

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

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

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

**DECLARATION OF
PAULA G. MACCABEE**

State of Minnesota)
) ss.
County of Ramsey)

I, Paula G. Maccabee, hereby declare as follows:

1. I am an attorney licensed in Minnesota. I represent WaterLegacy in the above-captioned matter.

2. Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, Center for Biological Diversity, WaterLegacy and the Fond du Lac Band of Lake Superior Chippewa (collectively, “Relators”) are the Relators in the above-captioned matter.

3. Analyzing the documents Relators included in their declarations attached to the December 27, 2019 informal Motion to Amend and December 31, 2019 supplemental letter, I created a summary of the proposed additional documents in **Attachment A**. **Attachment A** is a true and accurate summary of the documents with accompanying Bates numbers, declaration citations, and proposed exhibit numbers.

4. Relators provided documents secured from the U.S. Environmental Protection Agency (“EPA”) under the Freedom of Information Act (“FOIA”) within just a few days. I first was able to download the documents pertaining to the Sept. 25-26, 2018 meetings between EPA

and the Minnesota Pollution Control Agency (“MPCA”) on Dec. 21, 2019. Relators provided the documents to Respondents five days later on Dec. 26, 2019, and filed an informal motion to add these documents to Relators’ Exhibit List on Dec. 27, 2019. I received the second set of FOIA documents, including notes from phone conferences between EPA and MPCA, late in the afternoon on Dec. 27, 2019. Despite the intervening weekend, Relators provided these documents to Respondents and the Court that they sought to be added to the Exhibit List four days later on Dec. 31, 2019. For both sets of documents, Relators acted quickly, despite weekends, the holidays and other deadlines, and Respondents have not been prejudiced.

5. All of the EPA notes under the FOIA produced in my previous declarations and summarized in **Attachment A** reflect meetings between EPA and MPCA or conference calls between EPA and MPCA in which Kevin Pierard, EPA Region 5 NPDES Branch Chief participated. In fact, one of the sets of notes are his own. (RELATORS_65981-88 (proposed exhibit 769)). Relators intend to call Mr. Pierard as a witness. The contemporaneous notes from these meetings and calls with MPCA are needed to refresh Mr. Pierard’s recollection and to demonstrate that the matters to which he will testify have been publicly disclosed so that any applicable privilege EPA might have had is waived.

6. **Attachment B** to Relators’ Jan. 13, 2020 letter is a true and correct copy of a letter from Benjamin Grillot, U.S. Department of Justice (“DOJ”) to Judge Guthmann dated January 10, 2020. In a phone conversation with Relators on January 9, 2020, Mr. Grillot explained that DOJ would not object to testimony by Kevin Pierard as to any matters disclosed by EPA under the FOIA, even if the EPA might otherwise claim that such matters were privileged or protected.

7. **Attachment C** is a true and correct copy of the email and attachment (Relators Ex. 480) that I received on June 12, 2019 from Kevin Bell, the attorney who represented WaterLegacy

in FOIA federal litigation to secure EPA's comments on the draft PolyMet Permit. True and correct copies of WaterLegacy's federal Complaint and the DOJ's Answer in this FOIA litigation are provided, respectively as Relators Ex. 475 and 479. The email I received on June 12, 2019 from Kevin Bell summarized, "the agency rolled over and gave us the comments, so hooray we win!" Mr. Bell forwarded the email from Peter Bermes at the EPA, which attached EPA's comments on the draft PolyMet Permit both in annotated form and as a clean copy. These complete EPA comments are provided both as Relators Ex. 481 and as Relators Ex. 337. WaterLegacy's FOIA case was stayed, briefing suspended, and, on information and belief, EPA agreed to pay Mr. Bell's attorneys' fees under the Equal Access to Justice Act shortly thereafter. EPA's comments on the draft PolyMet Permit were provided to WaterLegacy in settlement of FOIA litigation.

8. Regional Administrator Cathy Stepp's June 12, 2019 letter to the Fond du Lac Band of Lake Superior Chippewa in MPCA Exhibit 1125 produced only part of EPA's comments on the draft PolyMet Permit, which did not disclose that the comments had been read aloud to MPCA. Ms. Stepp also wrote that "Region 5 has made the decision to provide the document," without mentioning the FOIA litigation settled that day to release the document.

I declare under penalty of perjury that everything that I have stated in this document is true and correct

Dated: January 13, 2020

s/s Paula G. Maccabee
PAULA G. MACCABEE

ATTACHMENT A
Maccabee January 13, 2020 Declaration
Exhibits Listed in the Order They Appear in Relators' Declarations
Dated December 27, 2019 and December 31, 2019

Proposed Ex. No.	Declaration	Bates Range	Description
766	2019-12-27 Larson Decl. Ex. A	RELATORS_0065955	2019-11-14 DPA request received by MPCA
765	2019-12-27 Larson Decl. Ex. B	RELATORS_0065952-54	2019-12-17 Response DPA re litigation hold
764	2019-12-27 Larson Decl. Ex. C	RELATORS_0065950-51	2019-11-27 Litigation hold
767	2019-12-27 Maccabee Decl. Ex. D	RELATORS_0065956-60	2019-12-19 FOIA letter with enclosures (R5-2019-6658)
768	2019-12-27 Maccabee Decl. Ex. D	RELATORS_0065961-80	2018-09 C. Bauer Notes (FOIA 6658)
769	2019-12-27 Maccabee Decl. Ex. D	RELATORS_0065981-88	2018-09 K. Pierard Notes (FOIA 6658)
770	2019-12-27 Maccabee Decl. Ex. D	RELATORS_0065989-92	2018-09 K. McKim Notes (FOIA 6658)
771	2019-12-27 Maccabee Decl. Ex. D	RELATORS_0065993-6002	2018-09 L. Holst Notes (FOIA 6658)
761	2019-12-27 Maccabee Decl. Ex. E	RELATORS_0064227	2018-09-25 Agenda received by EPA
762	2019-12-27 Maccabee Decl. Ex. E	RELATORS_0064228	2018-09-26 Agenda received by EPA
763	2019-12-27 Maccabee Decl. Ex. F	RELATORS_0064181-82	2018-06-18 Letter from the Band to C. Stepp
772	2019-12-31 Maccabee Decl. Att. A	RELATORS_0066003	2019-12-27 Disposition FOIA (R5-2020-1126)
773	2019-12-31 Maccabee Decl. Att. A	RELATORS_0066004-08	2019-12-19 FOIA letter final disposition with enclosures (R5-2020-1126)
774	2019-12-31 Maccabee Decl. Att. A	RELATORS_0066009	2018-04-30 K. McKim Notes (R5-2020-1126)
775	2019-12-31 Maccabee Decl. Att. A	RELATORS_0066010	2018-03-12 K. McKim Notes (R5-2020-1126)
776	2019-12-31 Maccabee Decl. Att. A	RELATORS_0066011	2018-03-12 M. Ackerman Notes (R5-2020-1126)



U.S. Department of Justice

Environment and Natural Resources Division

BJG/DJ 90-5-1-4-21627

Environmental Defense Section
P.O. Box 7611
Washington, DC 20044

Telephone (202) 514-2219
Facsimile (202) 514-8865

January 10, 2020

VIA EMAIL AND OVERNIGHT DELIVERY

The Honorable John H. Guthmann
Ramsey County District Court
15 W. Kellogg Boulevard
St. Paul, MN 55102
(2ndJudgeGuthmannChambers@courts.state.mn.us)

Re: Ramsey County District Court File No. 62-cv-19-4626

Dear Judge Guthmann:

The United States Environmental Protection Agency (“EPA”), a non-party to this matter, submits this letter in response to your order of December 8, 2019, compelling former EPA employee Kevin Pierard to testify under oath.

EPA does not object to Mr. Pierard’s testimony regarding non-privileged public information either at a deposition or in-person (or by live video feed) at the evidentiary hearing that is scheduled to begin on January 21, 2020. However, pursuant to the Minnesota Rules of Civil Procedure and Federal Rules of Civil Procedure, EPA respectfully requests that this court permit EPA to protect against “disclosure of privileged or other protected matter” for which “no exception or waiver applies” for Mr. Pierard or any other current or former EPA employee.¹ M.R.C.P. 45.03(c)(1)(C); F.R.C.P. 45(d)(3)(A)(iii).

The undersigned intends to be present at Mr. Pierard’s testimony, either at a deposition or evidentiary hearing, and to assert relevant objections at that time. However, to minimize the need for such objections, the Relators and EPA have already begun to work to reach agreement on the scope of Mr. Pierard’s testimony to ensure that privileged and otherwise protected material is not disclosed.

On a telephone call on January 9, 2020, EPA informed counsel of record for all parties of this request. The Minnesota Pollution Control Agency and PolyMet do not object to this request. The Relators take no position on the request.

¹ The submission of this letter is not intended, and should not be construed, as a waiver of sovereign immunity or an acknowledgement of this Court’s jurisdiction over EPA.

Sincerely,



Benjamin J. Grillo
Trial Attorney
U.S. Department of Justice
Environmental Defense Section
Environment and Natural Resources
Division

Phone: (202) 305-0303

E-mail: Benjamin.grillo@usdoj.gov

Message

From: Kevin Bell [kbell@peer.org]
Sent: 6/12/2019 2:23:47 PM
To: Paula Maccabee [pmaccabee@justchangelaw.com]
Subject: FW: WaterLegacy v. EPA (19-412) Discretionary Production and Proposed Stay
Attachments: (1) Annotated Copy.pdf; (2) Clean Copy, Enclosure.pdf; Waterlegacy Joint Motion To Stay.docx

the agency rolled over and gave us the comments, so hooray we win! I'm going to agree to the motion to stay the case for now and we'll work on settlement negotiations in the next two weeks

Kevin

From: Bermes, Peter <Bermes.Peter@epa.gov>
Sent: Wednesday, June 12, 2019 2:50 PM
To: Kevin Bell <kbell@peer.org>
Cc: Kahn, Matthew (USADC) <Matthew.Kahn@usdoj.gov>
Subject: WaterLegacy v. EPA (19-412) Discretionary Production and Proposed Stay

Hello Kevin,

Attached is the single document at issue in this case, both the annotated version and a clean copy, as requested. The Agency is providing these records as a discretionary release. As the only two records at issue in this case are now provided in full, the Agency proposes to vacate the briefing schedule and allow two weeks to discuss any outstanding issues. Also attached is a proposed joint motion to stay.

Please review, and if the language in the proposed joint motion is acceptable to you, we will file it today. If you'd like to discuss, we are happy to have a call. As you know, we have a filing due with the Court today, so please let us know as soon as possible how you would like to proceed.

Thank you,

Peter

Peter Bermes
Attorney-Advisor, Office of General Counsel
United States Environmental Protection Agency
312-886-6631 | Room R1325



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

The information underlined in the
attachment to this letter was

REPLY TO THE ATTENTION OF:

conveyed verbally to MPCA
on April 5, 2018. This was read

WN-15J

word for word to PCA participants Richard Clark, Mike Schmidt, Jeff Udd,
Jeff Udd and Stephanie Handeland. EPA participants Paul Compton, Krista McKim,
Metallic Mining Director Barbara Woster, Candice Bever, Mark Ackerman &
Minnesota Pollution Control Agency Kevin Bierard.
525 Lake Avenue South, Suite 400
Duluth, MN 55802

WMP 4.5.18

Re: U.S. Environmental Protection Agency Review of the Public Notice Draft NPDES Permit,
PolyMet Mining, Inc., NorthMet Project, Permit No. MN0071013

Dear Mr. Udd:

The U.S. Environmental Protection Agency (EPA) has reviewed the Public Notice Draft National Pollutant Discharge Elimination System (NPDES) Permit, fact sheet, and supporting documents for the proposed PolyMet Mining, Inc., NorthMet Project, Permit No. MN0071013 received from the Minnesota Pollution Control Agency (MPCA) on January 17, 2018.

EPA would like to recognize the progress that has been made regarding the design of the NorthMet project over the duration of the environmental review process. PolyMet is proposing advanced water treatment and project design components that include a tailings basin seepage capture system. Specifically, as part of the NorthMet project, the proposed seepage capture system, as described in the fact sheet on pages 17 and 70, is designed to capture the existing discharge from the tailings basin owned by Cliffs Erie, LLC that currently discharges to receiving waters surrounding the basin. EPA would also like to note that the proposed water capture systems for the mine site, plant site, and other associated areas is designed to be integrated into the project's overall water management system. The advanced water treatment technology is a step forward toward protecting water quality and we commend both MPCA and PolyMet for their effort to require and utilize this technology.

Enclosed for your consideration are our comments on the Public Notice Draft Permit. We hope that these will be helpful to MPCA as it works to prepare a proposed permit. EPA will continue to work with MPCA in our review of the proposed permit for this facility to ensure the permit issued by MPCA is consistent with the Clean Water Act (CWA) and implementing regulations. Please note that the comments below are abbreviated, and additional details are included in the Enclosure to this letter.

1. **Water Quality Based Effluent Limitations** – The draft permit does not include water

ATTACHMENT C
Macabee January 13, 2020 Declaration

ATTACHMENT C
Macabee January 13, 2020 Declaration

