

The logo for Greene Espel PLLP, featuring the name "GREENE" above "ESPEL" in a bold, sans-serif font, with "PLLP" in a smaller font to the right of "ESPEL". The text is white on a black rectangular background.Monte A. Mills
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December 6, 2019

VIA ODYSSEY AND HAND 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:

PolyMet respectfully submits this letter in response to Relators' informal request for a written order compelling retired EPA employee Kevin Pierard to testify under oath.

Ideally, Pierard would testify in person at the evidentiary hearing that is scheduled to begin on January 21, 2020. PolyMet has no objection to Pierard testifying at the hearing as a fact witness about non-privileged matters within his personal knowledge. Because such live testimony would occur under oath, PolyMet agrees with Relators that it would not be prohibited by the Ethics in Government Act. If Pierard is unable or unwilling to travel to St. Paul for the hearing, PolyMet is not opposed to a deposition in New Mexico that would preserve his testimony, so long as he is subject to cross-examination.

If this Court allows Pierard's deposition, no special order is necessary to "compel" his testimony. As far as PolyMet can see, the only reason for the specific order Relators now seek is to authorize Pierard's testimony as an expert witness on Relators' behalf. PolyMet opposes that kind of order.

Pierard was an EPA employee. He is not qualified to opine on the procedures that the Minnesota Pollution Control Agency uses to issue water quality permits. Nor should this Court issue an order countermanding Pierard's ethical obligations under federal law, which—absent "extraordinary circumstances"—bars former EPA employees from testifying as an expert when they participated in the decision-making process. *See* 5 C.F.R. § 2641.301(f) and Example 4 to paragraph (f); 18 U.S.C. § 207(j)(6)(A). In that regard, PolyMet notes that one of the Relators in this case has sued EPA in federal court, alleging that the agency "violated [its] duties" under the Clean Water Act when it decided not to object to PolyMet's water quality permit. Whatever Pierard says here will likely be raised in that case, too. Pierard should not be allowed to testify as an expert.

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The judge should be the only legal expert in the courtroom. Thus, “an expert may not offer an opinion as to a legal issue or a mixed question of law and fact.” *State v. Dao Xiong*, 829 N.W.2d 391, 396 (Minn. 2013); *see also* Minn. R. Evid. 704, 1977 cmt. Relators assert that Pierard may “testify as an expert concerning the NPDES permitting process and what was regular or irregular in EPA oversight of MPCA permits.”¹ Whether something is an “irregularit[y]” under Minn. Stat. § 14.68, however, is a question of law within the province of this Court.

The determination of procedural irregularities concerns “whether the agency adhered to *statutorily defined* procedures or the *rules and regulations* promulgated by the agency itself which enter into the fundamental decision-making process.” *Mampel v. E Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977) (emphasis added); *see also In re Lecy*, 304 N.W.2d 894, 900 (Minn. 1980) (analyzing whether the commissioner “adhere[d] to all *statutory and procedural rules* in reaching his decision” (emphasis added)). It would be improper for Relators to have an expert opine that something that occurred (or did not occur) amounts to a procedural irregularity, because such an inquiry is a question of law or the application of law to facts. *See Dao Xiong*, 829 N.W.2d at 396; *see also Behlke v. Conwed Corp.*, 474 N.W.2d 351, 359 (Minn. App. 1991) (affirming the exclusion of an expert’s testimony that the defendant violated an OSHA regulation, after noting that “[l]egal analysis by an expert is ‘ordinarily inadmissible’”) (quoting *Conover v. N. States Power Co.*, 313 N.W.2d 397, 403 (Minn. 1981))). Relators may not ask an expert to opine on whether the statutory and regulatory procedures were followed.

Relators here have not attempted to establish that Pierard is qualified to testify as an expert witness under Minnesota law. *See* Minn. R. Evid. 702. Even if Pierard were qualified to testify as an expert, it would be highly prejudicial to permit him to do so. Relators have not previously represented to PolyMet or the Court that they intended to have Pierard testify as an expert witness. Although Relators listed him as a potential witness on an initial list,² Relators did not then at the August 7 case management hearing raise the issue of expert witnesses.³ Nor did Relators object to the absence of provisions concerning expert witnesses in this Court’s initial scheduling order.⁴ Permitting Relators now to introduce the opinions of a so-called “expert” without giving PolyMet an opportunity to receive an expert report would be both procedurally irregular and extremely prejudicial. *See* Minn. R. Civ. P. 26.01(b) (providing that the disclosure of an expert witness “must be accompanied by a written report”).

¹ Nelson letter to Court re: Pierard Testimony at 2 (Dec. 4, 2019).

² Plaintiffs’ List of Potential Fact Witnesses at 2 (Aug. 7, 2019).

³ *See generally* August 7, 2019 Rule 16 Hearing Tr.

⁴ *See generally* Order Setting Prehearing Conference and Hearing (Oct. 11, 2019).

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In sum, Pierard should not be permitted to testify as an expert witness. PolyMet does not object to Pierard appearing as a fact witness during the hearing. If he will not appear at the hearing, PolyMet is willing to participate in a videotaped deposition that allows for his cross-examination. But PolyMet opposes any order that would allow Pierard to testify as an expert witness. If this Court issues any order allowing a videotaped deposition, it should prohibit opinion testimony.

Very truly yours,

A handwritten signature in black ink, appearing to read "Monte Mills", written in a cursive style.

Monte A. Mills

c: All counsel of record (via Odyssey)