

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. MCEA, 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. On March 27, 2018, WaterLegacy made a Freedom of Information Act (“FOIA”) request to the U.S. Environmental Protection Agency (“EPA”) for documents, including notes, pertaining to meetings or phone communications between the EPA and the Minnesota Pollution Control Agency (“MPCA”) regarding the PolyMet mine project since January 1, 2015. (FOIA request EPA-R5-2018-005870). WaterLegacy requested a fee waiver for this FOIA request.
4. On April 13, 2018, EPA denied WaterLegacy’s fee waiver request, and on April 25, 2018, EPA advised WaterLegacy that the cost to search for the requested documents would

be between \$6,500 and \$10,000. On July 12, 2018, WaterLegacy appealed EPA's denial of the fee waiver.

5. Despite follow-up calls and email, EPA did not act on this appeal until August 14, 2019, when EPA notified WaterLegacy that EPA had granted the fee waiver.

6. Upon receiving the fee waiver from EPA, I again followed up with phone calls and email. On September 23, 2019, EPA informed WaterLegacy that we could obtain responses to our FOIA request EPA-R5-2018-005870 by reviewing records being released in response to other FOIA requests related to the PolyMet project. I downloaded these responses, and Relators supplemented discovery with these documents. Documents released by EPA to others and in response to WaterLegacy's FOIA request EPA-R5-2018-005870 included no notes of meetings or phone communications with MPCA.

7. On June 19, 2019, WaterLegacy made a FOIA request to EPA specifically requesting EPA notes from meetings with MPCA and PolyMet on September 25 and 26, 2018. (FOIA request EPA-R5-2019-006658). EPA informed WaterLegacy on August 1, 2019 that EPA was denying this FOIA request.

8. On October 18, 2019, WaterLegacy appealed EPA's denial of our FOIA request for the September 2018 notes. After several calls and emails to follow up on the appeal, we submitted it a second time on November 6, 2019, requesting expedited review. WaterLegacy received a determination on November 15, 2019 that EPA had reopened our request for September 2018 notes and would provide reasonably segregable material.

9. On December 18, 2019, EPA informed WaterLegacy that the EPA would release documents responsive to FOIA request EPA-R5-2019-006658. On December 23, 2019, I downloaded these documents, attached as **Exhibit D**, which include EPA's notes from the

September 25 and 26, 2018 meetings with MPCA and PolyMet. Relators notified opposing counsel on December 23, 2019 that we had obtained these documents and provided pdf copies of the documents the next day, on December 24.

10. There is good cause for Relators' failure to disclose these exhibits on or before December 16, 2019. Despite FOIA requests, appeals, follow-up and due diligence, Relators didn't secure access to these EPA documents until after December 16. On the day that WaterLegacy downloaded the documents released by EPA, Relators notified Respondents' counsel, following up one day later to send them pdf copies of the documents. Relators had listed as exhibits WaterLegacy's FOIA request EPA-R5-2019-006658, initial denial, FOIA appeal, and follow up to secure the **Exhibit D** documents as Relators' Exhibits 504-513 and 724-747.

11. Relators would be prejudiced if EPA's notes from the September 25 and 26, 2018 meetings with PolyMet and MPCA were not allowed as exhibits in this matter. Several MPCA staff have made assertions as to what transpired at the meetings, and all but one of the EPA participants at the meetings are still employed by EPA and not available to testify. The **Exhibit D** notes received by WaterLegacy in response to FOIA request EPA-R5-2019-006658 are highly probative and unavailable by other means.

12. Relators also seek to add three documents that were previously provided to Respondents in the course of discovery. The two documents in **Exhibit E** are agendas for the September 25 and 26, 2018 meetings attached to an email in EPA's files (RELATORS_64226). These attachments were inadvertently left off Relators' Exhibit List. This is an excusable error, and Respondents are not prejudiced by Relators' request to include these exhibits after December 16, 2019. The third document in **Exhibit F** is a response by the Fond du Lac Band of Lake Superior Chippewa (the "Band") to a June 12, 2019 letter from Regional Administrator Cathy Stepp to the

Band, identified by MPCA as its Exhibit 1125. There is good cause for Relators' addition of the Band's response to MPCA's Exhibit 1125 after December 16, 2019, since the Band's response is only relevant if Ms. Stepp's letter is introduced into evidence and, if so, is needed to create a fair and complete record.

13. Relators would be prejudiced if the agendas for the September 25 and 26, 2018 meetings in **Exhibit E** were not allowed as exhibits, since these documents demonstrate what information was provided to EPA regarding the upcoming meetings. Relators would, further, be prejudiced if the Band's response in **Exhibit F** was not allowed as an exhibit, since the June 12, 2019 letter from Regional Administrator Stepp, without this response, provides an unfair and incomplete description of events surrounding the release of EPA's comments on the draft PolyMet water pollution permit.

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

Dated: December 27, 2019

s/s Paula G. Maccabee
PAULA G. MACCABEE

