



John C. Martin  
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September 12, 2019

**VIA E-FILING AND E-MAIL**

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

Re: Case No. 62-cv-19-4626

Dear Judge Guthmann:

Respondent Minnesota Pollution Control Agency (“MPCA”) respectfully submits its 3-page letter to the Court regarding unresolved discovery disputes.

Minnesota Statutes Section 14.68 authorizes transfer to district courts “in cases of alleged irregularities in procedure, not shown in the record.” That is how the Court of Appeals described the content of Relators’ declarations (“allegations that ‘[MPCA and EPA] developed a plan to keep EPA criticism of the NorthMet permit out of the public record and the record for judicial review.’” Order, June 25, 2019, at 3). The Order indicates that relevant subjects for the hearing include: communications between MPCA and EPA concerning the NorthMet permit, including EPA’s draft written comments; whether it was unusual for EPA not to submit written comments; and whether MPCA sought to keep EPA’s comments out of the public record. *Id.* at 3-4. The Court of Appeals described the purpose of the evidentiary hearing as “limited.” *Id.* at 4. Most of MPCA’s discovery Objections are to Relators’ efforts to expand that limited purpose of this hearing.

**MPCA’s Objections to Relators’ Document Requests and Written Deposition Questions to MPCA’s Designee**

MPCA objects to Relators’ attempts to use document discovery to expand this proceeding. In particular, MPCA objects to requests for documents and written deposition questions on the following subjects:



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- communications with PolyMet or other permit applicants rather than with EPA (Request Nos. 6 and 22; Questions 8-9)
- documents that do not relate to the NorthMet permit (except for documents and questions intended to establish whether it was unusual for EPA not to submit written comments) (Request Nos. 9 and 11; Questions 3a, 3b, and 11)
- communications concerning substantive Clean Water Act issues rather than procedural issues (Question 12)
- issues concerning the Minnesota Data Practices Act (Request No. 14; Question 1a)
- a question asking which MPCA employee drafted which responses to public comments and when (Question 10)
- two questions of doubtful relevance and not subject to a definitive answer (when MPCA first anticipated litigation over the NorthMet permit (Question 7) and MPCA's "understanding" of what documents would be part of a possible future administrative record as of the date it issued the NorthMet permit (Question 13))

Additionally, MPCA objects to requests for documents and written deposition questions about MPCA's historical actions with respect to permits other than the NorthMet permit, with the exception that MPCA has agreed to produce responsive documents regarding EPA comments on other permits, to the extent that Mr. Udd, Mr. Clark, or Ms. Handeland is aware of such documents. Their combined experience with NPDES permits exceeds 70 years. Without such a limitation, MPCA would be faced with the tremendous burden of inquiring about the knowledge of a wide range of employees spanning a period of decades.

Finally, MPCA objects to a number of Relators' document requests and deposition questions as overly broad and unduly burdensome due to their excessive temporal scope. For example, some requests seek documents dating back to 1974. In order to limit the burden imposed, MPCA has agreed to a temporal scope beginning on July 11, 2016—the date on which PolyMet submitted its initial application for the NorthMet permit.

### **MPCA's Objections to Relators' Deposition Questions to Individual Witnesses**

MPCA objects to Relators' Question Nos. 8a & 8b to Mr. Udd on the grounds that they extend well beyond the scope of this proceeding by asking about PolyMet's communications expressing opposition to WQBELs in the NorthMet permit. PolyMet's desires are not relevant to the issue of whether MPCA engaged in procedural irregularities regarding the NorthMet permit. Likewise, MPCA objects to Question No. 13 to Mr. Udd as overly broad and unduly burdensome in that it asks the witness to "identify every document in the administrative record that memorialized the feedback MPCA had previously received from EPA throughout PolyMet NPDES Permit development so that the comments read by EPA over the phone on April 5, 2018 were duplicative." There were approximately 500 comment submittals on the draft NorthMet permit. Mr. Udd should not be required to search all of them.

Alaska	Montana	Utah
Colorado	Nevada	Washington, D.C.
Idaho	New Mexico	Wyoming



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MPCA objects to Relators' Question No. 6a to Mr. Clark as calling for hearsay, as it asks Mr. Clark to describe the statements of Ann Foss.

### **Relators' Objections to MPCA's Written Deposition Questions to Relators**

Because Relators' claims of procedural irregularities are so vague, MPCA has asked Relators to identify with particularity the nature and basis of their claims. Relators have objected "to the entirety of MPCA's written deposition questions" on the grounds that such questions "are merely interrogatories that are labeled deposition questions." This objection is meritless, and antithetical to the Court's goal of avoiding surprise. Relators have pointed to no authority for concluding that a deposition question must conform to certain stylistic features in order not to be an interrogatory. In reality, a question is a question, and there is nothing improper about the wording of MPCA's deposition questions.

### **Relators' Objections to MPCA's Document Requests to Relators**

Relators have made a number of boilerplate objections to MPCA's document requests. Two disputed issues remain. First, Relators have not agreed to identify the particular requests to which each produced document is responsive, as required by Minn. R. Civ. P. 34.02(c)(2). Second, Relators state that they will avoid disclosing confidential sources, either directly or indirectly, in their privilege log. Although MPCA has no specific objections to this plan at this time, MPCA reserves its rights to object to the contents of Relators' privilege log, including the basis for designating particular witnesses as "confidential sources," until MPCA has a chance to review the log.

### **Oral/Written Response to Deposition Questions**

There is some uncertainty among the parties as to whether answers to the written deposition questions must be provided orally before a court reporter. MPCA requests that the Court allow answers to be submitted in writing, so as to reduce the burden placed on the witnesses and the parties.

Sincerely,

/s/ John C. Martin

John C. Martin

Richard E. Schwartz

cc: All Counsel of Record

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Alaska	Montana	Utah
Colorado	Nevada	Washington, D.C.
Idaho	New Mexico	Wyoming

State of Minnesota  
Ramsey County

District Court  
Second Judicial District

Court File Number: 62-CV-19-4626

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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

**RESPONDENT MINNESOTA  
POLLUTION CONTROL AGENCY'S  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS AND WRITTEN  
DEPOSITION QUESTIONS**

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Respondent Minnesota Pollution Control Agency ("MPCA"), through its undersigned attorneys, hereby propounds to Relators the following requests for production of documents and written deposition questions. MPCA requests that Relators respond to these requests and questions in accordance with the Court's August 7, 2019 Order.

**DEFINITIONS AND INSTRUCTIONS**

1. If you have any question regarding the interpretation of any part of any of the requests for production or written deposition questions, contact undersigned counsel immediately for clarification. The language of these requests should be construed in the broadest possible sense so that full and complete discovery may be obtained with regard to the matters requested.

2. The conjunctive includes disjunctive and vice versa, "all" includes "any" and vice versa, and "each" includes "every" and vice versa, so that these discovery requests shall be construed to request the broadest scope of information.

3. If any request cannot be responded to in full, respond to it to the fullest extent possible, specifying the reasons for your inability to respond fully.

4. If an objection is made with regard to any information sought, state the nature of the objection and the legal authority therefor.

5. In the event that any document is not produced by you by reason of a claim of privilege, please state the following: (a) date of the document; (b) author of the document; (c) addressee of the document; (d) type of document (e.g., record, letter, statement, e-mail); (e) nature of the privilege claimed; (f) identity of the person or entity asserting the privilege; and (g) all persons who have had access to or received copies of the document.

6. “MPCA” means the Minnesota Pollution Control Agency and any of its current and former subparts, directors, officers, representatives, employees, and agents thereof.

7. “EPA” means the United States Environmental Protection Agency and any of its current and former subparts, directors, officers, representatives, employees, and agents thereof.

8. “Relators” or “you” means the Center for Biological Diversity, WaterLegacy, Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy, and the Fond du Lac Band of Lake Superior Chippewa, acting separately or collectively, and including all current and former directors, officers, representatives, employees, and agents thereof.

9. “NPDES Permit” means National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013, including all draft and final versions thereof, and the environmental review and permitting processes relating thereto.

10. “Hearing” means the evidentiary hearing ordered in this matter by the Minnesota Court of Appeals in its June 25, 2019 Order in Consolidated Case Nos. A19-0112, A19-0118, and A19-0124.

11. “Procedural Irregularities” means irregularities in procedure as used in Minn. Stat. § 14.68, as well as procedural irregularities as used by Relators in their August 14, 2019 List of Alleged Procedural Irregularities.

12. The word “documents,” “records,” or “writings” or words of similar import is used in the broadest sense possible and includes, without limitation, any written, printed, typed, graphic, or electronic material of any kind, and any physical means whatsoever of recording or storing information, data or knowledge, including any mechanical, electronic or sound recording, by whatever means made, including, but not limited to, papers, books, records, letters, photographs, tangible things, correspondence, communications, telegrams, cables, facsimile or telecopy messages, email, text messages, social media posts, messages or other electronically stored data, memoranda, notes, notations, work papers, transcripts, minutes, reports, records of telephone or other conversations, statements, summaries, opinions, studies, analyses, evaluations, contracts, agreements, jottings, agendas, bulletins, notices, announcements, instructions, guidelines, charts, manuals, brochures, publications, schedules, journals, books of account, diaries, lists, tabulations, newsletters, drafts, proofs, or other pre-publication forms or materials, telephone lists or indexes (written or electronic), Rolodexes, records or invoices reflecting business operations, canceled checks, vouchers, ledger sheets, statements of witnesses, findings of investigation, minutes of any corporate meetings, minutes of board of directors of corporations, records of negotiations, reports of experts, reports of consultants, any notes or drafts relating to any of the foregoing, and all things similar to the foregoing. It shall also mean all notes, outlines, drafts and non-identical copies of documents by whatever means made.

13. The term “communication” or “communications” means the transmittal of information in the form of facts, ideas, inquiries, discussions, conversations, negotiations,

agreements, undertakings, meetings, telephone conversations, letters, notes, telegrams, facsimiles, telexes, emails, text messages, social media messages, advertisements or other form of interchange whether oral or written.

14. Each of the following requests for production are continuing in nature, such that supplemental responses are required for any new information you receive that reveals an original response or answer was incorrect when made, or is no longer true or complete in light of such new information. This duty to supplement shall be continuing up until the Hearing, and such supplementary responses are hereby requested to be served immediately upon discovery or identification of such information.

15. “Describe,” when used with respect to a communication, act or conduct, means to give, state or identify the following: the date of communication, act or conduct, where it took place, and the person or persons present;

- a. If a communication, the words or substance of the communication, the person making each of the particular statements so listed, the mode of the communication (e.g., in writing, telephone, via computer, in person), and the location of each of the participants;
- b. If an act or conduct, the details of the act or conduct being described and what each participant in such act or conduct did; and
- c. Any document evidencing or reflecting any communication, act or conduct described in response to, or called for by, the question requesting you to describe that communication, act or conduct.

16. Some of the following requests and questions were drafted in light of Relators’ List of Alleged Procedural Irregularities filed on August 14, 2019. By

propounding the following requests and questions, MPCA fully reserves, and in no way waives, its rights to object to the scope of Relators' List of Alleged Procedural Irregularities, as well as Relators' requests for production or written deposition questions.

17. MPCA fully reserves the right to amend, modify, or propound new requests for production or written deposition questions if the Court strikes, sustains objections to all or part of, or otherwise limits some or all of these requests for production or written deposition questions.

### **REQUESTS FOR PRODUCTION OF DOCUMENTS**

**Request No. 1:** Produce all documents regarding any Procedural Irregularities in the NPDES Permit that are alleged by Relators.

**Request No. 2:** Produce all documents regarding any allegation by Relators that MPCA violated any statute, regulation, rule, or policy in relation to the NPDES Permit.

**Request No. 3:** Produce all documents that Relators allege were improperly excluded from the administrative record for the NPDES Permit.

**Request No. 4:** Produce all documents regarding Relators' allegation that MPCA failed to act with truthfulness, accuracy, disclosure, or candor in connection with the NPDES Permit.

**Request No. 5:** Produce all documents that Relators may seek to introduce at the Hearing, regardless of the purpose of such use.

**Request No. 6:** Produce all documents that in any way support Relators' responses to any of the written deposition questions set forth below.

**WRITTEN DEPOSITION QUESTIONS**

**Question No. 1:** Describe with particularity any Procedural Irregularities that Relators allege occurred regarding the NPDES Permit.

**Question No. 2:** Describe with particularity the basis for Relators' allegation that MPCA and/or EPA sought to prevent EPA's comments from becoming part of the administrative record for the NPDES Permit.

**Question No. 3:** Describe with particularity the basis for Relators' allegation that MPCA's issuance of the NPDES Permit was based on communications or documents that are not reflected in the administrative record.

**Question No. 4:** Describe with particularity the basis for Relators' allegation that MPCA sought to prevent documents or communications from being fully and fairly reviewed by the Court of Appeals.

**Question No. 5:** Describe with particularity each instance in which Relators allege that MPCA failed to act with truthfulness, accuracy, disclosure, or candor in connection with the NPDES Permit.

**Question No. 6:** Describe with particularity each instance in which Relators allege that MPCA improperly destroyed, discarded, or failed to retain written records of communications with EPA regarding the NPDES Permit.

**Question No. 7:** Describe with particularity how Relators allege that they were prejudiced by the alleged Procedural Irregularities associated with the NPDES Permit.

**Question No. 8:** For each document that Relators allege was improperly excluded from the administrative record for the NPDES Permit, describe with particularity why Relators allege the document should be included in the administrative record.

DATED: August 21, 2019

*/s/ John C. Martin*

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Sarah Koniewicz

MN Attorney License No.: 0389375

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STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT  
Case Type: Civil Other/Misc.

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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

**RELATORS' DEPOSITION  
ON WRITTEN QUESTIONS  
TO RICHARD CLARK**

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**TO: Respondent Minnesota Pollution Control Agency and its attorneys of record, Sarah Koniewicz, John C. Martin, Bryson C. Smith, Holland & Hart, LLP, 25 South Willow Street, Jackson, WY 83001, and A. Xavier Baker, Crowell & Moring, 1001 Pennsylvania Avenue N.W., Washington, D.C., 20004.**

**PLEASE TAKE NOTICE** that pursuant to the order of the Ramsey County District Court, the Honorable John H. Guthmann presiding, Richard Clark, Supervisor, Metallic Mining Sector Unit, Water and Mining Section Industrial Division of the Minnesota Pollution Control Agency ("MPCA"), is called upon to answer the questions enumerated below in a sworn deposition before Benchmark Reporting Agency, 222 South Ninth Street #950, Minneapolis, Minnesota, on or before Friday, September 20, 2019 at a time and place to be jointly determined by counsel.

**DIRECTIONS AND DEFINITIONS**

To the Court Reporter/Officer: Please read the following directions and definitions to the witness after the witness is sworn on oath but before you read the deposition questions to the witness.

A. Please answer all of the questions with verbal responses, rather than a nod of the head or other non-verbal response;

B. Please answer each question fully and to the best of your ability, and do not consult with your attorney while the questioning is underway;

C. If you read from or refer to any document during your answers, please identify that document by Exhibit number or as set forth in the definition of “identify” below;

D. If you are asked to “identify” a person or persons in a question, please provide that person’s name, position, and the organization they were affiliated with during the relevant time period;

E. If you are asked to “identify” a document or documents in a question, please name the author or authors, the recipients, the date and subject matter of the document, and the present custodian of the document;

F. If you are asked to “identify” a permit issued by MPCA, please state the name of the facility, and the date on which the permit was issued.

G. If you are asked to “identify” a communication in a question, please state who the participants were to the communication, when the communication occurred, and the type of communication used (i.e. telephone call, email, etc.);

H. “Comments” or “commented” of or by EPA means communication of suggestions, concerns, recommendations, requirements, or objections by EPA whether orally or verbally.

I. “Declaration” means a declaration given by you in connection with the Motion for Transfer to the District Court or, in the Alternative, for Stay Due to Irregular Procedure and Missing Documents in Relators’ appeals of the PolyMet NPDES Permit to the Minnesota Court of Appeals in case numbers A19-0112, A19-0118, A19-0124;

J. “Documents” means any written or recorded item, whether created or stored on paper, electronically, or any other format, including, but not limited to, notes, memoranda, agendas, emails, text messages, instant messages, calendars, phone logs, PowerPoint or other presentation programs, photographs, drawings, web ex materials, and tape recordings;

K. “EPA” means the United States Environmental Protection Agency, and its employees, representatives and agents;

L. “MPCA” means the Minnesota Pollution Control Agency, and its employees, representatives, and agents;

M. “NPDES” means National Pollutant Discharge Elimination System/State Disposal System as provided for in the Clean Water Act and implementing regulations;

N. “PolyMet” means Poly Met Mining, Inc., and any parent entities and subsidiaries, and its employees, representatives, and agents, including counsel;

O. “PolyMet NPDES Permit” means and refers to the NPDES permit issued to Poly Met Mining, Inc. by the MPCA on or about December 20, 2018;

P. “Regarding” means and includes evidencing, reflecting, relating to, concerning, consisting of, comprising, discussing, recording, or in any way referring to or pertaining to; and

Q. “WQBELs” means water quality-based effluent limitations as provided for in the Clean Water Act and implementing regulations.

**DEPOSITION ON WRITTEN QUESTIONS**

1. Based on your experience working at MPCA since 1986, identify every NPDES permit other than the PolyMet NPDES Permit for which EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read EPA's comments aloud to MPCA.
2. Based on your experience working at MPCA since 1986, identify every NPDES permit for which EPA sent written comments on the draft NPDES permit during the public comment period.
3. Based on your experience working at MPCA since 1986, identify every NPDES permit where EPA commented upon the proposed final NPDES permit.
4. Your declaration of June 12, 2019 (¶ 8) states that MPCA "responded to the substance of EPA's April 5, 2018, comments" through MPCA's responses to other public comments. Based on your experience working at MPCA since 1995, identify every NPDES permit other than the PolyMet NPDES Permit where MPCA responded to the substance of EPA comments in its responses without attributing the comments to EPA.
5. Your declaration of May 28, 2019 (¶ 1) states that your job title is "Supervisor, Metallic Mining Sector Unit, Water and Mining Section Industrial Division."
  - (a) In your role as Supervisor, how do you ensure that NPDES permits implement MPCA decisions made as a result of discussions with permittees and with EPA?
  - (b) Identify the time period during which you worked under the supervision of MPCA Mining Sector Director Ann Foss.

6. Relators obtained an April 9, 2015 email from Ann Foss, MPCA Mining Sector Director to Kevin Pierard, EPA's NPDES Program Branch Chief, responding to Mr. Pierard's email sent two days before entitled "Polymet NPDES Requirements." The emails between Mr. Pierard and Ms. Foss with Mr. Pierard's enclosure are provided in Clark Exhibit 1. Ms. Foss' email proposed a process where, instead sending written documentation, Mr. Pierard would contact Ms. Foss by phone, set up a future conference call with others, if needed, and provide written documentation only if MPCA "agreed that documentation of certain items is needed" and agreed who will draft the document.
  - (a) What did Ms. Foss communicate to you regarding her concerns about the content or process for documentation in Mr. Pierard's memo and enclosure dated April 7, 2015 stating EPA's requirements for the PolyMet NPDES Permit?
  - (b) What did you understand to be the position of MPCA's Mining Sector as to the need for MPCA to agree in order for EPA to document items pertaining to the PolyMet NPDES Permit.
7. Your declaration of June 12, 2019 (¶ 10) states, "At meetings, I would sometimes take basic notes in my own shorthand to help me remember what had come up in the meeting" and "to help commit the issues to memory." Clark Exhibit 2 contains agendas, emails, and notes prepared by Stephanie Handeland pertaining to approximately three dozen calls or meetings between MPCA and EPA regarding the PolyMet NPDES Permit since August 2016.
  - (a) Referring to Clark Exhibit 2 as needed, identify all calls or meetings with EPA regarding the PolyMet NPDES Permit at which you took notes.

- (b) For any notes from calls or meetings with EPA regarding the PolyMet NPDES Permit that you discarded, state why you discarded your notes if they helped you commit the issues to memory;
- (c) For any notes from calls or meetings with EPA regarding the PolyMet NPDES Permit that you discarded, identify any other documents in which the content of your notes was reflected or retained.
8. Your declaration of May 28, 2019 (¶ 10) states that by the August 2017 time frame “MPCA and EPA had discussed together all of the major issues that EPA had with the pre-proposed permit and MPCA fully understood and considered EPA’s positions.” Please explain in detail all of “EPA’s positions” that MPCA fully understood and considered by August 2017.
9. Your declaration of May 28, 2019 (¶ 15) states that “On April 5, 2018, MPCA and EPA had a conference call in which EPA told us that it would read from its draft written comments.” How and when did you first learn that EPA had prepared written comments on the draft PolyMet NPDES Permit?
10. Your declaration of May 28, 2019 (¶ 15) states with respect to the April 5, 2018 call with EPA regarding the PolyMet NPDES Permit, “EPA treated the call as a summary or compendium of all of its previous concerns about the public comment draft permit.” Do you agree that one of EPA’s primary concerns in EPA comments read to MPCA on April 5, 2018, was the lack of WQBELs in the PolyMet NPDES Permit?

11. Your declaration of May 28, 2019 (¶ 17) states that a number of the issues raised in the April 5, 2018 call with EPA regarding the PolyMet NPDES Permit “were not finally resolved, however, until a September 2018 meeting between MPCA and EPA.” Do you agree that the EPA’s concern about the lack of WQBELs in the PolyMet NPDES Permit was also not resolved in the September 2018 meeting between MPCA and EPA regarding the PolyMet NPDES Permit?
12. Your declaration of June 12, 2019 (¶ 6) states that you do not know anything about an alleged phone call between former MPCA Commissioner John Linc Stine and EPA Regional Administrator Cathy Stepp concerning EPA’s written comments on the draft PolyMet NPDES Permit. How and when did you learn of Shannon Lotthammer’s March 13, 2108 request to Kurt Thiede that EPA not send its written comment letter on the draft PolyMet NPDES Permit during the public comment period?
13. Your declaration of June 12, 2019 (¶ 7) states that, in addition to Stephanie Handeland’s notes taken of calls and meetings between MPCA and EPA, public comments on the draft NPDES Permit “provide a complete record of EPA’s criticisms and concerns with the draft permit.” In your view, how do comments submitted by members of the public provide a record of *EPA’s* criticisms and concerns?
14. Your declaration of June 12, 2019 (¶ 12) describes your frustration with EPA “because sometimes EPA would tell us that something was not agreeable to them, but when we would ask them what would be agreeable, they would not tell us.” Based on Stephanie Handeland’s notes of calls with EPA regarding the NPDES Permit in Clark Exhibit 2 pages 58-59 and 82:

- (a) Do you agree that EPA communicated to MPCA at least as early as November 1, 2017 that EPA did not find operating limits sufficient and wanted the PolyMet NPDES Permit to contain WQBELs?
- (b) Do you agree that on October 22, 2018, EPA communicated to MPCA that EPA wanted the proposed PolyMet NPDES Permit to have language providing WQBELs?
15. Identify all documents that were reviewed, consulted, referred to, or otherwise used in your preparation for, or answers to each of the foregoing questions.
16. Other than legal counsel, identify all persons you communicated with regarding your answers to these questions.

Dated: August 21, 2019

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY**

*/s/ Elise L. Larson*

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**JUST CHANGE LAW OFFICES**

*/s/ Paula Maccabee*

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**FOND DU LAC BAND OF LAKE  
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*/s/ Vanessa Ray-Hodge*

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*Attorneys for Relators Fond du Lac Band of  
Lake Superior Chippewa*

STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT  
Case Type: Civil Other/Misc.

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Court File No. 62-CV-19-4626  
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**RELATORS' DEPOSITION  
ON WRITTEN QUESTIONS  
TO STEPHANIE HANDELAND**

---

**TO: Respondent Minnesota Pollution Control Agency and its attorneys of record, Sarah Koniewicz, John C. Martin, Bryson C. Smith, Holland & Hart, LLP, 25 South Willow Street, Jackson, WY 83001, and A. Xavier Baker, Crowell & Moring, 1001 Pennsylvania Avenue N.W., Washington, D.C., 20004.**

**PLEASE TAKE NOTICE** that pursuant to the order of the Ramsey County District Court, the Honorable John H. Guthmann presiding, Stephanie Handeland, Environmental Specialist 4, Permit Writer for the Minnesota Pollution Control Agency ("MPCA"), is called upon to answer the questions enumerated below in a sworn deposition before Benchmark Reporting Agency, 222 South Ninth Street #950, Minneapolis, Minnesota, on or before Friday, September 20, 2019 at a time and place to be jointly determined by counsel.

**DIRECTIONS AND DEFINITIONS**

To the Court Reporter/Officer: Please read the following directions and definitions to the witness after the witness is sworn on oath but before you read the deposition questions to the witness.

A. Please answer all of the questions with verbal responses, rather than a nod of the head, or other non-verbal response;

B. Please answer each question fully and to the best of your ability, and do not consult with your attorney while the questioning is underway;

C. If you read from or refer to any document during your answers, please identify that document by Exhibit number or as set forth in the definition of “identify” below;

D. If you are asked to “identify” a person or persons in a question, please provide that person’s name, position, and the organization they were affiliated with during the relevant time period;

E. If you are asked to “identify” a document or documents in a question, please name the author or authors, the recipients, the date and subject matter of the document, and the present custodian of the document;

F. If you are asked to “identify” a permit issued by MPCA, please state the name of the facility, and the date on which the permit was issued.

G. If you are asked to “identify” a communication in a question, please state who the participants were to the communication, when the communication occurred, and the type of communication used (i.e. telephone call, email, etc.);

H. “Comment” or “commented” of or by EPA means communication of suggestions, concerns, recommendations, requirements, or objections by EPA whether orally or verbally;

I. “Declaration” means a declaration given by you in connection with the Motion for Transfer to the District Court or, in the Alternative, for Stay Due to Irregular Procedure and Missing Documents in Relators’ appeals of the PolyMet NPDES Permit to the Minnesota Court of Appeals in case numbers A19-0112, A19-0118, A19-0124;

J. “Documents” means any written or recorded item, whether created or stored on paper, electronically, or any other format, including, but not limited to, notes, memoranda, agendas, emails, text messages, instant messages, calendars, phone logs, PowerPoint or other presentation programs, photographs, drawings, web ex materials, and tape recordings;

K. “EPA” means the United States Environmental Protection Agency, and its employees, representatives, and agents;

L. “MPCA” means the Minnesota Pollution Control Agency, and its employees, representatives, and agents;

M. “NPDES” means National Pollutant Discharge Elimination System/State Disposal System as provided for in the Clean Water Act and implementing regulations;

N. “PolyMet” means Poly Met Mining, Inc., its parent entities and subsidiaries, and its employees, representatives, and agents, including counsel;

O. “PolyMet NPDES Permit” means and refers to the NPDES permit issued to Poly Met Mining, Inc. by the MPCA on or about December 20, 2018.

P. “Regarding” means and includes evidencing, reflecting, relating to, concerning, consisting of, comprising, discussing, recording, or in any way referring to or pertaining to; and

#### **DEPOSITION ON WRITTEN QUESTIONS**

1. Based on your experience working at MPCA since 1995, identify every NPDES permit other than the PolyMet NPDES Permit for which EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read EPA’s comments aloud to MPCA.
2. Based on your experience working at MPCA since 1995, identify every NPDES permit for which EPA sent written comments on that draft NPDES permit during the public comment period.
3. Based on your experience working at MPCA since 1995, identify every NPDES permit where EPA commented upon the proposed final NPDES permit.

4. Your declaration of June 12, 2019 (¶ 8) states that MPCA “responded to the substance of EPA’s April 5, 2018, comments” through MPCA’s responses to other public comments. Based on your experience working at MPCA since 1995, identify every NPDES permit other than the PolyMet NPDES Permit where MPCA responded to the substance of EPA comments in its responses without attributing the comments to EPA.
5. Your declaration of May 28, 2019 (¶ 6) states that you “participated in essentially all of the phone calls and meetings that MPCA had with EPA about the Water Permit” and your declaration of June 12, 2019 (¶ 6) states that these calls or meetings occurred “twice-monthly.” Handeland Exhibits 1-3 pertain to meetings and phone calls with EPA regarding the PolyMet NPDES Permit. Exhibit 1 contains agendas and emails with notes in your handwriting on them, Exhibit 2 contains agendas and emails without notes, and Exhibit 3 contains your handwritten notes from a spiral notebook.
  - (a) For calls and meetings with EPA related to the PolyMet NPDES Permit reflected by annotated agendas and emails in Exhibit 1, identify any separate notes you prepared regarding those calls and meetings.
  - (b) State whether you prepared any notes regarding calls or meetings with EPA regarding the PolyMet NPDES Permit on or about the dates of the agendas in Exhibit 2 and/or on or about the following dates referenced in Exhibit 3 in your notes from March 5, 2018, March 12, 2018, June 11, 2018, July 9, 2018, October 22, 2018, and November 8, 2018.
  - (c) For any of the calls or meetings with EPA on the dates indicated in paragraph (b) that did not occur state your best understanding of why they did not take place.

6. Your declaration of June 12, 2018 (¶ 10) states that during the April 5, 2018 call when EPA read its comments on the draft PolyMet NPDES Permit you stopped taking notes because EPA was reading so quickly “I could not keep up accurate notetaking.”
  - (a) Identify all other calls or meetings with EPA where you stopped taking notes because you could not keep up accurate notetaking;
  - (b) State whether the initial notes you took on April 5, 2018 were in the same spiral notebook from which the other notes in Handeland Exhibit 3 were copied.
  
7. Your declaration of June 12, 2019 (¶ 10) states that, during the April 5, 2018 call with EPA regarding the PolyMet NPDES Permit, “I noticed that Mike Schmidt was also taking notes, so I stopped.”
  - (a) Did you ever observe another MPCA staff person taking notes during any other call or meeting with EPA regarding the PolyMet NPDES Permit?
  - (b) Did you ever stop taking notes of a call or meeting with EPA regarding the PolyMet NPDES Permit based on the fact that another person was also taking notes?
  
8. Your declaration of June 12, 2019 (¶ 10) states that you discarded your notes from the April 5, 2018 call with EPA regarding the PolyMet NPDES Permit “because [your] note taking was worthless.”
  - (a) On what date did you discard these notes?
  - (b) Describe every communication you had with anyone else at MPCA regarding the notes you took of the EPA call on April 5, 2018.
  - (c) Do you agree that your notes from April 5, 2018 would have memorialized the fact that a call between MPCA and EPA pertaining to the PolyMet NPDES Permit occurred on April 5, 2018?

- (d) Identify every other call or meeting with EPA regarding the PolyMet NPDES Permit where you took handwritten notes and subsequently discarded them.
9. Your declaration of May 28, 2019 (¶ 7) states regarding the April 5, 2018 call with EPA in which EPA read its comments on the PolyMet NPDES Permit, “There was 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.”
- (a) Describe in detail all of the concerns regarding the PolyMet NPDES Permit raised by EPA’s comments read to MPCA on April 5, 2018;
- (b) Identify every document that reflects that EPA’s concerns regarding the PolyMet NPDES Permit in the comments read aloud by EPA on April 5, 2018 had been discussed in previous meetings or conference calls with MPCA.
10. The annotated copy of EPA’s comments on the draft PolyMet NPDES Permit that Kevin Pierard read aloud to MPCA is attached as Handeland Exhibit 4. Referring to Mr. Pierard’s statement that the underlined portions of this document were read word for word to you on April 5, 2018, state with specificity any disagreements you have with Mr. Pierard’s statement and the basis for you disagreement.
11. Your declaration of June 12, 2019 (¶ 14) stated that once EPA “did send a letter stating that all issues with a permit had been resolved to its satisfaction” because “I had personally requested the letter.” Identify the NPDES permit and the documents to which you referred in this statement.

12. Your declaration of June 12, 2019 (¶ 16) states “We knew we had addressed the substance of EPA’s comments in the responses-to-comments document because (except for EPA’s comment about domestic wastewater) EPA’s comments fully overlapped with other stakeholders' written comments.”
- (a) Explain the basis for your statement that you knew MPCA had addressed the substance of EPA’s comments on the draft PolyMet NPDES Permit because EPA’s comments fully overlapped with other stakeholders’ written comments.
- (b) State which written comments by other stakeholders on the draft PolyMet NPDES Permit you personally read;
- (c) For any written comments by other stakeholders on the draft PolyMet NPDES Permit that you read state when you read them.
13. Identify all documents that were reviewed, consulted, referred to or otherwise used in your preparation for, or answers to each of the foregoing questions.
14. Other than legal counsel, identify all persons you communicated with regarding your answers to these questions.

Dated: August 21, 2019

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY**

*/s/ Elise L. Larson*

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**JUST CHANGE LAW OFFICES**

*/s/ Paula Maccabee*

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT  
Case Type: Civil Other/Misc.

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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

**RELATORS' DEPOSITION  
ON WRITTEN QUESTIONS  
TO RESPONDENT MINNESOTA  
POLLUTION CONTROL AGENCY**

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**TO: Respondent Minnesota Pollution Control Agency and its attorneys of record, Sarah Koniewicz, John C. Martin, Bryson C. Smith, Holland & Hart, LLP, 25 South Willow Street, Jackson, WY 83001, and A. Xavier Baker, Crowell & Moring, 1001 Pennsylvania Avenue N.W., Washington, D.C., 20004.**

**PLEASE TAKE NOTICE** that pursuant to the order of the Ramsey County District Court, the Honorable John H. Guthmann presiding, an officer, director or managing agent, or other person who consents to testify on its behalf designated by Respondent Minnesota Pollution Control Agency ("MPCA"), is called upon to answer the questions enumerated below in a sworn deposition before Benchmark Reporting Agency, 222 South Ninth Street #950, Minneapolis, Minnesota, on or before Friday, September 20, 2019 at a time and place to be jointly determined by counsel.

**DEFINITIONS & DIRECTIONS**

To the Court Reporter/Officer: Please read the following directions and definitions to the witness after the witness is sworn on oath but before you read the deposition questions to the witness.

A. Please answer all of the questions with verbal responses, rather than a nod of the head or other non-verbal response;

B. Please answer each question fully and to the best of your ability, and do not consult with your attorney while the questioning is underway;

C. If you read from or refer to any document during your answers, please identify that document by Exhibit number or as set forth in the definition of “identify” below;

D. If you are asked to “identify” a person or persons in a question, please provide that person’s name, position, and the organization they were affiliated with during the relevant time period;

E. If you are asked to “identify” a document or documents in a question, please name the author or authors, the recipients, the date and subject matter of the document, and the present custodian of the document;

F. If you are asked to “identify” a permit issued by MPCA, please state the name of the facility, and the date on which the permit was issued.

G. If you are asked to “identify” a communication in a question, please state who the participants were to the communication, when the communication occurred, and the type of communication used (i.e. telephone call, email, etc.);

H. “Administrative record” means the administrative record filed with the Minnesota Court of Appeals in Relators’ appeals of the PolyMet NPDES Permit in case numbers A19-0112, A19-0118, A19-0124 (the “PolyMet NPDES Permit Appeal”);

I. “Comments” or “commented” of or by EPA means communication of suggestions, concerns, recommendations, requirements, or objections by EPA whether orally or verbally.

J. “Data Practices Act” means the Minnesota Government Data Practices Act;

K. “Declaration” means a declaration given in connection with the Motion for Transfer to the District Court or, in the Alternative, for Stay Due to Irregular Procedure and Missing Documents in the PolyMet NPDES Permit Appeal;

L. “Discarded” means thrown away physically or deleted electronically.

M. “Documents” means any written or recorded item, whether created or stored on paper, electronically, or any other format, including, but not limited to, notes, memoranda, agendas, emails, text messages, instant messages, calendars, phone logs, PowerPoint or other presentation programs, photographs, drawings, web ex materials, and tape recordings;

N. “EPA” means the United States Environmental Protection Agency, and its employees, representatives, and agents, including counsel;

O. “MPCA” means the Minnesota Pollution Control Agency, and its employees, representatives, and agents, including counsel;

P. “NPDES” means National Pollutant Discharge Elimination System/State Disposal System as provided for in the Clean Water Act and implementing regulations;

Q. “PolyMet” means Poly Met Mining, Inc., its parent entities and subsidiaries, and its employees, representatives, and agents, including counsel;

R. “PolyMet NPDES Permit” means and refers to the NPDES permit issued to Poly Met Mining, Inc. by the MPCA on or about December 20, 2018;

S. “Regarding” means and includes evidencing, relating to, reflecting, concerning, consisting of, comprising, discussing, recording, or in any way referring to or pertaining to;

T. “Under MPCA’s possession or control” means if MPCA has a practical ability to influence the person in possession to provide it, or a right or privilege to examine it upon request or demand;

U. “WQBELs” means water quality-based effluent limitations as provided for in the Clean Water Act and implementing regulations; and

V. “You” or “your” refers to the Minnesota Pollution Control Agency (“MPCA”), and its employees, agents, and representatives, including, but not limited to, counsel.

**DEPOSITION ON WRITTEN QUESTIONS**

1. The June 18, 2019 media release from the EPA union leaking a portion of an email on March 13, 2018 from Shannon Lotthammer to Kurt Thiede is attached as MPCA Exhibit 1. Ms. Lotthammer's email in MPCA Exhibit 1 is entitled "FW: Minnesota Speaker's Office." The email reads, in part, "We have asked that EPA Region 5 not send a written comment letter during the public comment period and instead follow the steps outlined in the MOA, and wait until we have reviewed and responded to public comments and made associated changes before sending comments from EPA." The email also refers to additional notes below from MPCA Commissioner John Linc Stine.
  - a. Please explain why Ms. Lotthammer's March 13, 2018 email was not produced in response to WaterLegacy's five Data Practices Act requests beginning on March 26, 2018 or Minnesota Center for Environmental Advocacy's June 19, 2019 Data Practices Act request.
  - b. If MPCA claims that Ms. Lotthammer's March 13, 2018 email has been discarded, state from which paper files and computers it was discarded, by whom and on what date.
  - c. Explain why Ms. Lotthammer's March 13, 2018 email is entitled "FW: Minnesota Speaker's Office."
2. Michael Schmidt's declaration of June 12, 2019 (§ 20) states with respect to the April 5, 2018 call between MPCA and EPA regarding the PolyMet NPDES Permit, "I do not remember specifically what I did with my handwritten notes" and that Mr. Schmidt customarily would not retain handwritten notes because he would integrate those notes in a typed document.
  - a. Has MPCA retained either Mr. Schmidt's original handwritten notes of April 5, 2018 or his typed document regarding the substance of that call?

- b. If MPCA claims that Mr. Schmidt's typed document regarding the substance of the April 5, 2018 call has been discarded, state from which paper files and computers it was discarded, by whom and on what date.
3. The Memorandum of Agreement ("MOA") between MPCA and EPA signed in 1974 and amended in 2000 to reflect the Great Lakes Initiative, is attached as MPCA Exhibit 2.
  - a. Given MOA provisions pertaining to Section 124.22, including paragraph (8) on page 4, after MPCA received EPA's November 3, 2016 letter stating deficiencies in PolyMet's NPDES Permit application, on what basis did MPCA conclude it was entitled to proceed with the PolyMet NPDES Permit?
  - b. Describe MPCA's discussions with EPA in 2018 regarding potential amendment of the MOA to reflect a procedure specific to the PolyMet NPDES Permit, including for what purpose such discussions and how they were resolved.
4. Since the 1974 MOA, identify every NPDES permit other than the PolyMet NPDES Permit for which EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read the comments aloud to MPCA.
5. Since the 1974 MOA, identify every NPDES permit where EPA commented upon or objected to MPCA's proposed final NPDES permit.
6. Since January 1, 2000, identify every NPDES permit proposed by MPCA for which EPA sent written comments on the draft NPDES permit during the public comment period.
7. Since what date has the MPCA anticipated the potential for litigation of the PolyMet NPDES Permit?
8. Since January 1, 2010, state the date of every meeting MPCA had with EPA or with PolyMet related to the PolyMet NPDES Permit whether held in person or electronically.

9. Identify all meetings that MPCA has participated in since January 1, 2010 in which an applicant for an NPDES permit met with you and the EPA at the same time.
10. In connection with MPCA's responses to public comments on the draft PolyMet NPDES Permit,
  - (a) Identify every person responsible for the tasks involved in preparing responses to these public comments;
  - (b) State for each person responsible for preparing responses to public comments with what specific tasks that person was involved;
  - (c) Identify the dates on which each person responsible for preparing responses to public comments began and completed each of their tasks identified in paragraph (b).
11. Identify all documents, including journals or notebooks, under MPCA's possession or control regarding MPCA mining permits prepared or kept by former Mining Sector Director Ann Foss.
12. State whether MPCA's decision with respect to the PolyMet NPDES Permit that operating limits, rather than WQBELs would be sufficient to protect water quality was influenced by your perceptions of the character or experience of PolyMet's Executive Vice President for Environmental and Governmental Affairs, Brad Moore.
13. State MPCA's understanding, as of December 20, 2018, the date when the PolyMet NPDES Permit was issued, whether the following documents would be part of the administrative record provided to the Court of Appeals, should the MPCA's permit decision be appealed:
  - (a) EPA's written comments on the draft PolyMet NPDES Permit;
  - (b) any notes from April 5, 2018, when EPA read its comments on the draft PolyMet NPDES Permit to MPCA over the phone;
  - (c) Shannon Lotthammer's March 13, 2018 email to Kurt Thiede;

(d) any document indicating that EPA staff believed that EPA's comments regarding the PolyMet NPDES Permit had not been fully resolved by the time the Permit was finalized.

14. Identify all documents that were reviewed, consulted, referred to or otherwise used in your preparation for, or answers to each of the foregoing questions.

Dated: August 21, 2019

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY**

*/s/ Elise L. Larson*

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*Attorneys for Relators Fond du Lac Band of  
Lake Superior Chippewa*

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT  
Case Type: Civil Other/Misc.

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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

**RELATORS' DEPOSITION  
ON WRITTEN QUESTIONS  
TO JEFF UDD**

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**TO: Respondent Minnesota Pollution Control Agency and its attorneys of record, Sarah Koniewicz, John C. Martin, Bryson C. Smith, Holland & Hart, LLP, 25 South Willow Street, Jackson, WY 83001, and A. Xavier Baker, Crowell & Moring, 1001 Pennsylvania Avenue N.W., Washington, D.C., 20004.**

**PLEASE TAKE NOTICE** that pursuant to the order of the Ramsey County District Court, the Honorable John H. Guthmann presiding, Jeff Udd, Manager of the Water and Mining Section for the Minnesota Pollution Control Agency ("MPCA"), is called upon to answer the questions enumerated below in a sworn deposition before Benchmark Reporting Agency, 222 South Ninth Street #950, Minneapolis, Minnesota, on or before Friday, September 20, 2019 at a time and place to be jointly determined by counsel.

**DIRECTIONS AND DEFINITIONS**

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A. Please answer all of the questions with verbal responses, rather than a nod of the head or other non-verbal response;

B. Please answer each question fully and to the best of your ability, and do not consult with your attorney while the questioning is underway;

C. If you read from or refer to any document during your answers, please identify that document by Exhibit number or as set forth in the definition of “identify” below;

D. If you are asked to “identify” a person or persons in a question, please provide that person’s name, position and the organization they were affiliated with during the relevant time period;

E. If you are asked to “identify” a document or documents in a question, please name the author or authors and the recipients and state the date and subject matter of the document, and the present custodian of the document;

F. If you are asked to “identify” a permit issued by MPCA, please state the name of the facility, and the date on which the permit was issued.

G. If you are asked to “identify” a communication in a question, please state who the participants were to the communication, when the communication occurred, and the type of communication used (i.e. telephone call, email, etc.);

H. “Administrative record” means the administrative record filed in Relators’ appeals of the PolyMet NPDES Permit to the Minnesota Court of Appeals in case numbers A19-0112, A19-0118, A19-0124, the “PolyMet NPDES Permit Appeal;”

I. “Comment” or “commented” of or by EPA means communication of suggestions, concerns, recommendations, requirements, or objections by EPA, whether orally or verbally.

J. “Declaration” means a declaration given by you in connection with the Motion for Transfer to the District Court or, in the Alternative, for Stay Due to Irregular Procedure and Missing Documents in the PolyMet NPDES Permit Appeal;

K. “Documents” means any written or recorded item, whether created or stored on paper, electronically, or any other format, including, but not limited to, notes, memoranda, agendas, emails, text messages, instant messages, calendars, phone logs, PowerPoint or other presentation programs, photographs, drawings, web ex materials, and tape recordings;

L. “EPA” means the United States Environmental Protection Agency, and its employees, representatives, and agents;

M. “MPCA” means the Minnesota Pollution Control Agency, and its employees, representatives, and agents;

N. “NPDES” means National Pollutant Discharge Elimination System/State Disposal System as provided for in the Clean Water Act and implementing regulations;

O. “PolyMet” means Poly Met Mining, Inc., its parent entities and subsidiaries, and its employees, representatives, and agents, including counsel;

P. “PolyMet NPDES Permit” means the NPDES permit issued to Poly Met Mining, Inc. by the MPCA on or about December 20, 2018;

Q. “Regarding” means and includes evidencing, reflecting, relating to, concerning, consisting of, comprising, discussing, recording, or in any way referring to or pertaining to; and

R. “WQBELs” means water quality-based effluent limitations as provided for in the Clean Water Act and implementing regulations.

### **DEPOSITION ON WRITTEN QUESTIONS**

1. Your declaration of May 28, 2019 (¶¶ 1, 3) states that you are the Manager of the Water and Mining Section for the MPCA and that you’ve been involved in the oversight of the PolyMet NPDES Permit from January 2018 until issuance on December 20, 2018.

- (a) Identify every document and file pertaining to the PolyMet NPDES Permit transferred to you when you assumed responsibility for oversight of this Permit.
- (b) Describe your involvement with the PolyMet NPDES Permit prior to January 2018.
2. Based on your experience working at MPCA since 2002, identify every NPDES permit other than the PolyMet NPDES Permit for which EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read EPA's comments aloud to MPCA.
3. Based on your experience working at MPCA since 2002, identify every NPDES permit for which EPA sent written comments on the draft NPDES permit during the public comment period.
4. Your declaration of May 28, 2019 (§ 5) states that in reading EPA's comments on the draft PolyMet NPDES Permit to MPCA on April 5, 2018, EPA was "alerting" MPCA to the issues it would be looking at most carefully and that "As of April 5, 2018, most of these issues had been discussed, but some had not been finally resolved." Your declaration of June 12, 2019 (§ 7) states that the April 5, 2018 call was about "what EPA would be looking for in evaluating the adequacy of the pre-proposed draft."
- (a) Explain whether you agree that one of the primary issues that EPA was alerting MPCA would be looked at by EPA to evaluate the adequacy of the PolyMet NPDES Permit was whether the Permit contained the WQBELs EPA believed were required.
- (b) Explain whether you agree that as of April 5, 2018 the issue of whether the PolyMet NPDES Permit would contain WQBELs had not been fully resolved.

5. Your declaration of May 28, 2019 (¶¶ 7-8) states that at the conclusion of the two-day in-person meeting between EPA and MPCA on September 25 and 26, 2018 “I believed that no unmanageable issues remained, and we were in a position to finalize the draft permit.”
  - (a) State on what you based this opinion.
  - (b) Explain whether you agree that as of September 26, 2018, the issue of whether the PolyMet NPDES Permit would contain WQBELs remained unresolved.
  - (c) Explain whether you agree that, as of the October 22, 2018 call between MPCA and EPA regarding the PolyMet NPDES Permit, EPA stated they would focus their review on final draft permit language on WQBELs.
6. Your declaration of May 28, 2019 (¶ 9) cites the Memorandum of Agreement (“MOA”) between MPCA and EPA. Describe the substance of any discussions between MPCA and EPA in 2018 in which you participated or about which you were informed regarding the potential to amend the MOA in connection with the PolyMet NPDES Permit.
7. Your declaration of May 28, 2019 (¶ 10) states that the pre-proposed version of the PolyMet NPDES Permit sent to EPA on October 25, 2018 “reflected all of the discussion points from the two-day, in-person meeting in September 2018.” Do you agree that this pre-proposed version of the PolyMet NPDES Permit did not provide WQBELs?
8.
  - (a) In the September 25, 2018 meeting between MPCA, EPA and PolyMet, did PolyMet oppose putting WQBELs in the PolyMet NPDES Permit due to concerns that “anti-backsliding” would prevent removing WQBELs even if water quality standards changed?
  - (b) Identify all other communications of which you are aware where PolyMet expressed opposition to including WQBELs in the PolyMet NPDES Permit.

9. Your declaration of June 12, 2019 (¶ 5) states that you have “no knowledge of whether Regional Administrator Stepp prevented professional staff from sending written comments” and “no knowledge of any communications between MPCA Commissioner John Linc Stine and EPA Administrator Cathy Stepp about alleged complaints with EPA's written comments.”
- (a) How did you first learn that Shannon Lotthammer had requested that EPA not send its written comment letter on the draft PolyMet NPDES Permit during the public comment period?
- (b) How did you first see a copy of Shannon Lotthammer's March 13, 2018 email to Kurt Thiede asking that EPA not send its written comment letter on the draft NPDES Permit during the public comment period?
10. Stephanie Handeland's notes of March 5, 2018, attached as Udd Exhibit 1, state that “EPA will submit comments during PN [public notice] period,” that Kevin Pierard said, “EPA will discuss draft comments,” and that MPCA and EPA would “[s]et up call early next week” at 9:00, 10:00 or 11:00 on Monday.
- (a) Did you speak by phone with Mr. Pierard on or about Monday, March 12, 2018 about EPA's draft comments on the draft PolyMet NPDES Permit?
- (b) In the discussion with Mr. Pierard on or about Monday March 12, 2018, did he provide details about what would be contained in EPA's comments on the draft PolyMet NPDES Permit?
11. Your email to Richard Clark and Stephanie Handeland dated March 16, 2018, attached as Udd Exhibit 2, states that you just got off the phone with Kevin Pierard and that he would like to have a meeting “the first week of April to walk through what the comment letter would have said if it were sent.” Other than Mr. Clark and Ms. Handeland, who else at MPCA was

informed that Mr. Pierard was going to walk through what EPA's comment letter on the draft PolyMet NPDES Permit would have said if it were sent in a call with MPCA in early April?

12. Your declaration of June 12, 2019 (¶ 6) states "As I understood it, rather than submitting comments on a draft of the permit that was going to be changed anyway, it would make more sense and be more efficient for EPA to comment on the post-comment version of the permit."

(a) Please identify what documents or communications provide a basis for your understanding that it would be "more efficient" if EPA did not submit its comments on the draft PolyMet NPDES Permit.

(b) Please identify every NPDES permit other than the PolyMet NPDES Permit of which you have knowledge where MPCA and EPA acted on the understanding that it would be "more efficient" to comment on the post-comment version of the permit to delay or prevent EPA's written comments on a draft NPDES permit.

13. Your declaration of June 12, 2019 (¶ 10) states that the comments regarding the PolyMet NPDES Permit that EPA read over the phone on April 5, 2018 "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." Please identify every document in the administrative record that memorialized the feedback MPCA had previously received from EPA throughout PolyMet NPDES Permit development so that the comments read by EPA over the phone on April 5, 2018 were duplicative.

14. Your declaration of June 12, 2019 (¶ 8) states that on or about December 18, 2018, Kevin Pierard informed you that EPA would not file an objection to the PolyMet NPDES Permit. State to the best of your recollection what Mr. Pierard said in this phone conversation,

including whether Mr. Pierard described EPA's decision process or which issues EPA still considered unresolved.

15. Identify all documents that were reviewed, consulted, referred to or otherwise used in your preparation for, or answers to each of the foregoing questions.
16. Other than legal counsel, identify all persons you communicated with regarding your answers to these questions.

Dated: August 21, 2019

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY**

*/s/ Elise L. Larson*

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**JUST CHANGE LAW OFFICES**

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*Attorneys for Relators Fond du Lac Band of  
Lake Superior Chippewa*

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

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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

**RELATORS' REQUEST FOR  
PRODUCTION OF DOCUMENTS TO  
RESPONDENT MINNESOTA  
POLLUTION CONTROL AGENCY**

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**TO: Respondent Minnesota Pollution Control Agency and its attorneys of record, Sarah Koniewicz, John C. Martin, Bryson C. Smith, Holland & Hart, LLP, 25 South Willow Street, Jackson, WY 83001, and A. Xavier Baker, Crowell & Moring, 1001 Pennsylvania Avenue N.W., Washington, D.C., 20004.**

**PLEASE TAKE NOTICE** that pursuant to the order of the Ramsey County District Court, the Honorable John H. Guthmann presiding, you are hereby requested to respond to these Requests for Production of Documents within thirty (30) days of service.

**DEFINITIONS**

For the purpose of this Request for Production and wherever used herein, the terms set forth below shall have the following meanings (whether capitalized or not):

A. "Identify" (when used with reference to a person) requires that the response include the person's name, address (indicating whether it is a business address or personal residence), job title or occupation, and place of employment.

B. "Identify" (when used with reference to a business) requires that the response include the business name, address, telephone number, and type of business.

C. “Identify” (when used with reference to a document) requires that the response include the name of the document, the date the document was created and all other dates on which there appears a notation, the name of the person or entity that created the document, the name of the person or entity to whom the document is addressed or was given, and the location where the document was located.

D. “Person” refers to any individual person (whether living or deceased), partnership, firm, corporation, company, association, joint venture, governmental body or agency, or other entity.

E. “You” or “your” refers to the Minnesota Pollution Control Agency, and its employees, agents, and representatives, including, but not limited to, counsel; however, the use of such term or terms shall not be construed so as to limit the information provided to that which is within the personal knowledge of such party.

F. “Describe” (when used in reference to a factual situation or allegation) means to state with particularity all facts known to you connected with, bearing upon, or regarding in any way to the matters of which inquiry is made.

G. “Document(s)” is used in its customary broad sense and includes both paper documents and electronically stored information. E-mail communications are specifically included as documents requested pursuant to these requests. Documents also include hand-written notes, memoranda of telephone conversations, other communications, discussions, agreements, and other acts, transactions, or activities, invoices, time sheets, expense vouchers, contracts, agreements, pamphlets, receipts, books of account (including cash disbursement journals, cash receipt journals, income statements, reconciliation statements, or other similar financial statements), order forms, records, bonds, requisitions, bills, plans, drawings, specifications, sound recordings, minutes,

diaries, by-laws, articles of incorporation, calendars, forms, statements, journals, letters, telegrams, notices, intra-office and inter-office communications, photostats, microfilms, studies, reports, analyses, messages, comparisons, graphs, charts, Excel spreadsheets, underlying formulae, computer data bases, summaries, films, photographs, tapes, advertisements, data compilations (including PowerPoint and similar presentation materials), computer programs and codes (whether in machine or human readable format), and any other human or machine readable matter of any kind including, but without limitation, any marginal comments appearing on any document or any other writing. A document is in your possession, custody, or control if you have a practical ability to influence the person in possession to provide it, or a right or privilege to examine it upon request or demand.

H. “Electronically stored information” means all documents of any kind without limitations stored at any time on computer or other electronic means, including metadata, erased, fragmented or damaged data.

I. “Facts” means any act, action, or statement, including, but not limited to, the following: (a) the time and place of any such act or action; (b) the nature of any such act or action; (c) the person or persons performing or joining in any such act or action; (d) the names of all persons present and witnesses to any such act or action; (e) the time and place where any such statement was made; (f) the person by whom any such statement was made; (g) the substance of any such statement; (h) the name of the person or persons to whom any such statement was made; and (i) the names of all other persons present at the making of such statement.

J. “Communication,” “communicate,” and “communicated” mean both verbal and written communications.

K. “Comments” of or by EPA means communication of suggestions, concerns, recommendations, requirements, or objections by EPA, whether orally or in written form.

L. “Regarding” means and includes evidencing, relating to, reflecting, concerning, consisting of, comprising, discussing, recording, or in any way referring to or pertaining to.

M. All uses of the conjunctive shall be interpreted as also being in the disjunctive and vice versa. All terms in the singular shall be interpreted as also being in the plural and vice versa.

N. “NPDES” means National Pollutant Discharge Elimination System/State Disposal System as provided for in the Clean Water Act and its implementing regulations.

O. “PolyMet” means Poly Met Mining, Inc., including any parent entities, subsidiary entities, and sister entities.

P. “PolyMet NPDES Permit” means the water permit issued by you to PolyMet on or about December 20, 2018.

Q. “EPA” means and refers to the United States Environmental Protection Agency, and its employees, representatives, and agents.

R. “PolyMet Project” means and refers to the NorthMet copper-nickel mine project proposed by PolyMet.

S. “Environmental review” means review of the PolyMet Project pursuant to Minn. Stat. ch. 116D and Minn. R. ch. 4410.

T. “PolyMet permitting” means the process of reviewing the PolyMet NPDES Permit application and issuing the PolyMet NPDES Permit by the MPCA.

U. “Relators’ Deposition On Written Questions” means Relators’ Deposition on Written Questions served on MPCA and its employees Richard Clark, Stephanie Handeland, and Jeff Udd.

V. “WQBELs” means water quality-based effluent limitations as provided for in the Clean Water Act and its implementing regulations.

### **DIRECTIONS**

1. All documents produced should be provided to Relators in the same order that they are kept by you in the ordinary course of your carrying out your duties and business.

2. All documents produced electronically must be searchable and in a format to be mutually agreed upon by you and Relators.

3. All documents which you have withheld from production must be identified in an appropriate privilege log which includes the identity of the author of the document, the identity of all recipients of the document (including cc and bcc recipients), the date of the document, a brief description of the subject matter and contents of the document, and the basis of the privilege asserted.

### **DOCUMENT REQUESTS**

**REQUEST NO. 1:** All documents identified in the responses to Relators’ Deposition On Written Questions, served on you herewith.

**REQUEST NO. 2:** All documents regarding any document retention or destruction policy, guidelines, custom, or practice which you had in place at any time from 2015 to the present.

**REQUEST NO. 3:** All documents setting forth the procedures to be followed by you in the receipt, review, analysis, denial, or issuance of an NPDES permit, including documents related to the creation of the public record.

**REQUEST NO. 4:** All documents regarding any communications between you and the EPA, including those involving third parties, during environmental review and PolyMet permitting.

**REQUEST NO. 5:** All documents regarding your evaluation of, or response to, comments made by the EPA regarding the PolyMet NPDES Permit and application from environmental review through PolyMet permitting.

**REQUEST NO. 6:** All documents regarding any communications between you and PolyMet, including but not limited to those involving other parties, regarding comments made by the EPA regarding the PolyMet NPDES Permit and application from environmental review through PolyMet permitting, including but not limited to whether the PolyMet NPDES Permit required WQBELs and how the reasonable potential analysis for WQBELs should be performed.

**REQUEST NO. 7:** All documents subsequent to November 3, 2016 indicating that the deficiencies in the PolyMet NPDES Permit application for the PolyMet Project identified by the EPA were corrected or that the EPA concurred that the PolyMet NPDES Permit application was complete.

**REQUEST NO. 8:** All documents regarding any communications by or between John Linc Stine, Rebecca Flood, Shannon Lotthammer, Ann Foss, Jeff Udd, or the EPA regarding any aspect of the PolyMet Project.

**REQUEST NO. 9:** All documents regarding any communications by or between John Linc Stine, Rebecca Flood, Shannon Lotthammer, Ann Foss, Jeff Udd, or the EPA regarding potential amendments, changes or revisions of the Memorandum of Agreement between you and the EPA delegating Clean Water Act oversight to you.

**REQUEST NO. 10:** All documents regarding any communications by or between John Linc Stine, Rebecca Flood, Shannon Lotthammer, Ann Foss, Jeff Udd, or the EPA from January 1, 2015 to present regarding EPA oversight, including but not limited to whether communications on NPDES permit matters should or should not be in writing.

**REQUEST NO. 11:** All documents regarding any communications by or between you and the EPA from January 1, 2018 to present expressing any concerns of any nature regarding the EPA's NPDES program or its staff or counsel.

**REQUEST NO. 12:** All documents provided to Craig McDonnell at any time regarding or alleging practices or actions by you or by particular MPCA staff or managers to avoid creating a written or electronic record of concerns or issues regarding NPDES mining permits and the PolyMet NPDES Permit.

**REQUEST NO. 13:** All documents regarding any effort, plan, or actions, proposed or undertaken, to prevent, defer, or minimize written questions, concerns, suggestions or criticisms by the EPA of NPDES mining permits including but not limited to the PolyMet NPDES Permit.

**REQUEST NO. 14:** All documents from January 1, 2015 to the present regarding compliance with Minnesota Data Practices Act requests.

**REQUEST NO. 15:** All documents regarding any policy, guidelines, custom, or practice applicable at any time from January 1, 2015 to the present which you contend provides evidence that it was the usual or customary practice for you to request that EPA communications on permitting matters not be made in written form or that comments prepared in writing by EPA would be verbally conveyed to you (by telephone or otherwise) instead of being sent to you in written form.

**REQUEST NO. 16:** All documents from 1974 to the present regarding an example, procedure, or practice other than that for the PolyMet NPDES Permit where EPA prepared written comments on the draft NPDES permit, did not send the written comments and, instead, read EPA's comments aloud to MPCA.

**REQUEST NO. 17:** All documents from 2000 to the present regarding the submission of EPA written comments on a draft NPDES permit proposed by you during the public comment period for that permit.

**REQUEST NO. 18:** All documents from 2000 to the present regarding EPA's written comments upon a proposed final NPDES permit proposed by you.

**REQUEST NO. 19:** All documents regarding any phone conference or meeting in 2018 between you and the EPA during which the EPA indicated it might object to an NPDES permit proposed by you.

**REQUEST NO. 20:** All documents from January 1, 2017 to the present regarding any comments made by the EPA to the (pre-proposed, draft, or final) PolyMet NPDES Permit.

**REQUEST NO. 21:** All documents regarding the meetings on the PolyMet Project which took place on September 25-26, 2018 in which you participated.

**REQUEST NO. 22:** All documents regarding any request made to you by PolyMet that EPA's comments and issues for the (pre-public notice, draft or final) PolyMet NPDES Permit not be reflected, recorded, or sent in written form.

**REQUEST NO. 24:** All documents from January 1, 2017 to the present regarding communications between MPCA and any Minnesota elected official or any staff person of a Minnesota elected official regarding EPA comments, issues, or concerns regarding the PolyMet NPDES Permit.

**REQUEST NO. 25:** All documents received from EPA that confirm that EPA's comments and issues with the PolyMet NPDES Permit were resolved prior to MPCA's issuance of the PolyMet NPDES Permit.

Dated: August 21, 2019

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY**

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