

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Court File Number: 62-CV-19-4626

Honorable Judge John H. Guthmann

**MINNESOTA POLLUTION CONTROL AGENCY'S
PRE-HEARING BRIEF**

The Court of Appeals has directed this Court to conduct a hearing to determine whether there were “irregularities in procedure” in the Minnesota Pollution Control Agency’s (“MPCA”) permitting process for the National Pollutant Discharge Elimination System (“NPDES”)/ State Disposal System Permit for the NorthMet Mining Project (the “NorthMet Permit”). Transfer Order at 4 (June 25, 2019). MPCA did not engage in procedural irregularities in the NorthMet permitting process. To the contrary, MPCA complied with its statutory and regulatory obligations throughout the process.

Essentially, Relators claim is that “MPCA’s Commissioner and political leaders at the United States Environmental Protection Agency (EPA) developed a plan to keep EPA criticism of the NorthMet permit out of the public record and the record for judicial review.” Transfer Order at 3 (quoting Relators’ Motion to Transfer). This contention is mere speculation unsupported by any evidence. Instead, Relators’ contention is contravened by witness testimony and the evidence of record, which establish that MPCA did not engage in any procedural irregularities with respect to the NorthMet Permit.

BACKGROUND

The NorthMet Project has received an unprecedented level of review by MPCA and other government agencies, including the Minnesota Department of Natural Resources (“DNR”), the EPA, and the U.S. Forest Service. Following 10 years of environmental review, MPCA led a permit review process that spanned an additional two and a half years and generated voluminous comments. Findings of Fact and Conclusions of Law and Order for the NorthMet Permit (“NorthMet FOF”) at ¶¶ 2-3.¹

Shortly before PolyMet commenced the NPDES permitting phase by submitting its application in July 2016, NorthMet FOF at ¶ 3, MPCA and EPA agreed to hold twice-monthly conference calls regarding the NorthMet Permit development process. Ex. A, Declaration of Richard Clark (May 28, 2019) (“Clark Decl.”) ¶ 9; Ex. B, Declaration of Michael Schmidt (June 12, 2019) (“Schmidt Decl.”) ¶ 5. MPCA and EPA regularly held such calls from August 2016 to August 2017, at which point MPCA focused on drafting the permit in light of its discussions with EPA. Ex. A, Clark Decl. ¶ 10. By that time, EPA had fully informed MPCA of its concerns regarding the permit. *Id.*

After further discussions with EPA on November 1 and November 9, 2017, MPCA circulated its public-comment draft permit to EPA on January 18, 2018. *Id.* at ¶¶ 12-13. The public comment period was open from January 31, 2018 to March 16, 2018. NorthMet FOF at ¶¶ 21, 23. During this period, MPCA received approximately 1600 individual comments. NorthMet FOF at ¶ 23. Additionally, on January 31, February 13,

¹ WATER_0006163-0006206; also available at <https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-51kk.pdf>.

and March 5, 2018, MPCA and EPA held conference calls to discuss the public-comment draft. Ex. A, Clark Decl. ¶ 14. MPCA's handwritten notes from these and other calls are included in the administrative record. Ex. C, MPCA(62-cv-19-4626)_016069-88. On an April 5, 2018 call, EPA chose to read draft written comments to MPCA staff members. Ex. A, Clark Decl. ¶ 15. These comments reflected no new concerns, but rather, simply summarized the issues EPA had previously raised during the prior calls and in-person meetings with MPCA, as well as written comments from other stakeholders. *Id.* at ¶¶ 15, 17; Ex. D, Declaration of Stephanie Handeland ("Handeland Decl.") ¶ 7; Ex. E, Declaration of Jeff Udd (May 28, 2019) ("Udd Decl.") ¶ 5; Ex. B, Schmidt Decl. ¶¶ 9-10.

On September 25 and 26, 2018, MPCA and EPA held a two-day, in-person meeting about the terms of the next draft of the permit. Ex. A, Clark Decl. ¶ 20; Ex. E, Udd Decl. ¶¶ 7-8. In particular, EPA expressed a desire to add operating limits for additional parameters and expressed concerns about the federal enforceability of the permit. In response, MPCA added the additional operating limits EPA wanted and committed to add a permit condition prohibiting the violation of any water-quality standard. Ex. A, Clark Decl. ¶ 18. By the end of the September 2018 meeting, all critical issues had been discussed, and EPA had specified additional language it wanted MPCA to add to the revised permit. *Id.* at ¶ 20; Ex. E, Udd Decl. ¶ 8.

On October 25, 2018, MPCA publicly released a revised draft of the permit which addressed EPA's concerns. Ex. A, Clark Decl. ¶ 22; Ex. E, Udd Decl. ¶ 10. Then, on December 4, 2018, MPCA sent EPA a final draft for EPA's review. Ex. A, Clark Decl. ¶ 23. EPA did not object or provide any further comments on the final draft.

MPCA issued the final NorthMet Permit on December 20, 2018, along with 42 pages of factual findings. Significantly, the permitting requirements would control currently uncontrolled seepage at an existing facility which, absent the NorthMet Permit, would continue to flow from the abandoned facility to receptors near the site. *See* NorthMet FOF at ¶¶ 5, 9. Moreover, the DNR’s Permit to Mine for the NorthMet Project contains robust financial assurances that cover the costs of remediation should the project cease before planned. *See* NorthMet Permit to Mine, Attachment 1.²

In January 2019, Relators filed three separate appeals challenging the NorthMet Permit, which the Court of Appeals consolidated in its January 25, 2019 order. On June 25, 2019, the Court of Appeals transferred this matter to this Court “for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure” regarding the NorthMet permitting process. Sept. 9, 2019 Order at 1 (quoting June 25, 2019 Order). The evidentiary hearing is limited to the discrete alleged procedural irregularities identified by the Court of Appeals order, consistent with Minn. Stat. § 14.68, which vests the district court with narrow jurisdiction “to take testimony and to hear and determine the alleged irregularities in procedure.” All substantive issues remain to be determined by the Court of Appeals in a review that “shall be confined to the record” that was established in the underlying administrative proceeding. Minn. Stat. § 14.68.

² Available at https://files.dnr.state.mn.us/lands_minerals/northmet/final_permit/01-polymet-ptm-northmet-approval.pdf.

LEGAL STANDARD

This Court's sole task is to determine whether MPCA engaged in "irregularities in procedure" during the permitting process for the NorthMet Permit. Under Minnesota law, "[t]here is a presumption of regularity to the administrative acts of" an agency. *Larson v. Comm'r of Pub. Safety*, 405 N.W.2d 442, 443 (Minn. Ct. App. 1987). Thus, Relators bear the burden of establishing procedural irregularities sufficient to overcome the presumption of regularity. Relators must satisfy their burden "without speculation or conjecture." *Vroman v. City of Austin*, 169 N.W.2d 61, 62 (Minn. 1969); *see also State v. Costello*, 646 N.W.2d 204, 210 (Minn. 2002) ("[W]e have condemned arguments that invite the jury to speculate about the facts.").

The Minnesota Legislature has not defined the term "irregularities in procedure." In the absence of a statutory definition, courts often look to the "plain and ordinary meaning" assigned to the term. *State v. Overweg*, 922 N.W.2d 179, 183 (Minn. 2019). In the context of this case, however, Minn. Stat. §14.69 provides important context: the reviewing court can set aside agency action only for use of "unlawful" procedures, not those that are merely unusual, and the term "irregularity" should be interpreted accordingly in Section 14.68. *See also In re Koochiching Cnty.*, No. A09-381, 2010 WL 273919, at *10 (Minn. Ct. App. Jan. 26, 2010) (declining to find irregularities in procedure and explaining that commissioner's finding "may be imprecise or dismissive" but that "nothing in the record shows or tends to show that the commissioner was affected by actual bias, failed to hear and consider opposing points of view, or failed to reach a reasoned decision").

ARGUMENT

No evidence supports a finding of unlawful procedures in MPCA's development of the NorthMet Permit. Rather, Relators' entire case hinges on unfounded speculation. Relators have framed their case as one of malevolent collusion between EPA and MPCA. Yet, following several depositions and the production of nearly 20,000 pages of documents, there remains no support for Relators' accusations.³

Through the witnesses called at trial, MPCA will bolster the presumption of regularity by further establishing its compliance with applicable statutory and regulatory requirements.

I. MPCA PROVIDED FOR ROBUST PUBLIC PARTICIPATION REGARDING THE NORTHMET PERMIT.

Throughout the permitting process, MPCA has facilitated public input. Before PolyMet even filed its permit application, MPCA released an Environmental Impact Statement describing the ten-year environmental review of the NorthMet Project. NorthMet FOF at ¶ 2. In addition, MPCA created a public web portal for the NorthMet Project—the first time such a step has been used for an NPDES permit in Minnesota. NorthMet FOF at ¶ 16. MPCA testimony will show that this portal contained links to key project documents, thereby allowing the public to easily access the information relied on by MPCA. MPCA also held two public meetings—both of which had hundreds of

³ In an effort to compensate for their lack of evidence, Relators have requested that this Court simply presume that MPCA engaged in procedural irregularities. *See* Relators' Motion *In Limine* for Spoliation Sanctions (Dec. 27, 2019) at 18. There is no basis for presuming that which, by law, Relators bear the burden of proving with evidence.

attendees—and established a dedicated phone number and email address for questions or comments from the public. NorthMet FOF at ¶ 19.

Furthermore, the public filed extensive comments—approximately 1600—on the draft NorthMet Permit. NorthMet FOF at ¶ 23. MPCA carefully considered and responded to all of these comments. NorthMet FOF at ¶ 25. MPCA revised the draft permit in response to some comments and specified the reasons for such changes, in compliance with 40 C.F.R. § 124.17. NorthMet FOF at ¶ 262. Where MPCA disagreed with a public comment, MPCA fully explained its reasoning. In short, contrary to Relators' allegations, MPCA amply satisfied its public participation requirements under 40 C.F.R. § 25.3.

II. MPCA INTERACTED EXTENSIVELY WITH EPA REGARDING THE NORTHMET PERMIT.

In addition to being the first proposed nonferrous mining project in Minnesota history, the NorthMet Project has some features that raise complex permitting issues. For example, the NorthMet Project involves three distinct sites—a mining area, an ore processing area, and a tailings area. NorthMet FOF at ¶¶ 4-5. There are also several different wastewater streams and several seepage collection areas. NorthMet FOF at ¶¶ 6-7.

Consistent with the complexity of the project, MPCA had extensive interactions with EPA regarding the terms of the NorthMet Project—to a much greater extent than most other NPDES permits. Ex. A, Clark Decl. ¶ 6 (“[I]n my 33 years of experience developing NPDES/SDS permits with MPCA, EPA has never been as involved in the

development of a permit from start to finish as it was with this permit.”); Ex. D, Handeland Decl. ¶ 5 (“EPA was by far more involved in the development of this Water Permit than it had been in any other permit I have worked on in my previous 23 years with MPCA.”).

MPCA tailored its review and permitting process to account for the NorthMet Permit’s unique complexities. The fact that the NorthMet permitting process may have involved far more EPA interaction and public comments than some other permits is not a procedural irregularity. Rather, it reflects thorough work by MPCA and EPA. In any event, in order to establish “irregularities in procedure,” Relators must establish that MPCA acted unlawfully. As explained below, no evidence supports such a conclusion.

III. THERE WERE NO PROCEDURAL IRREGULARITIES IN THE NORTHMET PERMITTING PROCESS.

Relators allege a number of procedural irregularities regarding the permitting process for the NorthMet Permit, none of which are supported by the evidence. In particular, Relators allege procedural irregularities regarding (i) the basis for MPCA’s issuance of the NorthMet Permit; (ii) EPA’s decision not to submit written comments during the public comment period; (iii) EPA’s decision to read comments during an April 5, 2018 phone call with MPCA instead of submitting the comments in writing; (iv) the resolution of EPA’s concerns regarding the NorthMet Permit; (v) MPCA’s decision not to respond to EPA comments in writing; and (vi) MPCA’s notetaking and retention practices. The evidence, however, will further support the presumption that MPCA acted lawfully during the NorthMet permitting process. In particular, the Court will hear

testimony from a number of current and former MPCA officials, all of whom will testify that there was no effort to conceal EPA comments from the public record.

A. MPCA's Decision to Issue the NorthMet Permit Was Made on the Merits and Was Not Influenced by Political or Permittee Pressure.

Because he was the MPCA Commissioner when the NorthMet Permit was issued, John Linc Stine's approval was required. Mr. Stine's testimony will establish that MPCA's decision to issue the NorthMet Permit was not tainted by undue political pressures, as Relators suggest. Specifically, Mr. Stine was not subject to any attempts to influence the outcome of the NorthMet permitting decision from Governor Dayton, members of Congress, or members of the state legislature. While some political figures expressed a desire for a timely decision, they did not dictate the outcome of that decision. Indeed, Mr. Stine will testify that he remained unsure whether he would approve the NorthMet Permit until he reviewed the final proposed permit and heard from his staff. Far from a predetermined outcome orchestrated by politicians, MPCA's issuance of the NorthMet Permit was the result of independent agency analysis. As numerous current and former MPCA officials will testify, technical decisions about the terms of the NorthMet Permit were made by MPCA's technical staff without interference either from MPCA management or extra-agency figures.

Likewise, MPCA's decision to issue the NorthMet Permit was not unduly influenced by PolyMet. Mr. Stine had infrequent discussions regarding the project with PolyMet's representative. These conversations were informational only, and the frequency of contact was comparable to the level of contact Mr. Stine had with

permittees for other projects. PolyMet never requested favors of MPCA. In short, there was nothing improper about MPCA's communications with PolyMet, and there is no basis to conclude that MPCA's issuance of the NorthMet Permit was unduly influenced by PolyMet.

B. EPA's Decision Not to Submit Written Comments During the Public Comment Period Does Not Constitute a Procedural Irregularity.

Relators contend that MPCA pressured EPA not to submit written comments on the draft NorthMet Permit that was circulated for public comment. This argument rings hollow given that (i) MPCA has no authority or ability to dictate the actions of EPA, and (ii) the evidence demonstrates that to promote efficiency, MPCA simply requested that EPA wait to submit comments on a revised draft that reflected changes made to the permit in response to public comments.

First, any suggestion that MPCA pressured EPA into not submitting comments is rooted in a fundamental misunderstanding of the power dynamic between EPA and MPCA. Pursuant to the Clean Water Act and the 1974 Memorandum of Agreement ("MOA") between EPA and MPCA, EPA retains the authority to comment on or veto any NPDES permit proposed by MPCA. 33 U.S.C. § 1251, *et. seq.*; Ex. F, MPCA(62-cv-19-4626)_008548-87. Thus, MPCA is not in a position to strongarm EPA. Moreover, EPA's actions cannot form the basis of a procedural irregularity, as Minn. Stat. § 14.68 does not contemplate a finding of procedural irregularities by EPA. Rather, the statute authorizes this Court to determine only procedural irregularities committed by state agencies—in this case, MPCA.

Second, the facts do not support a conclusion that MPCA pressured EPA not to submit written comments. Rather, MPCA simply requested that EPA wait to submit comments on a *revised* draft permit that incorporated revisions based on public comments and gave EPA an additional 45 days to comment on the revised draft permit. This request was fully compliant with the MOA and had nothing to do with concealing EPA comments.

1. *The Requested Delay in EPA Comments Was Designed to Promote Efficiency.*

Because the NorthMet Permit attracted an unprecedented level of public feedback, MPCA had to expend far more resources than usual in order to adequately review and respond to the public comments. Testimony will show that the comment responses were handled almost entirely by two MPCA staff officials, Richard Clark and Stephanie Handeland.

Jeff Udd, Manager of MPCA's Water and Mining Section, will testify that he approached Shannon Lotthammer, who was then MPCA's Assistant Commissioner for Water Policy, and broached the idea of having EPA wait to comment until after MPCA issued a revised permit that incorporated public feedback on the initial draft in order to save both EPA and MPCA the time and effort of dealing with comments on a soon-to-be-outdated draft of the permit.

Ms. Lotthammer will similarly testify that after Mr. Udd raised that idea, she called Kevin Pierard—EPA Region 5 NPDES Program Chief—and asked EPA to consider waiting to submit written comments until EPA saw the revisions that MPCA

was planning to make in the next draft. Ms. Lotthammer also discussed this request with Chris Korleski, Region 5 Assistant Administrator for Water.

Former MPCA Commissioner John Linc Stine will further testify that, after being informed of this request by Ms. Lotthammer, he called Cathy Stepp, EPA's Region 5 Administrator, to make the same request. Mr. Stine invoked no political reasons. Rather, his request was based solely on the fact that MPCA staff were inundated responding to public comments and that it would be more efficient to have EPA wait to comment on the soon-to-be revised draft permit. Shortly thereafter, Mr. Stine added Ms. Lotthammer to an email chain regarding the issue of timing for EPA comments. Ex. G, MPCA(62-cv-19-4626)_008481.

Ms. Lotthammer will testify that she then worked with Kurt Thiede, Ms. Stepp's chief of staff, to iron out the details regarding the timing of EPA comments. Ex. H, Declaration of Shannon Lotthammer (June 12, 2019) ("Lotthammer Decl.") ¶ 5; Ex. G, MPCA(62-cv-19-4626)_008480. Mr. Thiede stated that EPA was willing to wait to comment on the revised draft as long as MPCA would agree to provide EPA 60 days (as opposed to the standard 15 days provided in the MOA) to comment on the proposed final permit. After conferring with Mr. Udd, Ms. Lotthammer informed Mr. Thiede that MPCA was amenable to providing the additional 45 days. *See* Ex. H, Lotthammer Decl. ¶ 6.

Notably, MPCA had no control over EPA's decision whether, when, or how to submit comments. Rather, MPCA simply requested—as opposed to ordered—that EPA delay—as opposed to forego—submitting comments so that EPA would be commenting

on the current revised version of the permit rather than an obsolete version. Likewise, MPCA never requested that EPA provide oral comments in lieu of written comments. In fact, MPCA staff was taken by surprise when EPA later read its comments from a document during an April 5, 2018 phone call.

EPA retained full authority to comment on the proposed final permit that was sent to EPA on December 4, 2018. MPCA did not request that EPA refrain from commenting. Yet, EPA voluntarily chose not to comment on the final proposed permit. Not only is EPA's decision outside of MPCA's control, it is indicative of the fact that EPA was satisfied with the permit revisions and apparently felt no need to object or comment further.

2. *The Requested Delay in EPA Comments Was Consistent with the MOA.*

Section 124.46(2) of the MOA provides, in relevant part: "After a public notice period has expired, [MPCA] shall consider all comments received as a result of the public notice and may modify the proposed NPDES permit as it considers appropriate." Ex. F, MPCA(62-cv-19-4626)_008556. This provision does not mention EPA. Rather, EPA comments are subsequently addressed in Section 124.46(5), which provides that the EPA Regional Administrator "may comment upon, object to or make recommendations with respect to the proposed NPDES permit" for which MPCA seeks EPA's "final approval." Ex. F, MPCA(62-cv-19-4626)_008557-58. Taken together, these two provisions prescribe a procedure whereby MPCA considers public comments, makes any necessary

modifications, and then develops a final proposed NPDES permit, which EPA “may comment upon”

Notably, the MOA expressly provides for EPA comments only on the proposed final NPDES permit that is developed after the public comment period and sent to EPA for “final approval.” *Id.*; *see also* Ex. E, Udd Decl. ¶ 9 (“Under the [MOA] . . . once MPCA has completed a ‘proposed’ permit—which in this context refers to a post-public-comment draft permit—MPCA sends the proposed permit to EPA, and it is this version that EPA officially comments on.”). The MOA does not establish—or even mention—EPA’s comments on the public-comment draft permit. Thus, MPCA’s encouragement of EPA to provide comments after the public comment period fully accords with the procedures set forth in the MOA.

MPCA’s accommodation of EPA comments—consistent with the MOA—is further underscored by the fact that MPCA quadrupled the time EPA usually has to comment or object on a proposed NPDES permit. Specifically, Section 124.46(5) of the MOA calls for EPA comments or objections to the proposed permit within 15 days of receipt, but MPCA agreed to allow 60 days for EPA review of the NorthMet Permit. Ex. E, Udd Decl. ¶¶ 9-11. Thus, MPCA’s conduct fostered more—not less—EPA oversight and feedback and cannot be deemed a procedural irregularity. Because MPCA’s treatment of EPA comments was consistent with the MOA and was based on a desire to promote efficiency and preserve resources, such actions cannot form the basis of a procedural irregularity.

C. EPA's Decision to Read Comments during an April 5, 2018 Phone Call Does Not Constitute a Procedural Irregularity.

Throughout the NorthMet permitting process, MPCA and EPA frequently had informal meetings or phone calls regarding various issues. Relators have focused on one such call—on April 5, 2018—during which EPA read its concerns with the draft NorthMet Permit from a prepared document. Ex. I, Declaration of Richard Clark (June 12, 2019) (“Clark Decl. II”) ¶ 9; Ex. J, Declaration of Stephanie Handeland (June 12, 2019) (“Handeland Decl. II”) ¶ 9; Ex. K, Declaration of Jeff Udd (June 12, 2019) (“Udd Decl. II”) ¶ 11. Relators’ allegations of procedural irregularities are unfounded.

First, EPA unilaterally chose to read its comments instead of submitting them in writing. MPCA had no control over EPA’s decision to do so. Accordingly, that cannot be deemed to be a procedural irregularity by MPCA.

Again, EPA is a federal agency over which MPCA exercises no authority. EPA’s decision to read comments to MPCA during the April 5 call cannot be attributed to MPCA. Because Minn. Stat. § 14.68 contemplates only procedural irregularities by state agencies, EPA’s actions cannot give rise to a finding of procedural irregularities under the governing statute.

Finally, the concerns raised on the April 5, 2018 call were duplicative of EPA’s previously raised concerns, which were already reflected in MPCA notes that MPCA placed in the administrative record. Ex. K, Udd Decl. II ¶ 10; Ex. C, MPCA(62-cv-19-4626)_016069-88.

D. There Are No Procedural Irregularities Regarding the Resolution of EPA's Concerns.

Relators allege that the final NorthMet Permit failed to resolve EPA's expressed concerns. As a threshold matter, whether the final NorthMet Permit satisfied EPA's concerns is a substantive issue beyond the jurisdiction of this Court. But, in any event, there is no basis for Relators' allegation.

MPCA made a number of revisions to the draft permit based on public comments and EPA's concerns expressed during its meetings and phone calls with MPCA. MPCA and EPA met again on September 25-26, 2018 for the specific purpose of addressing any remaining concerns EPA had with the proposed permit. MPCA officials present at the September 25-26 meetings will testify that EPA raised its concerns and proposed new language it wanted MPCA to add to the permit. In particular, EPA voiced concerns regarding the lack of operating limits for certain parameters and federal enforceability of the permit. Ex. A, Clark Decl. ¶ 18. After that meeting, MPCA added a permit term expressly prohibiting any discharge that would violate a water quality standard, in addition to adding the operating limits that EPA had requested. MPCA subsequently sent the revised permit to EPA, and EPA did not raise any further objections or concerns.

EPA's decision not to provide written confirmation that its concerns had been resolved does not constitute a procedural irregularity because EPA's decision cannot be attributed to MPCA and, in any event, EPA's action was consistent with its prior course of conduct. Ex. B, Schmidt Decl. ¶ 16; Ex. J, Handeland Decl. II ¶ 14.

Relators make much of a December 18, 2018 memo to file purportedly written by Kevin Pierard, EPA Region 5 NPDES Program Chief, in an effort to show that the NorthMet Permit did not satisfy EPA's concerns. Ex. L, MPCA(62-cv-19-4626)_017083-017111. Yet the views of one EPA employee do not reflect EPA's official position, which was to approve the permit. EPA's decision to allow the final NorthMet Permit to move forward without objection carries far more weight than Mr. Pierard's memo, which was never even shared with MPCA until it was leaked in June 2019.

E. MPCA's Decision Not to Respond to EPA Comments in Writing Does Not Constitute a Procedural Irregularity.

Relators allege that MPCA engaged in procedural irregularities by not explicitly responding to EPA's oral comments read on April 5, 2018. This allegation is meritless.

The relevant regulatory provision under the Clean Water Act—40 C.F.R. § 124.17—requires MPCA to “[b]riefly describe and respond to all significant comments on the draft permit . . . raised *during the public comment period*, or during any hearing.” (emphasis added). In addition to the plain text of this provision, surrounding provisions make clear that it is concerned only with comments submitted during the public comment period. *See* 40 C.F.R. § 124.10 (governing public notice of permit actions and the public comment period); §124.11 (governing public comments and requests for public hearings); §124.12 (governing public hearings); §124.13 (creating the obligation to raise issues and provide information during the public comment period); §124.14 (governing the reopening of the public comment period).

First, MPCA did respond to EPA's oral comments throughout the permitting process, both through bilateral discussions and revisions to the permit. Ex. B, Schmidt Decl. at ¶ 11. Thus, even if 40 C.F.R. § 124.17 did require that MPCA respond to EPA's oral comments submitted outside the public comment period—which it does not—MPCA still satisfied this hypothetical obligation. Moreover, any notion that MPCA was somehow trying to hide EPA's concerns from the public is belied by the fact that MPCA placed its substantive notes regarding EPA's concerns in the administrative record. Ex. D, Handeland Decl. ¶ 7; Ex. K, Udd Decl. II ¶ 9; Ex. C, MPCA(62-cv-19-4626)_016069-88.

Second, EPA's oral comments were duplicative of other comments submitted during the public comment period, to which MPCA responded in writing. *See* Ex. D, Handeland Decl. ¶ 7 (explaining that MPCA staff found “nothing new or surprising in EPA's comments, all of which had been covered and discussed in previous meetings or conference calls, except for one small concern about domestic wastewater, which MPCA summarized and addressed in the fact sheet.”); Ex. K, Udd Decl. II ¶ 10 (“The comments EPA read over the phone were duplicative of the feedback we had received from EPA throughout the permit-development period and are thus memorialized in the notes and other material included in the administrative record.”). Because EPA's comments overlapped with other comments MPCA was already addressing, MPCA addressed the substance of EPA's concerns in its response to other public comments. This was vital because a dissatisfied EPA could simply veto the permit.

In short, MPCA acted lawfully in its responses to comments. MPCA addressed EPA's concerns—as evidenced by the avoidance of an EPA veto—through the agencies' extensive discussions, as well as through its written responses to overlapping comments submitted during the public comment period.

F. There Were No Procedural Irregularities Regarding MPCA's Documentation of Its Interactions with EPA.

Relators claim there are procedural irregularities stemming from MPCA's failure to preserve and include in the administrative record and public records disclosures certain notes taken by MPCA staff during various informal calls with EPA. In particular, Relators argue that MPCA violated the Minnesota Administrative Procedure Act ("MAPA"), Minn. Stat. ch. 14, Official Records Act, Minn. Stat. § 15.17, and the Minnesota Government Data Practices Act ("MGDPA"), Minn. Stat. § 13.03, with respect to its data retention and disclosure for the NorthMet Permit. Yet, none of those statutes requires MPCA to preserve informal notes taken during the process leading up to an agency decision. Likewise, the MOA does not require EPA or MPCA to create a formal record of their informal permitting discussions.

1. *There Is No Legal Requirement to Retain and Produce Informal Notes that Are Not Subsequently Relied upon by the Agency.*

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

The record upon which the commissioner shall make a final decision in all matters other than rulemaking and contested case hearings consists of the following:

A. relevant *written* materials submitted to the commissioner or agency staff within an established comment period, including requests for an informational meeting and petitions for contested case hearings;

B. *written* materials submitted to the commissioner or agency staff within a time period established by the commissioner; and

C. *written* documents containing relevant information, data, or materials referenced and relied upon by agency staff in recommending a proposed action or decision.

Minn. R. 7000.0755 (emphasis added). Thus, MPCA was not obligated to include in the administrative record any informal notes that were not subsequently relied upon in the decision to issue the NorthMet Permit.

The Official Records Act, Minn. Stat. § 15.17, which governs all state agencies' obligations to preserve records, provides in relevant part that “[a]ll officers and agencies of the state . . . shall make and preserve all records necessary to a full and accurate knowledge of their official activities.” It is the “duty of each agency, and of its chief administrative officer, to carefully protect and preserve government records from deterioration, mutilation, loss, or destruction.” *Id.*

The Minnesota Supreme Court has limited the scope of “records” that agencies must maintain to comply with the Official Records Act. *Kottschade v. Lundberg*, 160 N.W.2d 135, 137–38 (Minn. 1968). The court explained that the statutory language, when “[r]ead literally, . . . seems to place no bounds on the information which must be made a public record.” *Id.* at 137. However, the court found that the “legislature did not intend anything that sweeping” because such a broad reading “would fill official archives to overflowing.” *Id.* at 138. Instead, the court found that the record-keeping requirement

must be bound by “reasonable limits” and those limits are established by what constitutes “official activities.” *Id.* Such “official activities” are “limited to official actions as distinguished from thought processes”; therefore, “*all that need be kept of record is information pertaining to an official decision, and not information relating to the process by which such a decision was reached.*” *Id.* (emphasis added). Examples of such information that the court found to be outside the scope of “official activities” include “casual jotting [or] any tear-sheet observation.” *Id.*; *see also Zangs v. The City of St. Paul*, 2006 WL 6639215 (Minn. Dist. Ct. Dec. 08, 2006) (holding agency only has a duty to create a record of what becomes an official transaction and that official transaction did not include notes or comments, which are akin to the “thought processes” referenced in *Kottschade*).

Thus, like MAPA, the Official Records Act distinctly does not require that MPCA personnel retain informal notes that are not subsequently relied upon as part of the administrative decision-making process.

And the MGDPA, Minn. Stat. § 13.03, provides that “[a]ll government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified . . . as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential.” Notably, the MGDPA sets forth requirements for responding to data requests, not for determining which data to create or collect in the first place.

As explained in the following section, MPCA has fully complied with these statutes and regulations.

2. *MPCA Properly Retained and Produced Its Notes Regarding Interactions with EPA.*

As an initial matter, the NorthMet Permit entailed much more EPA/MPCA interaction than is typical for an NPDES permit in Minnesota. This unprecedented level of review is a testament to the seriousness with which both EPA and MPCA approached the NorthMet Permit. Despite the fact that neither the Clean Water Act nor the MOA requires them, MPCA held numerous informal meetings and phone calls with EPA during the course of developing the NorthMet Permit. Had no phone calls taken place, there would necessarily be no dispute over notes taken during such calls. Thus, the dispute over MPCA notes arises only as a result of MPCA's and EPA's heightened diligence and scrutiny of the NorthMet Permit.

Moreover, there is nothing unlawful regarding MPCA's documentation of its interactions with EPA regarding the NorthMet Permit. All of the MPCA witnesses, including those on the April 5, 2018 call, will testify that no one ever instructed them not to take notes, or to discard notes that were taken. In addition, all non-privileged, subsequently relied upon notes were included in the administrative record and in MGDPA document releases. Ex. K, Udd Decl. II ¶ 9; *see also* Ex. B, Schmidt Decl. ¶ 21; Ex. I, Clark Decl. II ¶ 7; Ex. J, Handeland Decl. II ¶ 7.

As for the April 5, 2018 phone call—the primary basis of Relators' alleged procedural irregularities regarding document retention—four MPCA officials participated: Jeff Udd, Stephanie Handeland, Richard Clark, and Michael Schmidt.

Mr. Udd did not take notes during the April 5 call, consistent with his general practice. Ex. K, Udd Decl. II ¶ 12.

Although not required to do so, Ms. Handeland, an MPCA Permit Writer, often took notes of her meetings with EPA officials regarding the NorthMet Permit. The reason she took notes was to record critical issues for further agency consideration. All of these notes, with the exception of notes she started to take (before giving up) during the April 5, 2018 call with EPA, were included in the administrative record and produced in response to MGDPA requests.⁴

Regarding the April 5, 2018 phone call where EPA read comments to MPCA, Ms. Handeland will testify that she began taking notes but stopped doing so because (i) the EPA official was reading the comments too quickly to take accurate notes, and (ii) it became apparent that EPA was repeating comments it had already expressed to MPCA. Ex. J, Handeland Decl. II ¶ 10; Ex. D, Handeland Decl. ¶ 7. Specifically, Ms. Handeland's notes from the prior calls—which were included in the administrative record—had already documented the concerns EPA was voicing during the April 5 call. Ex. J, Handeland Decl. II ¶ 8. Because Ms. Handeland did not intend to rely on her unfinished and duplicative April 5 notes going forward, she discarded them in compliance with the Official Records Act and MAPA.

Mr. Clark, Supervisor of MPCA's Metallic Mining Sector Unit, sometimes took notes on calls with EPA, but only to help him follow along, as opposed to providing a

⁴ Ex. C, M.

source of information going forward. Ex. I, Clark Decl. II ¶ 10. Mr. Clark typically did not retain his shorthand notes from these calls, as he did not intend to rely on them in the future. *Id.*

Mr. Schmidt, a former MPCA staff attorney, also took notes on a number of phone calls with EPA, including the April 5, 2018 call. His practice was to discard his handwritten notes after incorporating them into typed work product. Ex. B, Schmidt Decl. ¶ 20. Because his typed summaries were attorney work product, they were not included in the administrative record or produced in response to Relators' MGDPA requests. Minn. Stat. § 13.393; *see also* Ex. B, Schmidt Decl. ¶ 21. Despite their protection as attorney work product, MPCA has voluntarily produced Mr. Schmidt's notes for the call on April 5, 2018. Ex. N, MPCA(62-cv-19-4626)_019620-22. Similarly, MPCA has produced Mr. Schmidt's notes concerning the September 2018 meeting. Ex. O, MPCA(62-cv-19-4626)_019623-25. In addition, MPCA included in the administrative record the agendas listing the subjects to be discussed during meetings or calls with EPA.

Finally, MPCA has moved to supplement the administrative record with the actual written comments that EPA read to MPCA during the April 5, 2018 phone call. These notes were properly excluded from the initial administrative record because EPA did not submit them in writing to MPCA. Thus, the initial exclusion of these comments did not constitute a procedural irregularity. Moreover, there is now what amounts to a public transcript of the April 5, 2018 phone call, thus negating any speculation regarding the contents of EPA's comments during that call.

In short, the administrative record's lack of notes from the April 5 call is legally permissible and not a procedural irregularity. Despite Relators' speculation, there is no evidence that the absence of notes results from a conspiracy to conceal EPA's concerns regarding the NorthMet Permit. Moreover, to the extent Relators argue that key facts regarding the April 5 call remain hidden, such claims are meritless given that MPCA has produced both (i) EPA's comments read on the April 5 call, and (ii) Mr. Schmidt's summary of the April 5 call.

CONCLUSION

For the foregoing reasons, MPCA respectfully requests that the Court enter an Order that MPCA did not engage in procedural irregularities in the NorthMet permitting process.

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