phone call.

Even if Mr. Pierard's April 5 phone call had fallen within the public comment period, MPCA still would have had no obligation to formally respond given the lack of evidence that EPA intended to elicit any formal response.

Prior to April 5, 2018, most of the phone calls between MPCA and EPA regarding the PolyMet Permit had been informal discussions in which the representatives from each agency engaged in a dialogue regarding permitting issues. Tr. 1194:21-22 (Mr. Schmidt). The MPCA officials on the April 5 call—Jeff Udd, Richard Clark, Stephanie Handeland,

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and Michael Schmidt—were surprised when Mr. Pierard began speaking as if he were reading from a prepared document. Tr. 924:14-17 (Mr. Udd); 980:23 – 981:1 (Ms. Handeland); 1194:17 – 1195:1 (Mr. Schmidt); 1342:12-15 (Mr. Clark). Moreover, EPA did not provide MPCA with (i) a written copy of the letter from which Mr. Pierard read, (ii) a recording of the April 5 call, or (iii) a transcript of the April 5 call.[2] Tr. 1193:23-25 (Mr. Schmidt); 1367:3-12 (Mr. Clark).

In short, EPA voluntarily chose not to submit written comments on the PolyMet Permit during the public comment period. Shortly thereafter, Mr. Pierard chose to read portions of a draft comment letter over the phone despite the fact that MPCA had expressly welcomed written comments. Ex. 333 (Ms. Lotthammer stating that MPCA's concern "is the *timing* of EPA comments, not the ability for EPA to comment") (emphasis in original); Ex. 64A (Ms. Lotthammer confirming the understanding that EPA would "provide written comments on the [pre-proposed permit] to MPCA"). Finally, EPA chose not to follow up with any written documentation of its telephone statements. EPA's actions confirm that it did not intend to elicit a formal response from MPCA to Mr. Pierard's statements during the April 5 telephone call.

3. To avoid a possible EPA veto, MPCA responded to EPA's concerns throughout the PolyMet permitting process.

Even though MPCA had no legal obligation to respond specifically to Mr. Pierard's April 5 call, MPCA did respond to EPA's concerns in order to develop a better permit and avoid an EPA veto. Indeed, MPCA worked collaboratively with EPA

[2] MPCA did not receive a copy of the letter from which Mr. Pierard read until the document was leaked in a June 12, 2019 news story. Ex. 535; Tr. 746:14-18 (Ms. Bishop).

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throughout the PolyMet permitting process, both before and after the April 5 call. Ex. 708 (listing meetings and calls between MPCA and EPA regarding the PolyMet Permit); Tr. 349:13 – 350:2 (Mr. Pierard); 1214:4-12 (Mr. Schmidt). These interactions "were very productive" in shaping the revised permit. Tr. 937:13 – 938:10 (Mr. Udd).

Notably, Mr. Pierard's statements on the April 5 call were "very similar" to concerns that EPA had already raised on prior calls with MPCA—particularly calls on January 31, February 13, and March 5, 2018. Tr. 1342:20-24 (Mr. Clark); *see also* Tr. 233:13-22 (Mr. Pierard stating that "a lot of the topics that were contained in the draft letter that we read to PCA were topics that we brought up during the calls we had in early 2018"). Had EPA felt that the revised permit failed to address EPA's concerns, EPA was free to veto the permit. Tellingly, EPA did not do so.

Finally, Minnesota law makes clear that MPCA's responses to written comments "may be made either *orally* or in writing." Minn. R. 7001.1070, subp. 3 (emphasis added); *see also* Tr. 1214:4-20 (Mr. Schmidt). Thus, even assuming that MPCA was required to respond to Mr. Pierard's April 5 statements—which it was not—MPCA met such requirements through its extensive oral discussions with EPA between April 5, 2018 and the issuance of the PolyMet Permit on December 20, 2018. Ex. 708; Tr. 349:13-350:2 (Mr. Pierard); 1214:4-12 (Mr. Schmidt); 937:13 – 938:3 (Mr. Udd).

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G. Relators' Motion for Spoliation Sanctions Is Meritless.[3]

Prior to the evidentiary hearing, Relators filed a motion for spoliation sanctions requesting that the Court make negative inferences against MPCA based on alleged missteps in MPCA's preservation of documents. The Court deferred ruling on this motion until after the hearing. Tr. 85:6-7.

In their motion, Relators concede that they "do not have conclusive evidence that MPCA directed the deletion of certain evidence outside of normal retention policy." Mot. at 13. The evidence presented at the hearing further underscores the fact that Relators' spoliation request is based entirely on speculation and conjecture.

Specifically, MPCA's internal policies generally authorize discarding notes of telephone calls. Ex. 77 at MPCA_008744 ("Unless otherwise specified, notes that do not qualify as personal papers can be destroyed/deleted once they are incorporated into a final product. Examples include . . . records of telephone conversations . . . or other documents when the gist of the discussion, conversation, direction or other activity is embodied in a document that states the official agency decision, position or outcome."); Ex. 1003 (instructing MPCA personnel to "[k]eep your files neat and discard any drafts and notes when you are through using them"). Furthermore, MPCA personnel involved in the PolyMet permitting process testified that no one at MPCA instructed them to discard notes taken on calls with EPA. Tr. 1044:5-16 (Ms. Handeland); 1331:15 – 1332:1 (Mr. Clark). Thus, with respect to the PolyMet Permit, there is no basis to

[3] MPCA hereby incorporates by reference its January 10, 2020 response in opposition to Relators' Motion *in Limine* for Spoliation Sanctions.

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conclude that MPCA "directed the deletion of [notes] outside of normal retention policy." Mot. at 13.

As for Relators' fixation on Ms. Lotthammer's deletion of a March 13, 2018 email to Kurt Thiede, there are no grounds for spoliation given that this email *has been produced in this litigation* and its contents are thus readily available. Ex. 333. Moreover, there is no basis for speculating that Ms. Lotthammer deleted this email in an effort to conceal from the public her communications with EPA. That is because Mr. Thiede's March 16, 2018 email laying out EPA's and MPCA's understanding of EPA's plan for commenting on the PolyMet Permit, as well as Ms. Lotthammer's confirmation of that understanding, were included in the administrative record and produced in response to Relators' DPA requests. Ex. 64A; *see also* Tr. 544:16 – 545:8, 609:24 – 610:14 (Ms. Lotthammer). This email chain sets forth the agreement between MPCA and EPA, whereas Ms. Lotthammer's March 13 email was merely a preliminary communication leading up to that agreement. Had MPCA actually sought to conceal from the public its discussions with EPA regarding EPA comments, it would have made no sense for MPCA to save and make publicly available the email setting forth the end result of such discussions.

Lacking evidence of procedural irregularities, Relators are asking the Court to simply presume the existence of such evidence. There is no legal basis for doing so. *See Costello*, 646 N.W.2d at 210 ("[W]e have condemned arguments that invite the [fact finder] to speculate about the facts."); *Vroman v. City of Austin*, 169 N.W.2d 61, 62

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(Minn. 1969) (explaining that a party must satisfy its burden "without speculation or conjecture").

Indeed, the case law on which Relators rely is plainly distinguishable. In their pre-trial brief, Relators cite to *Dillon v. Nissan Motor Co.*, 986 F.2d 263 (8th Cir. 1993), and *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995), for the proposition that the "Court need not find intent in order to impose negative inference sanctions." Relators' Pre-Trial Br. at 7. Yet each of these cases involved the destruction of evidence that was obviously crucial. In *Dillon*, 986 F.2d at 266-67, a products liability suit involving an allegedly defective car, plaintiffs' expert and counsel ordered the *destruction of the car*. *Patton* similarly involved the disappearance of an allegedly defective motor home—*after* plaintiffs had conducted an expert inspection but *before* defendants had a chance to do so. 538 N.W.2d at 117-18. Like the car in *Dillon*, the motor home in *Patton* was crucial evidence, and its disappearance prejudiced the defense by depriving it of an inspection.

In the instant matter, one would have to speculate wildly in order to conclude that MPCA has destroyed evidence of significance to judicial review of the permit—let alone that MPCA "knew or should have known" that such evidence should be preserved for a subsequent § 14.68 proceeding. *Patton*, 538 N.W.2d at 118.

Here, another critical distinction is that MPCA did not stand to benefit from the destruction of documents relevant to its decision to issue the PolyMet Permit. To the contrary, MPCA stood to benefit from filing a complete administrative record in order to minimize the chance of a finding that its decision was unsupported by substantial evidence. *See Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644

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N.W.2d 457, 464 (Minn. 2002) (explaining that courts review an agency decision "for whether it was unsupported by substantial evidence in view of the entire record as submitted or was arbitrary or capricious").

The actual documentation in this case further undermines any notion that MPCA negligently or intentionally withheld material documents. Beyond the robust administrative record that MPCA filed in the Court of Appeals, for this hearing MPCA has provided responses to DPA requests, responses to document requests, and documents from a court-ordered forensic search involving thousands of documents on the devices and email accounts of former MPCA employees. Ex. 839. Given the broad scope of document-based discovery in this case, there is no basis to conclude that more relevant documents are lurking somewhere in the ether—much less that such documents are materially adverse to MPCA.

In short, spoliation sanctions are inappropriate given that (i) MPCA had a specific litigation interest in including all necessary documentation in the administrative record; (ii) there is no evidence that MPCA destroyed relevant documents; (iii) there is no evidence that MPCA knew or should have known that it should preserve documents for a subsequent proceeding under Minn. Stat. § 14.68, and (iv) there is no evidence that Relators have been prejudiced. To the contrary, as discussed below, MPCA acted appropriately by adhering to its policy regarding litigation holds and complying with the rules governing document preservation.

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1. MPCA properly waited to issue a litigation hold order until it anticipated litigation that would extend outside the administrative record.

Relators argue that MPCA was obligated to implement a litigation hold as far back as 2015, when MPCA hired outside legal counsel to provide advice regarding the PolyMet permitting process. Mot. at 1-3, 7-8. This argument is wholly without merit. MPCA does not issue litigation hold orders for cases that are adjudicated on the administrative record, as such cases "come[] up very frequently" and instituting a litigation hold on each such case "would create a huge burden on the agency." Tr. 1235:5-21 (Mr. Schmidt); *see also* MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶¶ 6-7 (Decl. of Adonis Neblett) (explaining that implementing litigation hold orders on all matters potentially reviewed on the administrative record "would be very burdensome" and would "consume a large amount of this Agency's scarce resources"). Here, MPCA did not reasonably anticipate that the PolyMet Permit would be the subject of litigation beyond the administrative record until the Court of Appeals transferred this proceeding to this Court on June 25, 2019. MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶ 3 (Decl. of Adonis Neblett). Once the Transfer Order was issued, MPCA promptly issued a litigation hold order. *Id.* at ¶ 8. Thus, MPCA's handling of litigation holds was consistent with its standard practices. *Id.* at ¶ 4.[4]

[4] As with MPCA, it is not the custom of federal agencies to implement litigation hold orders for matters expected to be adjudicated on the administrative record. MPCA's Response to Motion for Spoliation Sanctions, Ex. 11 at ¶¶ 7-8 (Decl. of Andrew Emrich); MPCA's Response to Motion for Spoliation Sanctions, Ex. 12 at ¶¶ 3, 7 (Decl. of Thomas Sansonetti).

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This result is not changed by the fact that Relators filed their motion to transfer on May 17, 2019. Motions asking the Court of Appeals to transfer proceedings to the district court under Minn. Stat. § 14.68 have rarely been granted. Moreover, in cases regarding procedural irregularities, discovery has been limited to written interrogatories or written deposition questions. *See In re Application of Lecy*, 304 N.W.2d at 900; *Mampel*, 254 N.W.2d at 377-78; *Ellingson & Associates, Inc. v. Keefe*, 396 N.W.2d 694, 695 (Minn. Ct. App. 1986). Requests for production of documents traditionally have not been allowed in proceedings such as the instant transfer proceeding. Thus, MPCA had no basis to reasonably anticipate that its documents would be subject to document requests if Relators' transfer motion was granted. For these reasons, MPCA was not required to implement a litigation hold order upon Relators' filing of their transfer motion.

In addition, there is no basis for concluding that Relators were prejudiced by the fact that MPCA waited to issue a litigation hold until the Court of Appeals actually issued the Transfer Order. The resulting delay is short—May 17, 2018 to June 25, 2018. And the three individuals at the center of Relators' spoliation motion had all ceased working for MPCA prior to Relators' filing of the transfer motion on May 17, 2018.[5] Thus, it would have been impossible for these employees to delete or destroy any responsive documents during the period between Relators' filing of the transfer motion and the Court of Appeals' order granting the motion. Likewise, once these employees stopped

[5] Ms. Foss stopped working for MPCA in January 2018, Tr. 959:21-960:7 (Ms. Handeland), 848:12-14 (Mr. Udd), followed by Mr. Stine in January 2019, Tr. 484:11-17 (Mr. Stine), and Ms. Lotthammer in February 2019, Tr. 542:4-10 (Ms. Lotthammer).

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using their agency-issued devices upon leaving the agency, their files could no longer be automatically overwritten. Tr. 1100:20-23 (Mr. Gutierrez). As a result, Relators were not prejudiced by any delay in issuing a litigation hold order between May 17, 2018 and June 25, 2018.

Similarly, Relators have not established prejudice from any other allegedly missing documents. In the absence of any showing of prejudice, Relators' motion for spoliation sanctions must be denied. *Miller v. Lankow*, 801 N.W.2d 120, 132 (Minn. 2011); *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) (there needs to be an express finding of prejudice to the requesting party before a court may impose a sanction for the destruction of evidence).

2. MPCA's rules determine what documents must be preserved, and MPCA complied with those rules.

Until the Court of Appeals issued its Transfer Order on June 25, 2019, MPCA anticipated that the PolyMet Permit would give rise only to judicial review on the administrative record. MPCA Response to Motion for Spoliation Sanctions, Ex. 2 at ¶ 3 (Decl. of Adonis Neblett). Thus, MPCA's record preservation and production obligations for the anticipated litigation were controlled by the MAPA, the Official Records Act, and MPCA's regulations , not by a litigation hold that would apply in ordinary civil litigation under the rules of civil procedure. As explained in Sections IV.B-D above, MPCA fully

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complied with its statutory and regulatory record retention requirements. Those legal requirements render a litigation hold largely superfluous and unduly burdensome.

There is no basis for applying a more stringent litigation hold policy that goes beyond the statutory and regulatory requirements already in place for administrative review. If this Court were to impose a separate obligation on agencies to impose broad civil litigation holds every time an agency reasonably anticipates a challenge under MAPA, such imposition would undermine the intent and purpose of the statutes and impose overly burdensome obligations on agencies to collect and preserve far more than administrative records. *See Kottschade*, 160 N.W.2d at 138 (criticizing agency record retention obligation that "would fill official archives to overflowing"); *Kimmel v. Twp. of Ravenna*, No. A05-362, 2005 WL 3372716, at *3 (Minn. Ct. App. Dec. 13, 2005) (rejecting request for spoliation sanctions on appeal from administrative proceeding); *Ammar v. Olatoye*, 136 A.D.3d 585, 586, 26 N.Y.S.3d 42, 43 (N.Y. App. Div. 2016) ("sanctions for spoliation of evidence are inapplicable to this administrative proceeding"); *Yao v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2002 WI App 175, ¶ 19, 256 Wis. 2d 941, 953, 649 N.W.2d 356, 362 (in administrative record review proceeding, court held that "a 'spoliation rule' developed and applied in case law involving civil litigation does not necessarily govern the outcome here").

V. CONCLUSION

The PolyMet NPDES permit is a 453-page document, the development of which required the resolution of exceptionally difficult technical and policy issues by MPCA's career staff. The record in this hearing is notably free of any evidence of political

pressure to steer the outcome, or of any MPCA conspiracy to hide anything from the public.

MPCA staff responded to the PolyMet permitting challenges by engaging in expanded public outreach, thorough investigation of technical issues, and an unprecedented degree of interaction with EPA that extended over more than two years.

After over a year of frequent telephone discussions of permitting approaches between MPCA and EPA, in March of 2018 EPA announced that it was also contemplating the submission of written comments on the public notice draft of the PolyMet permit. The calls between MPCA and EPA that ensued from EPA's announcement were not about technical or policy issues, but about the efficient use of state and federal resources. The upshot was that MPCA agreed to give EPA extra time to comment in writing on a new draft of the permit, an agreement that MPCA placed in the administrative record for judicial review. With or without this agreement EPA could have submitted written comments during the public comment period, or at any other time during permit development, but it chose not to do so.

EPA also chose to summarize its March 2018 comments on the public notice draft permit orally, after the close of the public comment period. That choice was made exclusively by EPA.

MPCA followed Minnesota law and its own rules in developing the PolyMet permit: such actions are not "procedural irregularities." The only unusual decision that MPCA made was to engage so extensively with EPA. If that is an "irregularity," it is not one that the relevant Minnesota law was intended to discourage.

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DATED: April 22, 2020

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