

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

3 *****

4 Court File No. 62-CV-19-4626

5 Judge John H. Guthmann

6 In the Matter of the Denial

7 of Contested Case Hearing

8 Requests and Issuance of National

9 Pollutant Discharge Elimination

10 System/State Disposal System,

11 Permit No. MN0071013 for the

12 Proposed NorthMet Project,

13 St. Louis County, Hoyt Lakes,

14 and Babbitt, Minnesota.

15 *****

16 EVIDENTIARY HEARING

17 TUESDAY, JANUARY 21, 2020

18 VOLUME I, DAY 1 OF 7 (pp. 1 - 210)

19 *****

20 The evidentiary hearing (Day 1 of 7) came on

21 before the Honorable John H. Guthmann, District Court

22 Judge, in Ramsey County District Court on Tuesday, the

23 21st day of January, 2020.

24 *****

25 REPORTED BY: Lori Morrow, RMR, RPR, CRR, CLR, CBC

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A P P E A R A N C E S:

On Behalf of Center for Biological Diversity, Friends of
the Boundary Waters Wilderness, and Minnesota Center for
Environmental Advocacy:

William Z. Pentelovitch, Esquire

Evan A. Nelson, Esquire

Margo S. Brownell, Esquire

MASLON LLP

90 South Seventh Street, Suite 3300

Minneapolis, Minnesota 55402-4140

(612) 672-8200

bill.pentelovitch@maslon.com

evan.nelson@maslon.com

margo.brownell@maslon.com

- and -

Matthew C. Murphy, Esquire

NILAN JOHNSON LEWIS, P.A.

120 South Sixth Street, Suite 400

Minneapolis, Minnesota 55402

(612) 305-7500

mmurphy@nilanjohnson.com

- and -

(APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 ALSO On Behalf of Center for Biological Diversity,
3 Friends of the Boundary Waters Wilderness, and Minnesota
4 Center for Environmental Advocacy:

5 Elise L. Larson, Esquire

6 MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY

7 1919 University Avenue West, Suite 515

8 St. Paul, Minnesota 55104

9 (651) 223-5969

10 elarson@mncenter.org

11

12 On Behalf of WaterLegacy:

13 Paula Goodman Maccabee, Esquire

14 JUST CHANGE LAW OFFICES

15 1961 Selby Avenue

16 St. Paul, Minnesota 55104

17 (651) 646-8890

18 pmaccabee@justchangelaw.com

19

20

21

22

23

24

25 (APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 On Behalf of Fond du Lac Band of Lake Superior Chippewa:

3 Vanessa Ray-Hodge, Esquire

4 SONOSKY, CHAMBERS, SACHSE, MIELKE & BROWNELL, LLP

5 500 Marquette Avenue, N.W., Suite 660

6 Albuquerque, New Mexico 87102-5302

7 (505) 247-0147

8 vrayhodge@abqsonosky.com

9 - and -

10 Matthew L. Murdock, Esquire

11 SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP

12 1425 K Street, N.W.

13 Washington, D.C. 20005

14 (202) 682-0240

15 mmurdock@sonosky.com

16 - and -

17 Sean Copeland, Esquire

18 FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA LEGAL

19 AFFAIRS OFFICE

20 1720 Big Lake Road

21 Cloquet, Minnesota 55720

22 (218) 878-2607

23 seancopeland@fdlrez.com

24
25 (APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 On Behalf of Minnesota Pollution Control Agency:

3 Richard E. Schwartz, Esquire

4 John Martin, Esquire

5 Bryson C. Smith, Esquire

6 HOLLAND & HART LLP

7 25 South Willow Street, Suite 200

8 Jackson, Wyoming 83001

9 (307) 734-4507

10 jcmartin@hollandhart.com

11 bcsmith@hollandhart.com

12 - and -

13 Caryn A. Boisen, Esquire

14 Larson King, LLP

15 30 East 7th Street, Suite 2800

16 St. Paul, Minnesota 55101

17 (651) 312-6500

18 cboisen@larsonking.com

19
20
21
22
23
24
25 (APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 On Behalf of PolyMet Mining, Inc.:

3 Monte A. Mills, Esquire

4 Davida S. McGhee, Esquire

5 GREENE ESPEL P.L.L.P.

6 222 South Ninth Street, Suite 2200

7 Minneapolis, Minnesota 55402-3362

8 (612) 373-0830

9 mmills@greeneespel.com

10 dwilliams@greeneespel.com

11 - and -

12 Kathryn K. Floyd, Esquire

13 Kyle W. Robisch, Esquire

14 Venable LLP

15 600 Massachusetts Avenue, N.W.

16 Washington, D.C. 20001

17 (202) 247-5050

18 kkfloyd@venable.com

19 kwrobisch@venable.com

20
21 ALSO PRESENT: Adonis Neblett, General Counsel, Minnesota

22 Pollution Control Agency

23 Benjamin J. Grillot, Esquire, U.S.

24 Department of Justice

25 *****

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I N D E X

WITNESSES: PAGE:

KEVIN PIERARD (By Livestream Video)

Direct Examination by Ms. Maccabee.. 95

E X H I B I T S

COURT EXHIBITS:

EXHIBIT NO.: DESCRIPTION: REFERENCED:

Exhibit A (First marked as Court Exhibit 1
and then re-marked as A) Privilege
Log Entries which were not ordered
to be produced..... 20

Exhibit B (First marked as Court Exhibit 2
and then re-marked as B)
30 stipulations of fact..... 89

Exhibit C Exhibits offered but not received... 165

(Note: Court Exhibits will be marked as confidential
documents. They will not be publicly accessible but will
be part of the record in case of appeal.)

EXHIBIT NO.: DESCRIPTION: REC'D:

Exhibit 34 Email dated 1/17/18 from Mr. Clark
to NPDES (without attachment)..... 159

Exhibit 35 Draft PolyMet NPDES Permit..... 159

(EXHIBITS continued on the next page.)

1 EXHIBITS (CONTINUED):

2	Exhibit 36	Draft fact sheet for the PolyMet	
3		NPDES Permit.....	159
4	Exhibit 37	NPDES/SDS Permit Program Fact sheet..	161
5	Exhibit 107	Email chain, the top one dated	
6		11/3/16 from Ms. Foss to Mr. Schmidt,	
7		et al. (without attachment) re:	
8		PolyMet permit application.....	151
9	Exhibit 164	Letter dated 2/29/12 - EPA comments	
10		on Mesabi Nugget draft permit.....	121
11	Exhibit 174	EPA comments letter dated 9/2/11	
12		re: U.S. Steel Keetac mine.....	121
13	Exhibit 185	Permit for the Glencoe	
14		facility.....	118
15	Exhibit 217	EPA comments dated 8/12/13 on the	
16		Litchfield Wastewater permit.....	114
17	Exhibit 218	EPA comments dated 6/4/14 on the	
18		Litchfield Wastewater permit.....	114
19	Exhibit 264	Letter stamped received 2/13/17	
20		from Mr. Ireland to Ms. Flood re:	
21		Delano Permit.....	264
22	Exhibit 290	Email dated 8/5/16 from Mr. Ireland	
23		re: review of PolyMet permit	
24		application.....	150

25 (EXHIBITS continued on the next page.)

1	EXHIBITS (CONTINUED):	
2	Exhibit 306	EPA's letter dated 11/3/16 re:
3		PolyMet permit application..... 151
4	Exhibit 307	Email chain, the top one dated
5		3/16/18 from Mr. Udd to Mr. Clark,
6		et al..... 192
7	Exhibit 324	Handwritten notes of Mr. Pierard
8		re: EPA call dated 1/31/18,
9		2/13/18, and 3/5/18..... 162
10	Exhibit 325	MPCA's staff handwritten notes of
11		11/1/17 and 11/9/17..... 155
12	Exhibit 328	Memorandum of Agreement 4
13		between EPA and Minnesota..... 105
14	Exhibit 333	Email dated 3/13/18 from
15		Ms. Lotthammer to Mr. Thiede (with
16		attached amendment to NPDES
17		Memorandum of Agreement)..... 182
18	Exhibit 337	Letter from Mr. Pierard to Mr. Udd
19		with handwritten notes at the top,
20		with attached comments and
21		recommendations to ensure consistency
22		with the Clean Water Act..... 194
23	Exhibit 372	Email chain, the top one dated
24		11/20/17 from Ms. Flood to Ms. Foss... 156
25	(EXHIBITS continued on the next page.)	

1 EXHIBITS (CONTINUED):

2 Exhibit 530 Letter stamped received 12/19/14

3 from Mr. Pierard to Ms. Foss re:

4 Minntac Tails Basin..... 122

5 Exhibit 531 Letter stamped received 07/22/16

6 from Mr. Pierard to Ms. Foss..... 126

7 Exhibit 532 Letter stamped received 12/21/16

8 from Mr. Pierard to Ms. Foss re:

9 Minntac public notice draft..... 125

10 Exhibit 595 Email dated 1/19/18 from Ms. Bauer

11 to Ms. Bauer, et al., Subject:

12 Polymet Public Comment Period Closes.. 160

13 Exhibit 616 Email dated 3/12/18 from Ms. Bauer

14 to Mr. Korleski..... 181

15 Exhibit 641 Email chain, the top one dated

16 3/5/18 from Mr. Korleski to

17 Mr. Pierard..... 163

18 Exhibit 649 Email dated 3/12/18 from Mr. Pierard

19 to Mr. Korleski..... 181

20 Exhibit 685 Email chain, the top one dated

21 4/9/15 from Mr. Pierard to Ms. Foss... 142

22 Exhibit 706 Exhibit to Jeff Udd's

23 deposition on written

24 questions re: comments on proposed

25 final permits..... 112

1
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4
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19
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21
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EXHIBITS (CONTINUED):

Exhibit 707 EPA's written comments on question 6. 128

Exhibit 775 Typewritten notes of MPCA call
dated 3/12/18..... 175

Exhibit 815 Email chain, dated 11/20/17 between
Mr. Korleski and Ms. Flood..... 156

1 P R O C E E D I N G S

2 THE CLERK: All rise. Ramsey County District
3 Court is now in session, the Honorable John H. Guthmann
4 presiding.

5 THE COURT: Have a seat, please.

6 Good morning.

7 ALL: Good morning, your Honor.

8 THE COURT: All right. We have some work to
9 do. Let's start with appearances by counsel starting
10 with Relators.

11 MS. MACCABEE: Good morning, your Honor. I'm
12 Paula Maccabee, and I represent WaterLegacy.

13 MR. PENTELOVITCH: Good morning, your Honor.
14 Bill Pentelovitch on behalf of, let's see, Friends of the
15 Boundary Waters Wilderness, Minnesota Center for
16 Environmental Advocacy, and probably somebody else.

17 THE COURT: Let us know when you think of it.

18 MR. NELSON: Good morning, your Honor.
19 Evan Nelson for Center for Biological Diversity, Friends
20 of the Boundary Waters Wilderness, and Minnesota Center
21 for Environmental Advocacy, as well as Mr. Pentelovitch,
22 who is for those same parties as well.

23 THE COURT: All right.

24 MS. RAY-HODGE: Good morning, your Honor.
25 Vanessa Ray-Hodge here for the Fond du Lac Band of Lake

1 Superior Chippewa.

2 MR. MURDOCK: Good morning, your Honor.
3 Matthew Murdock for the Fond du Lac Band of Lake Superior
4 Chippewa.

5 MS. LARSON: Good morning, your Honor.
6 Elise Larson representing Center for Biological
7 Diversity, Minnesota Center for Environmental Advocacy,
8 and Friends of the Boundary Waters Wilderness.

9 THE COURT: Okay.

10 MS. BROWNELL: Good morning, your Honor.
11 Margo Brownell representing Center for Biological
12 Diversity, Friends of the Boundary Waters Wilderness, and
13 Minnesota Center for Environmental Advocacy.

14 MR. MURPHY: Good morning, your Honor.
15 Matthew Murphy for Minnesota Center for Environmental
16 Advocacy, Friends of the Boundary Waters Wilderness, and
17 Center for Biological Diversity.

18 MR. COPELAND: Good morning, your Honor. Sean
19 Copeland for the Fond du Lac Band.

20 THE COURT: Anyone else?

21 All right. Well, let's get this meeting of the
22 bar association under way.

23 What we'll do first is take care of the
24 business we need to take care of prior to calling
25 witnesses. So that will involve some of the letters I've

1 received with regard to sequestration of witnesses. I've
2 received a letter with regard to someone who has admitted
3 pro hoc who wants permission for their local counsel not
4 to be present 100 percent of the time. We also have the
5 motions in limine. And then we also have a couple of
6 lingering documents that were not covered in the order I
7 issued on Friday. And then I have one copy -- I only
8 made two copies. We're running low on paper, and you can
9 share with PolyMet. One copy of Privilege Log 301
10 redacted by the Court and one copy of Privilege Log 301
11 redacted for Relators. So I'll make that available, too.
12 So I'm prepared to go through all of that, and we'll try
13 to get through it as expeditiously as possible.

14 Starting at the top of the pile, I got a letter
15 on January 16 from Vanessa Ray-Hodge, Matthew Murdock,
16 and Sean Copeland, and it indicates that Mr. Copeland
17 would like permission to be absent from the hearing as
18 circumstances may require.

19 Who wants to address that?

20 MS. RAY-HODGE: Vanessa Ray-Hodge for the Band,
21 your Honor. I would.

22 As noted in the letter, we're required by the
23 general rules, as Matt Murdock and I are both pro hoc
24 vice in this case, to have local Minnesota counsel
25 present in all proceedings but under the discretion of

1 the Court can seek permission to have Mr. Copeland
2 absent.

3 Mr. Copeland is general counsel for the Fond du
4 Lac Band. He is in an office of only two attorneys. The
5 Reservation Business Committee has a lot of ongoing
6 matters. In particular, I think next week they're hoping
7 Sean can be present on the reservation as issues arise.
8 I believe they're having an election period that's
9 ongoing, and sometimes questions arise that they need his
10 immediate help on to address, and so he's tried to make
11 sure that his calendar is open so that he can attend
12 every day. But in particular, I think next week is some
13 areas of concern that he has. So we'll have to make
14 adjustments for him not being here if we have to have
15 Minnesota counsel present, but we ask leave of the Court
16 to allow him to be absent.

17 THE COURT: Is there going to be any objection?

18 MR. MARTIN: No objection, your Honor.

19 MR. PENTELOVITCH: No, your Honor.

20 THE COURT: Okay. Does anyone object? Let's
21 do it that way.

22 All right. Mr. Copeland, I will relieve you of
23 the obligation of being here every day as long as you
24 make every effort to be here as business circumstances
25 allow.

1 MR. COPELAND: Thank you, your Honor.

2 THE COURT: All right.

3 Let's see. I got a letter from the EPA
4 regarding Mr. Pierard's testimony. I don't think there's
5 anything that we need to discuss on the record with
6 regard to that. I did receive a letter.

7 MR. GRILLOT: Your Honor.

8 THE COURT: Yes.

9 MR. GRILLOT: I'm Ben Grilloth with the
10 Department of Justice representing EPA. And the letter
11 is a request from me to make objections during
12 Mr. Pierard's testimony. And I'm happy to elaborate on
13 the type of objections I would be interested in making,
14 but --

15 THE COURT: Did you make this letter available
16 to everybody?

17 MR. GRILLOT: I did. That letter has been sent
18 to everyone.

19 THE COURT: Okay.

20 MR. GRILLOT: And a separate letter was sent to
21 Mr. Bell, who is Mr. Pierard's attorney, on Friday, and
22 that's also been shared, so...

23 THE COURT: Okay. I don't think there's any
24 particular controversy about it yet.

25 MR. GRILLOT: Okay. Thank you, your Honor.

1 THE COURT: We'll get there when we get there.
2 But thanks for taking ownership of your letter.

3 We have a letter dated January 14 from the
4 Maslon firm on behalf of Relators, and the request is --
5 and this, if granted, would be applicable to all parties.
6 This is not a one-way request. It is to sequester
7 witnesses. In other words, witnesses are not allowed to
8 be in the courtroom during the testimony of any other
9 witness. Witnesses are not allowed to review any news
10 feeds or other accounts, live or otherwise, that occur
11 during the hearing, and they aren't allowed to speak with
12 each other or counsel as to what other witnesses said.

13 Is that the gist of what you're requesting,
14 Mr. Pentelovitch?

15 MR. PENTELOVITCH: Yes, it is, your Honor.

16 THE COURT: All right.

17 Reaction?

18 MR. MARTIN: And, your Honor, we've come to an
19 agreement. We have discussed this. We agree to
20 sequestering the witnesses. The one caveat that we've
21 talked about is that, to the extent the motion in limine
22 asks that particular witnesses not be allowed to testify,
23 that, obviously, that would be an ongoing objection. We
24 would expect to raise that when the witnesses are called
25 or when particular evidence is offered.

1 THE COURT: How does what you just said relate
2 to what Relators have requested? What difference does it
3 make if a witness is or is not allowed to testify?

4 MR. MARTIN: Ultimately, your Honor, I don't
5 think it does matter. I just wanted to make that clear.

6 THE COURT: Okay. I guess that's clear.
7 What's really clear is that you both -- everyone agrees
8 to the relief requested.

9 Someone is standing, so...

10 MR. MILLS: Good morning, your Honor.
11 Monte Mills for PolyMet.

12 We don't disagree with the request for
13 sequestration of witnesses, but I just observe that
14 neither Brad Moore nor Christie Kearney are on Relators'
15 list of witnesses scheduled to testify. And as a result,
16 we would understand that the sequestration request dated
17 January 14 does not apply to them because they are not
18 witnesses scheduled to testify at the hearing. And we
19 just wanted to confirm that our understanding is correct.

20 MR. NELSON: Your Honor, Evan Nelson for
21 Relators.

22 Pursuant to the rules, we had shared with other
23 counsel our tentative schedule for witnesses that will be
24 called. And Mr. Mills is correct that Mr. Moore and
25 Ms. Kearney are not on that list. However, we reserve

1 the right to amend that list depending on how the
2 testimony and the evidence unfolds in this case or if we
3 need to call rebuttal witnesses. So we would ask that
4 anybody who would be on the witness list would be
5 pursuant to that order of sequestration.

6 THE COURT: Well, let's put it this way.
7 Anyone who you think is going to be a witness in this
8 case better abide by this order. Err on the safe side.
9 And that will continue until a party affirmatively
10 informs you, you meaning the person who controls the
11 witness if that's the case, that they are definitely not
12 going to be calling them. And you may all want to get
13 that in writing that that's going to happen because some
14 of these witnesses may be in a position to help one party
15 or another with their case if they aren't going to be
16 called and if they are able to watch the hearing. So I
17 think it's fair for the parties to notify each other as
18 soon as they know that somebody is or isn't going to be
19 called who has previously been identified as a potential
20 witness. Fair enough?

21 MR. PENTELOVITCH: Understood.

22 MR. MARTIN: Yes, your Honor.

23 THE COURT: All right. With all the people in
24 the room, it's really important to identify yourself when
25 you speak. It's easy to forget.

1 All right. In my order with regard to
2 attorney-client privilege and work product privilege
3 issues, I promised the parties a redacted copy of
4 Exhibit [sic] 301. So there it is.

5 MR. MARTIN: Thank you, your Honor.

6 MS. MACCABEE: Thank you, your Honor.

7 THE COURT: And my plan for preserving the
8 record is to take all the documents that I did not order
9 produced or in the case of Privilege Log Number 301 -- I
10 may have misspoke and called it Exhibit 301, but it's
11 Privilege Log Number 301, which is the only one that was
12 redacted by the Court. So the ones that weren't ordered
13 produced in Privilege Log Number 301 which was redacted
14 by the Court, the unredacted version of that and the
15 withheld documents will be Court Exhibit Number 1. So if
16 there's an appeal, and one of the subjects of the appeal
17 is a challenge to the Court's ruling on those documents,
18 the Court of Appeals will then have all those documents
19 for their own viewing pleasure.

20 And let me make a note that that will be Court
21 Exhibit Number 1.

22 I also have Privilege Log Entry Number 597.

23 The 301 I just handed out, was there a Post-It
24 note on both copies? Is there a Post-It note on that?

25 MS. MACCABEE: Yes.

1 THE COURT: You're too busy reading.

2 All right. Here's 597. I did not redact this
3 one.

4 MR. MARTIN: Thank you, your Honor.

5 MS. MACCABEE: Thank you, your Honor.

6 THE COURT: As my order indicated, there's
7 three other documents that I simply didn't feel I had
8 enough information to make a ruling on. And obviously,
9 you'll be reasonably circumspect in answering my
10 questions. And if you think I've gone too far, you can
11 let me know. I know it's the Relators' position that if
12 I even have to ask these questions, there's been a
13 failure of the party who seeks protection to satisfy
14 their burden of deserving protection. I understand that,
15 so you don't need to repeat it.

16 There's three of them, so let's review those
17 now before we move on to motions in limine.

18 The first one is Privilege Log Entry Number 39.
19 The log indicates it's dated March 17, 2017. Authors,
20 Scott Kyser and Michael Schmidt of the MPCA. And the
21 description is attorney-client privileged communication
22 to receive legal advice. It appears to be some kind of
23 draft report that relates to the permit.

24 So my question is, what's privileged about it?

25 MR. SMITH: Good morning, your Honor. Bryson

1 Smith on behalf of MPCA.

2 Our understanding is that that document was
3 drafted by Mr. Schmidt, who is a former staff attorney at
4 the MPCA during initial permitting development. And the
5 reason was there was some new regulations at issue and
6 some -- in order to ensure that whatever steps were taken
7 by MPCA were compliant with those regulations.

8 Mr. Schmidt took a leading role in developing that
9 initial draft. And you're right, I do want to be
10 circumspect, so I don't want to comment elaborately on
11 the contents of that document.

12 THE COURT: What about Kyser?

13 MR. SMITH: Mr. Kyser is an engineer with MPCA,
14 and he worked hand in hand with Mr. Schmidt in developing
15 that particular document.

16 THE COURT: And was the final version of this
17 document part of the permit?

18 MR. SMITH: Yes, your Honor.

19 THE COURT: Okay. Anyone want to respond?

20 MS. MACCABEE: Your Honor, Paula Maccabee.

21 I haven't seen the document, so I can't --

22 THE COURT: I know that --

23 MS. MACCABEE: -- attest to it.

24 THE COURT: That's the dispute.

25 MS. MACCABEE: But from the very little that

1 I've heard here, it seems that Mr. Schmidt was acting in
2 his role in the ordinary course of preparing documents
3 for permitting rather than acting in the capacity of
4 providing attorney-client advice. And I'm telling you
5 that's based on the very little I've heard here today.

6 THE COURT: Okay. I'll be reserving judgment
7 on all three of these until after our morning break, but
8 I wanted to get whatever I can get first.

9 The second one and the third one are related.
10 Privilege Log Document 1117 indicates that the author is
11 Jeff Udd, U-d-d, not an attorney. Recipients are Shannon
12 Lotthammer and Mr. Schmidt, the attorney. And it's a
13 series of emails, attorney communication with agency
14 personnel, which I have a question about because none of
15 the emails are written by an attorney. In fact, the
16 first email is written by a non-attorney, and it's not --
17 and there's no CC to an attorney on it at all, and it
18 attaches a document. The first meeting, the first in the
19 chain, which is the end. I hope you understood that.

20 The last email, being the first page, also
21 refers to an attachment. Document 1118 says it's an
22 email attachment. It's authored by Jeff Udd on June 6,
23 2018, and it says, "work product created at request of
24 counsel and to receive legal advice." So since the email
25 chain refers to two attachments, I'm not sure if they're

1 the same attachment or different attachments. And if
2 they're different attachments, then your description in
3 your privilege log doesn't tell me which attachment it
4 is. If they're different attachments, then you didn't
5 mention the other attachment in your privilege log. So I
6 don't know about the status of that, either.

7 MR. SMITH: Yes, your Honor.

8 First of all, I think there might be an easier
9 resolution to this particular document. As your Honor is
10 aware, there was a time pressure in getting these
11 documents out during the document production. And in an
12 abundance of caution, we marked documents as responsive
13 if there was any doubt as to whether it may be. A point
14 of closer look, it's apparent that these documents, this
15 particular email chain, as well as that attachment,
16 refers to a permit other than the NorthMet permit at
17 issue in this case. Therefore, we have deemed that it is
18 not responsive. However, if you would like further
19 consideration, the particular document was drafted at the
20 urgency of Mr. Schmidt, again, former staff attorney at
21 MPCA. And while he may not have been cc'd on every email
22 in that chain, he was cc'd in the most substantive and
23 material portions of that chain.

24 THE COURT: So the emails don't relate to the
25 subject project, either?

1 MR. SMITH: Correct, your Honor.

2 THE COURT: It's a different NPDES issue?

3 MR. SMITH: That's correct.

4 THE COURT: Okay. That was clear from the
5 attachment. I wasn't so sure about the emails.

6 MR. SMITH: Yes, sir.

7 THE COURT: And I thought that might be the
8 case, but I'm not an expert on every aspect of these
9 permit issues.

10 All right. So non-responsive.

11 Any comment?

12 MS. MACCABEE: Your Honor, Relators are not
13 entitled to non-responsive documents. Unfortunately, in
14 the crush of time, it seems there's a little bit of
15 inefficiency in this process.

16 THE COURT: That's a fair statement. So I'll
17 take one last look at these and hold back for the break.

18 MR. SMITH: And, your Honor, if I could make
19 one more point about document 39.

20 THE COURT: Yes.

21 MR. SMITH: I'd like to note that those were
22 new regulations that weren't [sic] at issue. They
23 weren't long-standing regulations, which is why in this
24 particular case for that particular issue there was much
25 more attorney involvement from a legal perspective, as

1 you might expect from other issues in the permit
2 development process.

3 THE COURT: Okay.

4 All right. I think that takes us to the
5 motions in limine.

6 MS. LARSON: Your Honor, we have one other
7 housekeeping --

8 THE COURT: And you are? I know who you are,
9 but --

10 MS. LARSON: Elise Larson.

11 THE COURT: Okay.

12 MS. LARSON: We have one more housekeeping
13 item. We filed on Friday evening a letter to the Court
14 seeking to amend our exhibit list. On Friday, in the
15 late morning, we received a supplemental response to
16 FOIA Request Number EPA-R5-2020-1126. And in that
17 supplemental response, we received notes from -- Kevin
18 Pierard's own notes from meetings with the MPCA dated
19 March 12, April 30, and October 22, 2018. And we have
20 asked the Court to allow us to amend our exhibit list to
21 include those notes as Exhibit 836. We talked to
22 Respondents' counsel this morning, and they have
23 indicated that they do not object to that amendment to
24 our exhibit list.

25 THE COURT: Any further input?

1 All right. It's allowed.

2 MS. LARSON: Thank you, your Honor.

3 THE COURT: All right. Motions in limine. Let
4 me make a few comments about the lay of the land going
5 into this case. And a lot of what I'm about to say was
6 discussed during our first pretrial in August. The
7 transfer order did not address whether the Minnesota
8 Rules of Civil Procedure apply to this hearing process,
9 so I made a ruling in August on their applicability and
10 how that would -- and how the scope of discovery would
11 work.

12 The transfer order did not define the term
13 "procedural irregularity" as that term is used in
14 Minnesota Statute Section 14.68. So it's left to the
15 Court to determine what the meaning of that term is as it
16 relates to the statute using your arguments and any
17 applicable case law. The transfer order did not direct
18 the Court to apply the Minnesota Rules of Evidence versus
19 the applicable rules in Minnesota Statute Section 14.60,
20 Subdivision 1. So it's left to me to decide what the
21 evidentiary rules are during this hearing process.

22 The ruling on what evidentiary rules apply to
23 the hearing process obviously has a direct impact on the
24 type of testimony that may be permitted during the
25 hearing, and it has a direct impact on the documents that

1 might be admissible at the hearing or the foundational
2 predicate necessary to receive those documents.

3 Again, a caveat there is that the Court's
4 pretrial order directed the parties to make their
5 foundation objections by a certain date, and so you can
6 all rely on the fact that if you didn't get a foundation
7 objection, it's been waived. And so regardless of what
8 rules apply, the foundation for those unobjected-to
9 documents has been established.

10 So I wanted to start with that predicate
11 because there are certain things that were quite clearly
12 spelled out in the transfer order, and there are certain
13 things that the Court of Appeals obviously left to the
14 trial court.

15 So these motions in limine were briefed quite
16 well and extensively. But I also want to give the
17 parties an opportunity to cover anything that wasn't
18 covered in their brief before I make a ruling. And I'm
19 going to start with the evidentiary rules that are
20 applicable to the case. I think the Relators made the
21 first motion in that regard, moving to have the Court
22 apply the Minnesota statute relating to administrative
23 process, the APA.

24 So who is going to speak to that if you have
25 anything to add?

1 MR. NELSON: Thank you, your Honor. Evan
2 Nelson for Relators.

3 Relators feel that this case, as your Honor has
4 said, is fundamentally an Administrative Procedures Act
5 case. This is about processes that were used at an
6 agency. And in that, the Rules of Evidence that apply to
7 APA proceedings are logical to apply to this case as
8 well. Largely, the APA defers to the Rules of Evidence.
9 So the Rules of Evidence that your Honor is used to and
10 that we all are used to largely still apply. The
11 difference that the APA allows for falls back to the idea
12 that the agency itself is in possession of a large amount
13 of data and controls that information. Relators didn't
14 have the fulsome discovery that a normal proceeding would
15 allow for. In normal proceedings, fulsome discovery
16 allows us the opportunity to solve what might be some
17 hearsay problems under the Rules of Evidence. The APA
18 contemplates that that has not happened, and it hasn't
19 happened in this case. And so for that reason, we think
20 that the APA should govern everything. And we also rest
21 on the papers.

22 THE COURT: Okay.

23 MR. SMITH: Good morning again. Bryson Smith,
24 your Honor.

25 This sounds mostly like a policy argument from

1 Relators. But the statutory and regulatory language is
2 abundantly clear on this topic. I don't want to bore
3 everyone rehashing our motion response when we laid out
4 the citations to the various statutory and regulatory
5 provisions. But in essence, Rule 101 and Rule 1101 of
6 the Rules of Evidence make it clear that the Rules of
7 Evidence apply in all court proceedings in this state.
8 This is with the exception of particular enumerated
9 exceptions in Rule 1101(b), none of which cover the case
10 here. Therefore, it's clear that the Rules of Evidence
11 apply.

12 Moreover, with the Administrative Procedure
13 Act, that statutory language makes it clear that it
14 applies to contested case proceedings before an
15 administrative law judge or an agency. Again, that's not
16 where we are. We are in district court in a judicial
17 proceeding, and therefore, the Rules of Evidence must
18 apply.

19 THE COURT: Anyone from PolyMet want to
20 respond?

21 MR. MILLS: Yes, your Honor. Monte Mills on
22 behalf of PolyMet.

23 We think the text of the rules and the Supreme
24 Court precedent here are clear. Evidentiary hearings
25 held under Section 14.68 are not included in the list of

1 proceedings that are exempted from the applicability of
2 the Rules of Evidence, and so the Court's decision in the
3 *Willis* case cited in our memo controls this question.
4 This notion that this transfer somehow changed this Court
5 into an agency doesn't make any sense. This Court is not
6 an agency. This proceeding is not a contested case
7 hearing.

8 The rules of evidence govern this proceeding as
9 stated in the rules themselves.

10 THE COURT: Well, fortunately for me, the
11 legislature and the Minnesota Supreme Court made the
12 outcome of this motion rather clear.

13 It's not that difficult to trace the applicable
14 statutes and rules. And as I go through each of them
15 separately, the other thing I look for is to see if the
16 statute and the rules are in harmony with each other, and
17 they are. So just as it was crystal clear, at least to
18 me, as to whether the Minnesota Rules of Civil Procedure
19 are applicable to this case, it is equally clear to me
20 that the Minnesota Rules of Evidence apply to this case.
21 And I can first start with the authority cited by the
22 Relators. The Relators argue that Minnesota Statute
23 14.60, Subdivision 1 governing contested case hearings
24 before administrative law judges under the Administrative
25 Procedure Act should control this hearing process. That

1 statute states, and I'll quote, "In contested cases
2 agencies may admit and give probative effect to evidence
3 which possesses probative value commonly accepted by
4 reasonable prudent persons in the conduct of their
5 affairs. They shall give effect to the rules of
6 privilege recognized by law. They may exclude
7 incompetent, irrelevant, immaterial, and repetitious
8 evidence." And having practiced administrative law for
9 27 years myself, I know that the Rules of Evidence are
10 significantly different depending on the type of issue
11 that comes up at the administrative hearing.

12 The statute relied upon by Relators refers
13 specifically to administrative agencies. That term is
14 defined by statute. Minnesota Statute Section 14.02,
15 Subdivision 2 defines the term "agency" to mean, quote,
16 Any state officer, board, commission, bureau, division,
17 department, or tribunal, other than a judicial branch
18 court and the tax court, unquote. So the exclusion of
19 judicial branch courts is obviously pivotal in the
20 statute. By its own express terms, clearly and
21 unambiguously, courts -- district courts are excluded
22 from the definition of agency, therefore, as a matter of
23 law, Minnesota Statute Section 14.60, Subd. 1 doesn't
24 apply to this case. So that's inquiry number one.

25 Supporting that determination -- I'll save that

1 for last.

2 Going on to the Minnesota Rules of Evidence.
3 Obviously, the Minnesota Rules of Evidence are applicable
4 to all proceedings in district court. This is a
5 proceeding in district court. The rules, Minnesota Rule
6 1101(a) says, quote, All actions and proceedings in the
7 courts of this state, unquote, are governed by the
8 Minnesota Rules of Evidence. And that's when the express
9 exceptions stated in the rules applies. None of them do,
10 none of them come close, and no one, including Relators,
11 argue that any of them do. In the rule, it says "all."
12 All means all. This is one of them.

13 So both the Administrative Procedure Act and
14 the Minnesota Rules of Evidence are in complete alignment
15 with regard to what the rules are that govern this
16 proceeding, just as the rules are in alignment as to the
17 civil procedure applicability issue that I decided in
18 August in a certiorari case. The Rules of Evidence in
19 the determinations of the legislature are in alignment.
20 Both the executive and judicial branches -- excuse me.
21 Both the legislative and judicial branches are on point.

22 The Court of Appeals could have referred this
23 case to an administrative agency so as to open up the
24 inquiry to include a proceeding governed by the broader
25 Rules of Evidence in Minnesota Statute Section 14.60.

1 One of the options the Court of Appeals had was to refer
2 this case for the taking of additional evidence by the
3 agency under Minnesota Statute 14.67. Obviously, if that
4 had been done, the Rules of Evidence governing agencies
5 would control. Moreover, portent of future discussions
6 this morning, if the hearing process had been opened up
7 for the taking of more evidence, the inquiry would have
8 been arguably broader than what has been sent to me.

9 Instead, the Court of Appeals referred this
10 case to district court pursuant to Minnesota Statute
11 14.68. The limited purpose of that statute is to conduct
12 a hearing and to determine whether irregularities in
13 procedure not shown in the record as alleged by Relators
14 actually occurred. If the legislature preferred to make
15 an exception to the express statutory scheme regarding
16 the applicable Rules of Evidence, it could have done so
17 in Section 14.68, and it did not. It could have done
18 that in two ways: It could have sent the procedural
19 irregularities hearing back to an agency in that statute
20 instead of to district court, which it didn't do, or it
21 could have said in that statute that the hearing process,
22 even though it's in district court, would be controlled
23 by Minnesota Statute Section 14.60. It didn't do that,
24 either.

25 So my ruling is that the Rules of Evidence

1 apply to this case.

2 And with all due respect to the press, and I
3 know a couple of the exhibits that have been identified
4 by Relators are newspaper articles, even in my
5 administrative law practice, I can't imagine one of the
6 administrative law judges who I appeared in front of
7 admitting a newspaper article as substantive evidence in
8 a contested case unless there was some exception to the
9 hearsay rule.

10 So as to motions in limine seeking to preclude
11 the receipt of evidence based on hearsay, or even lack of
12 foundation to the extent those objections have been
13 asserted, it's premature for the Court to make a ruling.
14 I'm going to wait for that evidence to be offered, and
15 we'll see if there's an applicable exception and whether
16 the necessary predicate under the Minnesota Rules of
17 Evidence can be established by the proponent of that
18 exhibit. Obviously, this ruling applies to everybody,
19 not just one party. So in light of this ruling, the
20 parties should not bother attempting to offer evidence by
21 a witness or exhibit unless the standards of the
22 Minnesota Rules of Evidence can be met. And I'll leave
23 it to you to make a decision as to whether to withdraw a
24 planned offering or move forward and see what the Court
25 rules.

1 All right. We have a PolyMet motion to strike
2 procedural irregularities 1, 6, and 7. We'll take that
3 next.

4 Anyone have anything to add?

5 MS. MCGHEE: Yes, your Honor. This is
6 Davida McGhee for PolyMet.

7 PolyMet's motion is not, as Relators argue, a
8 summary judgment motion. It's a motion to limit the
9 evidence on issues that are unrelated to the question at
10 issue in this case. And that is whether MPCA departed
11 from established procedures and regulations when it
12 issued the permit on the 2017 permit application.

13 The first procedural irregularity, that MPCA
14 used irregular procedures during the environmental review
15 and throughout the process exceeds the scope of the
16 question before the Court now. It concerns the entire
17 environmental review and the entire permit process. The
18 Court argued limited discovery predating the initial
19 application because there can't be procedural
20 irregularities before July 11, 2016. This is just an
21 attempt -- this procedural irregularity is an attempt to
22 get in more information that's unrelated to the actual
23 permit that's at issue in this case.

24 The sixth procedural irregularity alleges that
25 EPA did not send a letter stating that deficiencies in

1 the initial 2016 permit application were resolved. This
2 irregularity relates to actions that occurred before the
3 application that's at issue here, the October 2017 permit
4 application, which superseded the first application.

5 And then the final irregularity, the seventh,
6 alleges that PolyMet's NPDES permit is inconsistent with
7 EPA's substantive expectations and concerns. That's an
8 issue that's entirely separate from the approval of the
9 permit, and it's a thinly-veiled complaint about the
10 substance of the permit itself. It's not a complaint
11 about any procedure that MPCA allegedly failed to follow.

12 Finally, I'll point out that Relators
13 mischaracterized their submissions to the Court of
14 Appeals. In their transfer reply brief, it does not say
15 that there was an irregular procedure in the
16 environmental review or even that EPA or MPCA did
17 anything improper during the environmental review.

18 Second, the fact that the point was in the
19 transfer reply brief and not the transfer motion itself
20 speaks volumes. It shows that the basis of the transfer
21 motion was not the environmental review, because new
22 arguments can't be raised in a reply brief.

23 With that, I'll rest on the brief.

24 THE COURT: All right.

25 Response?

1 MS. LARSON: Good morning, your Honor. Elise
2 Larson again for Relators.

3 We mostly would like to rest on our papers
4 regarding this motion. However, there are a couple of
5 points that we would like to highlight for the Court.
6 One of them is that I think that Ms. McGhee's own
7 argument shows that this is a disguised summary judgment
8 motion. They are arguing that three of our alleged
9 procedural irregularities should be dismissed as a matter
10 of law. Ms. McGhee didn't even talk about the relevancy
11 of this evidence for this actual proceeding. And so for
12 the same reasons that this Court struck MPCA's motion for
13 partial summary judgment, we think that this motion
14 should be dismissed entirely as a disguised summary
15 judgment motion, which PolyMet is also required to comply
16 with the rules regarding summary judgment. They can't
17 simply call it a motion in limine and convert it and not
18 need to comply with the rules and with this Court's
19 pretrial order.

20 Second, PolyMet, you know, makes a -- in their
21 papers, they indicate that the Court of Appeals -- that
22 the only issue that the Court of Appeals is going to
23 contemplate when it reviews your ultimate findings in
24 this case is whether an unlawful procedure occurred.

25 And Relators would like to clarify their

1 position. Nowhere in the language of Section 14.68 does
2 the word "unlawful" appear. In fact, the word is
3 irregular, and if we use dictionaries like Merriam
4 Webster or Black's, the definitions of the word irregular
5 is "varying from normal conduct, improper conduct,
6 dishonest conduct, conduct that is not correct or
7 acceptable."

8 THE COURT: Unlawful is in the list, too.

9 MS. LARSON: I mean, it's one of numerous
10 different definitions of what an irregular -- what
11 irregularity can mean.

12 THE COURT: I enjoy the fact that everyone
13 cites a different dictionary. It's all English, folks.

14 MS. LARSON: Had we filed our motion in
15 response to the partial summary judgment motion, we had a
16 few additional ones, your Honor.

17 We would also note that in Section 14.69, the
18 statute particularly cites 14.68 and says that the Court
19 of Appeals can use your findings from 14.68 to go to all
20 of the different parts of the scope of review for the
21 Court of Appeals, not merely whether there's an unlawful
22 procedure. Your findings can be used to determine if
23 this conduct is arbitrary and capricious or whether PCA's
24 decision was not based on substantial evidence. And
25 that's explicitly laid out in 14.69. And so this idea

1 that irregular -- and in fact, I mean, if we're just
2 using normal, you know, terms of statutory construction,
3 the legislature put together 14.68 and 14.69 at the same
4 time. And in one of the statutes, they chose to use the
5 word "irregular procedure," and in the other statute,
6 they chose to use the word "unlawful procedure." And so
7 from our perspective, it's very clear that those are two
8 separate and distinct types of conduct that you would
9 have at this hearing versus a hearing before the Court of
10 Appeals.

11 And then if this Court chooses to restyle
12 PolyMet's disguised summary judgment motion as a motion
13 in limine, all of the evidence that we're talking about
14 is wholly relevant to this proceeding. Evidence
15 regarding environmental review shows motive, intent,
16 opportunity, preparation, and plan under the Rules of
17 Evidence as well as a pattern of conduct from the agency
18 that they have continually been trying to avoid EPA
19 making comments into the record.

20 With regard to the July 2016 application, the
21 permit itself cites to the July 2016 application as its
22 basis for issuing the permit. And so the indication that
23 what happened in July 2016 was not relevant to the
24 permitting process is not supported by the record. And
25 further, we have direct evidence that decisions that were

1 made during that time period were -- that irregular
2 procedures occurred during that time period. And this is
3 really trying to eliminate a claim for which we have
4 strong evidence to show an irregular procedure.

5 And then lastly, and we laid this out in our
6 briefs, EPA's substantive concerns are necessary for us
7 to be able to prove our claims. Part of what our claims
8 are is that EPA's substantive concerns do not appear in
9 the administrative record, and we cannot show the absence
10 of something unless we know what those concerns actually
11 were.

12 And then, finally, we would just note for the
13 Court that, like the witness objections and the exhibit
14 objections, PolyMet is seeking on the basis of relevancy
15 to dismiss whole swaths of evidence. And if the Court
16 was so inclined to do that, we think it would be more
17 appropriate for those objections to be made as the
18 witnesses were on the stand testifying.

19 THE COURT: All right.

20 MS. MACCABEE: Your Honor, Paula Maccabee. If
21 I could just add a few more granular things about the
22 evidence.

23 Each of these three alleged procedural
24 irregularities were part of the motion that was made to
25 the Court of Appeals. And the information about MPCA

1 asking to keep things out of the record during
2 environmental review was also stated to the Court of
3 Appeals. And that is there will be testimony with
4 documents and also with Mr. Pierard's recollection about
5 that pattern and process.

6 Second, in terms of the July 11, 2016
7 application and the deficiency letter, that claim was
8 also made to the Court of Appeals. And it was made both
9 on its own, a question of whether that action of never
10 submitting -- PCA never getting a letter from EPA and
11 then going forward anyhow, was itself an unlawful
12 procedure. But it also goes to motive of the PCA in
13 insisting on --

14 THE COURT: Unlawful procedure by who?

15 MS. MACCABEE: By --

16 THE COURT: The EPA for not issuing the letter
17 and still approving the permit or the MPCA?

18 MS. MACCABEE: All by the PCA, because once the
19 PCA gets a letter of deficiency that there's something
20 wrong with the application, they're not supposed to
21 process the application until they get another letter
22 saying everything is okay.

23 THE COURT: What difference does that make
24 since the EPA approved the permit and they had veto power
25 over the permit and it was their right to send that

1 letter or not?

2 MS. MACCABEE: The memorandum of agreement does
3 not say that this only applies if the EPA makes an
4 objection to the permit. And we'll also have testimony
5 that there's a big difference between, quote-unquote,
6 approving the permit and not objecting to a permit. And
7 that goes to the third point, too, because one of the
8 biggest defenses that Respondents have made is that none
9 of this matters because EPA didn't object. And so it is
10 important to explain how the concerns of EPA were not
11 addressed by PCA in providing the final and proposed
12 final permit. And that's why alleged procedural
13 irregularity seven is really central not only to
14 Relators' case, but it's a way of explaining why
15 Respondent's argument is not valid and that this is a
16 really substantial and material procedural irregularity.

17 So I understand, your Honor, that as the
18 evidence comes in, of course you're going to scrutinize
19 it and make sure it's relevant, but there's going to be
20 specific evidence on these three points that we believe
21 is very highly probative and relevant not only about the
22 fact that procedural irregularities took place, the
23 motives for them and why they're significant.

24 THE COURT: All right. Who is going to speak
25 on behalf of the PCA?

1 MR. SCHWARTZ: Rich Schwartz for MPCA. There's
2 a very important part of the memorandum of agreement that
3 Ms. Maccabee omitted, and that is that when a permit
4 application is filed, the MOA has a waiver provision that
5 says that if EPA doesn't file an objection within 20 days
6 after the permit application has been received -- they
7 have received it, then the MPCA has the right to assume
8 that EPA does not object to the completeness of the
9 application. And PolyMet can tell you, probably with
10 more specificity than I can, that in fact they filed a
11 new application, and 20 days after they filed the new
12 application, EPA's objection was waived because they
13 didn't object to it. And that's part of the MOA. So
14 that -- and in fact, there's also another point that
15 after they received -- after PolyMet received the initial
16 objection by EPA, they sent a letter to EPA essentially
17 saying we're addressing your concerns, we're revising the
18 permit. And so what happened in between the time EPA did
19 object to the completeness and the time that PolyMet
20 filed a complete application was that those completeness
21 questions of EPA were being addressed.

22 THE COURT: Do you have a citation to a
23 paragraph in the 50 or 60-page MOA?

24 MR. SCHWARTZ: Yeah. I think -- I can get it
25 to you pretty quickly, I believe.

1 THE COURT: Why don't you supply it to me once
2 you find it so we can keep moving along.

3 MR. SCHWARTZ: Okay.

4 THE COURT: I don't have to decide that issue
5 right now, but it helps to get a jump cite.

6 MR. SCHWARTZ: Yeah. I actually can supply it
7 now.

8 THE COURT: Oh, okay.

9 MR. SCHWARTZ: It's on page 4 of the original
10 MOA from 1974, and it is Part II, Section 124.22, and the
11 paragraph is paragraph 7, which appears on page 4, and
12 the page of the exhibit is page 024.

13 THE COURT: All right. I think that's enough
14 references to get me through.

15 All right. This is an interesting issue that's
16 been raised, and it's also tied up in the issue of new
17 permit versus revised permit. The original permit
18 application was filed by PolyMet on July 11, 2016, and
19 the revised permit application was filed on October 23,
20 2017. And the argument was made in a briefing that this
21 was a brand new permit and we should ignore the previous
22 one and pretend it didn't exist. The problem with that
23 is the permit itself. The permit itself describes the
24 process as starting on July 11, 2016. The actual permit
25 treats it as a continuous process that began on that date

1 and ended in December of 2018 when the permit was
2 ultimately approved. So I really don't place much stock
3 in that argument. There was no law cited in the briefing
4 that would cause me to conclude that the initial permit
5 vanished from the Earth and is no longer legally
6 significant once a revised permit is submitted, and in
7 fact, the trial brief that the Pollution Control Agency
8 filed treated it as a continuous process as well. And
9 there is really no reference to the revised permit in the
10 trial brief that I got from the PCA, which contains a
11 summary of all of the relevant facts leading up to
12 approval of the permit.

13 So I thought that was interesting.

14 And I also thought it was interesting that
15 everyone cites one of my favorite cases, the *Hebrink*
16 case, H-e-b-r-i-n-k, and everyone cites it when it suits
17 them, and then they argue against it when it doesn't.
18 You're all really good lawyers. And one of the things
19 that the *Hebrink* case stands for is the proposition that
20 you can't turn a motion in limine into a summary judgment
21 motion without satisfying the terms of a scheduling order
22 or the applicable rules that govern summary judgment
23 motions, Rule 56, and the timing requirements contained
24 in the General Rules of Practice. And so you're both
25 accusing each other of violating that premise established

1 in the *Hebrink* case in the various motions.

2 This is interesting in the context of the
3 motion to strike procedural irregularities one, six, and
4 seven. In a typical case started by a pleading called a
5 complaint, the claims and legal theories that a party
6 bases their case on are set forth in the complaint. So
7 if someone wants to dismiss one of those claims or
8 contentions that are asserted in the complaint, you
9 either bring a Rule 12 motion for judgment on the
10 pleadings, or you, if there are facts that you want to
11 use to supplement the record beyond the pleadings and
12 claim that there are no genuine issues of material fact,
13 you would make a Rule 56 motion for summary judgment.

14 Here there is no pleading. Here there is a
15 transfer order from the Court of Appeals. The Court of
16 Appeals in its order to me defined for me what the case
17 was about and what I was supposed to do. The operative
18 order defines the issues before the Court. So the
19 purpose of this hearing is to determine whether there
20 were alleged irregularities in procedure not shown in the
21 record. And that's a quote from the case in the statute
22 within the meaning of 14.68. I've invited the parties to
23 litigate what an irregularity in procedure means. I
24 already got a little taste of that from Ms. Larson and
25 all the dictionaries that you're citing and cases that

1 you're citing in your various briefs. That is in play.
2 And I won't shirk my responsibility ultimately in my
3 order to make it clear what I think that terminology
4 means. But there are things that I can tell you that it
5 doesn't mean. And that doesn't mean I'm issuing an order
6 for summary judgment because, in reality -- I'll give you
7 an analogy. Let's say in a typical lawsuit the complaint
8 asserts a claim for negligence, and you show up at trial
9 or advise a party shortly before trial that you're going
10 to be also making a products liability claim, a strict
11 liability claim. So I get a motion in limine to preclude
12 the Plaintiff from bringing any evidence in about strict
13 liability. It's not a summary judgment motion. It's not
14 a dispositive motion. That's a motion to control the
15 evidence that comes in to the case based upon the rules
16 of the game as established in the complaint. It's, in
17 essence, a motion to amend the complaint that's outside
18 the rules and isn't permitted. So what I am about to
19 talk about isn't an order for summary judgment. It is an
20 order that defines what the rules of the game are as
21 established in the operative pleading in this case, a
22 referral order from the Minnesota Court of Appeals.

23 I am not going to be striking procedural
24 irregularities one, six, and seven, but what I am going
25 to do is make it clear to the parties what kinds of

1 evidence the Court will allow you to admit that relates
2 to those procedural irregularities and any of the claims
3 and defenses that are asserted in this case.

4 An irregularity in procedure does not mean an
5 irregularity in substance. Thus, any substantive
6 determinations by the MPCA are beyond the scope of this
7 hearing, and the parties should not offer testimony,
8 exhibits, or argument that attempts to question the
9 MPCA's substantive determinations. So in this regard, a
10 proper inquiry would be did the EPA have substantive
11 concerns about the NPDES permit that should have been in
12 the administrative record but were not due to procedural
13 irregularities.

14 That's a proper inquiry. That's what the case
15 is about. And I think that addresses what Ms. Larson
16 indicated the Relators want to do.

17 On the other hand, the extent to which the
18 EPA's concerns are substantively and scientifically valid
19 is beyond the scope of the transfer order, and I will
20 disallow any such evidence. No finding on substantive
21 questions like that were requested, and none will be
22 offered by the Court, and no such evidence will be
23 permitted. In other words, to the extent substantive
24 concerns were raised, they can be discussed but only in
25 the context of procedural irregularities. Everything

1 else is up to the Court of Appeals with regard to the
2 very broad appeal that is pending before the Court of
3 Appeals. I'm only getting a very narrow issue. The
4 Court of Appeals gets the rest.

5 I am willing to consider two exceptions to this
6 ruling. If the MPCA or PolyMet open the door and argue
7 that an EPA concern should not have been included in the
8 administrative record solely because that concern had no
9 scientific validity, then and in that event Relators may
10 submit evidence that the EPA concern at issue had
11 substantive validity. And if the door is opened by
12 PolyMet or the PCA and Relators contend that the door was
13 opened, bring that to my attention before you bring in a
14 crushing weight of evidence.

15 The other exception relates to the issue of
16 prejudice. PolyMet and the MPCA argue that there was no
17 evidence that procedural irregularities prejudiced
18 Relators. Substantive evidence may be admissible to
19 demonstrate prejudice. I'll reserve my rulings on that
20 evidence. I'll look at that at the time it's offered and
21 make a determination as to whether it's appropriate or
22 whether it's too broad to specifically relate to the
23 issue of prejudice. In other words, I don't think you
24 need to bring in a complete scientific explanation of a
25 particular substantive point with experts just to give me

1 basic information as to how a procedural irregularity
2 affected the Relators.

3 Next, my review is limited to the permit under
4 review by the Court of Appeals. The permit under review
5 was filed on July 11, 2016. So that's what we'll look
6 at, are procedural irregularities related to the permit.
7 I've already talked about that.

8 Beyond that, the Court holds that the
9 environmental review process for the NorthMet project
10 prior to July 11, 2016, is irrelevant to my task subject
11 to one large exception: The evidence may be admissible
12 to establish a record or baseline as to what procedural
13 processes are regular in the context of an NPDES permit
14 application generally. So environmental reviews, other
15 permits, and other proceedings that were completed in the
16 past prior to July 11, 2016, they have their own right of
17 judicial review. In fact, with regard to the
18 environmental impact statement, there was a right of
19 judicial review related to that, and no one took up their
20 opportunity to file judicial review. The environmental
21 impact statement is final, and it's the law of the case.

22 So Relators cannot reopen things like the
23 environmental impact statement or other permits not
24 related to the permit at issue simply because they were
25 cited in the permit or consulted at the time the current

1 permit was drafted or relied upon when the NorthMet NPDES
2 permit was under consideration. However, Relators may
3 present evidence concerning the administrative procedures
4 involved in those other processes but only to the extent
5 they are relevant to the administrative procedures
6 followed by the MPCA when it considered the NorthMet
7 NPDES permit application. But that also means you have
8 to be careful what you ask for. That can cut both ways.
9 Your evidence might demonstrate that what you claim was
10 an irregular procedure in connection with the NPDES
11 permit under consideration was actually quite normal in
12 light of the past. So be careful what you ask for. I
13 have no idea what this will bring me, but I know from
14 experience things like this can cut both ways.

15 Finally, the procedural and substantive actions
16 of the federal EPA are beyond the scope of this hearing.
17 If a party is unhappy with what the EPA did or didn't do,
18 they can sue the EPA. In fact, there is a pending suit
19 by at least one of the Relators here making such claims.
20 The interface between the EPA and the MPCA must always be
21 presented in the context of the duties and obligations of
22 the MPCA. That much is conceded in Relators' brief at
23 page 3, footnote 3. So the PI numbers 1, 6, and 7 are
24 not stricken. Instead, they must be presented in light
25 of the limitations of the controlling pleadings, which

1 I've said are the transfer order in this case.

2 I did request a statement of procedural
3 irregularities from the Relators. That was not intended
4 to expand the scope of what the Court of Appeals was
5 referring to this Court. The purpose was to make clear
6 to the parties what was going to be claimed in this
7 proceeding so they could respond accordingly and to give
8 me a chance to compare what was being claimed to what the
9 Court of Appeals told me to do. And I think I've just
10 completed that comparison and issued my ruling
11 accordingly.

12 Does anyone have any questions?

13 Okay. We will go on from there.

14 Next I would like to address the spoliation
15 motion that was brought by Relators. Who wants to -- who
16 is going to be addressing that by Relators?

17 MR. NELSON: Thank you, your Honor. I'm just
18 going to flip to a different page.

19 THE COURT: All right. We're all doing a lot
20 of that.

21 MR. NELSON: Evan Nelson on behalf of Relators.

22 And again, with our other motions, we also
23 would like to largely rest on our papers, but I wanted to
24 highlight a few things for the Court.

25 This is an evidentiary hearing that has been

1 hamstrung because MPCA did not preserve evidence despite
2 knowing since 2015 that litigation and legal challenges
3 were anticipated and likely.

4 In 2015, PCA knew it had an extraordinary
5 permitting decision coming with the PolyMet mine, so
6 extraordinary they knew there would be legal challenges,
7 so extraordinary they retained sophisticated, outside
8 counsel with extensive history in mining administrative
9 and regulatory practice. But despite that, PCA did not
10 take any extraordinary steps to preserve documents and
11 prepare for that litigation.

12 So we are --

13 THE COURT: What obligation is there to issue a
14 hold order beyond the statutes and rules that require the
15 preservation of documentation relevant to a decision?

16 MR. NELSON: Their obligation moved beyond the
17 statutory normal, ordinary process. As soon as they
18 recognized along with the DNR that, either way, the
19 decision was going to come out, litigation and
20 administrative challenges were coming, they didn't just
21 anticipate administrative challenges. They anticipated
22 all litigation and legal challenges. And that's proven
23 if you look at the contract -- the retaining contract
24 between Mr. Martin's firm, MPCA, and DNR. So it wasn't
25 simply that they needed to preserve an administrative

1 record. It was that they needed to preserve any
2 documents relating to that permitting because they knew
3 it was going to be challenged at some point either way.
4 If the permitting decision had come out the other way,
5 PolyMet would be here right now saying where is this
6 evidence that we need to prove our case that these
7 procedures were irregular.

8 THE COURT: So, of course, they knew there was
9 going to be litigation. The litigation is the Minnesota
10 Statute 14.69 appeal that's been brought to the Court of
11 Appeals, right? So what's your case for requiring them
12 to preserve anything that they aren't required to
13 preserve to make up the administrative record?

14 MR. NELSON: This case is about efforts that
15 PCA undertook to withhold documents from that
16 administrative record. That behavior, that conduct, was
17 their conduct at the time. They knew it was happening.
18 They knew that would be part of any legal challenge
19 coming down the road. 14.69 and 68 existed at the time
20 they made these decisions. The obligation to preserve
21 evidence relating to the conduct arose from the moment of
22 2015 and forward as they were doing this conduct. This
23 is more than just what is in an administrative record or
24 not as to this specific question. This is about the
25 conduct that PCA undertook trying to keep things out of

1 that record, and --

2 THE COURT: So is it your contention then that
3 some kind of temporary litigation hold should have been
4 put in place in anticipation that there might be a 14.68
5 referral some day?

6 MR. NELSON: It is Relators' contention that as
7 soon as they knew this extraordinary permitting decision
8 was coming and as soon as they made the decision to
9 control the administrative record with the conduct that
10 we will set forth with evidence in this hearing, that
11 there also rose an obligation to keep documents based
12 upon that decision making. The necessary legal expertise
13 that is in --

14 THE COURT: So what about my question?

15 MR. NELSON: Could you repeat your question,
16 your Honor?

17 THE COURT: Is there some kind of obligation
18 for there to have been a temporary hold on
19 non-administrative record documents just because there
20 might be a 14.68 challenge some day?

21 MR. NELSON: There always might be a 14.68
22 challenge. That's always part of the statute. That's
23 always part of their obligation. And the obligation
24 arises as soon as they know what might happen. And they
25 knew in 2015 what might happen. There is

1 documentation --

2 THE COURT: So if the permit is approved and no
3 one appeals, then they can throw away all those documents
4 as long as they preserve the administrative record?

5 MR. NELSON: The issue here --

6 THE COURT: Is that true?

7 MR. NELSON: There is more than just also the
8 administrative record that we need to keep in mind here.

9 THE COURT: That's what I just said, so --

10 MR. NELSON: There were --

11 THE COURT: So are you contending then that
12 there should have been some kind of temporary hold on
13 non-administrative record documents that could be thrown
14 away later if no one appeals so you could trace how the
15 administrative record was built if there's a 14.68
16 challenge?

17 MR. NELSON: There's -- the obligation arises
18 not just by 14.68, but we also need to keep in mind that
19 there were other laws at play here. There were Data
20 Practices Act requests at play. There were open meetings
21 laws at play here. And they didn't retain records from
22 those issues either related to this conduct and this
23 behavior. And so when they decided to get rid of these
24 documents while they anticipated litigation, that is
25 spoliation of evidence that they knew. In your

1 hypothetical, your Honor, if there was no challenges, no
2 legal holds or litigation or anything, then they're free
3 to get rid of documents later on. That's fine. But
4 while the conduct was happening, while they anticipated
5 litigation, not just for the agency review but also when
6 there's DPA requests being made, open meetings laws were
7 being -- at play, they had to hold on to these documents,
8 and they didn't. They just fell back on regular,
9 ordinary process despite the fact this is an
10 extraordinary case, wiping computers, deleting emails,
11 and moving on. And so here we are without fulsome
12 evidence before your Honor in this evidentiary hearing.
13 And for that reason, we are entitled to spoliation
14 sanctions.

15 Now, if you don't want to rule now and want to
16 wait until the evidence comes forward, I think we will
17 show you the intent and the extent of their spoliation.
18 But as it stands right now, we believe we are entitled to
19 these inferences. We believe we're entitled to these
20 sanctions because they knew this day was coming and
21 didn't prepare for it.

22 THE COURT: At some point, no later than your
23 final argument submission, you're going to have to
24 identify for the Court exactly what you think should have
25 been in the administrative record but which wasn't and

1 why and what should have been saved separately, not
2 necessarily as part of the administrative record,
3 conceding it didn't necessarily have to be in the
4 administrative record, but it should have been saved for
5 some other reason. Those are important distinctions, and
6 you're going to need to make them. Okay?

7 PCA.

8 MR. MARTIN: Thank you, your Honor. John
9 Martin for PCA.

10 Your Honor, if I could, I would like to build
11 on the colloquy that you just had with Mr. Nelson.

12 You asked him, well, at what point in time was
13 there something different than what is ordinary? That is
14 to say isn't it the case that we at PCA expected
15 litigation, a challenge that would have been grounded on
16 the administrative record. And in point of fact, we did
17 expect that.

18 If you look at the case law that is cited, on
19 the other side, there literally is no authority for the
20 proposition that one is required to put a litigation hold
21 in place for a case that's based on the administrative
22 record. Literally, there is no case law. There is case
23 law to the contrary. We've cited that. *Seattle Audubon*
24 and some of the other cases demonstrate that, as a
25 general proposition, if a piece of litigation is to be

1 based on the administrative record, as it is in this
2 case, under Section 4.68 [sic], it is confined to the
3 administrative record, one is not required to accumulate
4 and hold all of the evidence that would be the case if it
5 were an evidentiary hearing.

6 THE COURT: So why did you put a litigation
7 hold in place in June?

8 MR. MARTIN: We did that because, at that point
9 in time -- there were two different reasons. It happened
10 to coincide with a legislative audit request. But we
11 would have put that litigation hold in place because that
12 was the day that the referral was made from the Court of
13 Appeals.

14 THE COURT: Well, that brings up Mr. Nelson's
15 point, which is can't you always -- or shouldn't you
16 always anticipate while you're anticipating litigation
17 that there will be a 14.68 challenge? And if that's
18 true, and if a litigation hold is necessary to preserve
19 documents related to 14.68 challenges, why don't you do
20 that from the beginning?

21 MR. MARTIN: Your Honor, I think that's
22 unnecessary because it is so rare to have the 14.68
23 challenge for procedural irregularities. I think we all
24 know from having searched for precedent on procedural
25 irregularities, there is a dearth of precedent on that

1 provision. And, your Honor, if I may, I would like to
2 draw an analogy to the federal APA. Most of the case law
3 on this subject is derived from the APA in the federal
4 context. That's never done in the context of federal
5 challenges under the APA.

6 THE COURT: Is that never done because you say
7 so, or is that never done because you have something you
8 can cite me to that establishes that?

9 MR. MARTIN: Indeed, I do. If you look at the
10 attachments that we have to our brief, we have several
11 affidavits. One of the affidavits was from the former
12 Assistant Attorney General who oversaw litigation for
13 several federal agencies. And he says in a point blank,
14 direct way that, in fact, we did not put litigation holds
15 on cases that were confined to the administrative record.
16 We also have an affidavit from a person who served within
17 the Department of Justice representing EPA for a period
18 of, I believe, eight years, fourteen years. Don't hold
19 me to that. And he never put litigation holds on cases
20 that were confined to the administrative record.

21 Finally, your Honor, bringing it back to state
22 law, we've also got a declaration from Mr. Neblett. He
23 explains two things. Number one, he says, we never put a
24 litigation hold on challenges that are based on the
25 administrative record. He points out that there may be

1 hundreds of decisions that the Agency makes on a yearly
2 basis. And if we had to put a litigation hold and hold
3 all those documents, then it would strain the resources
4 of MPCA.

5 THE COURT: Even if they can --

6 MR. MARTIN: That's not done.

7 THE COURT: Even if those extra documents can
8 be discarded once the litigation is over?

9 MR. MARTIN: Your Honor, I think one of the
10 problems -- I mean, the short answer is yes, that makes
11 it less of a burden than it might otherwise be if you
12 could discard them after the litigation is over. But, of
13 course, litigation, as we all know, can last for a period
14 of years. And also, this means that if you have X
15 employees, rather than repurposing the computers that you
16 ordinarily do, you wait 30 days, and then you wipe the
17 computer and use it again. You wouldn't be able to do
18 that. You would probably have to keep all of those hard
19 drives or all of those computers, keep them around for a
20 long period of time because you have a litigation hold on
21 every case that could be the subject of an administrative
22 record. That would be an incredible burden. And also,
23 your Honor, it's so rare that you get into an evidentiary
24 hearing of the sort that we're dealing with now that it
25 just would not make sense.

1 Now, once you're in a litigation of this nature
2 where evidence is at issue, then, certainly, we
3 understand that a litigation hold may be appropriate.
4 That's what happened here. On June 25, the very day that
5 there was referral from the Court of Appeals, a
6 litigation hold went in force, and we have reason to
7 believe that everybody abided by that litigation hold.
8 And we've done what's appropriate, we think, in this
9 context.

10 THE COURT: So the bottom line is that you, by
11 having placed the litigation hold, would agree that
12 litigation related to 14.68 requires steps to preserve
13 records over and above the steps you would ordinarily
14 take to preserve an administrative record?

15 MR. MARTIN: Your Honor, if what you're talking
16 about when you refer to 14.68 is a referral for
17 procedural irregularities --

18 THE COURT: Right.

19 MR. MARTIN: -- then I do agree.

20 THE COURT: Okay. So the real issue is what
21 triggers the need to place the hold.

22 MR. MARTIN: Correct.

23 THE COURT: That's where really the dispute
24 lies.

25 MR. MARTIN: I think, your Honor, that's well

1 characterized.

2 THE COURT: Okay. It doesn't help me decide
3 the issue, but at least we know where the dispute lies.

4 Anything else you would like to add?

5 MR. MARTIN: Your Honor, the only other thing
6 that I would offer is that we do have a definition of
7 what is required under Minnesota Rule 7000.750. It's
8 cited in our briefs. And it only requires written
9 documents. And essentially, what it requires is
10 comments, responses to comments, and then documents,
11 written documents on which the agency relied. That is
12 what's required for the administrative record, and that's
13 something that PCA did in fact preserve.

14 Thank you, your Honor.

15 THE COURT: All right. And --

16 MS. MCGHEE: Davida McGhee for PolyMet,
17 your Honor.

18 THE COURT: Yes.

19 MS. MCGHEE: Just a quick point.

20 Relators have admitted that they don't have
21 conclusive evidence that MPCA acted outside of the normal
22 document retention policy. And in light of that and the
23 fact that any spoliation sanctions or negative inferences
24 drawn against MPCA would also affect PolyMet, we just
25 want to make sure the Court is aware that it should not

1 exercise its discretion to draw negative inferences,
2 especially before any testimony happens.

3 Second, two of Relators' procedural
4 irregularities, number two and three, relate to MPCA
5 improperly destroying written records. And so any
6 finding that the Court can make now on spoliation, it
7 seems like that would also be making a premature finding
8 on those alleged procedural irregularities.

9 THE COURT: All right. Thank you.

10 MR. PENTELOVITCH: May I?

11 THE COURT: You may.

12 MR. PENTELOVITCH: With respect to --

13 THE COURT: If you identify yourself.

14 MR. PENTELOVITCH: I will. Bill Pentelovitch
15 for Relators.

16 With respect to counsel's comment that the
17 Relators have conceded that there was nothing that took
18 place outside of the records policy of the PCA, that's
19 incorrect. If you read our trial brief, it's quite clear
20 we're saying that that did happen. But that's not --

21 THE COURT: Page 13, footnote 11, "Relators do
22 not have conclusive evidence that MPCA directed the
23 deletion of certain evidence outside a normal retention
24 policy." I think that's what counsel just referred to.

25 MR. PENTELOVITCH: We may have conclusive

1 evidence, but we have substantial evidence. That's
2 different. But be that as it may --

3 THE COURT: Okay.

4 MR. PENTELOVITCH: -- the main point --

5 THE COURT: We'll find out.

6 MR. PENTELOVITCH: -- is going to when the
7 trigger would have occurred for putting on a litigation
8 hold. I just want to read you a couple items from a
9 September 24 --

10 THE COURT: Something popped in my mind, so
11 forgive me for interrupting.

12 When was the motion made to the Court of
13 Appeals to request a 14.68 referral? Do you have a date
14 for that?

15 MR. PENTELOVITCH: We'll get it for you.

16 MS. RAY-HODGE: May 17, 2019, your Honor.

17 THE COURT: Okay.

18 MS. RAY-HODGE: Or around then, on or around.

19 MS. LARSON: May.

20 THE COURT: Okay. On May 17, 2019.

21 MS. RAY-HODGE: Yeah. Vanessa Ray-Hodge.
22 2019.

23 THE COURT: Okay.

24 All right. Sorry, Mr. Pentelovitch.

25 MR. PENTELOVITCH: No problem. I'm going to

1 read to you from what's been listed as an exhibit for
2 this trial, Exhibit 382. It's a September 4, 2015 letter
3 from the commissioners of the PCA and the DNR to Attorney
4 General Swanson. I just want to read you a couple
5 sentences from it:

6 "The NorthMet project presents the DNR and MPCA
7 with complex and unprecedented environmental and human
8 health questions. DNR and MPCA have devoted their most
9 experienced, capable staff to the project and have
10 contracted with recognized outside experts for many
11 aspects of the necessary work.

12 "As part of that team, DNR and MPCA both have
13 an immediate need for highly experienced environmental
14 lawyers to provide sound, timely legal advice, as well as
15 effective representation in the likely event of a legal
16 challenge to the DNR and PCA's decision making."

17 Then it goes on.

18 But on the next page, they say, "It is
19 imperative that our legal team is engaged with us on a
20 realtime basis to ensure that the many decisions in front
21 of us are defensible and consistent with an overall
22 litigation strategy. The complexity of the litigation
23 surrounding NorthMet is comparable to *Reserve Mining*."

24 And that's the point I want to make, your
25 Honor. *Reserve Mining* was not a rule -- a Section 14.68

1 case. *Reserve Mining* played out in federal court and
2 in the Eighth Circuit. It was litigation-litigation,
3 not this kind of litigation. And as early as
4 nineteen -- or 2015, rather, Commissioner Landwehr
5 and Commissioner Stine were concerned that this was a
6 *Reserve Mining* type of situation.

7 They go on to say, "The MPCA's full-time legal
8 team for *Reserve Mining* was led by three environmental
9 litigators with extensive environmental litigation
10 experience with an outside firm and two Assistant
11 Attorney Generals."

12 So I don't think the MPCA can say with a
13 straight face that they only expected some sort of
14 administrative challenge. They were concerned about a
15 *Reserve Mining* situation even before filing the permit in
16 July 2016.

17 MR. MARTIN: Excuse me, your Honor.

18 THE COURT: Go ahead.

19 MR. MARTIN: Your Honor, John Martin on behalf
20 of MPCA.

21 Yes, it's true that we were charged with
22 developing an overall litigation strategy. That overall
23 litigation strategy had to recognize that proceedings
24 were, to quote 14.68, confined to the administrative
25 record. The overall litigation strategy didn't

1 specifically say that we were anticipating an evidentiary
2 hearing. That is not something that ordinarily is
3 the case. In fact, for the most part, what happens
4 is, if someone says using modern statutes that postdate
5 *Reserve Mining* back in the 1970s, modern statutes
6 specifically say the sorts of things that 14.68 says.
7 And more importantly, what happens if someone disagrees
8 with the contents of the administrative record. And,
9 your Honor, this is true both on a state basis and a
10 federal basis. One goes to the Court and says, I need to
11 add these documents to the administrative record. Or in
12 some cases, in an extreme case, occasionally in a federal
13 context you get a motion where somebody says, oh, we do
14 want an evidentiary hearing. They are rarely granted,
15 but, you know, I have to concede that perhaps one in a
16 thousand cases something like that could happen, but it's
17 very, very rare. In the ordinary course, what's done is
18 what Relators have done in other contexts in proceedings
19 about the PolyMet mine. They have asked that particular
20 documents be added to the administrative record. That's
21 the nature of the litigation that one would expect in
22 this context. The fact that in the late 1970s
23 *Reserve Mining* was a case that entailed many hearings
24 before Judge Lord; it eventually made its way up to the
25 Eighth Circuit, as we all know, and gave rise to some

1 precedent that, quite frankly, is the sort of precedent
2 in a different context that we cite to. But what wasn't
3 the case back then is we didn't have these statutes,
4 these administrative proceedings, and we didn't have case
5 law that made it absolutely and adamantly clear that
6 proceedings of this nature are, quote, confined to the
7 administrative record.

8 Thank you, your Honor.

9 THE COURT: All right.

10 MS. LARSON: Your Honor, I would just like to
11 bring up that --

12 THE COURT: Your name?

13 MS. LARSON: Elise Larson.

14 I would just like to bring up that this is not
15 the only way to challenge a permit. We also have the
16 Minnesota Environmental Rights Act here in Minnesota.
17 Minn. Stat. 116.10 would also allow us to challenge a
18 permit. And so the idea that this is the sole or only
19 way that we could challenge a permit here in the state is
20 not true. And so if there is any anticipation of
21 litigation, there are other statutes that, you know,
22 would require a full district court hearing. And
23 litigation holds to maintain records for those actions
24 are appropriate.

25 THE COURT: That may be true, but that isn't

1 what we have. What we have here is an appeal where the
2 administrative record is the record.

3 MS. LARSON: Correct.

4 THE COURT: And the issue is what, in the
5 context of a 14.68 referral, was or should have been
6 saved in order to prove or disprove procedural
7 irregularities occurring in a permitting process. So
8 your position on spoliation, all things being equal with
9 the record, might be different if this was an MERA
10 action.

11 MS. LARSON: I agree, your Honor. But I think
12 the point that I'm trying to make is that Mr. Martin is
13 saying that in 2015 that they assumed that the only way
14 that this permit could be challenged is through an
15 administrative proceeding. And I think the point that I
16 am trying to make is that in 2015 there are different
17 avenues by which you can challenge a permit. And so to
18 say we knew we only needed to maintain an administrative
19 record because the only way that this would be challenged
20 is through an administrative proceeding is not -- it
21 isn't consistent with what the stakes were in 2015 when
22 they should have been placing this litigation hold.

23 THE COURT: Okay.

24 MS. RAY-HODGE: Vanessa Ray-Hodge, your Honor,
25 for the Band.

1 I just want to make one point, and maybe it
2 sounds a little simple. But I think part of
3 our spoliation --

4 THE COURT: Simple is good.

5 MS. RAY-HODGE: Part of our spoliation gets at
6 the fact that MPCA was aware in 2015 when this case --
7 when this permit was proceeding that there was going to
8 be litigation challenges. And as we will show throughout
9 the evidentiary hearing, at certain times we will show
10 that records were destroyed, and, at that point in time,
11 nobody knew what the administrative record was going to
12 be. And so there was no reason for destroying or
13 discarding documents that then have -- should have been
14 included in the administrative record or retained for
15 other purposes, because, generally, in my administrative
16 law practice, an agency doesn't put together a record and
17 know what's going to go into the record until the end of
18 a decision. So there is an ongoing obligation and duty
19 of employees to keep and retain things that could become
20 part of the administrative record at the end of the day.
21 And so it's our position that things were destroyed along
22 the way that should have been retained.

23 Thank you, your Honor.

24 THE COURT: All right. We'll take our morning
25 recess. We'll be back in 15 minutes.

1 (A recess was taken at 10:34 a.m. until 10:55 a.m.)

2 THE COURT: Please remain seated. Welcome
3 back.

4 We will continue to close the loop.

5 Privilege Log Documents 1117 and 1118 are
6 non-responsive, so they will be excluded from my order
7 requiring certain disclosures.

8 And as to Privilege Log Entry Number 39, in
9 light of the discussion on the record, the Court
10 concludes that, from its review in camera of the
11 document, that it is replete with legal analysis, which
12 constitutes advice to the client. That's why attorney
13 draftsmanship was requested. The final product is
14 public, and the authors are known and potentially
15 accessible to Relators. So the motion to compel
16 Privilege Log Entry Number 39 is denied.

17 We'll move on to the spoliation motion that we
18 were almost done with. I have a couple questions for
19 Relators. And I think I know the answer, but just to
20 make sure I'm tracking, you're not -- there's no issue as
21 to whether there was a destruction of certain records or
22 the wiping of certain computers. That's all conceded.
23 The issue -- one of the issues is whether the PCA
24 violated a statute, rule, or case that interprets a
25 statute or rule that would have required them to retain

1 certain records. Are you relying on that principle, or
2 are you relying on more, more of a common law argument?

3 MS. MACCABEE: Your Honor, Paula Maccabee.

4 We are actually relying on both.

5 THE COURT: Okay.

6 MS. MACCABEE: Because we have alleged
7 procedural irregularities under both Chapter 13 and
8 Chapter 15, and then we're relying on the fact that it
9 was necessary to preserve records, because in this
10 record, we can see in the administrative record there
11 were documents included, because WaterLegacy got them
12 under the Data Practices Act and then made that known.
13 And so there's -- at least an inference can be drawn that
14 if the documents had been retained, that would have been
15 an opportunity to put them in the administrative record.

16 We're also requesting a spoliation motion on
17 the basis of policy. And I know we've already talked
18 about how there could be a 14.68 action. There could be
19 Minnesota Environmental Rights Act action. And I think
20 the only other thing that hasn't been discussed is the
21 potential that there would have been a contested case
22 hearing. And that was contemplated all the way through
23 the late summer of 2018. And for example, missing
24 documents about what was communicated by MPCA to EPA or
25 missing documents in this record could have been

1 necessary in a contested case hearing, so even if there's
2 no -- even if there's a thought that they can't
3 anticipate in every instance that there would be a 14.68
4 challenge, they --

5 THE COURT: Doesn't a contested case hearing
6 still only involve what the law requires you to preserve
7 as the administrative record?

8 MS. MACCABEE: The contested case hearing would
9 have been a question of what is the basis for the permit
10 and things like what was the justification for the
11 permit. And that could have gotten into any kind of
12 evidence. I mean, there's a -- in my experience -- and
13 granted, I haven't done an MPCA case, but in my
14 experience, there's all kinds of other things that can be
15 admitted into an administrative hearing record, again,
16 often based on one of the parties doing a Data Practices
17 Act request.

18 THE COURT: Okay.

19 MS. MACCABEE: And finally, I know that
20 Mr. Martin talked about the Environmental Protection
21 Agency not having a litigation hold, but you'll see in
22 this record, most of the documents we have are from the
23 Environmental Protection Agency, and they consider it
24 their policy to preserve not only the emails of the calls
25 and meetings but all their handwritten notes. And the

1 reason we have handwritten notes from the EPA, even from
2 Mr. Pierard, who is no longer an employee, is because
3 there is that policy very broadly applied in the
4 Environmental Protection Agency to keep those notes.

5 THE COURT: Is there a written policy that
6 you're aware of or some kind of rule that they used that
7 dictates those preservation efforts --

8 MS. MACCABEE: Your Honor --

9 THE COURT: -- or is it simply that their
10 document preservation rules are different than ours?

11 MS. MACCABEE: Your Honor, we'll talk about
12 that a little bit more with Mr. Pierard, that the EPA's
13 NPDES Permit Writers' Manual, which is one of our
14 exhibits, does talk about sort of the minimum
15 requirements of the administrative record and also talks
16 about preserving notes and records of official meetings,
17 and the -- so the question about did EPA have to do a
18 litigation hold to preserve those kinds of notes and
19 emails, the answer is no, because they have done that
20 without having to do an administrative hold across the
21 board.

22 THE COURT: You would agree that the EPA did
23 not do a litigation hold on this permit.

24 MS. MACCABEE: Your Honor, I would agree that
25 that's the case, and I would also agree that the EPA did

1 not destroy documents and did not wipe computers and did
2 not take things and make it so it was not possible to
3 find the record. As a matter of fact, in this case, the
4 MPCA got some of their documents from WaterLegacy's
5 Freedom of Information Act request to the EPA and some of
6 them from office of regional counsel in Chicago from the
7 EPA, and they say on the top of them "From the desk of
8 Kurt Thiede."

9 THE COURT: So, in fact, it would appear, from
10 looking at certain identified hearing exhibits, the PCA
11 has identified as its own exhibits materials that they
12 got from you?

13 MS. MACCABEE: Your Honor, and we have
14 identified -- Relators have identified exhibits which
15 clearly indicate that they were obtained from PCA and
16 that PCA had gotten them from EPA. So there's --
17 there's --

18 THE COURT: Because they didn't save their
19 copy.

20 MS. MACCABEE: Yes, sir.

21 THE COURT: Okay.

22 MS. RAY-HODGE: Vanessa Ray-Hodge for the Band.

23 I just wanted to clarify so we have an accurate
24 record, there is actually a litigation hold on this
25 permit at the EPA. But that's --

1 THE COURT: Okay. When is the date from?

2 MS. RAY-HODGE: It's starting from July --

3 THE COURT: Your lawsuit?

4 MS. RAY-HODGE: July 15. For all records
5 starting July 15 moving forward.

6 THE COURT: And was that based on the lawsuit
7 filed by your client?

8 MS. RAY-HODGE: Correct.

9 THE COURT: All right. The other question I
10 have -- oh, you wanted to respond first?

11 MR. MARTIN: No. I'm happy to respond to your
12 question, your Honor.

13 THE COURT: Well, it wasn't for you.

14 MR. MARTIN: Oh, I'm sorry. You looked my
15 direction.

16 THE COURT: So there.

17 MR. MARTIN: Your Honor, I would if I may.

18 THE COURT: Go ahead.

19 MR. MARTIN: I would just like to respond
20 briefly.

21 Let's respond first to the EPA policy that
22 Ms. Maccabee mentioned. That's akin to the state's
23 counterpart, which is the Public Records Act. We are
24 required to preserve certain documents, and we don't
25 dispute that. We never violated the Public Records Act.

1 Those documents have been retained. The truth of the
2 matter is that the only thing that we're required to do
3 is preserve that which constitutes the administrative
4 record. And at the risk of repetition, we have a
5 regulation that expressly addresses that. One, it only
6 applies to written documents; two, it applies to comments
7 and responses to comments; and three, it applies to
8 written documents on which the agency relied.

9 THE COURT: But if you look at it as limited
10 only to that, you've already conceded then you aren't
11 going to preserve documents that are relevant only to
12 whether there were procedural irregularities under 14.68,
13 which is, arguably at least, something you can anticipate
14 in 2015 as part of this broad litigation strategy.

15 MR. MARTIN: All right. Let's talk then about
16 the language of the agreement, I believe, between DNR and
17 PCA. It was the language that counsel read. What it
18 talks about is, quote, an overall strategy. Read in
19 context, what that means is an overall strategy as
20 between DNR and PCA. That's what they were talking about
21 when they said overall strategy. That's what this meant.
22 And I think that the standard that we need to employ in
23 this context is what did we reasonably anticipate. I
24 would submit that it would be unreasonable if in every
25 instance where we have a proceeding that's based on an

1 administrative record, we anticipate that there will be a
2 challenge based on procedural irregularities.

3 Respectfully, your Honor, we had no reason to believe
4 that there would be a referral from the Court of Appeals.
5 And again, I think everyone would agree that it's very
6 rare that an action like this is referred from the Court
7 of Appeals. Instead, what happens is that it's an action
8 based on the administrative record.

9 I'm sorry. I don't mean to be repetitious.

10 THE COURT: Okay. That's fine.

11 Question for Relators, one of the arguments
12 that PolyMet made was no one is claiming that PolyMet did
13 anything wrong or destroyed any records. You're seeking
14 spoliation sanctions, which affect PolyMet, and there's
15 case citation in PolyMet's brief. I think it's the
16 *Patton* case, *Patton v. Newmar*, that talks about the least
17 restrictive sanction should be used under the
18 circumstances. What, if anything, if the Court chooses
19 the sanction, should be done with PolyMet's point and the
20 concept that the least restrictive sanction should be
21 considered in light of the consequences of the sanction.

22 MR. NELSON: Your Honor, Evan Nelson for
23 Relators.

24 If this Court were to fashion spoliation
25 sanctions or adverse inferences, making them the least

1 restrictive as possible is part of the Court's discretion
2 and part of the Court's prerogative. The fact that --

3 THE COURT: That's why I'm asking you for help.

4 MR. NELSON: The fact that PolyMet is the
5 permittee of this process is a simple fact of the case
6 but does not necessarily protect PolyMet or shield
7 PolyMet from that process. PolyMet is correct, their
8 conduct is not at issue in this case. The conduct at
9 issue in this case is PCA and whether they spoliated
10 evidence. If that evidence would have been harmful or
11 helpful to PolyMet is irrespective of the fact that they
12 destroyed the evidence in the first place. The adverse
13 inferences that we're asking for, the spoliation
14 sanctions that we are asking for are related to PCA's
15 obligation to preserve evidence. They did not do so.
16 And the inferences would be that the documents that they
17 destroyed would have been harmful to them and beneficial
18 to Relators, or else they wouldn't have deleted them.
19 They would have kept them like they kept the other
20 documents in the case. Whether that's harmful or
21 beneficial to PolyMet is a secondary consideration.

22 THE COURT: Okay.

23 PolyMet want to respond?

24 MS. MCGHEE: Sure. Your Honor, Relators bear
25 the burden of proof here, and I think that the Court

1 should wait until all the evidence has been presented and
2 then evaluate whether or not there are any gaps in the
3 evidence or whether or not Relators have just simply
4 failed to meet their burden.

5 THE COURT: And if I assume everything that
6 Relators are arguing and that there was spoliation and
7 there should be sanctions, how would I tailor those
8 sanctions in light of the concern PolyMet raised? What
9 would I do? I mean, the request is for an adverse
10 inference. Is there some other sanction other than an
11 adverse inference, or is there a lesser inference that is
12 less harmful that you would advocate for? You did a
13 great job of laying out the principle but not how it
14 might be applied.

15 MS. MCGHEE: I think the way it would be
16 applied is to evaluate if there are any gaps and then to
17 determine, you know, the relevance of those gaps, the
18 implications of those gaps. It might involve a negative
19 inference, but we should see first whether or not there
20 are any gaps to begin with.

21 THE COURT: Okay.

22 Last word, do you have anything to say on the
23 issue?

24 MR. MARTIN: No, your Honor, except to point
25 out that, in our view, there are no gaps. It's simply a

1 misstatement of the record to suggest that there are
2 salient documents that should have been in the
3 administrative record that were discarded, destroyed,
4 spoiled, to use the word that was used by opposing
5 counsel. We don't believe that there are relevant
6 documents. We don't believe that they have been able to
7 demonstrate so far or that they will be able to
8 demonstrate in the course of this hearing. Documents --

9 THE COURT: Well, don't forget that their
10 argument --

11 MR. MARTIN: -- like that --

12 THE COURT: Their argument includes a claim
13 that there's documents that you should have saved even if
14 they shouldn't have been in the administrative record.

15 MR. MARTIN: Your Honor, with respect, I don't
16 believe there's any evidence that there are documents
17 that fall within that category. And, you know, they say,
18 we can't prove what you have and what you don't have. I
19 have to say, I can't prove a negative. All I can do is
20 rely on the testimony from the people from PCA who will
21 say we didn't destroy documents. If there was something
22 that was relevant to this proceeding, we did not destroy
23 it. And certainly, if there's something that should have
24 been in the administrative record under the regulatory
25 boundaries that we've talked about, they saved that

1 document.

2 THE COURT: Okay. Thank you.

3 Having heard everything and read everything,
4 we're back to *Hebrink*. The effect of an adverse
5 inference at this stage of the litigation is a virtual
6 summary judgment motion in favor of the Relators. And
7 the way adverse inferences in spoliation motions work in
8 typical litigation that's tried to juries is that the
9 Court will make legal rulings and instruct the jury as to
10 what the inferences are when viewing the evidence. In
11 this case, I'm both. I determine what the law is, and I
12 determine what the facts are, and I instruct myself, if
13 I'm instructing anyone, on what the legal -- or excuse
14 me -- what the evidentiary inferences should be. I
15 haven't even heard the evidence yet. And one of the
16 reasons the spoliation issues are decided in advance is
17 because when you're trying a case to the jury, you want
18 to know what you're going to be arguing to the jury, and
19 usually, there aren't any lingering legal issues that
20 will impact the Court's conclusion. Here, I've got a
21 little bit of both. I have some legal issues, the
22 resolution of which may depend upon what I hear during
23 the hearing process. And I haven't heard the evidence
24 yet to know the nature and extent of any spoliation and
25 any prejudice as a result of that spoliation to even be

1 able to determine what, if any, sanctions should be
2 imposed. And there may be a broad array of sanctions
3 that could be considered depending on what happened. So
4 I need to know what happened before I can make a
5 determination. So I'm not saying that I'm denying the
6 motion. I'm not saying I'm granting the motion. I am
7 deferring the motion.

8 And at the conclusion of the hearing, when all
9 the evidence is in, I'm going to be asking the parties to
10 draft their written final arguments in the form of a
11 memorandum of law. I'll be asking the parties to submit
12 proposed findings of fact, conclusions of law, and an
13 order. I'll be asking the parties to write that
14 document, the latter document, in a neutral, judge-like
15 fashion without advocacy because you'll have plenty of
16 opportunity to be advocates in the memoranda that you
17 prepare. And if you want me to use your work, you have
18 to write it fairly. And that's one of the reasons for
19 requesting proposed findings, and so you give me a --
20 what you view as a neutral view of what the findings
21 should be. And when you do that, you can include your
22 ultimate advocacy as it relates to whether there actually
23 was spoliation using the record as it was admitted by the
24 Court.

25 So the motion is deferred.

1 Similarly, there were a number of motions to
2 exclude witnesses and exhibits and categories of
3 exhibits. I don't think I need any arguments on those
4 motions. I've already described for the parties,
5 particularly Relators. You've identified a couple of
6 experts, and your briefs imply that you want to open up a
7 class on environmental law and do a little seminar on
8 what the by-products of sulfide mining are and why you
9 need to have controls for those by-products and permits.
10 Again, as I indicated earlier this morning, for the most
11 part, that is irrelevant. What is relevant are
12 procedural irregularities. And I don't think there is
13 too much need to educate the Court on the need to have a
14 permit that protects water resources from the by-products
15 of sulfide mining. I've seen plenty of that in what
16 you've already given me and in the permit. And I think,
17 given the multi-year process that it took to get a
18 permit, I don't see anyone disagreeing that there should
19 be significant controls in place to protect the
20 environment from sulfide mining. That debate will
21 continue at some point at the Court of Appeals as it
22 relates to the primary appeal of the permit itself, which
23 is what I'm not hearing in this case. So I'm not going
24 to exclude any witnesses or exhibits in advance. But
25 I've warned the parties that I may sustain objections to

1 certain testimony as irrelevant or beyond the scope of
2 the hearing, depending on what it is, and I assume that,
3 based on what the Court has indicated already here on the
4 record today, you will tailor the exhibits and testimony
5 that you plan to offer accordingly.

6 As it relates to post hoc documents explaining
7 the position of the PCA, some of that material may be the
8 subject of a hearsay objection, depending on what it is
9 or how it's used. I think that whatever post hoc
10 explanation for the PCA's actions I'm going to hear, I'm
11 going to be getting a lot of that in argument and briefs,
12 and I'm going to be getting plenty of post hoc
13 explanations from the Relators, as I already have in the
14 spoliation motion, which is what that is. And I don't
15 mean that in a pejorative sense. I mean everything is
16 post hoc because it happened after the permit was
17 approved. So I'm not going to exclude anything in
18 advance. I've just advised the parties what I view my
19 litmus test to be in light of the very limited
20 jurisdiction that the Court of Appeals gave me when it
21 referred the case to the district court for this hearing.
22 And we'll see what happens as it comes in.

23 I'm going to consult my pile of motions and see
24 if there's anything I've missed.

25 I don't see anything. Does anyone else have

1 something that I missed?

2 All right.

3 MR. NELSON: Your Honor, nothing that you
4 missed. Evan Nelson for Relators.

5 Yesterday, Relators and Minnesota Pollution
6 Control Agency were able to come to agreement as to
7 certain stipulations.

8 THE COURT: Okay.

9 MR. NELSON: I don't know if you would like me
10 to submit those in writing to you or read them into the
11 record or how you would like to proceed with that.

12 THE COURT: Why don't you read them into the
13 record slowly, and then when you're done, I'll tell you
14 whether I want it in writing.

15 MR. NELSON: Okay.

16 Stipulation number one: "PolyMet Mining,
17 Incorporated ("PolyMet") submitted an application for a
18 National Pollutant Discharge Elimination System/State
19 Disposal System ("NPDES") permit or PolyMet's NorthMet
20 Mine Project ("PolyMet Project") on July 11, 2016."

21 THE COURT: Hold on. I can just feel something
22 voluminous coming on. How many individual stipulations
23 are there?

24 MR. NELSON: Thirty.

25 THE COURT: Thirty? How many pages are there?

1 MR. NELSON: We've agreed to five -- four pages
2 of stipulations.

3 THE COURT: All right.

4 MR. NELSON: And there are 30 individual
5 stipulations. And it's all signed, your Honor. It's all
6 signed.

7 THE COURT: Then what I would like you to do is
8 mark it as an exhibit, a court exhibit, and I will
9 receive it as a court exhibit unless you want it to be a
10 substantive exhibit. I don't think it matters for our
11 purposes, but basically, the stipulation -- you propose
12 that the stipulation simply be incorporated into my
13 findings of fact, right?

14 MR. NELSON: That's the purpose of them, yes.

15 THE COURT: Okay. So why don't you get a copy
16 of that, and we'll mark it as Court Exhibit Number 2,
17 and --

18 MR. NELSON: I'm sorry, your Honor. Is this
19 Court Exhibit 3 or 2?

20 THE COURT: Two. Number 1 were all the
21 documents that I reviewed, and they will be filed as
22 confidential documents, so they will not be publicly
23 accessible, but they will be part of the record in case
24 there's an appeal. So this would be Court Exhibit
25 Number 2, your thirty stipulations of fact.

1 MR. NELSON: Thank you, your Honor.

2 THE COURT: And as a signed stipulation, I take
3 it that no one is going to require anyone to prove
4 anything that's in that stipulation, correct?

5 MR. MARTIN: Correct, your Honor.

6 THE COURT: Okay.

7 MR. PENTELOVITCH: Can I raise one other
8 housekeeping thing, your Honor?

9 THE COURT: Yes.

10 MR. PENTELOVITCH: Counsel have discussed about
11 how the most efficient way to do exhibits during the
12 trial would be, and we've hit on an idea that some of us
13 have used in a lot of trials, and we just want to present
14 it to you and see if it's okay. The idea, there's lots
15 of exhibits that have been marked, obviously, I think
16 obviously, not all of them will be admitted into
17 evidence. The idea would be that as somebody uses an
18 exhibit, we're not going to go through the formalities of
19 identifying, laying a foundation, and offering it unless
20 somebody says I'm going to have an objection to that
21 exhibit, at which point the person using the exhibit
22 would have to do that. Otherwise, if an exhibit is used
23 and there's no objection raised at the outset, it will be
24 deemed admitted, and you can either, as you choose,
25 either admit it at the time, or, at the conclusion of the

1 trial, we could go through and make a list of everything
2 that's been used, and then you could admit them all at
3 once before the record is closed. So I think all three
4 counsel -- all three parties have agreed that that would
5 be more efficient than just trying to go through the
6 whole normal process --

7 THE COURT: Another option is to stipulate to
8 party exhibits, and they could be admitted up front by
9 number. That would probably require a meeting that
10 hasn't happened.

11 MR. PENTELOVITCH: Yeah. I think that's right.

12 THE COURT: All right.

13 Reaction?

14 MR. MARTIN: Yes, your Honor. We have -- we
15 agree that that is a procedure that we think would be
16 efficient. And the only caveat that I mistakenly
17 mentioned before was -- is that if we do have a motion in
18 limine that's challenging a particular document,
19 presumably, the discussion of the exhibit would occur
20 when it's being used. But otherwise, if it is the
21 subject of a motion in limine, it would not automatically
22 be admitted.

23 And my colleague from PolyMet, I think, has
24 some notions about this as well.

25 THE COURT: Okay.

1 MR. MILLS: Monte Mills from PolyMet.

2 I agree with what Mr. Martin said about the
3 exhibits. Thank you.

4 THE COURT: All right. I do tend to like to
5 keep track of exhibits as we go and note whether they
6 have been received as we go. I've tried enough cases to
7 know that there is sometimes a debate at some point as to
8 whether something actually was received into evidence, so
9 I try to take pretty good notes on that topic.

10 So it may be worth your while to review your
11 exhibit lists together, either over lunch or over night,
12 and just stand up and take care of a big block of
13 exhibits, and then you can use them in an unfettered
14 fashion, because that is even less complicated than your
15 relatively uncomplicated procedure. So absent that, I
16 will assume that if someone grabs an exhibit, announces
17 what number it is, you're going to -- or whoever is going
18 to state whether there is going to be an objection or
19 not, and if there isn't, it's received. So that's how
20 we'll proceed. I'm fine with that. But my guess is that
21 there is probably a large number of exhibits that won't
22 be objected to at all.

23 As to foundation objections, those are going to
24 be confined to the foundation objections that were in one
25 or two of the motions in limine. And those documents

1 were identified by number. So there won't be any
2 foundation objections other than that. All the other
3 objections are available to everyone. So that's fine.

4 MR. PENTELOVITCH: We'll see if we can come up
5 with something more comprehensive.

6 THE COURT: Yeah. It would be nice. I mean,
7 you've been attaching the same stuff to your motion
8 papers, so I know that's a small percentage of -- since
9 there were like twelve or fifteen bankers boxes in
10 chambers, and I had trouble getting in my door, so I know
11 that's more than what you've copied and put in your
12 briefs.

13 Any other housekeeping measures before we can
14 start taking testimony?

15 Ms. Maccabee.

16 MS. MACCABEE: Yes, your Honor. For the
17 exhibits that you have required be produced, which are
18 Privilege Log Exhibits 301 and 597, do you want us simply
19 to mark them sequentially as Exhibits 837 and 836? I
20 mean, 838 -- I'm sorry. 837 and 838?

21 THE COURT: I think you should continue -- if
22 you're going to use them as hearing exhibits, then you
23 should continue your sequential marking.

24 MS. MACCABEE: All right. Thank you, your
25 Honor.

1 THE COURT: Anything else by way of
2 housekeeping?

3 All right. Relators have the burden of proof.
4 Who are you calling first?

5 MS. MACCABEE: Your Honor, Relators would call
6 Mr. Kevin Pierard as our first witness.

7 THE COURT: All right.

8 MS. MACCABEE: We are waiting for technology,
9 your Honor.

10 THE COURT: While we're waiting, why don't you
11 state on the record why we are all staring at a screen.

12 MS. MACCABEE: Your Honor, for the record, we
13 are staring at a screen because Mr. Pierard is, by
14 agreement of the parties and the Court, going to be
15 testifying from his home in Santa Fe by video livestream,
16 and so we are waiting to get his wonderful face on the
17 camera so we can see him testify.

18 THE COURT: All right.

19 (Reporter's Note: A connection was established
20 with Mr. Pierard on the ITV via a Zoom meeting
21 room.)

22 THE COURT: I am so happy.

23 MS. MACCABEE: We are seeing two screens. Is
24 it possible to have the witness on a --

25 THE COURT: We're up to three. Well, one of

1 them is our courtroom.

2 MS. MACCABEE: It would be better if we had the
3 witness on one screen and didn't have to see ourselves as
4 well. We're seeing a shot of some books.

5 THE COURT: It looks like there is a camera on
6 a table or the floor looking at the ceiling.

7 UNIDENTIFIED SPEAKER: Let me go ahead and call
8 the office and get that taken care of.

9 THE COURT: Judges sometimes get mad when this
10 occurs, but I know you were here last week, and I know it
11 worked last week. Lawyers always tell me it worked in
12 rehearsal, and I don't always believe that.

13 Mr. Pierard, can you hear us?

14 THE WITNESS: Yes, I can hear you.

15 THE COURT: All right. I'm going to swear you
16 in. Why don't you raise your right hand.

17 Do you swear to tell the truth, the whole
18 truth, and nothing but the truth, so help you God?

19 THE WITNESS: I do.

20 THE COURT: All right.

21 Counsel, you may proceed.

22 KEVIN PIERARD,

23 duly sworn, was examined and testified as follows:

24 DIRECT EXAMINATION

25 BY MS. MACCABEE:

1 Q Mr. Pierard, can you state your name and
2 address for the record and spell any names involved?

3 A Sure. My name is Kevin Pierard, P-i-e-r-a-r-d.
4 I live at 42 Vista Redonda in Santa Fe, New Mexico.

5 Q And, Mr. Pierard, I'm going to ask you -- the
6 reception is medium; it's not great -- to speak up as
7 much as you can and make sure that you answer any
8 questions with the words -- with actual words like yes or
9 no rather than shaking your head or nodding your head.

10 Do you understand, Mr. Pierard?

11 A I understand.

12 Q And where are you currently employed,
13 Mr. Pierard?

14 A At the New Mexico Environment Department.

15 Q And what position do you hold there?

16 A I'm chief of the Hazardous Waste Bureau.

17 Q Prior to working for the New Mexico Department
18 of Environment, where did you work?

19 A Prior to the current position, I worked as
20 the -- I worked as the municipal team manager for the
21 NPDES program. That's the National Pollutant Discharge
22 Elimination System program at New Mexico Environment
23 Department. Prior to that, I was employed at EPA in
24 Chicago.

25 Q And when you say EPA, just for the record, is

1 that the United States Environmental Protection Agency?

2 A Yes, it is.

3 Q Mr. Pierard, for how many years did you work
4 for the EPA?

5 A I worked for EPA for 36 years.

6 Q And during that time, how much of your career
7 were you actually working in the EPA Region 5?

8 A That was my entire career in Region 5. I
9 worked -- most recently, I -- before I retired, I worked
10 for just a few months as the chief of the Groundwater and
11 Drinking Water Branch in Chicago. Prior to that,
12 previous nine years I was chief of the NPDES Programs
13 Branch also in Chicago. Prior to that, I was in the
14 Hazardous Waste Program in the RCRA program --

15 (Reporter clarification.)

16 THE COURT: That's all blurring together. You
17 said you were "chief of the NPDES Programs Branch also in
18 Chicago. Prior to that, I was in the Hazardous Waste
19 Program," and then we lost you.

20 THE WITNESS: Okay. The Hazardous Waste
21 Program was the Resource Conservation and Recovery Act
22 Program that was doing hazardous waste enforcement and
23 corrective action. And that was basically my career at
24 EPA.

25 BY MS. MACCABEE:

1 Q Mr. Pierard, I'm going to ask you, I'm not sure
2 if you can tell where the camera is, but it might be
3 easier for the court reporter to get your testimony if
4 you look up.

5 Did you also serve as the branch chief for
6 Watersheds and Wetlands for some years?

7 A Yes, for about 15 years. So Watersheds and
8 Wetlands Branch managed the Nonpoint Source Program,
9 the Wetlands Program, and the Total Maximum Daily Load
10 Program. Those are all programs under the Clean Water
11 Act.

12 Q So for how many years then have you been
13 working at EPA Region 5 in programs that involve
14 implementation of the Clean Water Act and its
15 regulations?

16 A About 25 years, 25, 24 years.

17 Q Now, can you explain a little bit what your
18 role was as the NPDES program chief for EPA Region 5?

19 A I managed the program. They called it the
20 NPDES Programs Branch. It was more commonly referred to
21 as the Permits Branch. We managed the oversight of state
22 programs primarily, the NPDES program for each of our
23 states. Our states were authorized to administer that
24 program, and our function was to oversee the program.

25 Q And you said the states were authorized to

1 issue permits. Which states were covered by Region 5?

2 A Illinois, Indiana, Ohio, Minnesota, Wisconsin,
3 and Michigan.

4 Q And for how many years did you serve as the
5 NPDES program chief?

6 A I think it was nine years.

7 Q Can you briefly explain what an NPDES permit
8 is?

9 A That's a permit that authorizes the discharge
10 of pollutants to waters of the United States from a point
11 source.

12 Q And what are waters -- how do waters of the
13 United States apply to the PolyMet NPDES permit?

14 A Well, the NPDES permit would authorize the
15 discharge of pollutants to waters of the United States.
16 I believe it was the Partridge and Embarrass Rivers in
17 Minnesota.

18 Q And would it also -- would an NPDES permit then
19 be also authorizing discharge to surface waters that are
20 wetlands or further downstream waters?

21 A Yes. The waters of the United States includes
22 associated wetlands. So wetlands adjacent to the
23 Partridge or the Embarrass River would be included as
24 waters of the United States.

25 Q Were there any downstream waters to which the

1 Partridge and Embarrass Rivers were tributaries that were
2 implicated by the PolyMet permit?

3 A I believe the downstream receiving water was
4 the St. Louis River.

5 Q Now, can NPDES permits be issued either by EPA
6 or by states?

7 A They can be issued by either EPA or the state,
8 but where there's an authorized program, the state has
9 the lead responsibility for issuance of those permits.

10 Q And when there's an authorized program, can you
11 explain what the responsibility of the EPA is in terms of
12 oversight of the state-issued permits?

13 A Well, we would oversee that process. And what
14 EPA typically does, there's two basic forms of oversight
15 that we would conduct. One is called a permit quality
16 review. That's a retrospective. You're looking back at
17 state-issued permits and assessing the quality of those
18 permits.

19 The other way to oversee a state program in
20 terms of the permits issues is what we refer to as
21 realtime reviews. Those would be permits that the state
22 has proposed to move forward on to draft and issue a new
23 permit. EPA would play a role in that. We would review,
24 draft, and propose permits prior to their issuance.

25 Q Did your work as NPDES program chief in

1 reviewing permits in realtime involve interpreting
2 memorandums of agreement between EPA and Region 5 states
3 pertaining to the NPDES program?

4 A Yes, it did.

5 Q Can you explain briefly what memorandums of
6 agreement between EPA and states are and why they are
7 adopted?

8 A That basically is a more specific agreement
9 between EPA and the authorized states on conducting the
10 NPDES program.

11 Q And does the state that has a memorandum of
12 agreement need to comply with that memorandum of
13 agreement?

14 A Yes.

15 Q Are there other sources of authority in a NPDES
16 permit that a state issuing a NPDES permit has to comply
17 with in addition to the memorandum of agreement?

18 A Yes. The Clean Water Act and its implementing
19 regulations.

20 Q So just to make sure I understand, was part of
21 your role to make sure that states followed the
22 requirements for issuing an NPDES permit under both the
23 memorandum of agreement and the Clean Water Act
24 regulations?

25 A Yes.

1 Q As you know, this case has a lot to do with EPA
2 comments. In your experience as NPDES program chief,
3 what role did EPA comments play in oversight to make sure
4 that states followed their requirements for issuing NPDES
5 permits?

6 A Right. Our normal practice was we would
7 identify every year permits in each state that EPA was
8 interested in reviewing. These were permits that had
9 expired or were about to expire and would be reissued.
10 We would identify those to the state. They would provide
11 us with feedback on that list, and we would finalize the
12 list for the coming year. And states at that point would
13 submit to us usually early versions of permits. Those
14 would come in to my staff -- the staff -- at the staff
15 level, they would work together to review the permit
16 conditions and resolve any issues that might have been
17 identified. If there was a situation where they were
18 unable to resolve those issues, that would be elevated to
19 the section chief who reported to me and ultimately to me
20 if they weren't able to resolve an issue.

21 Q So just from what you just explained, if a
22 comment went out from EPA under your signature during the
23 years that you were an NPDES program chief, how would
24 that comment have been formulated? Was that your writing
25 or come up from the staff? Can you explain?

1 A Yeah. The staff would usually draft the
2 comment, and that would go through my section chief's
3 review and ultimately my review, and I would sign it.
4 Many times, it wasn't only one individual staff person
5 that was on it. We had some experts in the office that
6 would contribute many times to the review. So there was
7 a lead staff person, and typically, there would be one,
8 maybe two other people that would contribute that were
9 considered experts. In many situations, there was also
10 an attorney assigned to the permit that would provide
11 legal advice and legal input on the letter as well.

12 Q And what would your role be then in the stages
13 of completing and preparing comments on an NPDES permit?

14 A I would edit the correspondence. And any
15 questions I had -- many times, if there was
16 controversial, complex, the staff would brief me, and I
17 would make edits to the letter before it went out.

18 Q Okay. Mr. Pierard, let's turn now to
19 Exhibit 328. I don't know if someone there is handing
20 you that exhibit.

21 A I think so. I hope so.

22 MR. NELSON: May I approach, your Honor?

23 MS. MACCABEE: Your Honor, would you like us --
24 would you like the other people who are there with
25 Mr. Pierard to identify themselves for the record, sir?

1 THE COURT: That would be fine.

2 Who are you with, Mr. Pierard?

3 MR. BELL: My name is Kevin Bell. I'm
4 Mr. Pierard's personal attorney in this matter.

5 THE COURT: All right.

6 MR. BELL: That's spelled K-e-v-i-n, B-e-l-l.

7 THE COURT: And there's someone else in the
8 room. We can't see you, but you've been acknowledged.

9 MR. MARTIN: We'll see if we can move the
10 camera.

11 MR. MIELKE: Hi, your Honor. My name is
12 David Mielke. I'm with the Sodosky Chambers firm
13 representing the Fond du Lac Tribe.

14 THE COURT: And?

15 MS. BASSLER: Good morning, everyone. My name
16 is Briana Bassler, and I'm with Holland & Hart
17 representing the MPCA.

18 MS. FISHER: My name is Caitlinrose Fisher here
19 with Greene Espel representing PolyMet.

20 THE COURT: All right. I should have done that
21 at the beginning, but I -- why don't we go back to the
22 other view just because it's easier for us to see. Well,
23 Mr. Bell, unless you're testifying, we don't want to --
24 there, that's better.

25 MS. MACCABEE: If we can make it closer up on

1 the witness, that would be even better if it's possible
2 to do that because I think then we can see your face.
3 And then also, if you're watching the camera,
4 Mr. Pierard, it would be really helpful to us.

5 THE WITNESS: Okay.

6 THE COURT: This is the best it has been.

7 I have not heard any objections, so Exhibit 328
8 is received.

9 BY MS. MACCABEE:

10 Q Mr. Pierard, if you could turn in Exhibit 328
11 to Section 124.46 on page 9 of the memorandum of
12 agreement. And that's the first numbered paragraph.

13 THE COURT: And it may be helpful, because of
14 so many people in the room, for these exhibits to get a
15 quick identifier. You've already called it a memorandum
16 of agreement, but it would be sufficient just to say it's
17 the memorandum of agreement with the State of Minnesota.

18 MS. MACCABEE: Would you prefer that I do that
19 or the witness do that, your Honor?

20 THE COURT: If there's agreement that it's
21 admitted, I would prefer you to do it because you'll be
22 faster.

23 MS. MACCABEE: Yes, your Honor.

24 BY MS. MACCABEE:

25 Q So Exhibit 328, for the record, is the

1 memorandum of agreement between EPA and Minnesota
2 Pollution Control Agency, which I will refer to as
3 "MPCA," as amended.

4 Have you found page 9 of the memorandum of
5 agreement?

6 A Yes.

7 Q The first paragraph?

8 A Yes.

9 Q And what does the memorandum of agreement with
10 the MPCA say that the director must do at the time of
11 public notice of a permit?

12 A It says that at the time of public notice of
13 the permit, the director should submit to EPA a copy of
14 that permit along with fact sheets and the public notice.

15 Q And does that go directly to the NPDES permit
16 branch?

17 A Yes.

18 Q Now, the memorandum uses the word "director."
19 Who do you understand is meant by that title?

20 A The director would be the commissioner of PCA.
21 That's my understanding.

22 Q And based on your experience, can you explain
23 what the time of public notice means?

24 A That would be the date that -- by the date that
25 the permit is actually public noticed in the newspaper or

1 online, public noticed or public comments.

2 Q Would it be accurate to call the version of the
3 permit sent to the NPDES branch at the time of public
4 notice a public notice draft permit or a draft permit?

5 A Yes.

6 Q I'm going to ask you, and I'm going to try to
7 do the same, to use the term "draft permit" at or before
8 the public notice stage so that we can be clear what's a
9 draft and what's a final. Is that okay?

10 A That's fine.

11 Q Do you have an understanding, based on your
12 experience, of why this memorandum of agreement requires
13 MPCA to send EPA's NPDES branch copies of the draft NPDES
14 permit and fact sheet at the time of the public notice?

15 A Well, it's to facilitate oversight. It allows
16 us to be aware of when the permit is put on public notice
17 and, if we choose to, to allow us an opportunity to
18 review that permit.

19 Q And when EPA reviews a permit, what does that
20 review entail?

21 A Technical and legal review. So my staff would
22 undertake the technical review. As I said earlier, many
23 times it would involve an attorney that would do the
24 legal review as well.

25 Q And could that review result in EPA making a

1 comment at the time of the draft permit during the public
2 notice period?

3 A Yes.

4 Q Does the memorandum of agreement between EPA
5 and MPCA say anywhere that EPA cannot provide comments on
6 a draft NPDES permit during the public notice period?

7 A No, it does not.

8 Q Now, I'm going to take us to one more
9 section of the memorandum of agreement, which is
10 Section 124.46, which is at the bottom of 10 and the
11 top of 11, paragraph 5. And does that -- if you want
12 to take a minute to read that.

13 A (Perusing document.) Okay.

14 Q Does that paragraph of the memorandum of
15 agreement on paragraph 5 at the bottom of page 10 and the
16 top of page 11 deal with what the regional administrator
17 may do when he or she receives a letter from MPCA
18 requesting final approval to issue or deny the proposed
19 permit?

20 A Right. The paragraph gives the regional
21 administrator a chance to review the permit and
22 potentially object to the permit if the terms of that
23 permit aren't consistent with the Clean Water Act.

24 Q And would it be accurate to call this stage of
25 the NPDES permit process the proposed final permit?

1 A Yes.

2 Q I'm going to try and remember to use the word
3 "final" every time I refer to this stage, and I would ask
4 you to do the same. Now -- is that okay?

5 A I will, yeah.

6 Q The memorandum of agreement uses the phrase
7 "Regional Administrator." To whom does this refer?

8 A The Region 5 regional administrator.

9 Q What is your understanding of what happens if
10 EPA objects to a proposed final permit?

11 A If EPA objects, it starts the process. First
12 within the 15 days, we would send out what's referred to
13 as a general objection; and within 75 days after that, we
14 would be required to send out a specific objection that
15 would outline exactly what the flaws are in the permit.
16 At that point, the state would have an opportunity to
17 address those objections. And once that was done -- once
18 EPA and the state agreed on the modifications that were
19 made in the permit to correct the objections, the state
20 would be allowed to issue the permit. If the state is
21 not able to overcome an EPA objection, exclusive
22 authority to issue that permit transfers to U.S. EPA.

23 Q Now, in the nine years that you served as NPDES
24 program chief for EPA Region 5, about how many times did
25 EPA Region 5 object to a proposed final permit?

1 A Probably about five times. I don't have an
2 exact number, but that's probably in the ballpark.

3 Q So would you characterize that as a rare step
4 to take?

5 A Yes.

6 Q And in those --

7 A Mostly --

8 Q Oh, I'm sorry. Go ahead.

9 A Well, the whole process that we have, the early
10 review of permits and the working directly staff to
11 staff, management to management between EPA and the
12 state, the whole process is set up to avoid a potential
13 objection, try to work things out at the lowest level
14 possible and as early as possible so that the process can
15 move expeditiously to plan the permit. And the permit
16 would be acceptable in terms of its compliance with the
17 Clean Water Act and its regulations.

18 Q Now --

19 A So I would say the process worked. If we only
20 objected about five times, that process works.

21 Q And in those nine years, about how many times
22 did EPA Region 5 send comments on a public notice draft
23 of an NPDES permit?

24 THE COURT: Are we talking about written
25 comments or oral comments?

1 BY MS. MACCABEE:

2 Q I should clarify. In the nine years that you
3 were NPDES program chief, about how many times did EPA
4 Region 5 send written comments on a draft NPDES permit?

5 A Well, during that nine years, we probably would
6 have reviewed about 700 permits in draft. Most of those
7 would have received comments from us. Usually, our
8 comments would be in the form of a letter. Sometimes
9 they would be in emails.

10 Q And would a ballpark figure be about 500 or
11 more or less? What do you think?

12 A I would say more than 500. We generally would
13 comment on every permit that we received. Now, sometimes
14 the comments were very minimal. You know, they weren't
15 always major issues that could reach an objection. We
16 would provide comments to the state, even something as
17 small as typographical errors or just certain clarity of
18 a permit, things that we noticed that would certainly not
19 lead to an objection. So I would say in most of those
20 700 instances, the state would receive written comments
21 from EPA in either a letter or email.

22 Q Thank you. In your experience -- and were most
23 of these comments -- I'm sorry. I'll start over.

24 In your experience, did EPA Region 5 provide
25 written comments even earlier than a public notice draft

1 permit?

2 A Most of the time, we did provide comments
3 earlier than the public notice version of the permit.
4 The rationale there was, even before it goes to public
5 notice, the states were interested in knowing from EPA if
6 there were any big ticket issues that they should address
7 in advance of public noticing the permit. If there
8 were -- in a public notice permit, if there were major
9 issues that EPA had, potentially even objectionable
10 issues, once the state rectified those, it might cause
11 the state to re-public notice the permit, and it just
12 slows down the process. So that's why the states and EPA
13 were very interested in getting those things out of the
14 way even before the public notice.

15 Q And would that mean then just that EPA would
16 comment on a pre-public notice draft of the permit?

17 A Yes.

18 Q Now, let's turn now to Exhibit 706. And that
19 is the exhibit for -- to Jeff Udd's deposition on written
20 questions and talks about comments on proposed final
21 permits.

22 MS. MACCABEE: Oh, your Honor. I'm sorry.

23 I do not hear any objections to that.

24 THE COURT: Exhibit 706 is received.

25 BY MS. MACCABEE:

1 Q And, Mr. Pierard, you have that exhibit before
2 you also that's marked as Exhibit 706?

3 A Yes, I do.

4 Q And that document states at the top that it
5 identifies every NPDES permit where EPA commented upon or
6 objected to a final proposed permit and then has the
7 names of the facilities involved. Can you tell us,
8 looking at that document, which of the permits on this
9 list are you personally familiar with?

10 A The only -- there's a reference to Mesabi
11 Nugget here that the date the permit was issued was
12 July 29, 2005. I have not have an awareness of that one.
13 Other than that, all of these were during my tenure as
14 NPDES branch chief. So I was familiar with -- to some
15 degree with all of them.

16 Q Let's turn now to look at Exhibits 217 and 218,
17 which are the comments that EPA provided on the
18 Litchfield permit in both August 2013, and I think the
19 other one is on June of 2014.

20 And I have not heard any objections to those
21 documents, either. Is that correct?

22 MR. NELSON: Yes, that's correct.

23 THE COURT: I only have one of them that was
24 handed to me.

25 MR. NELSON: On its way.

1 MS. MACCABEE: Mr. Nelson is going to get us
2 218.

3 Your Honor, should we wait until he gets it to
4 you before we start?

5 THE COURT: That would be nice.

6 MS. MACCABEE: So you have both of them.

7 THE COURT: Exhibits 217 and 218 are received.

8 BY MS. MACCABEE:

9 Q Mr. Pierard, let's first look at Exhibit 217,
10 which are the August 12, 2013 EPA comments on the
11 Litchfield Wastewater permit. Looking at the first page
12 and first paragraph of Exhibit 217, at what stage of the
13 permit is EPA commenting?

14 A This was a letter. It was a review of the
15 pre-public notice draft version of the permit.
16 Apparently, there were two versions submitted, one on
17 April 3, 2013, and another on July 31, 2013. So the
18 review would encompass the reviews of both of those
19 permits.

20 Q Thank you. And now let's turn to Exhibit 218.

21 A One thing, would you mind if I clarify --

22 Q Go ahead.

23 A -- on that? So I think it might be important.
24 So Minnesota submitted a pre-public notice draft permit
25 on April 3, 2013, and then there was a revised permit,

1 also a pre-public notice draft submitted on July 31,
2 2013. When you see things like that, it means there was
3 a lot of communication between EPA and the state, and as
4 a result of that communication, the state had submitted a
5 revised version. So that's probably relevant here
6 because this letter is a very generic letter for us.
7 It's saying we basically have no comment. Unless there's
8 a really substantial change, EPA is okay with this
9 version of the permit.

10 Q Great. And if you're looking, if you would
11 turn to Exhibit 218, which is EPA comments in June of
12 2014, at what stage of the permit is EPA commenting in
13 this document? And you might want to look at both the
14 first and second paragraphs.

15 A Right. This was on a public notice draft
16 permit. This was EPA's review of that.

17 Q So if we're just looking at the Litchfield
18 case, did EPA comment --

19 (Reporter clarification.)

20 BY MS. MACCABEE:

21 Q Litchfield. I'm sorry. I'm just talking too
22 fast.

23 If we're just talking about the Litchfield
24 case, did EPA comment on both the pre-public notice
25 drafts and the public notice draft of the permit?

1 A Yes, we did.

2 Q Now let's turn to Exhibit 185.

3 THE COURT: Let's turn to the lunch break.

4 MS. MACCABEE: Yes, sir.

5 THE COURT: It's noon. We'll reconvene at
6 1:30, and you can talk to Alex about securing of the
7 courtroom. All right?

8 (Lunch recess was taken at 12:04 p.m. until 1:40 p.m.)

9 * * * * *

10 A F T E R N O O N S E S S I O N

11 * * * * *

12 THE CLERK: All rise.

13 THE COURT: Have a seat please. We had to get
14 an order out.

15 First order of business, we had identified
16 court exhibits this morning. And because the exhibits of
17 the parties are numbered, I thought it would be easier
18 and less confusing if the Court exhibits were lettered.
19 So what was Court Exhibit 1 is now Court Exhibit A. What
20 was Court Exhibit 2 is now Court Exhibit B. That's all
21 we have so far, so that's easy. And we'll proceed from
22 there if there are any other court exhibits.

23 Do we have the witness ready to proceed?

24 MS. MACCABEE: Your Honor, I believe they have
25 already called in, so if you're ready to go, I think we

1 can dial them up.

2 THE COURT: Let's dial them up.

3 (Reporter's Note: A connection was established
4 with Mr. Pierard through the Zoom Meeting
5 room.)

6 MS. MACCABEE: All right. And we're still
7 going to ask, like we had right before lunch, that we
8 have only one screen and that it be closed in on the
9 witness so that we can see him here in St. Paul.

10 MR. BELL: They're in the process of closing
11 the other screen, and we're waiting on one member to get
12 back just in from the bathroom real quick.

13 THE COURT: Someone must really like that
14 picture.

15 MS. MACCABEE: Excellent. Are we okay to start
16 there in terms of having all the parties represented in
17 the room?

18 MR. BELL: PCA is not back yet, but she should
19 be here any minute.

20 MS. MACCABEE: Mr. Martin, would you like us to
21 wait?

22 MR. MARTIN: Why don't you give us just a
23 moment. If it takes longer than that, then we'll
24 proceed.

25 (Off the record.)

1 MS. MACCABEE: So are you set for me to go
2 ahead then, and all the parties are in the room?

3 THE WITNESS: Yes.

4 MS. MACCABEE: Excellent.

5 BY MS. MACCABEE:

6 Q Mr. Pierard, before we broke for lunch, we were
7 talking about the permits that were listed in Exhibit
8 706, and we went through before lunch the Litchfield
9 permit. And now I would like you to take a look at
10 Exhibit 185, which is the permit for the Glencoe
11 facility.

12 THE COURT: Any objection? None? Exhibit
13 received.

14 BY MS. MACCABEE:

15 Q Do you recognize this document?

16 A Yes. This is our comments on a pre-public
17 notice NPDES permit for Glencoe -- the Glencoe Wastewater
18 Treatment Plant in Minnesota.

19 Q And if you look at that first paragraph, do you
20 see the sentence, "On March 2, 2016, EPA received a
21 revised permit that responded to EPA comments on the
22 prior draft permits"?

23 A Yes.

24 Q Does that mean that EPA --

25 A Yes, multiple -- it was multiple drafts that we

1 had received.

2 Q And did that -- in that case, did EPA comment
3 on more than one version of a pre-public notice draft
4 permit?

5 A Yes.

6 Q Do you know whether those comments were in
7 writing, whether by letter or by email?

8 A The comments -- I would expect that they were
9 in written form. I don't know explicitly if that's true
10 here or not.

11 Q What's the basis for your expectation that they
12 would have been in written form?

13 A That was our standard practice that we would do
14 that, that we would put our comments in writing.

15 Q Now, one more wastewater permit. If we could
16 turn to page [sic] 264, which is the Delano comments on
17 February 2017.

18 MR. SCHWARTZ: Is that Exhibit 264?

19 THE COURT: Exhibit 264?

20 MS. MACCABEE: Yes, Exhibit 264, correct.

21 THE COURT: That's correct.

22 Exhibit 264. Hearing no objection, it's
23 received.

24 MR. PENTELOVITCH: Was the preceding exhibit
25 received, your Honor?

1 THE COURT: Yes.

2 MS. MACCABEE: And if the record isn't clear, I
3 meant Exhibit 264 if I said something else.

4 BY MS. MACCABEE:

5 Q And if you look at the second paragraph, do you
6 see the sentence, "The permit we received and commented
7 on was a Pre-public Notice permit"? Do you see --

8 A Yes.

9 Q And is that -- and then if you look at the
10 sentence below, "As is our practice, we provide comments
11 prior to the issuance of the proposed permit, which
12 allows for us to work with the State in addressing our
13 concerns so there would be no need to issue an objection
14 letter." So at this --

15 A Yes.

16 Q So even though it's identified on Exhibit 706
17 as a comment on a final proposed permit, was EPA actually
18 commenting on a pre-public notice permit?

19 A EPA was commenting on a pre-public notice
20 permit.

21 Q And is that early or late in the process?

22 A That's early in the process.

23 Q Now, I believe you testified before that
24 Exhibit -- that on Exhibit 706, you were also familiar
25 with the Mesabi Nugget and Keetac Mining permits. So

1 let's look at --

2 A Yes.

3 Q Let's look at Exhibit 164. And that is a
4 letter dated February 29, 2012, which are EPA comments on
5 the Mesabi, M-e-s-a-b-i, Nugget, N-u-g-g-e-t, draft
6 permit. And that was signed by you. Is that correct?

7 A Yes.

8 THE COURT: Hearing no objection, Exhibit 164
9 is received.

10 BY MS. MACCABEE:

11 Q And just looking at the first paragraph of
12 EPA's comment letter in Exhibit 164, is this an EPA
13 comment on a draft NPDES permit or a final proposed
14 permit?

15 A It's in a draft NPDES permit. It apparently
16 was the draft version that was public noticed.

17 Q Now let's look at another mining document, and
18 that is Exhibit 174. And if you can pull that one out.
19 That is an EPA comment dated September 2, 2011, which is
20 also signed by Mr. Pierard.

21 Mr. Pierard, if you look at the first
22 paragraph --

23 THE COURT: Hearing no objection, the exhibit
24 is received.

25 MS. MACCABEE: Oh, I'm sorry.

1 BY MS. MACCABEE:

2 Q Mr. Pierard, if you look at the first paragraph
3 of EPA's comment letter, is this comment letter in
4 Exhibit 174 EPA's comment on a final permit or on a draft
5 permit for the U.S. Steel Keetac mine area and tailings
6 area?

7 A It's a comment on a draft permit.

8 Q Let's see. We have just a couple more mining
9 permits to go.

10 Let's look at Exhibit 530. And, Mr. Pierard,
11 so far, are all those permits that we're talking about
12 permits where EPA Region 5 was commenting on an
13 MPCA-issued NPDES permit?

14 A Yes. Permits that were drafted by PCA.

15 Q Thank you. Now, Exhibit 530 --

16 THE COURT: Hearing no objection, it's
17 received.

18 BY MS. MACCABEE:

19 Q And that is a December 19, 2014 letter
20 regarding the Minntac Tailings Basin. And this is
21 another letter that was signed by you. And now, just --

22 A Yes.

23 Q -- to make it clear for the record, a letter
24 might be -- if it's signed by you, does that mean that
25 you did all the work on that letter?

1 A No. No. My team would have done that. Some
2 of these are larger, more complex permits. Minntac,
3 Mesabi Nugget, they would have had attorneys assigned as
4 well. So it would have been technical staff working in
5 my branch as well as attorneys, and potentially, it could
6 have involved some people from our Water Quality
7 Standards branch for assistance.

8 Q Now, let's just -- you know, Mr. Pierard, I'm
9 going to ask you if when you answer as much as possible
10 you could look up, because it's a little hard to see from
11 this video technology.

12 A Okay.

13 Q But looking at the first page, the first
14 paragraph, it says, "Because this is an early draft and
15 has not gone to public notice, the U.S. Environmental
16 Protection Agency is providing only preliminary feedback
17 at this time."

18 Do you see that?

19 A Yes.

20 Q So at what stage is this first comment in
21 Exhibit 530 in terms of the NPDES permit for the Minntac
22 mine?

23 A It's a draft pre-public notice comment.

24 Q And on complicated permits, was that really
25 your preference, to get the draft before the public

1 notice so that EPA could review it and make their major
2 comments at that time?

3 A Yes.

4 Q And now, also on page one, if you look at
5 paragraph three, you can see the sentence, and I'm just
6 trying to -- at the very bottom of the page, "We look
7 forward to working with you as we conduct a formal review
8 of the permit consistent with Section II of our
9 Memorandum of Agreement."

10 Do you see that language?

11 A Yes.

12 Q Do you have any understanding in these EPA
13 comments on the early draft of the Minntac permit when in
14 the process is that EPA formal review consistent with the
15 memorandum of agreement going to take place?

16 A Well, the memorandum of agreement anticipates
17 that we'll receive the public notice version of the draft
18 permit. So at that point, we would be essentially
19 following the MOA. There would be a more formal part of
20 the process, and the proposed final permit is the point
21 at which EPA would go on record as objecting or not
22 objecting. And that's also contemplated in the MOA.

23 Q Now let's turn to page -- to Exhibit -- let's
24 turn to Exhibit 532. And that document is a December 21,
25 2016 comment letter from EPA to PCA signed by you on the

1 public notice draft Minntac permit.

2 THE COURT: There being no objection,
3 Exhibit 532 is received.

4 BY MS. MACCABEE:

5 Q And just looking at both 530 and 532, in the
6 case of the Minntac NPDES permit, was this comment in
7 Exhibit 532 on the draft public notice Minntac permit
8 the, quote, formal review consistent with a memorandum of
9 agreement that was mentioned in the 2014 preliminary
10 letter in Exhibit 530?

11 A I would say so. You know, as I said, the MOA
12 contemplates that we receive a copy of the public notice
13 permit, and, you know, it doesn't say whether EPA must or
14 should or shall review that version of the permit. It's
15 silent on that. So -- but it is contemplated that we
16 receive it, so I anticipate it's understood that we would
17 likely review it also.

18 Q And then in your experience as NPDES program
19 chief, when you had a permit like the Minntac permit that
20 was complex, did you take advantage of the draft public
21 notice permit stage to do a formal review consistent with
22 the memorandum of agreement?

23 A Yes. It was, again, an effort to avoid an
24 objection down the road. So yeah, we would take that
25 opportunity to review the permit.

1 Q How does providing a comment at the draft
2 public notice stage help avoid an objection later? What
3 happens that makes that possible?

4 A EPA is able to provide really explicit comments
5 on the permit to the state agency. We have an
6 opportunity then to work with them on revising the permit
7 in such a way that it would not be objectionable. And
8 the state could then, you know, if it's a pre-public
9 notice draft, they could go ahead and public notice it.
10 And they have a high degree of confidence that EPA
11 probably won't even comment on that version of the permit
12 and that they would be able to avoid any kind of
13 objection. So in a way, it's a lot of front work that
14 streamlines the process down the way. It makes it a lot
15 easier for the state to move on to final issuance of the
16 permit.

17 Q And does it also result in a better permit, in
18 your view?

19 A Well, assuming EPA has valuable input, yes, it
20 would.

21 Q All right. Let's turn now, one more EPA
22 Region 5 comment on a mining permit issued by MPCA under
23 the NPDES program. Let's take a look at Exhibit 531.

24 THE COURT: Hearing no objection, Exhibit 531
25 is received.

1 BY MS. MACCABEE:

2 Q And if you want to take a look in this -- this
3 permit, I'm going to ask you to turn all -- is this also
4 a comment on a pre-public notice draft, NPDES permit for
5 a mine project?

6 A Yes, it is.

7 Q And I'm not sure if your pages are numbered.
8 But if you can turn to the last page of the document in
9 the same paragraph that has the underlining, right before
10 your signature. Do you see in the second --

11 A Okay.

12 Q The second page from the bottom, it says, "As
13 noted above, we believe that the current draft permit is
14 incomplete and significantly inconsistent with NPDES
15 requirements."

16 And then on the -- do you see that paragraph?

17 A Yes.

18 Q And in terms of NPDES permit requirements, does
19 that include requirements under the Clean Water Act and
20 its regulations?

21 A Yes.

22 Q And then the last paragraph, it says, "Our
23 formal review process will begin when MPCA puts a draft
24 of the permit on public notice and will follow the
25 guidelines set forth in the Memorandum of Agreement

1 between MPCA and EPA."

2 Do you see that sentence?

3 A Yes.

4 Q And is this another permit where EPA's formal
5 review process began when MPCA put a draft of the permits
6 on public notice?

7 A This letter is in a pre-public notice version
8 of the permit. The final paragraph says, "Our formal
9 review process will begin when the draft public notice
10 permit is put on notice."

11 Q So that's what is contemplated. It is
12 contemplated that when the MPCA puts the draft on public
13 notice, that that's when the formal process would begin?

14 A Yes.

15 Q Okay. Let's turn now to Exhibit 707. And we
16 are all looking for it. And that is marked as an exhibit
17 that shows EPA's written comments on draft permits during
18 the public notice period for MPCA permits. Do you see
19 that?

20 THE COURT: Hearing no --

21 THE WITNESS: Yes.

22 THE COURT: -- objection, Exhibit 707 is
23 received.

24 I spoke over the witness. Your answer was yes?

25 THE WITNESS: My answer was yes.

1 THE COURT: Thank you.

2 BY MS. MACCABEE:

3 Q And, Mr. Pierard, do you see -- I don't know if
4 you counted the number of these permits, but how many of
5 these permits are you familiar with personally? You can
6 give an approximation if you wish.

7 A You know, I would say most of them. I was
8 somewhat familiar with most of the permits on here.

9 Q Based on the municipal wastewater and mining
10 permits we've discussed today and the other NPDES permits
11 in Exhibit 707 with which you are personally familiar, in
12 your experience, has EPA Region 5 customarily commented
13 on MPCA draft permits, either before or during the public
14 notice period?

15 A Yes. It's customary for us to do that. Of
16 course, the risk of permits that we review is much less
17 than what MPCA would issue in a year. We don't review
18 all of their permits.

19 Q And in your experience, would all the specific
20 NPDES permits we've been talking about today, including
21 the ones that you're familiar with on Exhibit 707, when
22 EPA Region 5 has commented, are those comments in
23 writing?

24 A Yes. That was our practice. I would say most,
25 if not all, of these would have received written

1 comments.

2 Q And those written comments would either be in
3 the form of letters, or they would be in the form of
4 emails detailing concerns?

5 A Yes.

6 Q Can you think of any time -- maybe I'll come
7 back to that later.

8 But why did EPA choose to put its comments on a
9 draft permit in writing rather than just provide those
10 comments orally?

11 A Well, mainly, so that our communication is
12 clear, we can't be misconstrued, people understand what
13 our comment is and why we're making it, and what the
14 significance of the comment is. A much more fundamental
15 rationale, I mean, it's a document that's put in the
16 record, and it -- if someone were to ask what's EPA's
17 role, what did EPA do, that's in the record, and you can
18 see that. That was one of the reasons that many of our
19 letters, especially in the last five years I was there,
20 we would identify in a letter this is a review after
21 pre-public notice draft that was received in February and
22 revised in March and updated in April. That was really
23 to document kind of the sequence of events just for the
24 record. So that was important to us for a number of
25 reasons.

1 Q Can you explain why it's important to have the
2 sequence of events documented in the record?

3 A Well, the easiest one, as a government
4 employee -- no government employee is ever accused of
5 doing their job quickly, and we would receive feedback
6 from time to time that it took us too long to do our
7 reviews. And if you looked at the record, if the record
8 only said we received your permit in April and here's our
9 comments in December, you would get the impression it
10 took us eight months to review that permit when, in
11 reality, we got the draft -- pre-public notice draft in
12 April, and there was a revision provided by the state in
13 May and another revision in August, and it suddenly
14 becomes clear we weren't lackadaisical, we were doing our
15 job. We were moving that process forward and
16 communicating with the state and getting that permit to a
17 place that it was improved every time and any issues that
18 we had could be resolved.

19 We also thought it was important just for
20 transparency purposes. If we were to receive a Freedom
21 of Information Act request on a specific permit, that you
22 could see what EPA was thinking and why and what the
23 response was, and that just created a much stronger
24 record, I thought, for both us and the state.

25 Q Thank you very much.

1 So far, we've been talking about your work in
2 the NPDES program and EPA's comment process in general.
3 I would like to turn to the PolyMet permit.

4 Were you serving as NPDES program chief during
5 review of the PolyMet NPDES permit for the North -- a
6 NorthMet mine project proposed in Minnesota?

7 A Yes.

8 Q And I might sometimes refer to this as the
9 PolyMet permit, but in any case, I will mean the PolyMet
10 NPDES permit.

11 When did you first learn about the PolyMet
12 project?

13 A Shortly after I took the branch job. It was
14 probably 2010, 2011, that time frame.

15 Q And were you at all involved with the PolyMet
16 project during the environmental review process?

17 A I was involved in that. That was mostly at the
18 staff level. Part of the EIS process is they will pull
19 in people from the various programs that might be
20 interested. And of course, there was going to be a
21 potential surface water discharge.

22 (Reporter clarification.)

23 A Surface water discharge.

24 Q Go ahead, Mr. Pierard. And if you could look
25 up, it might be easier for the court reporter to tell

1 what you're saying.

2 A Sure. Okay.

3 That was it. You know, we were pulled into
4 that process. From time to time, we would have meetings
5 that I would attend. But most of the work at that point
6 was really being conducted by my staff.

7 Q And during the environmental review process,
8 were you aware that -- where the proposed mine project
9 was located?

10 A Oh, yes.

11 Q Can you just describe your awareness of where
12 it was?

13 A Yes. Could I describe? Oh, okay. Sorry. It
14 was in Northeastern Minnesota, Hoyt Lakes, that area.

15 Q And was it going to be located in an area that
16 had already been impacted by mining discharge?

17 A Yes.

18 Q When you look at -- when you look at a project,
19 what factors influence whether EPA needs to conduct
20 oversight of a permit? What are some of the things that
21 you look at as salient factors for reviewing an NPDES
22 permit?

23 MR. SCHWARTZ: Your Honor, I just want to
24 propose that we be watchful about the scope of the
25 proceeding and the rulings that you've made in terms of

1 what EPA did as opposed to what MPCA did and also events
2 that occurred before the permit was -- before the permit
3 application was filed.

4 THE COURT: If you have an objection, just
5 stand up and object.

6 MR. SCHWARTZ: Okay. I object.

7 THE COURT: Overruled. It's preliminary.

8 But you're close to the line.

9 BY MS. MACCABEE:

10 Q Do you need the question re-read again,
11 Mr. Pierard?

12 A Yes, please.

13 THE COURT REPORTER: "When you look at a
14 project, what factors influence whether EPA needs to
15 conduct oversight of a permit? What are some of the
16 things that you look at as salient factors for reviewing
17 an NPDES permit?"

18 THE WITNESS: Right. And let me make sure I've
19 got that right. The factors we consider in selecting a
20 permit for review. Is that correct?

21 BY MS. MACCABEE:

22 Q Yes.

23 A All right. We had a set number of factors that
24 we'd look at to identify facilities that we may want to
25 review, size, complexity, discharges to an impaired

1 water, discharges to waters upstream, the drinking water
2 intake. Those are some examples that we would use. So
3 that was just part of our standard process.

4 Q Now, in this case, in the PolyMet case, how did
5 you come -- how did EPA come to be involved in evaluating
6 the NPDES permit for the PolyMet project?

7 A My recollection on that is that MPCA asked us
8 to be involved thinking that the process would be more
9 streamlined if EPA could be involved in it from the
10 beginning.

11 Q Now, during -- even before the NPDES permit
12 application was submitted, did EPA begin to have
13 discussions with MPCA regarding how the NPDES permit
14 process should go?

15 A Yes.

16 Q Can you just describe briefly what the nature
17 of those conversations were?

18 A Well, we -- during the environmental review
19 process, we were talking to MPCA about what we had seen
20 in that process and permit implications of that
21 information. At the time, it was thought that some of
22 these things that we were identifying as potential
23 concerns might be dealt with during the environmental
24 review process, during the EIS process. So that was
25 probably some of the earliest discussions that we had

1 with PCA.

2 We also talked a little bit about a scope of
3 work, an SOP, standard operating procedure, for how we
4 would proceed as well. And we were doing similar things
5 for the mining sector for Minnesota --

6 Q Okay.

7 A -- working with Ann Foss, who was the director
8 at that time, and anticipating that we were going to see
9 a much larger volume of permits coming through from that
10 sector.

11 Q Now, just, do you recall how soon EPA began to
12 communicate to MPCA its expectations for what would be
13 contained in the NPDES permit?

14 MR. SCHWARTZ: Objection. Again, we're getting
15 into the period before the permit is filed. This is a
16 specific permit. It's not EPA's custom. It's asking
17 about things that happened prior to the filing of the
18 permit application.

19 THE COURT: Why don't you reask the question as
20 to date. It's vague. Sustained on the grounds of
21 vagueness.

22 BY MS. MACCABEE:

23 Q Let's turn to Exhibit 331. And that document
24 is a date -- a letter dated August 7, 2013, that is
25 referring to the PolyMet environmental review but has a

1 specific statement on page two.

2 THE COURT: Hearing no objection --

3 MR. SCHWARTZ: Your Honor, I was just going to
4 ask if we can look at it. We can only see the beginning
5 of the letter.

6 THE COURT: It's an 18-page document, so we'll
7 take a time-out.

8 (Off the record.)

9 MR. SCHWARTZ: Your Honor, it looks like this
10 document and the letter are exclusively about the EIS
11 that Minnesota Department of Environmental Resources was
12 involved in. It doesn't look like it is directed to an
13 NPDES permit at all.

14 THE COURT: What's the relevance of this
15 document?

16 MS. MACCABEE: Your Honor, there are two points
17 of relevance. One is that this letter was sent to both
18 Ann Foss and Shannon Lotthammer, as is shown on page two
19 of the letter. And then the primary reason we believe
20 it's relevant is, on page eight of the enclosure, the
21 fourth unnumbered paragraph, EPA was already trying to
22 set expectations for the NPDES permit in the future
23 stating about "appropriate WQBELs must be derived based
24 on water quality standards and implemented in the
25 permit."

1 MR. SCHWARTZ: Your Honor, that section or that
2 paragraph that Ms. Maccabee is referring to goes not to
3 procedures but to what EPA believed would be required in
4 the permit. So it goes to substantive requirements. It
5 does not go to process or procedure.

6 THE COURT: What's the point of this exhibit as
7 it relates to procedural irregularities?

8 MS. MACCABEE: The point of this procedure is
9 that long -- even before the permit application was
10 submitted, EPA had made MPCA aware of its expectations
11 that the permit would contain water quality based
12 effluent limitations, sir.

13 THE COURT: Okay. Objection sustained. This
14 is excluded. It's beyond the scope of the hearing.

15 It's a substantive matter involving the
16 substantive comments of the permit, which are beyond the
17 scope of this hearing.

18 BY MS. MACCABEE:

19 Q Early in the process of review for the PolyMet
20 permit, did EPA have discussions in an effort to explain
21 to MPCA what its expectations would be for the NPDES
22 permitting process?

23 MR. SCHWARTZ: Your Honor, again, it's the same
24 issue in terms of EPA's expectations. This happened --
25 as far as I can tell from the description, counsel is

1 still trying to get at the substantive requirements that
2 should be in the permit, according to EPA's view, before
3 the permit application was ever filed. And that's beyond
4 the scope of the hearing.

5 THE COURT: Okay. The question relates to
6 review of the permit, so it's vague as to time unless it
7 specifically says from and after July 11, 2016. The
8 question, as worded, does talk about the permitting
9 process, which, arguably, relates to the procedures that
10 will be followed in processing the permit. So if that
11 truly is your question, the objection is overruled once
12 the date is corrected.

13 BY MS. MACCABEE:

14 Q Mr. Pierard, let me make it more clear so that
15 it follows what the Judge has instructed.

16 Did you have conversations with MPCA, and
17 specifically with Ann Foss, about what process and
18 communication would be followed in the -- once the NPDES
19 permit was under way?

20 MR. SCHWARTZ: Your Honor, the question sounds
21 like it's directed to events that occurred before the
22 permit application was filed.

23 THE COURT: Question -- objection sustained;
24 vague as to time.

25 MS. MACCABEE: Your Honor --

1 THE COURT: Give a date.

2 MS. MACCABEE: Your Honor, I'm going to ask you
3 a question to make sure that I understand your ruling.

4 THE COURT: Okay. There is no permit before
5 July 11, 2016, so any question that you have for him as
6 it relates to the permit process needs to be
7 referenced -- date referenced.

8 MS. MACCABEE: All right. Your Honor, if there
9 is evidence of MPCA's resistance to putting things in
10 writing for this NPDES permit even before the application
11 is filed, we would argue that it shows motive and pattern
12 and practice for the subsequent conduct during the time
13 period after the application is filed. And there is a
14 specific document that we provided to the court of
15 appeals that took place in April of 2015 which details
16 the history of EPA's efforts to get discussions and
17 commitments about the process and for the NPDES permit,
18 not the environmental review, in writing and MPCA's
19 objections to that. And that is why we are interested in
20 it, not because it goes to the environmental review or
21 any flaws in that, but because it shows, in our
22 perception, a pattern and practice and a motivation.

23 THE COURT: Okay. Well, if you're going to
24 talk about a document, let's see the document.

25 MS. MACCABEE: All right.

1 THE COURT: And if you are questioning --
2 intending to question the witness about that document,
3 then do that if I allow it instead of beating around the
4 bush like you've done.

5 MR. SCHWARTZ: Your Honor, I know what document
6 she's referring to, and we will object. But okay.

7 THE COURT: It's nice to know, but I would like
8 to see it myself.

9 MR. SCHWARTZ: Sure.

10 THE COURT: I'm sure that knowledge will
11 comfort me as I read the document.

12 BY MS. MACCABEE:

13 Q Let's look at Exhibit 685.

14 THE COURT: All right.

15 BY MS. MACCABEE:

16 Q Mr. Pierard, are you familiar with this
17 document -- or do you have it yet?

18 A I don't have it yet.

19 THE COURT: Okay. Let me read it. We're going
20 to take a time out for me to read it.

21 (Off the record.)

22 THE WITNESS: Are you waiting for me, or --

23 THE COURT: No, we're waiting for me,
24 Mr. Pierard.

25 THE WITNESS: Okay. All right. Good. I just

1 wanted to make sure.

2 THE COURT: Just blame me.

3 All right. Pages one, two, and three of the
4 exhibit are received. The remaining pages, which are not
5 numbered but are Relators 0064820, 821, 822, 823 are not
6 received. They relate to substantive matters not related
7 to procedural irregularities. Pages one, two, and three
8 specifically address NPDES permitting procedures and a
9 discussion of what parties would like to be written or
10 not written, and that is relevant to the Court's
11 consideration and the Relators' theory of the case.
12 However, the substantive issues themselves are
13 irrelevant, and they are excluded. And the exhibit will
14 need to be recopied in order to get -- because it's
15 double-sided. We can take care of that. All right?
16 That's my ruling.

17 You can proceed.

18 MS. MACCABEE: Your Honor, I'm going to -- if
19 you wouldn't mind, we have another exhibit number that
20 only has those first three pages. And if you wouldn't
21 mind us substituting it in, we can take care of it that
22 way.

23 THE COURT: That's fine with me.

24 MR. NELSON: I don't have it here. We have to
25 go upstairs and get it.

1 THE COURT: Oh, well, we'll fix it at the
2 break.

3 MS. MACCABEE: All right. So I will continue
4 questioning with this one then.

5 THE COURT: Right. Because as long as your
6 questions are confined to the portion of the exhibit that
7 was received.

8 MS. MACCABEE: Yes, your Honor.

9 BY MS. MACCABEE:

10 Q Turn to page two of the email chain between you
11 and Ms. Foss, the first paragraph of the email from you
12 to Ms. Foss on April 7, 2015. And that paragraph begins,
13 "During our review of the proposed PolyMet NorthMet
14 project, we had several conversations."

15 What were you trying to do by sending Ann Foss
16 this email in April of 2015, Mr. Pierard?

17 A In our discussions with MPCA, what was
18 contemplated was -- we would have these early discussions
19 on some of the major topics. And at the end of those
20 discussions, that we would summarize the outcome from
21 those really just to keep us all on the same page moving
22 forward. So my intent with this was basically that, to
23 summarize what we had done to date and things that we
24 agreed on, disagreed on, or were still up in the air.
25 That was my intent. And I informed MPCA that I was

1 preparing this.

2 Q And then what was your -- what was the reason
3 why you felt you wanted to memorialize what the
4 agreements had been?

5 A Well, it's a large and complex site, and I
6 wanted to make sure we had a record of our decisions
7 going forward, something we could reflect back on,
8 because -- and this was true during our discussions, that
9 issues would tend to come up at a meeting that some of us
10 believed had been resolved in a previous meeting with
11 PCA. So it created a lot of confusion operating that
12 way. So this was an effort to try to make that less
13 likely that that would happen and make sure we can really
14 only work on the remedial issues that were still
15 outstanding.

16 Q And then turning back --

17 THE COURT: Hold on. Whose phone is on? Is
18 that a phone?

19 UNIDENTIFIED SPEAKER: It's a mistake.

20 THE COURT: Okay. Turn it off. Make sure your
21 phones are off. Everyone else, too. They might end up
22 being donated to charity. That's what Judge Marrinan
23 used to always say.

24 BY MS. MACCABEE:

25 Q Mr. Pierard, if you could turn back to the

1 first page at the bottom of the page. And it says, "In
2 the future, if either of us has an issue" -- and then
3 Ms. Foss had some bullet points on the second page at the
4 top of the page. I just want you to take a look at that
5 to refresh your recollection, the second page at the top.
6 And what was your understanding of what Ms. Foss on
7 behalf of the MPCA was asking from EPA in terms of your
8 communications regarding the PolyMet NPDES permit?

9 A She was much more interested in verbal
10 communications than written communications. It was
11 interesting to me because she kind of outlines an
12 approach here that's roughly consistent with what I had
13 done in my email. We did discuss things by phone. We
14 did have follow-up conversations. And this was an effort
15 to summarize what we had done to that date. And she was
16 informed probably about a month prior to this that I was
17 going to make the effort to summarize where we were to
18 date. So I -- it seemed like she was surprised by this,
19 but I don't really think she should have been.

20 THE COURT: And when you say surprised by this,
21 you mean surprised by the written summary that you
22 attached to the email?

23 THE WITNESS: Yes.

24 THE COURT: Okay. And that's the summary of
25 substantive recommendations?

1 THE WITNESS: Yes.

2 THE COURT: Okay.

3 BY MS. MACCABEE:

4 Q In your experience dealing with states as NPDES
5 program chief, was it unusual that a state would ask you
6 not to put concerns about a permit in writing?

7 A Yes.

8 Q Can you explain?

9 A Well, I've never -- I never in this program
10 received a request to not put our concerns in writing.
11 We do routinely have conversations with the state about
12 permits, big and small, and we work through things
13 verbally, but I have never had an instance where a person
14 at any level in state government has asked that we not
15 put our comments in writing.

16 Q And when you say never, do you mean including
17 the PolyMet permit or other than the PolyMet permit?

18 A It was much more prevalent in this sector in
19 Minnesota, this sector being the mining sector in
20 Minnesota, that there was hesitancy at the state level to
21 memorialize things in writing. That was where I
22 experienced sort of the most pushback when it came to EPA
23 providing feedback or comments in writing.

24 Q Now, and was this more pronounced in the
25 PolyMet project?

1 A Yes, it was.

2 Q Now, did you agree in 2015 to have discussions
3 on the PolyMet permit instead of documenting NPDES
4 program concerns in writing?

5 A No. We agreed to communicate. And many times,
6 we were meeting every two weeks, something on that order.
7 So there was a lot of verbal communication. But I don't
8 recall ever agreeing to not ultimately put comments in
9 writing or communicate in writing.

10 Q Now, you had mentioned that EPA and MPCA became
11 involved in frequent phone conferences regarding the
12 PolyMet permitting approximately every two weeks in 2016
13 and 2017. Who asked for these frequent meetings?

14 A MPCA did.

15 Q Did you have an understanding about why MPCA
16 asked for EPA to become involved in these conference
17 calls?

18 A No. They -- I presume they wanted to get EPA
19 insight and talk through more difficult or complicated
20 areas of this permit.

21 Q How common was it for you -- for a state to ask
22 EPA to be involved in this kind of sequence of meetings
23 to review an NPDES permit?

24 A It was much more than I had experienced before.
25 You know, we would -- from time to time, a state would

1 ask us to be involved, and we would have a series of
2 meetings. But every two weeks was extremely often, and
3 the length of time that this went on was much longer.
4 With other states, you might have a monthly conference
5 call for six months or something like that. That wasn't
6 necessarily uncommon. But this level of communication
7 was substantial.

8 Q Now during this period in 2016 and 2017, did
9 you ever review for EPA early drafts of MPCA permit
10 language?

11 A No. Permit language on PolyMet specifically?

12 Q Yes. I'm sorry.

13 A No.

14 Q Did EPA ever ask to review early drafts of MPCA
15 permit language?

16 A Yes.

17 Q Can you explain why?

18 A Well, you can talk all you want, but the bottom
19 line is it's the written language in the permit. That's
20 what -- in EPA's review, that's what we are used to
21 reviewing rather than kind of overall global concepts.
22 It was -- it was specific permit language. And that
23 allows us then to really hone in on where the issues
24 might be and how those issues might be corrected. So I
25 did ask that the state provide early drafts of the

1 permit. They were reluctant to do that -- well, they
2 didn't do that. They refused to do that. And so I asked
3 if we could have specific, even sections of the permit.
4 And I made clear nobody expected this to be perfect when
5 it came to us. It was an early draft. These are
6 thoughts that PCA put together on how to construct this
7 permit. That was fine with us. But it really -- it
8 would give us something more tangible to comment on. And
9 in the end, our comments would be more valuable to the
10 state.

11 Q Now, during this process where EPA and MPCA
12 were meeting about every two weeks on the PolyMet permit,
13 did EPA ever communicate to MPCA that these phone
14 conferences would take the place of EPA's formal review
15 and written comments on a permit?

16 A No, not that I recall, no. In fact, my
17 recollection was that we would agree and come to a place
18 that we've completed some items. We completed the
19 discussion on some items and that we would, as I tried to
20 do in this email I had sent, sort of document those, and,
21 you know, it would be a way to allow us to kind of move
22 on from there. And I believed at the time that MPCA had
23 agreed to do that.

24 Q Now let's just turn for a minute to the PolyMet
25 application process. And if you could pull for us

1 Exhibit 290.

2 And then pretty soon afterwards, we'll need 107
3 and 306.

4 THE COURT: Hearing no objection, Exhibit 290
5 is received.

6 BY MS. MACCABEE:

7 Q And, Mr. Pierard, do you recognize this
8 document, which is an August 5, 2016 email copied to you
9 but from Scott Ireland regarding the review of the
10 PolyMet permit application?

11 A Yes.

12 Q And if you look at that text, it says the email
13 is to let you know that "we will be reviewing the PolyMet
14 Mining, Inc. application for the NorthMet mine" and that
15 the memorandum of agreement "between MPCA and EPA will
16 guide EPA's oversight."

17 Do you recall why this notification email was
18 sent to MPCA?

19 A Well, we had -- we had received the
20 application. The MOA contemplates that we may review
21 NPDES applications, and it gives EPA sort of a role in
22 it, that if we found deficiencies in the application, the
23 state must take measures to address those deficiencies.
24 But it was -- it was not our normal practice during my
25 time as NPDES program manager that we reviewed

1 applications. As a matter of fact, I can only remember
2 one other time that we did at that point. Many times, we
3 would review the application as we were reviewing a draft
4 permit. But in this case, we wanted to review the
5 application right after it came in, and that was -- so
6 that's what prompted this email.

7 Q And so was this notification then in order to
8 make sure that MPCA knew that you were going to take this
9 step?

10 A Yes.

11 Q Now let's turn to Exhibit 107 and then also
12 306. And 107 is the cover email for the EPA's letter of
13 November 3, 2016, on the PolyMet permit application, and
14 Exhibit 306 is EPA's letter responding to the PolyMet
15 application on November 3, 2016. Do you see that?

16 A Yes.

17 THE COURT: Exhibits 107 and 306 are received,
18 there being no objections.

19 BY MS. MACCABEE:

20 Q Now, let's look at the first paragraph of EPA's
21 Exhibit 306, letter on the PolyMet permit application.
22 When was PolyMet's application for an NPDES permit
23 submitted to MPCA?

24 A July 11, 2016.

25 Q And how did your staff get a hold of the

1 application itself?

2 A I believe we found it on MPCA's website.

3 Q What do you mean you found it?

4 A I don't recall that we received it from MPCA.

5 Q Okay.

6 A Oh, there it is. On August 2, MPCA informed
7 PolyMet that the application is complete. Right.
8 That's my recollection is that we -- my staff person,
9 Krista McKim, found it on their website. I'm not sure
10 if she was aware from any communication with PCA that
11 that had happened.

12 Q If you could turn to the second paragraph of
13 that first page, it discusses the memorandum of agreement
14 and talks about the memorandum of agreement and how it
15 applies if the EPA determines that the NPDES application
16 is not complete. Can you explain, looking at this, once
17 EPA has sent a letter saying that the application is
18 deficient, do I understand it correctly that an NPDES
19 application could not be processed by MPCA until a second
20 letter was sent by EPA?

21 A Yes.

22 Q And what did that second letter have to do?

23 A It had to advise the state that the application
24 was complete.

25 Q And if you look again at -- just on that first

1 page, paragraph three -- or actually, it's the bottom of
2 the page, the last paragraph, what's the last sentence on
3 the first page. "The enclosure to this letter describes
4 the deficiencies EPA has found and identifies additional
5 concerns."

6 Is this the type of letter that would then
7 require a second letter saying those had been resolved?

8 A Yes.

9 Q To the best of your knowledge, did EPA ever
10 send MPCA a letter saying that the deficiencies in the
11 application had been corrected?

12 A No, not to my knowledge.

13 Q To your knowledge, did MPCA ever ask EPA to
14 send a letter saying that the deficiencies had been
15 corrected?

16 A No, not to my knowledge. I don't recall that,
17 no.

18 Q Do you recall in October of -- and I'm
19 switching to another topic. Do you recall in October of
20 2017 MPCA telling you and your staff that PolyMet had
21 submitted an updated application?

22 A Yes. I don't know the exact date, but I do
23 recall that they told us an updated application had been
24 submitted.

25 Q Did any -- did you or any of your program staff

1 working on review of the updated permit application ever
2 tell you that they considered the October 2017 update to
3 be a, quote-unquote, new application for an NPDES permit?

4 A I don't recall that.

5 Q So did you treat it at any time -- the
6 October 2017 updated permit application, did you treat
7 that at any time as a new application?

8 A No.

9 Q Now, I'm going to just -- I don't know if you
10 have in front of you Exhibit 325. That might be helpful,
11 because I think you -- it may be helpful in refreshing
12 your recollection as to the timing.

13 And Exhibit 325 are MPCA's staff handwritten
14 notes of November 1 and November 9. And, Mr. Pierard, if
15 you want to look at the notes on November 9 there and see
16 if they refresh -- just take a quick look at them in
17 order to refresh your recollection of the dates.

18 THE COURT: Are you offering this, or are you
19 giving it to him to review to see if it refreshes his
20 recollection?

21 MS. MACCABEE: The latter, but I don't believe
22 that there are any objections for introducing it now, so
23 however you want to handle it, your Honor.

24 THE COURT: Are you going to use it again? Do
25 you want to offer it?

1 MS. MACCABEE: We are definitely going to use
2 it again, so we might as well offer it, sir.

3 THE COURT: All right. Hearing no objection,
4 it's received.

5 BY MS. MACCABEE:

6 Q And, Mr. Pierard, when you've had a chance to
7 look at it, just look up, and then I can continue.

8 MR. SCHWARTZ: One thing, it would be helpful
9 if we could see the rest of it, the part that Mr. Pierard
10 is looking at.

11 MS. MACCABEE: That's the part that he was
12 looking at, the page three. Does that help you? Are you
13 able to see it now?

14 BY MS. MACCABEE:

15 Q Mr. Pierard, are you ready?

16 A Yes.

17 Q Okay.

18 A Certainly.

19 Q In November of 2017, do you recall if you asked
20 MPCA to provide EPA with an advanced copy of the draft
21 public -- the draft PolyMet permit for reviewing comment
22 before the public review period started?

23 A Yes.

24 Q And what did you request?

25 A I requested a pre-public notice draft so that

1 we could review it. And at the time, I believe I asked
2 them to give us 60 days to review the permit and provide
3 comments to them.

4 Q And why did you ask for 60 -- so for the 60
5 days to review the permit?

6 A Well, I thought 60 days was a timely review
7 considering, you know, the size of this, the complexity,
8 the fact that we hadn't seen anything in advance. And
9 our normal, average review time for a pre-public notice
10 draft permit is about 45 days. So 60 seemed reasonable.

11 Q And was it your plan at the time that EPA would
12 provide written comments on that pre-public notice draft
13 permit?

14 A Yes.

15 Q And did MPCA agree to give you two months of
16 lead time to write comments on a pre-public notice draft
17 of the PolyMet permit?

18 A No.

19 Q Let's turn now to Exhibits 372 and 815.
20 And 872 [sic] is an email from Chris Korleski to
21 Rebecca Flood on November 20, 2017, and Exhibit 815 is
22 that same email, but it also includes a response on the
23 same day from Rebecca Flood back to Chris Korleski.

24 THE COURT: Hearing no objection, Exhibits 372
25 and 815 are received.

1 THE WITNESS: 815.

2 BY MS. MACCABEE:

3 Q 815.

4 A Hang on just one second.

5 Q Do we have the wrong numbers there for you?

6 THE COURT: 372 and 815.

7 THE WITNESS: 815, all right. I have those
8 now.

9 BY MS. MACCABEE:

10 Q First, can you explain, who was Chris Korleski
11 in terms of the structure of command at the EPA?

12 A He was the Water Division director, so he was
13 my direct supervisor.

14 Q And was he the highest program staff for Water
15 at Region 5?

16 A Yes.

17 Q And go ahead and use the email if you want to,
18 but what did PCA agree to, rather than the two months'
19 review that you had asked for, for a pre-public notice
20 permit?

21 A All right. The email from Chris Korleski is
22 agreeing to the MPCA proposal to provide the
23 United States Environmental Protection Agency the draft
24 permit. At the same time, they would provide it to the
25 affected tribes, so that would be about two weeks in

1 advance of the public notice date.

2 Q So as of November 20, 2017, what was
3 Chris Korleski suggesting would be the plan in terms
4 of EPA providing comments on the PolyMet permit?

5 A Well, the plan was to provide comments during
6 the comment period. 45 days is a pretty tight review
7 time frame for us, so it would take an effort for us to
8 meet that objective and have our comments in prior to the
9 close of the comment period.

10 Q Now, if you look at the email in Exhibit 815,
11 did Rebecca Flood provide Mr. Korleski with a response
12 from MPCA's perspective?

13 A Yes.

14 Q And what was the nature of her response on
15 behalf of PCA in terms of expecting comments on the draft
16 PolyMet permit?

17 A She said, "We look forward to any comments you
18 may wish to provide."

19 Q So as of November 20, 2017, would you say there
20 was a shared understanding between both EPA and MPCA that
21 EPA would provide written comments on the draft PolyMet
22 permit during the public notice period?

23 A It would seem so at that point in time, yes.

24 Q Thank you. Now let's turn briefly to Exhibits
25 34, 35, and 36. And some of these are kind of big.

1 THE COURT: What do you mean? Look at this.

2 MS. MACCABEE: That's the cover email, sir.

3 MR. SCHWARTZ: May we have copies as well?

4 MS. MACCABEE: All right. So I'm just going to
5 identify them for the record, that 34 is an email from
6 Mr. Clark at MPCA to the NPDES program and copied to you,
7 which attaches the draft NPDES permit package for
8 PolyMet's NorthMet mining project, and that package is in
9 35 and 36, exhibits. And Exhibit 35 is the draft PolyMet
10 NPDES permit, and Exhibit 36 is the draft fact sheet for
11 the PolyMet NPDES permit.

12 THE COURT: Hearing no objections, the
13 documents 34, 35, and 36 are received.

14 BY MS. MACCABEE:

15 Q Did your staff -- did you and your staff
16 receive the draft PolyMet permit on January 17, 2018?

17 A Yes.

18 Q And then did you and your staff review the
19 permit documents?

20 A Yes.

21 Q And at the time that you reviewed those permit
22 documents, was your staff aware when the public comment
23 period would end?

24 A Yes.

25 Q I'm just going to turn briefly to Exhibit 595.

1 And Exhibit 595, is that an email from Candice Bauer, and
2 it is copied to you, among other people, stating when the
3 public comment period for the PolyMet permit closes?

4 A Yes.

5 Q And you see the words, "Just something to keep
6 on our radar screen."

7 Why was it important or salient for you and
8 your NPDES program to keep the time when the public
9 comment period closed on your radar screen?

10 A Our intention was to provide comments on this
11 permit by the close of the comment period. That would
12 put our comments in the record, and it would require that
13 MPCA respond to our comments, along with the other
14 comments that were received on the permit.

15 THE COURT: Exhibit 595 is received.

16 BY MS. MACCABEE:

17 Q In fact, when you got the -- I'm going to pull
18 up Exhibit 37. Mr. Pierard, when you and your staff got
19 the draft PolyMet permit on January 17, did you
20 personally contact both Jeff Udd and Richard Clark to set
21 up a conference call with MPCA on the draft PolyMet
22 permit?

23 A Yes, I did. And Richard Clark was working on
24 setting up those calls.

25 Q And why did you ask for that meeting -- or

1 conference call?

2 A The time frame was fairly short for us, so as
3 my review team looked at the permit, we were anticipating
4 that questions would come up. And I wanted to have the
5 opportunity to talk to the MPCA staff to clarify things
6 or enlighten us on where in that permit our concern might
7 be addressed or things like that. It was just -- seemed
8 like a much more efficient way to go. So as we were
9 reviewing the permit, we had an opportunity to talk to
10 the PCA team that had drafted the permit.

11 THE COURT: Exhibit 37 is received.

12 BY MS. MACCABEE:

13 Q And so do you remember in January, February,
14 and March talking with -- conferring by phone with MPCA
15 regarding the draft PolyMet permit?

16 A Yes.

17 Q Did you perceive at any time in January,
18 February, or March of 2018 that these conference calls
19 would take the place of an EPA comment letter?

20 A No, not at all.

21 Q Can you explain?

22 A Like I said just a moment ago, it was really to
23 help my review team have their questions answered so that
24 we could formulate our comments on this permit in such a
25 way that it would enable PCA to simply respond to the

1 most significant comments that they hadn't been able to
2 address in our conference calls.

3 Q Let's turn now to Exhibit 324, which is a
4 ten-page document with MPCA's handwritten notes from
5 January 31, 2018, February 13, 2018, and March 5, 2018.
6 And I know you've -- I believe you've used this exhibit
7 to refresh your recollection.

8 A Uh-huh.

9 Q And I believe this is one of the documents that
10 was stipulated to by the parties.

11 THE COURT: Hearing no objection, Exhibit 324
12 is received.

13 BY MS. MACCABEE:

14 Q And, Mr. Pierard, I'm going to suggest you turn
15 to the last page of Exhibit 324. And it has -- if you
16 look at those notes, towards the bottom of the page, it
17 says -- it has the name "Udd," and then it says, "EPA
18 wants to submit comments, make clear what EPA concerns
19 are."

20 Do you see those notes?

21 A I'm sorry.

22 Q Back of the page. Sorry.

23 A Yes, I see that comment, yeah.

24 Q What did you tell MPCA in the conference call
25 of March 5, 2018 regarding EPA's plan or desire to submit

1 comments on the public -- on the draft PolyMet permit
2 during the public notice period?

3 A I told him that it was our intent to submit
4 those comments, and I also told him that we would discuss
5 our comments with them prior to them coming out.

6 Q And had you already prepared draft comments by
7 March 5?

8 A Roughly. They weren't in any shape at all.

9 Q So you had rough comments at that time?

10 A Yes.

11 Q From your perspective, should it have been a
12 surprise to MPCA that EPA wanted to submit comments on
13 the draft PolyMet permit during the public notice period?

14 MR. MILLS: Objection, foundation. He can't
15 speak to what PCA thought.

16 THE COURT: Sustained.

17 MS. MACCABEE: Withdrawn.

18 THE COURT: Also calls for speculation.

19 BY MS. MACCABEE:

20 Q Okay. Let's turn to Exhibit 641. And this is
21 a March 5, 2018 email from you to Chris Korleski, the
22 Water Division director.

23 MS. MACCABEE: I'm not hearing objections.

24 THE COURT: Exhibit 641 is received.

25 MS. MACCABEE: Thank you.

1 BY MS. MACCABEE:

2 Q And were you informing Mr. Korleski that
3 March 16 was the deadline to provide comments, not an
4 objection or a non-objection, but comments?

5 A Yes.

6 Q And what else did you tell Mr. Korleski in your
7 email on March 5?

8 A We have a draft letter prepared for him, and we
9 were preparing to discuss it with him.

10 Q And your email also mentions that "PCA is
11 talking with Stine today to provide an update."

12 Can you -- first, who is Stine?

13 A John Linc Stine. He was the commissioner of
14 the PCA.

15 Q And what was your basis -- what was the basis
16 for your -- the statement that "MPCA may ask us not to
17 comment"?

18 MR. SCHWARTZ: I'm going to object to the
19 extent that it calls for hearsay.

20 THE COURT: Overruled.

21 BY MS. MACCABEE:

22 Q Do you see that last line, "I expect that PCA
23 may ask us not to comment"?

24 A Yes.

25 Q Do you want the question repeated, Mr. Pierard?

1 A Yes, please.

2 Q It was just what is the basis for the statement
3 in this email that "PCA may ask us not to comment"?

4 A Comments, I think, made by Jeff Udd asking if
5 there was any wiggle room on that.

6 MS. MACCABEE: Mr. Pierard, do you need a
7 little break to get a glass of water or something?

8 THE COURT: No. But it is time for our mid
9 afternoon break, so we'll take 15 minutes.

10 (A recess was taken.)

11 THE COURT: You can stay seated. As a matter
12 of protocol, some documents are not being received
13 because of objections. I will keep them separately and
14 collect them all as Court Exhibit C, and they will be
15 maintained in the event there's an appellate issue that
16 involves those documents. I have made a clean copy of
17 the portion of Exhibit 685 that was received by the
18 Court, pages one, two, and three. No one ever said they
19 found it, so I took the bull by the horns.

20 So we can proceed.

21 MS. MACCABEE: Thank you very much, your Honor.

22 BY MS. MACCABEE:

23 Q Are we live? Are we live in Santa Fe,
24 Mr. Pierard?

25 A Yes.

1 Q Sir, before we broke, your last words were that
2 Jeff Udd asked "is there any wiggle room." Can you
3 explain what you understood him to mean by that question?

4 A At that point in the conversation, we're
5 talking about EPA providing comments, and Jeff had stated
6 that there's going to be a lot of public comments on this
7 permit. If they receive comments -- that many comments,
8 those comments are likely to be the same comments that
9 EPA would make, so doesn't it make sense for EPA to wait
10 to submit comments. And I had responded to him saying,
11 you know, we're going to send these comments in the
12 comment period; I had offered to talk to him about the
13 comments before we actually send them. And at that
14 point, he said, "is there any wiggle room on that," which
15 I responded, no, there wasn't.

16 Q Did it strike you as odd that MPCA might ask
17 EPA not to comment on the draft PolyMet permit?

18 MR. SCHWARTZ: Objection.

19 THE WITNESS: Yes.

20 THE COURT: Hold on.

21 MR. SCHWARTZ: Objection. It's asking for
22 speculation about what was in the mind of Mr. Udd.

23 THE COURT: Overruled because the question asks
24 for what was in his mind, so the answer "yes" stands.

25 BY MS. MACCABEE:

1 Q In your nine years as NPDES program chief, had
2 MPCA ever asked you or your program staff not to comment
3 on a draft NPDES permit?

4 A Not that I recall, no.

5 Q Would you recall something of that
6 significance?

7 A Probably.

8 THE COURT: Geez. When she does ask for
9 speculation, you don't object.

10 MR. SCHWARTZ: I've got to stop taking notes.
11 I can't take notes and listen at the same time.

12 BY MS. MACCABEE:

13 Q To the best of your knowledge, had EPA Region 5
14 ever had a request from a state not to comment on a draft
15 NPDES permit?

16 A Not that I recall.

17 Q Now, in your mind, Mr. Udd was talking about
18 comments from members of the public. Do you believe that
19 EPA comments are different from having a comment on the
20 same subject by a member of the public?

21 A Yes. And I expressed that to Jeff during the
22 call. The way our comments are typically set up and our
23 intent here was, we identified a concern that we have, we
24 would identify the regulatory citation, and we would
25 identify at least one way to rectify that issue that we

1 had identified. Typically, that's what we try to do, at
2 least for the more significant comments that we might
3 have. I've reviewed public comments and responses to
4 comments, and they tend to be pretty general. People are
5 concerned about mercury in their water or things like
6 this. They don't ever get into the details that EPA
7 does.

8 Now, on this permit, we did expect a lot of
9 comments probably from environmental groups, people that
10 maybe are a little bit more fluent in the regulatory
11 requirements. So I would expect they would receive some
12 detailed comments from some. But at that point, there
13 was no way of knowing who was going to comment or what
14 comments were going to be made, if ours would be
15 duplicative or not.

16 Q Mr. Pierard, don't feel that you have to
17 protect my feelings. Is there any difference between
18 getting even a detailed comment from an environmental
19 group or a member of the public as contrasted with
20 getting a comment from the United States Environmental
21 Protection Agency?

22 A Well, I think so. We're the agency that
23 oversees the program, and we will identify things that,
24 from our perspective -- and we've got a great deal of
25 expertise in this area -- may be inconsistent with Clean

1 Water Act and implementing regulation requirements. So
2 many times we can speak more authoritatively than most
3 commenters.

4 Q I think you still tried to spare my feelings.

5 A I did, yes.

6 Q During the week of March 5, did you either
7 participate in or become aware of a phone call between
8 MPCA Assistant Commissioner Shannon Lotthammer at the PCA
9 and Chris Korleski, the Region 5 Water Division Director,
10 on the subject of EPA's comments on the draft PolyMet
11 permit?

12 MR. SCHWARTZ: I object to the extent that he
13 was not actually on the call. Then it would be hearsay.

14 THE COURT: We're not there yet. Right now
15 he's being asked if he's aware of something or if he
16 participated. We don't know yet. The objection is
17 overruled.

18 Do you have the question in mind, or do you
19 want to hear it again?

20 THE WITNESS: I would like to hear it again.

21 THE COURT: All right. Lori, would you read it
22 back?

23 MS. MACCABEE: Thank you very much.

24 THE COURT: Beginning "During the week of March
25 5."

1 THE COURT REPORTER: "During the week of
2 March 5, did you either participate in or become aware
3 of a phone call between MPCA Assistant Commissioner
4 Shannon Lotthammer at the PCA and Chris Korleski, the
5 Region 5 Water Division Director, on the subject of EPA's
6 comments on the draft PolyMet permit?"

7 THE WITNESS: Yes.

8 MR. SCHWARTZ: Objection, it's a compound
9 question.

10 THE COURT: Overruled.

11 The answer is yes. It stands.

12 Next question.

13 BY MS. MACCABEE:

14 Q Maybe this will help. Mr. Pierard, can we turn
15 to Exhibit 775.

16 THE COURT: I'm going to ask a question.

17 MS. MACCABEE: All right.

18 THE COURT: Sir, did you become aware of the
19 call, or did you participate in the call?

20 THE WITNESS: During that time period, there
21 were a lot of phone calls. I participated on some with
22 my division director Chris Korleski, with Shannon
23 Lotthammer. I can't say if it was this particular call
24 or not.

25 THE COURT: Right. So the actual answer is

1 that you don't remember if you actually participated in
2 the call, right?

3 THE WITNESS: Yes.

4 THE COURT: But apparently, whether you
5 participated in the call or not, you became aware of it
6 after the fact?

7 THE WITNESS: Yes, that's right.

8 THE COURT: All right. Let's go on to the
9 document.

10 MS. MCGHEE: Your Honor, we objected to this
11 document for foundation. This doesn't appear to be a
12 document that Mr. Pierard authored.

13 THE COURT: Just a second.

14 All right. And this was objected to in timely
15 fashion on foundational grounds. Is there any dispute
16 over that?

17 MS. MACCABEE: Your Honor, it was objected to
18 after the Respondents saw the material. I'll be happy to
19 explain and lay some foundation for it, your Honor, if
20 you feel --

21 THE COURT: Well, go ahead. Lay foundation.
22 I'm seeing something in it that would lead me to believe
23 that it may be possible for foundation to be laid. Go
24 ahead.

25 BY MS. MACCABEE:

1 Q Mr. Pierard, looking at Exhibit 775, do you
2 recognize this document?

3 A It appears to be notes from March 12, 2018 call
4 with MPCA.

5 Q And were you on the March 12, 2018 call with
6 MPCA that is reflected in these notes?

7 A Yes.

8 Q And have you reviewed this document through
9 EPA's FOIA online website as one of the documents
10 released by EPA under the Freedom of Information Act?

11 A Yes, I did.

12 Q And do these notes reflect the official work of
13 the EPA conferring with MPCA on the PolyMet NPDES permit?

14 A It appears to me they're one person's notes
15 that participated in the meeting.

16 Q And based on your recollection of the call, do
17 these notes appear to be trustworthy and consistent with
18 your recollections?

19 A Yes.

20 Q And in your experience, does EPA preserve
21 meeting notes, including handwritten notes, of calls or
22 conferences between the applicant and other regulatory
23 agencies pertaining to NPDES permitting?

24 A Typically, we do, yes.

25 Q Can you give us as an example what happened to

1 your own notes even after you had left the EPA?

2 A Yeah, I -- at the time I left EPA -- and this
3 was true basically throughout my entire career, EPA was
4 taking the stance that handwritten notes of an employee
5 would not be -- they weren't an official document. So my
6 notes -- I left some with my staff when I left, but I
7 know others I simply left behind in my office.

8 Q And were your notes also released by EPA under
9 the Freedom of Information Act based on your review of
10 FOIA online?

11 A Yes.

12 MS. MACCABEE: Your Honor, I would suggest
13 these are an exception to the hearsay rule because -- for
14 several reasons: First, they're reflections of the
15 activities of an office or agency that -- and matters
16 observed pursuant to duty, and then that is under 803.
17 I'm not -- part A. And in addition, the comment to the
18 rule talks about how in a case of government officials,
19 the concern about curing the hearsay -- and this is in, I
20 believe this is a 1989 comment. The rationale for the
21 exception is the belief in the trustworthiness and also
22 concern for the disruption that would result in
23 government agencies if its employees were continually
24 required to testify. And the author of these notes,
25 Ms. Krista McKim, we asked the EPA to provide her as a

1 witness and, as is customary under the 2(e) rule, they
2 denied that because it would be disruptive. So those are
3 the bases on which we would suggest that the foundation
4 objections, which were timely made, should be overcome.

5 THE COURT: Any response by anybody, or are
6 they waiving the foundation objection?

7 MS. MCGHEE: Your Honor, we're --

8 THE COURT: Or the hearsay objection?

9 MS. MCGHEE: This is Davida McGhee for PolyMet.
10 We're keeping our objection. These aren't
11 Mr. Pierard's notes. He stated that he --

12 THE COURT: Well, they don't have to be his
13 notes, and there's no rule that says they do.

14 MS. MCGHEE: He stated he was at the meeting,
15 so he could testify about his personal knowledge of what
16 occurred at the meeting. But to testify about what's in
17 these notes, I think, is improper.

18 THE COURT: Okay. Anyone else want to be
19 heard?

20 MR. SCHWARTZ: Same objection.

21 THE COURT: Okay. Just a moment.

22 With regard to foundation, the witness'
23 testimony with regard to the policies of the EPA to keep
24 notes of this nature and the fact that they were produced
25 by the government as government records under the Freedom

1 of Information Act assures the Court of the legitimacy of
2 these documents and that they are what they purport to
3 be.

4 With regard to hearsay, the Court finds that
5 803.8 is applicable. The Court has no question about the
6 lack of trustworthiness, particularly as the witness has
7 identified the notes as being consistent with his
8 recollection of the call. The notion that because the
9 witness was at the meeting that it's improper for the
10 document to be received is actually a non-sequitur,
11 because the admissibility of the document stands whether
12 he testifies about it or was at the meeting or not. So
13 he's really serving as two roles here: Role one is
14 authenticating the document and addressing its
15 admissibility as a matter of foundation and as a matter
16 of hearsay. The fact that he may also be asked questions
17 about his own recollection of the meeting is incidental,
18 although the fact that he was there obviously puts him in
19 a better position to address the evidentiary issues
20 accompanying the document.

21 Exhibit 775 is received.

22 BY MS. MACCABEE:

23 Q Mr. Pierard, if you would turn to the last
24 paragraph in Exhibit 775, which reads, "Jeff provides
25 update on comment letter - Lottheimer has been" -- and

1 it's misspelled, but it's Lotthammer -- "has been in
2 contact with KP, Chris. KP - we briefed RA on Friday."

3 Can you explain, based on your recollection,
4 what that -- what those few sentences mean? What does it
5 mean when it says "Lotthammer has been in contact with
6 KP, Chris"?

7 A That refers to the conference calls that she
8 had with Chris.

9 Q And does KP mean you as well?

10 A Yes.

11 Q So by March 12, does this refresh your
12 recollection that you had actually heard from
13 Ms. Lotthammer regarding the comments -- the comment
14 letter?

15 A Yes.

16 Q Do you recall what Ms. Lotthammer asked or
17 what -- in that conference call?

18 A She had relayed that she thought it was
19 inappropriate for EPA to comment with everyone else.

20 Q Do you recall any reasons that Ms. Lotthammer
21 gave for that?

22 A At this point, some interpretation of the MOA
23 was starting to emerge, so I think there was a suggestion
24 made that we might be violating the MOA.

25 Q And did you or Mr. Korleski respond to that?

1 A Well, we would have said we weren't
2 violating -- the EPA was very careful that our actions
3 were consistent with or did not run afoul of our MOAs
4 with the state. That was just a standard procedure. It
5 usually would arise when we were having a dispute with
6 the state. That's when people begin to turn to the MOAs
7 to make sure that we were aligned with the requirements
8 in the MOA. So we had determined there was no violation
9 of the MOA, and it seemed rather odd that the Minnesota
10 water director would suggest that it was somehow
11 inappropriate for us to comment during the public comment
12 period. EPA makes comments all the time, inside and
13 outside the comment period, so that just struck me as
14 odd.

15 Q Now, on 775, there's also that sentence where
16 it says, "KP - we briefed RA on Friday." Can you explain
17 what that means?

18 A Yeah. The issue started to emerge that
19 Minnesota had expressed some discomfort. So we went up
20 and briefed the RA, I think, the Friday before. If I
21 remember right, it was March 9. And we talked to her a
22 little bit about what the project was and what our
23 recommendation was, which was to send our comments during
24 the comment period.

25 THE COURT: RA standing for?

1 THE WITNESS: Regional administrator.

2 THE COURT: Okay.

3 BY MS. MACCABEE:

4 Q And, Mr. Pierard, what was the name of the
5 regional administrator at that time?

6 A Cathy Stepp.

7 Q And do you have --

8 A It's S-t- --

9 Q Oh, I'm sorry. Go ahead.

10 A I was going to spell it for you. It's
11 S-t-e-p-p, I believe.

12 Q Thank you very much.

13 And, Mr. Pierard, do you have an understanding
14 of how long Ms. Stepp had been in that regional
15 administrator job as of March 9 when you briefed her on
16 the PolyMet NPDES draft permit?

17 A Probably about three months.

18 Q Was it your understanding that she was newly
19 appointed by the -- when President Trump took office?

20 A Yes. She took office in January of '17, so it
21 took a little while for him to appoint a regional
22 administrator for us.

23 Q So it might have even been less than the three
24 months that you mentioned?

25 A It might be. It's got to be very close to

1 that, though.

2 Q Okay.

3 A Prior to that, the last recollection I have, we
4 briefed the regional administrator, Bob Kaplan, in
5 November of 2017. So at that point, he was
6 still acting --

7 MR. SCHWARTZ: Your Honor --

8 THE WITNESS: -- in that role.

9 MR. SCHWARTZ: Your Honor, I just --

10 THE COURT: Okay. You want --

11 MR. SCHWARTZ: -- object to the line of --

12 THE COURT: -- to wait for the answer --

13 MR. SCHWARTZ: Excuse me. I object to the line
14 of questions. It is clearly a goal of sort of casting
15 doubt on Ms. Stepp's' qualifications. And what EPA does
16 in that sense is outside the scope of this proceeding.
17 It's about what MPCA does, not EPA. And the --

18 THE COURT: The questioning that I understand
19 is simply tracing the communications between the MPCA and
20 the EPA that led to comments -- written comments not
21 being made. So that's the line of questioning that I'm
22 listening to right now. There's no question before the
23 witness. So if you're going to object to a question, why
24 don't you wait for the next question.

25 BY MS. MACCABEE:

1 Q Mr. Pierard.

2 A Yes.

3 Q Did you also learn at the briefing with
4 Ms. Stepp that she was going to talk with MPCA
5 Commissioner Stine either Friday, March 9, or Monday,
6 March 12?

7 A Yes.

8 Q Did you become aware of a call having taken
9 place between Mr. Stine and Ms. Stepp?

10 A Chris Korleski advised me that it had.

11 Q And what did you learn from him about the
12 content --

13 MR. SCHWARTZ: Objection, that question calls
14 for hearsay.

15 THE COURT: It does. Sustained.

16 MR. SCHWARTZ: See, I do better when I don't
17 take notes.

18 MS. MACCABEE: Don't we all.

19 THE COURT: Just don't fall off the edge of
20 your seat.

21 MS. MACCABEE: If you could, Mr. Nelson, if you
22 could please pull Exhibits 616 and 649.

23 BY MS. MACCABEE:

24 Q And 616 is a March 12 email --

25 THE COURT: Hold on. Our document guy

1 disappeared.

2 MS. MACCABEE: He's working really hard.

3 THE COURT: He is, I know. Sure he didn't drop
4 a contact or something.

5 BY MS. MACCABEE:

6 Q And 616 is an email chain between Mr. Korleski
7 and Ms. Bauer regarding the deadline for providing
8 comments on the PolyMet draft permit, and it's dated
9 March 12, 2018. And 649 is an email response by you,
10 Mr. Pierard, to Mr. Korleski's question about deadlines
11 for commenting on the draft PolyMet permit.

12 THE COURT: Hearing no objections, those
13 exhibits are received.

14 BY MS. MACCABEE:

15 Q And looking at these documents, Mr. Pierard,
16 did both you and Ms. Bauer inform Mr. Korleski on
17 March 12 that the deadline for comments was March 16?

18 A Yes.

19 Q How would you interpret Mr. Korleski's interest
20 in the deadline for commenting on the draft PolyMet
21 permit as of March 12?

22 MR. SCHWARTZ: Objection. Again, it calls for
23 speculation.

24 THE COURT: That's sustained.

25 BY MS. MACCABEE:

1 Q By March 12 -- on March 12, 2018, was
2 Mr. Korleski aware that the -- did you make Mr. Korleski
3 aware that the comment period ended on March 16?

4 A Yes.

5 Q Now, did you become aware during the week
6 of March 12 that Ms. Lotthammer had sent an email to
7 Kurt Thiede, the deputy director to regional
8 administrator, Ms. Stepp?

9 A Yes.

10 Q And did you see the email at the time?

11 A Shortly after that, I believe.

12 Q Let's pull Exhibit 333.

13 Mr. Pierard, did you also review this document
14 on EPA's FOIA online site as a document released under
15 the Freedom of Information Act?

16 A Yeah.

17 Q And just looking --

18 THE COURT: Hearing no objection to the
19 exhibit, it's received.

20 BY MS. MACCABEE:

21 Q Let's take a look at the first page, the third
22 paragraph, I think it's the third paragraph, where it
23 says, "the established process is for MPCA to place the
24 draft permit on public notice, consider and respond to
25 public comments and make any resulting changes that are

1 necessary, and then to submit the proposed permit to EPA
2 for review and comment (which could include objection)
3 prior to final issuance."

4 Based on your experience as the NPDES program
5 chief, do you have an opinion whether it was the
6 established process for EPA to wait to review and comment
7 on an MPCA NPDES permit until after the public notice was
8 over and MPCA had submitted a proposed final permit to
9 EPA?

10 A Our established process was to receive and
11 review pre-public notice drafts and public notice drafts.

12 Q And if you also look at the first page, and
13 that's number fourth paragraph down, the last sentence of
14 that paragraph, it says, "We have asked that EPA Region 5
15 not send a written comment letter during the public
16 comment period and instead follow the steps outlined in
17 the MOA and wait until we have reviewed and responded to
18 public comments."

19 Based on your experience running Region 5's
20 NPDES program, what is the significance of EPA sending
21 their written comment letter during the public notice
22 permit instead of at some later time?

23 A Well, that's the official record. Gets their
24 comments on the record. It requires the state then to
25 respond to the comments, so it's much more official.

1 What she suggests here is waiting until they have -- if
2 they've taken the time to address all of the other
3 comments, modify the permit however they believe
4 appropriate based on those comments, and submitting to us
5 for a two-week review by EPA, that just doesn't make any
6 sense that we would do that. You know, that's not our
7 practice, and it wouldn't speed up the process, which I
8 think they were concerned about. It actually slows it
9 down. If at that late date EPA expresses a number of
10 objections to this permit, it creates a whole new process
11 to try and deal with our objections.

12 Q Now, thank you, Mr. Pierard.

13 If you could take a look at the second page of
14 Exhibit 333, is that an email from John Linc Stine to
15 Cathy Stepp and to Kurt Thiede?

16 A Yes.

17 Q What do you understand that -- and that email
18 says that Commissioner Stine is "looping Shannon
19 Lotthammer in who serves as the MPCA Assistant
20 Commissioner for Water, and she will follow up directly
21 with Kurt regarding the Region 5 MPCA agreement I
22 mentioned on our call."

23 Based on this email what do you understand to
24 have been the nature of the comment -- and your
25 communication with Shannon Lotthammer?

1 MR. SCHWARTZ: Objection to the extent it goes
2 beyond his direct communications with Ms. Lotthammer.

3 THE COURT: It appears to be a multiple
4 question, part of which calls for hearsay. So in its
5 current form, the objection is sustained.

6 BY MS. MACCABEE:

7 Q Sometime after Ms. Lotthammer's email to
8 Mr. Thiede on March 13, did you participate in a phone
9 call with Ms. Lotthammer involving Mr. Thiede and other
10 EPA senior managers?

11 A Yes.

12 Q Can you explain what that call was and how it
13 came about?

14 A We were called up to Kurt Thiede's office to
15 talk about our comments and the PolyMet permit and really
16 kind of inform Kurt on what our process was, what we
17 thought of the MOA, things like that. And it was
18 apparent at that time Kurt was trying to find some middle
19 ground where he could make PCA happy and still follow EPA
20 protocols --

21 Q Now --

22 A -- so -- yeah, go ahead.

23 Q And in that call, or in that meeting, who was
24 there besides you and Mr. Thiede?

25 A Chris Korleski and Linda Holst. That's

1 H-o-l-s-t. She was our deputy division director.

2 Q And to the best of your knowledge, at that
3 time, which is, I'm estimating, about March 13, how long
4 had Mr. Thiede been in his position as the chief of staff
5 to the regional administrator?

6 THE COURT: That's been asked and answered. We
7 already know that.

8 MR. PENTELOVITCH: No, I don't think so,
9 your Honor.

10 THE COURT: Mr. Thiede?

11 MS. MACCABEE: Sir, we asked about Ms. Stepp.

12 THE COURT: Ms. Stepp. You're correct.
13 You can go ahead and answer.

14 THE WITNESS: Mr. Thiede arrived shortly after
15 Ms. Stepp. So he had been there roughly three months,
16 maybe a little less, I believe.

17 BY MS. MACCABEE:

18 Q And at some point, did Mr. Thiede suggest that
19 they get Ms. Lotthammer on the line and have a conference
20 call or speakerphone?

21 A Yes.

22 Q And can you describe what Ms. Lotthammer asked
23 or communicated to EPA in that phone call?

24 A She expressed her concerns with us providing
25 written comments during the comment period. She

1 requested that we not send those during the comment
2 period.

3 Q What reasons -- to the best of your
4 recollection, what reasons did she give you in that
5 conference call?

6 A Well, it was -- it would confuse the public.
7 It would create a good deal of press. Other people were
8 going to make the same comments as EPA, so she didn't see
9 the value in us providing comments at that time.

10 Q And what was your reaction to those reasons?

11 A Well, I disagreed with them. You know, the
12 process is what it is. It's not -- you know, we don't
13 make it up site by site or where you might get press and
14 you might not. You know, our process was to provide
15 comments to the state in writing, and, you know, that as
16 the conversation went on after Shannon had hung up, we
17 talked to Kurt about that and about our concerns with
18 regard to that.

19 Q Did either you or Mr. Korleski or Ms. Holst
20 respond to Shannon Lotthammer on that phone call and give
21 her your position on her request?

22 A I believe we did. I think Chris was doing most
23 of the talking on that. And Chris was -- Chris was a
24 proponent of following our standard procedures and
25 providing comments, you know. And we had offered to talk

1 to the state in advance about what our comments would be
2 so they wouldn't be blindsided. But beyond that, we
3 weren't really offering anything else to Shannon at that
4 point.

5 Q And did you become aware between March 13 and
6 the end of the comment period about emails and conflict
7 between -- among the EPA staff pertaining to the decision
8 on whether or not to allow -- whether or not to allow the
9 EPA's comments on the draft permit to be sent?

10 MR. GRILLOT: Objection, your Honor. This is
11 Benjamin Grillot for the Department of Justice EPA.

12 To the extent that this question goes in to
13 EPA's internal decision-making process and their delivery
14 process in considering whether to comment or object on
15 the permit, we would ask that you not allow the question.

16 THE COURT: All right.

17 Anyone else want to speak to the objection?

18 Okay. The objection is sustained on that
19 ground and also on the ground that the question goes
20 beyond the scope of the hearing because procedural
21 irregularities by the EPA are not at issue in this case.
22 I think we covered that this morning.

23 MS. MACCABEE: I think so.

24 BY MS. MACCABEE:

25 Q Mr. Pierard, maybe we can turn to Exhibit 498.

1 THE COURT: Thank you.

2 BY MS. MACCABEE:

3 Q It has a staple on an odd side.

4 THE COURT: I thought the same thing.

5 BY MS. MACCABEE:

6 Q Turning it around, Mr. Pierard, this is a
7 privilege log of emails between EPA staff and lawyers
8 from March 13 through March 15. And have you seen this
9 document before on the EPA's FOIA online site?

10 A Yes.

11 Q And I would not -- I'm not asking you to
12 speculate or comment on any of the content of the
13 discussions but simply, looking at this privilege log, is
14 this consistent with your recollection that MPCA's
15 request that EPA not send comments resulted in a
16 considerable amount of controversy within EPA?

17 MR. SCHWARTZ: Objection. Again, it's outside
18 the scope of the hearing.

19 THE COURT: It's the same question I just
20 sustained the objection to. It's still sustained.
21 Hearing no objection to this document --

22 MS. MCGHEE: Your Honor, PolyMet objected to
23 this document on the basis of foundation, and I think we
24 also have a 602 objection to this that Mr. Pierard needs
25 personal knowledge to testify about what's contained in

1 this document.

2 THE COURT: Well, it's a privilege log. I
3 don't see what it adds to the case anyway. What does it
4 add to the case?

5 MS. MACCABEE: Your Honor, I think it just
6 shows that this is a relatively -- it is an extraordinary
7 request that MPCA made to EPA, and it documents the
8 degree to which they had to make efforts to make whatever
9 decision they made on the file, so that would be --
10 that's the limited purposes for which we wanted to admit
11 it.

12 THE COURT: All right. This document has no
13 relevance to the case for the same reason I sustained the
14 objection. Whether there was or was not controversy
15 within the EPA is irrelevant to the case. The EPA does
16 what the EPA does for reasons of the EPA that aren't
17 being reviewed in this case and are not the subject of
18 review by the court of appeals, as far as I am aware.

19 BY MS. MACCABEE:

20 Q During March 2018, other than MPCA's requests,
21 Mr. Pierard, were you aware of any request from any other
22 party or person or entity to EPA not to send the written
23 comments on the draft PolyMet permit?

24 A No, I wasn't.

25 Q When were EPA's written comments on the draft

1 PolyMet permit completed?

2 A March 14 or 15 they would have been ready to
3 go.

4 Q And was that date prior to the close of the
5 public comment period?

6 A Yes.

7 Q If EPA's comments on the draft Polymet permit
8 had been sent like other comments on draft permits, who
9 would have signed them?

10 A I signed those letters.

11 Q And if you had treated EPA's comments on the
12 draft PolyMet permit as you did other EPA comments on
13 draft permits, when would they have been sent?

14 A They would have been sent prior to the close of
15 the comment period, so these would have gone out March 15
16 or 16.

17 Q When did you learn that EPA's written comments
18 on the draft PolyMet permit were not going to be sent to
19 MPCA?

20 MR. GRILLOT: Objection again to the extent it
21 calls for a revelation of internal decision-making or --
22 but to the fact of -- the actual fact of the date,
23 there's no objection, but to the extent that the
24 testimony was to get any further than that, there's no
25 objection.

1 THE COURT: The question as phrased is not
2 objectionable because the question asks only for a date.

3 So confine your answer to the question asked,
4 and we'll be good.

5 THE WITNESS: I was made aware that we would
6 not be sending comments on -- either late on March 15 or
7 early March 16.

8 BY MS. MACCABEE:

9 Q And if we could turn now to Exhibit 307.

10 THE COURT: Thank you.

11 BY MS. MACCABEE:

12 Q And this document is a March 16, 2018 email
13 chain between Mr. Thiede and Ms. Lotthammer on which
14 Mr. Pierard was copied.

15 THE COURT: Hearing no objection, the document
16 is received.

17 BY MS. MACCABEE:

18 Q Mr. Pierard, if you could just look at the
19 first paragraph of that email, and it is an email -- it
20 is actually an email from Jeff Udd to Richard Clark, and
21 it describes a phone call between Mr. Udd and you. And
22 if you just use that to refresh your recollection, and
23 then explain what you did in terms of communicating with
24 MPCA on March 16 about checking meetings and going
25 through the content of the comments that you would have

1 sent.

2 A Right. So I spoke to Jeff telling him we would
3 not be sending comments. And my interest was that PCA be
4 aware of the specific comments we were going to make so
5 that they could consider them as they looked at other
6 comments. We also had an interest to know what the other
7 commenters had said and to talk to PCA about how they
8 might respond to those comments. And that was pretty
9 routine. Sometimes states would ask us to give them a
10 hand with response to comments.

11 Q And so when was the -- maybe let's just turn to
12 Exhibit 337.

13 While we're getting that, Mr. Pierard, prior to
14 your -- the day when you had a chance to walk through
15 your comments, what did you do to prepare for that
16 opportunity, that conference call with MPCA?

17 A I began to write notes to myself to kind of
18 guide myself through the upcoming call with PCA. And as
19 I got into it, I decided that the most effective way --
20 our comments were in relative summary form. We didn't go
21 into nearly the detail that we probably could have. I
22 decided to simply use the comments -- the comment letter
23 that was prepared. And in preparation for that, I just
24 underlined the portions that I was going to speak to and
25 itemize them that way. And to just keep myself

1 organized, I numbered paragraphs to be -- to identify the
2 issue, and then, secondarily, to identify the method in
3 which PCA could use to rectify the concern that we had.

4 THE COURT: There being no objection,
5 Exhibit 337 is received.

6 BY MS. MACCABEE:

7 Q And looking at your handwritten notes on the
8 top of that exhibit, does that -- do your handwritten
9 notes convey that the letter was conveyed verbally to
10 MPCA on April 5, 2018?

11 A Yes.

12 Q And that the letter was read word for word?

13 A Yeah. The underlined portions were read.

14 Q Other than the handwritten notes on the top of
15 the page, are EPA's comments in Exhibit 337 the same as
16 what you were prepared to sign by March 15 or 16, 2018?

17 A Yes.

18 Q Now, the comment letter -- and let's see where
19 that is. If you look at paragraph three on the first
20 page, it says, "Enclosed for your consideration are our
21 comments on the Public Notice Draft Permit."

22 When you said "our comments," who did you mean?

23 A Well, that would be EPA comments, and that's
24 the comment of -- the comments of the review team at EPA.

25 Q And just really briefly, who was on that review

1 team? Who prepared or contributed?

2 A Yeah. Krista McKim was our lead technical
3 person. In addition, on my staff would have been
4 Mark Ackerman provided some information. Robb Pepin
5 would have provided assistance on it. Beyond my group,
6 it was Barbara Wester and Jillian Rountree, who were
7 oversee attorneys.

8 Q While you were reading these comments to MPCA,
9 did MPCA say anything that gave you the impression they
10 were taking notes?

11 A Yes.

12 Q Can you elaborate? What did they say, and who
13 said it and --

14 A It was -- there wasn't a lot of conversation
15 about these comments. For the most part, the PCA folks
16 were silent during the call. Richard Clark was the one
17 that -- on a few occasions, he would ask me to either
18 slow down or if I could repeat a comment that I had read.
19 So that gave me the impression that they were taking
20 notes.

21 Q And did he do that just at the beginning of the
22 conference call or throughout the call?

23 A It was the middle and toward the end of the
24 conference call.

25 Q Do you recall about how long the conference

1 call lasted?

2 A I would say one hour.

3 Q And looking at the bottom of the first page of
4 the letter going on to the second page, what were EPA's
5 most serious concerns about the draft PolyMet permit?

6 MR. SCHWARTZ: Objection, your Honor. It goes
7 to substance and not the process.

8 THE COURT: Sustained. And the document speaks
9 for itself.

10 MR. PENTELOVITCH: Your Honor, may I be heard
11 on that motion?

12 THE COURT: Yeah.

13 MR. PENTELOVITCH: One of the defenses that's
14 been raised by the MPCA is that all of this doesn't
15 matter, because they took into account the EPA's comments
16 because they were similar to the comments made by the
17 public. That's one of their defenses. They have opened
18 up the issue, and we, I think, are entitled to show what
19 MPCA -- what EPA's comments were and then compare to the
20 final permit to show which of them were not, in fact,
21 addressed in the final permit. So I think that in their
22 trial brief, MPCA has opened it up for us not to go into
23 whether the science is right or wrong but as to what
24 EPA's comments were and whether, in fact, they were
25 addressed in the final permit.

1 THE COURT: You're absolutely right. But
2 that's not the question that was asked. The question
3 that was asked is what were the most substantial concerns
4 that the EPA had. So the question isn't -- the argument
5 you just made doesn't address the question that I
6 sustained the objection to.

7 MR. PENTELOVITCH: So the issue is the word
8 "substantial"?

9 THE COURT: The issue is weighing the
10 significance of various comments. I think we can examine
11 and compare public comments generally to EPA comments and
12 make a determination of whether they're the same or
13 whether they're not the same without going into the
14 science or weighing the relative merits of one comment
15 versus another comment.

16 MR. PENTELOVITCH: And just so that we're all
17 clear, I want to make sure. You're saying we could weigh
18 the public comments versus EPA, but we can also weigh the
19 EPA comments against the final permit as well, correct?

20 THE COURT: Not weigh, but compare.

21 MR. PENTELOVITCH: Compare.

22 THE COURT: Compare.

23 MR. SCHWARTZ: Your Honor, if I may.

24 THE COURT: Yes.

25 MR. SCHWARTZ: I think counsel has not quite

1 accurately portrayed the position that we're taking.
2 What we said was that the EPA comments duplicated or were
3 duplicated by public comments. And you can do that by
4 simply making a comparison.

5 THE COURT: I think that's what we just said.

6 MR. SCHWARTZ: Yes, exactly. That is exactly
7 what we said. The reason I'm bringing this up is that
8 counsel suggested that we had said something else, and we
9 did not.

10 THE COURT: Well, I didn't hear it that way. I
11 hear you saying that -- both saying the same thing. I
12 don't want to get into a fight about agreeing to the same
13 thing. So the bottom line is, no one is going to be
14 weighing the relative merits of one comment compared to
15 another comment. But what is fair game is whether the
16 MPCA's position that the public comments were the same as
17 the EPA comments is true or not is up for grabs. And so
18 I think we can do that without being scientists.

19 Right, Mr. Pentelovitch?

20 MR. PENTELOVITCH: I mean, the way I view this
21 is that's an affirmative defense, so the burden of
22 proving that they're right about that is on them, and we
23 have the right to rebut it. But you're right, it's not
24 about scientists. The public comments and the EPA
25 comments line up, and then were they addressed in the

1 final permit, and what the scientific merits of any of it
2 is basically a court of appeals question, not a question
3 for you.

4 THE COURT: Well, and whether they were
5 addressed in the final permit is taking an additional
6 leap, and I don't think I'm quite there with you on that
7 yet.

8 MR. PENTELOVITCH: Well, we'll get you there.

9 MR. SCHWARTZ: And, your Honor, we aren't
10 either.

11 THE COURT: Well, I knew that.

12 MR. SCHWARTZ: Yeah. All right. Then I'll sit
13 down.

14 THE COURT: So the problem with that is whether
15 that crosses over to science and, more fundamentally,
16 whether a particular solution that ended up in the final
17 permit truly did address an earlier concern could be
18 subject to debate. And, for example, there's no WQBELS
19 in the final permit. That was one of the concerns
20 raised. So can you address the lack of WQBELS by doing
21 something else? I'm sure you guys would love to debate
22 that and whether that's true or not. You can do that at
23 the court of appeals. We're not going to do that here.
24 Okay?

25 MS. MACCABEE: Your Honor --

1 MR. SCHWARTZ: Your Honor, let me just say that
2 that's important to us because it helps define what we
3 have to submit in this proceeding. We are all ready to
4 debate the debate that should be in the court of appeals.
5 And so to forego that, we have to know that we can safely
6 forego it because we won't be prejudiced by not
7 explaining why the NPDES permit was in fact an excellent
8 permit, which we think it was. And we will not present
9 that testimony here because it's irrelevant based on your
10 Honor's ruling. So we have to be confident that we're
11 properly interpreting your Honor's ruling.

12 THE COURT: In the interest of time, I don't
13 want to get ahead of ourselves, because the topic we were
14 just debating is not the topic that arose out of the
15 question before us. So let's just stick to where we are
16 and stop dreaming of the future.

17 BY MS. MACCABEE:

18 Q Let's bring it down a little bit to Earth.

19 Mr. Pierard, in your -- in the EPA's comment
20 letter of March 15, which was read to MPCA on April 5,
21 you have two different categories of comments, one which
22 starts on the enclosure at page 1 of 7 called "Comments
23 and Recommendations to Ensure Consistency with the Clean
24 Water Act," and then another that starts on page 6 of 7
25 called "Other Recommendations."

1 Can you explain how these two classifications
2 of comments differ?

3 MR. SCHWARTZ: Your Honor, again, it's going to
4 the topic that's outside this hearing, which is the
5 relative merits of different comments that are included
6 in EPA's letter.

7 THE COURT: What about this explanation is
8 necessary for me to know to determine if there's a
9 procedural or procedural irregularity?

10 MS. MACCABEE: Your Honor, what about this
11 that's important for you to know is which of these
12 comments EPA considered at the time of making these
13 comments were important.

14 THE COURT: Right. And --

15 MS. MACCABEE: Now, that is not the same as
16 saying they were scientifically more important or that
17 the Clean Water Act is going to be on one side or the
18 other. This is about what do these comments mean, and
19 that's --

20 THE COURT: It's irrelevant. And they are in a
21 letter; they're all important. I assume if it's in the
22 letter, they thought it was important. If it's not
23 important, they are not going to put it in the letter.
24 If they're happy with everything, they're not going to
25 comment at all. So I don't see how that advances the

1 issue before the Court.

2 MS. MACCABEE: Actually --

3 THE COURT: Everything is important.

4 MS. MACCABEE: Actually, your Honor, that's not
5 what this witness would have testified.

6 THE COURT: Let's move on.

7 BY MS. MACCABEE:

8 Q Look at page two of the letter, and not the
9 enclosures.

10 THE COURT: Okay. So this is something that
11 was not read during the conference call.

12 MR. SCHWARTZ: Do you have an extra copy?

13 BY MS. MACCABEE:

14 Q Do you see the paragraph saying, "The above" --
15 that starts, "The above concerns must be addressed to
16 ensure that the permit will achieve compliance," and it
17 goes on. This paragraph is not underlined.

18 Do you recall whether you told MPCA staff --
19 whether you told the MPCA staff --

20 THE COURT: Oh, we just lost our feed.

21 MR. SCHWARTZ: This will give him time to
22 consider the question.

23 THE COURT: He didn't hear it all yet. I love
24 the fact that they are nice enough to tell us that --
25 actually, the information on the screen is wrong. It

1 says you're the only person in the meeting.

2 MS. MACCABEE: There's a lot of us.

3 THE COURT: How many people are there here?
4 That's why we don't give our lives away to technology, or
5 shouldn't.

6 MS. LARSON: I'm worried, your Honor, that it
7 might be a timed-out meeting. Sometimes you set a time
8 for the meeting, and then it will log it out, and then
9 your host key won't work after it logs out.

10 MS. RAY-HODGE: They are trying to fix it right
11 now on their end, your Honor.

12 MR. PENTELOVITCH: The last time I tried one of
13 these was in 1996 in Anoka County. We actually had to
14 send someone to a TV studio in Indiana to try and
15 broadcast his live testimony.

16 THE COURT: You were ahead of your time.

17 MR. PENTELOVITCH: It went very poorly.

18 THE COURT: That's what happens when you're
19 ahead of your time.

20 MR. PENTELOVITCH: In 1996, your Honor.

21 THE COURT: That's pretty good, '96.

22 And I'm looking at the clock, too. You were
23 speculating about it timing out, but that was intuitive
24 based on the clock.

25 MS. LARSON: I just thought continuing to enter

1 a key that wasn't going to work anymore didn't seem fair.

2 THE COURT: Well, let's go off the record and
3 talk about logistics as long as we're a victim of them.

4 (Discussion was held off the record.)

5 THE COURT: Welcome back.

6 THE WITNESS: Thank you.

7 BY MS. MACCABEE:

8 Q Mr. Pierard, I just want to turn you back to
9 page two.

10 A Yes.

11 Q After the four numbered paragraphs. I'm just
12 going to read this to you, and then I have a question
13 about whether this was communicated.

14 "The above concerns must be addressed to ensure
15 that the permit will achieve compliance with all
16 applicable requirements of the CWA, including water
17 quality requirements of Minnesota and of all affected
18 states. If unaddressed, the above concerns may result in
19 an EPA objection to a proposed permit." This is not
20 underlined.

21 Do you recall whether you told MPCA in that
22 conference call on April 5 that, if unaddressed, some of
23 EPA's concerns may result in objection to the proposed
24 permit?

25 A Yes, I do.

1 Q And did you read it here, or did you say
2 something slightly different?

3 A I said something slightly different. As I
4 prepared to read the underlined items, what I said was
5 this first set of items that I'm going to read to you we
6 consider at this point are likely objectionable items.
7 So that was the way I introduced it.

8 Q And when you said that, which items were you
9 referring to?

10 MR. SCHWARTZ: Objection, your Honor. Again,
11 this is an attempt to prioritize the various comments.

12 THE COURT: Sustained.

13 MS. LARSON: Your Honor --

14 THE COURT: Yes.

15 MS. LARSON: -- he's testifying to things that
16 didn't -- that are not in the record because there was a
17 phone call instead of this being sent. And he's saying
18 that he said certain things were objectionable on the
19 phone call. And because we don't have a record of that
20 phone call, his testimony is important to understand what
21 was actually said in that phone call, and that's relevant
22 to this proceeding.

23 MS. MACCABEE: Your Honor, otherwise, we --

24 MR. SCHWARTZ: Your Honor --

25 THE COURT: Hold on.

1 MR. SCHWARTZ: -- if the subject matter isn't
2 relevant, then what he said isn't relevant.

3 The other thing is, when I heard the question,
4 I'm not certain that she would -- that counsel was simply
5 asking him to say what he said. She did that, he said
6 what he said, and then she asked a follow-up. And my
7 impression was she was asking him to provide more
8 information.

9 MS. MACCABEE: Your Honor --

10 THE COURT: Hold on, hold on, hold on.

11 All right. You can -- was someone going to say
12 something?

13 MS. MACCABEE: Yes, your Honor. What the
14 witness said is that the first set of items are likely --
15 that he told MPCA that the first set of items are likely
16 objectionable. So the question was simply which items
17 were you referring to, because otherwise, we have
18 something in the record where the witness says the first
19 set of items are likely objectionable, and we don't know
20 what that is.

21 MR. SCHWARTZ: Your Honor --

22 MS. MACCABEE: We don't know what that first
23 set is, and so we don't know what he told MPCA. And we
24 already found out that that isn't the underlying portion,
25 so the document itself doesn't give us the answer.

1 MR. SCHWARTZ: Your Honor, we have the letter,
2 and the letter does speak for itself. And we have a
3 statement from the witness saying what he read from the
4 letter and what he didn't. And so more explanation
5 simply goes deeper into an area that is really outside
6 the scope of this proceeding.

7 THE COURT: Well, the purpose of these
8 questions is to determine what occurred during a certain
9 phone call at a certain time. And because the letter was
10 never sent, the only source of knowledge as to what
11 actually happened is to hear what did happen based upon
12 the recollection of someone who was actually there. So
13 this doesn't necessarily go to the weighing of the
14 relative merits of objections as much as it goes to what
15 actually happened, which I need to know for the context
16 of whether there were any procedural irregularities. For
17 that limited reason, I will give leeway and allow the
18 question to be reasked and then answered.

19 MS. MACCABEE: Would you like me to repeat the
20 question, or would you like to read it back?

21 THE COURT: Actually, I'm going to ask the
22 question to make sure that no one goes wild.

23 You said in your answer that "What I said was,
24 the first set of items that I am going to read to you we
25 consider at this point are likely objectionable items."

1 What items were they?

2 THE WITNESS: Those were all the items up
3 through -- up to other recommendations on page 6 of 7.

4 THE COURT: Okay. That's the answer.

5 Your next question, Ms. Maccabee.

6 MS. MACCABEE: I am looking and seeing where we
7 end with material that --

8 THE COURT: It's 4:35. And due to the long
9 pause, I will consider this a convenient stopping point
10 for the day.

11 MS. MACCABEE: Yes, sir.

12 THE COURT: We will start again at 9 a.m.
13 tomorrow morning.

14 And then we'll go off the record. If there's
15 anything that the parties want to talk to me about that's
16 not on the record, we can do that procedurally. All
17 right? Thank you.

18 MS. MACCABEE: Thank you, your Honor.

19 THE COURT: Oh, one thing to go on the record.
20 I was going to say this. I can't remember if I did: As
21 to any documents for which I sustain objections, and they
22 don't go on the record, they're going to be all amassed
23 in one group called Court Exhibit C. And we'll build
24 that file as we go.

25 MR. PENTELOVITCH: Your Honor, just for

1 clarity, it's 9 a.m. Central Time? Because I believe the
2 witness is in a different time zone.

3 THE COURT: Yes, 9 a.m. Central Time. I know
4 the day is just beginning for you, sir, but we're on a
5 different schedule.

6 THE WITNESS: Yes, your Honor. Thank you.

7 THE COURT: We're off the record.

8 (Proceedings adjourned for the day at 4:34 p.m.)

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1 STATE OF MINNESOTA)
) SS.
 2 COUNTY OF RAMSEY)

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REPORTER'S CERTIFICATE

5

I, Lori Morrow, Registered Merit Reporter,

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Registered Professional Reporter, Certified Realtime

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Reporter, Certified LiveNote Reporter, Certified

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Broadcast Captioner, and Notary Public in and for the

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court reporter in and for the County of Ramsey, Second

11

Judicial District, State of Minnesota, and that I

12

reported the foregoing proceedings in this matter, and

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that the transcript contained on the foregoing

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209 pages constitutes a true and accurate record of the

15

proceedings had in the above-entitled matter at the said

16

time and place stated herein.

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Dated: March 2, 2020.

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Lori L. Morrow, RMR, RPR, CRR, CBC, CLR

22

Official Court Reporter

23

Ramsey County Courthouse, Chambers 1470

24

15 West Kellogg Boulevard

St. Paul, Minnesota 55102

(651) 266-8281

25

Notary Public, Minnesota

My commission expires: January 31, 2025