

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

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

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

**RELATORS' MEMORANDUM IN
RESPONSE TO MOTION TO COMPEL**

INTRODUCTION¹

The Court has made clear that the limited purpose of this evidentiary hearing is “to determine if there were irregularities in procedure by the Minnesota Pollution Control Agency, *no one else.*” (Rule 16 Conference Tr. (“Hr’g Tr.”) 93:17-23, Aug. 7, 2019 (emphasis added)). Related to this purpose, the Court has ruled that Relators in discovery are to provide documents in their possession that “may prove or disprove claims of procedural irregularities,” and that is all:

[MS. MACCABEE:] I want to make sure I understand that what the Court is asking [Relators] to do is to provide any documents that may prove or disprove claims of procedural irregularities. And those are not like my notes to myself. They are documents that might be communications from the MPCA to PolyMet or MPCA to EPA. They may be things that are in the administrative record already or things that are not . . . [I]s that the correct understanding of what the scope is?

THE COURT: Right.

(Discovery Telephone Conference Tr. (“Conference Tr.”) 123:1-12, Sept. 16, 2019). Guided by the Court’s clear rulings, Relators Fond du Lac Band of Lake Superior Chippewa (the “Band”), WaterLegacy, Minnesota Center for Environmental Advocacy, Center for Biological Diversity,

¹ Relators file this memorandum and its supporting documents on November 8, 2019, pursuant to an instruction received from the Court.

and Friends of the Boundary Waters Wilderness (collectively “Relators”), ask this Court to deny Respondent Minnesota Pollution Control Agency’s (“MPCA”) Motion to Compel (“Motion”). Relators have fully responded to MPCA’s Deposition on Written Questions as required by the Court in these proceedings and have submitted a complete privilege log.² MPCA’s Motion seeks information outside the scope of authorized discovery, and its attack on Relators’ privilege log is a baseless distraction.

BACKGROUND

The Court determined that the sole basis for the Court’s jurisdiction is the Court of Appeals’ transfer order under Minn. Stat. § 14.68 (Hr’g Tr. 92:6-9), and the sole purpose of the hearing is “to determine if there were irregularities in procedure by [MPCA], no one else.” (*Id.* at 93:21-23).

Scope of Discovery Authorized by the Court

The Court directed that Relators would disclose documents in their possession reflecting “evidence that might be used at the hearing.” (Hr’g Tr. 112:19-20). The Court authorized MPCA to address up to 25 questions to be answered at a deposition by a person designated by Relators, as under Minnesota Rules of Civil Procedure 30.02. (Order ¶ 6, Sept. 9, 2019). MPCA addressed eight questions to Relators, each of which asked Relators to “describe with particularity” some aspect of alleged procedural irregularities. (Letter from Relators’ Counsel to MPCA’s Counsel (Aug. 28, 2019) (attached as Exhibit A)). Relators objected to these questions on the grounds that they sought mental impressions, conclusions, opinions, or legal theories of Relators’ counsel. (*Id.*)

² Relators would not object to adding more descriptive information for the documents listed on the privilege log and believe this issue may be resolved by conferring with MPCA.

In the discovery conference held on September 16, 2019, the Court determined, and MPCA agreed, that the MPCA would “find out what documents [Relators] have that support these various claims of procedural irregularity,” but they would not “get a narrative as to why they concluded that a certain document was a procedural irregularity.” (Conference Tr. 115:6-15). The Court confirmed that Relators were not required to provide internal communications, but only “to provide any documents that may prove or disprove claims of procedural irregularities.” (*Id.* at 123:1-12).

Further, the Court determined the questions were actually “disguised document requests.” (*Id.* at 114:21-25). In fact, in direct response to the Court’s statement that the deposition questions were actually document requests and that MPCA would not get a narrative response – MPCA agreed that it expected to get documents in response to its deposition questions:

MR. SCHWARTZ: What we would ask for is the basis. And if the basis is a document, then *that’s what we would expect to get.*

(*Id.* at 115:6-15 (emphasis added)). The Court then gave the parties examples of appropriate answers to MPCA’s Written Deposition Questions. Quoting Question 1, which asked Relators to “describe with particularity” any alleged procedural irregularities, the Court stated: “Well, you’ve already done that.” (*Id.* at 107:15-20). Reading Question 3, the Court told Relators to respond: “‘These documents are the basis.’ That would be it.” (*Id.* at 112:18-24). Moving to Question 4, the Court indicated the answer would be “Here are the documents that contain the basis for that allegation.” (*Id.* at 112:24-113:4). Similarly, for Question 5, the Court explained: “These documents are the basis for it. You know, these are also questions that are disguised document requests, practically speaking” (*Id.* at 113:7-12). The Court directed that Relators list “segregate[d] documents . . . responsive to specific questions.” (*Id.* at 114:12-20).

The Court also reiterated that Relators' conduct is not at issue and not within the bounds of discovery. (*Id.* at 105:4-17; *see also* Hr'g Tr. 112:15-20 ("It's not a question of conduct. It's a question of possession")). Relators would not be required to identify where they obtained documents or give up their sources. (Hr'g Tr. 114:13-115:12; Conference Tr. 105:4-17, 123:1-12). The Court stated that Relators should state on a privilege log if they withheld documents within the scope of discovery to protect confidential sources, due to claims of privilege, or due to sovereign immunity (Conference Tr. 117:11-22, 122:19-23).

Relators Responses to MPCA Questions

Pursuant to the Court's Order and directions, Relators searched for documents in their possession that might be probative or exculpatory of Relators' alleged procedural irregularities ("APIs"). (Declaration of Paula Maccabee ("Maccabee Decl.") ¶ 2; Declaration of Evan Nelson ("Nelson Decl.") ¶ 3; Declaration of Matthew Murdock ("Murdock Decl.") ¶ 2). Although Relators obtained the vast majority of these documents from MPCA under the Minnesota Government Data Practices Act ("Data Practices Act"), Relators also produced documents obtained under the Freedom of Information Act, documents filed with the Court of Appeals and with this Court, complaints to the U.S. Environmental Protection Agency ("EPA") Office of Inspector General, press reports and public statements by MPCA, documents reflecting MPCA's customary procedures, and documents showing how Relators secured certain documents. (Maccabee Decl. ¶ 3; Nelson Decl. ¶ 4; Murdock Decl. ¶ 7).

Relators uploaded and provided Bates numbers for these documents. (Nelson Decl. ¶ 5). Relators segregated the documents that were responsive to each Written Deposition Question, including documents that might be probative, exculpatory, or provide foundation. (Maccabee Decl. ¶ 4; Nelson Decl. ¶ 5). On October 16, 2019, Relators' designee sat for the Rule 30.02 style

deposition. In keeping with the Court’s instructions—e.g., “‘These documents are the basis.’ That would be it.” (Conference Tr. 112:22-24)—Relators provided a separate exhibit for each Written Deposition Question, listing by Bates numbers the documents responsive to that question. (Maccabee Decl. ¶¶ 5-6; Nelson Decl. ¶ 7). Relators provided Respondents’ counsel with each exhibit and testified that, based on the information Relators’ currently possess and understanding that discovery and investigation were ongoing, the document lists were responsive to the corresponding question. (Maccabee Decl. ¶ 6; Nelson Decl. ¶ 7). Thus, for each document Relators produced, Respondents are able ascertain to which Written Deposition Question the document is responsive.

Relators also prepared a combined privilege log, which listed documents that were within the scope of discovery, but did not include documents the Court determined were outside the scope of discovery. (Maccabee Decl. ¶¶ 7-8; Nelson Decl. ¶ 8; Murdock Decl. ¶ 3). Relators’ privilege log listed twenty-one documents, none of which were withheld on the basis of sovereign immunity, all of which included information regarding a confidential source, and two of which included attorney work produce and attorney client privilege. (Maccabee Decl. ¶ 9; Nelson Decl. ¶ 10; Murdock Decl. ¶ 6).

ARGUMENT

MPCA’s Motion seeks to expand the scope of discovery in these proceedings and cure the shortcomings of its broad Written Deposition Questions. Relators fully answered MPCA’s questions as the Court required. MPCA also makes an unfounded challenge to Relators’ privilege log. MPCA’s motion appears calculated to distract and intimidate rather than to serve the objective for which Relators’ certiorari appeals were transferred to this Court.

I. Relators’ Responses to MPCA’s Written Deposition Questions are Consistent with the Court’s Orders and the Scope of Discovery from Relators in these Proceedings.

Relators followed the Court's instructions in responding to MPCA's Written Deposition Questions. MPCA's demands are spurious, and the law on which they base their claims is inapplicable.

A. MPCA's Spurious Demands

- Question 1: *Describe with particularity any Procedural Irregularities that Relators allege occurred regarding the NPDES Permit.*

MPCA complains Relators failed to answer Question 1 when Relators provided a copy of Relators' list of APIs and Relators' Rule 7.02 Motion, which provides more specific factual allegations.³ (MPCA Mem. Supp. Mot. Compel ("Mot.") 7-8, Oct. 31, 2019). Relators submission fully complied with the Court's decision regarding Question 1. (Conference Tr. 107:15-20).

- Question 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.*

MPCA complains Relators failed to answer Question 2 because Relators identified documents "without any explanation as to how these documents answer MPCA's question." (Mot. 8). The Court clearly ruled and MPCA agreed that Relators would produce documents, not a narrative. (Conference Tr. 115:6-15).

- Question 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.*

MPCA's peculiar claim about Relators' answer to Question 3 seems to be that the 169 documents listed by Bates numbers are not identified "with sufficient specificity" and that MPCA would like a narrative to explain how documents relate to claims. (Mot. 8-9). Yet, this Court

³ Relators made no assertions as to the breadth of issues that will be determined by the Court.

explicitly stated the appropriate response to Question 3 was “[t]hese documents are the basis.” (Conference Tr. 112:15-24).

- Question 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 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 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.*

With regard to Questions 4, 5, and 6, which are broadly worded questions, MPCA complains that Relators provided too many documents and that some documents are not pertinent. (Mot. 9-11). There is no mystery to the volume of documents that might be probative or exculpatory of these claims. Relators’ transfer motion, Rule 7.02 motion, and list of APIs filed with this Court explain the relationship between the Data Practices Act requests, documents produced, and documents not produced to Relators’ claims. Further, the Court instructed that the appropriate answer for Questions 4 and 5 was to provide documents (Conference Tr. 112:24-113:12).

MPCA also claims, with respect to Question 6, that “Relators should provide MPCA with a direct [narrative] answer listing the documents they allege were improperly discarded and the circumstances that made the actions improper.” (Mot. 11). MPCA’s argument is in direct conflict with this Court’s rulings and the scope of discovery ordered by the Court. (*See* Hr’g Tr. 93:21-23; Conference Tr. 115:6-15).

- Question 7: *Describe with particularity how Relators allege that they were prejudiced by the alleged Procedural Irregularities associated with the NPDES Permit.*

- Question 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.*

MPCA's complaints regarding Questions 7 and 8 that Relators "make no attempt to say, with particularity, how they have been prejudiced" and failed to describe "why Relators allege specific documents should be included in the administrative record" (Mot. 11-12) also have no merit. Again, MPCA improperly asks Relators to provide a narrative, which this Court specifically ruled Relators were not required to provide. (Conference Tr. 115:6-15).

B. MPCA Cites Inapplicable Law

MPCA also attempts to elicit additional responses from Relators to cure deficits in the way MPCA framed its Written Deposition Questions by applying standards applicable to interrogatories under the Federal Rules of Civil Procedure.⁴ Even under the Minnesota Rules of Civil Procedure, interrogatories and written depositions are different.⁵ Interrogatories can involve "an opinion or contention that relates to fact or the application of law to fact." Minn. R. Civ. P. 33.02. In contrast, depositions on written questions are narrower in scope, confining a party to eliciting specific facts. *See* Minn. R. Civ. P. 31.01-02; *Molignaro v. Dutton*, 373 F.2d 729, 730 (5th Cir. 1967) (noting written depositions "must be carefully constructed to elicit specific facts"); *Cronan v. Dewavrin*, 9 F.R.D. 337, 339 (S.D.N.Y. 1949) (noting written depositions "are investigatory for the purpose of ascertaining facts").

⁴ (*See, e.g.*, Mot. 6 (citing *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 579 (N.D. Tex. 2018))). By consistently referring to its written depositions questions as interrogatories, MPCA betrays that the true intention of its motion to compel is really to have the Court reconsider its ruling on the scope of discovery.

⁵ To the extent that the Minnesota Rules of Civil Procedure are instructive, it is worth noting that the Minnesota rules regarding written depositions were amended "[t]o avoid confusion between Rule 33 interrogatories and depositions by written questions under Rule 31." Minn. R. Civ. P. 31.0, cmt. (Advisory Comm. R. of Civ. Pro., amended 1973).

MPCA's Motion asks the Court to compel Relators to disclose their mental impressions and apply the law to the facts. MPCA's counsel may have inadvertently let the cat out of the bag when they asserted in their October 28, 2019 letter to Relators' that "Relators' position provides no meaningful opportunity for MPCA to discern the answer to *any of its interrogatories*." (Letter from MPCA's Counsel to Relators' Counsel, 3 (Oct. 28, 2019) (attached as Exhibit B) (emphasis added)). MPCA's Motion is in direct conflict with the Court's ruling that the Minnesota Rules of Civil Procedure – let alone the Federal Rules of Civil Procedure – do not apply in these proceedings (Hr'g Tr. 93:11-14) and, therefore, no interrogatories would be authorized (*id.* at 99:1-2). The Court explicitly told Relators, "you aren't being asked to reveal any mental impressions" (Conference Tr. 114:21-22) and advised MPCA, "[y]ou're not going to get a narrative as to why they concluded that a certain document was a procedural irregularity." (*Id.* at 115:10-12).

Although MPCA may pretend otherwise, the nature of this proceeding is inherently asymmetrical. Pursuant to Minn. Stat. § 14.68, the district court's jurisdiction is "to hear and determine the alleged irregularities in procedure." When a case is referred to district court due to irregular procedure not shown in the record, parties challenging administrative action are entitled to discovery "to explore the mental processes of the agency people." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 335 F. Supp. 873, 877 (W.D. Tenn. 1972) (interpreting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) on remand). An agency is not similarly entitled to discover Relators' mental processes.

II. MPCA's Challenge to Relators' Privilege Log is Unfounded.

MPCA's challenge to Relators' privilege log is baseless. The reason that Relators' privilege log is less expansive than MPCA's is simple: Relators' conduct is not at issue in this proceeding. (Hr'g Tr. 112:18-20; Conference Tr. 105:8-17). The scope of discovery neither includes Relators'

mental processes nor Relators' internal notes and communications. (Conference Tr. 123:1-12). MPCA provided no evidence that Relators possess documents within the scope of discovery defined by the Court that were withheld due to privilege or sovereign immunity but not disclosed on the privilege log.

In its demand letter to Relators, MPCA attempted to attribute to the Band the statement that it had "many" responsive documents. (Ex. B at 2). The Band never made this statement. At the discovery conference, the Band sought "to preserve an objection," (Conference Tr. 121:3), but later determined to not assert sovereign immunity.⁶ The Band withheld two documents on the basis of confidential source, attorney-client privilege, and attorney work product; one document for a confidential source; and the author's name for one document that was otherwise produced. (Murdock Decl. ¶ 4). The Band otherwise sought to make clear that it did not assert sovereign immunity to withhold any document by not listing it in the column specifying claimed privileges. (*Id.* at ¶ 4). The Band conducted a full search for documents within the scope of discovery directed at Relators and, except for the three documents contained in the log, produced responsive documents within that scope. (*Id.* at ¶ 5).

⁶ As such, the Court does not need to resolve MPCA's contentions regarding sovereign immunity (Mot. 15-16). To the extent MPCA continues to pursue this issue in its reply, a Tribe does not waive its immunity from legal process wholesale by voluntarily participating in litigation. *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991); *Rosebud Sioux Tribe v. Val-U Const. Co. of S.D., Inc.*, 50 F.3d 560, 562 (8th Cir. 1995). Rather, the extent to which a Tribe's voluntarily participation in litigation effects a waiver of immunity depends on "the particular circumstances, including the tribe's actions and statements as well as the nature and bounds of the dispute that the tribe put before the court." *Quinault Indian Nation v. Pearson for Estate of Comenout*, 868 F.3d 1093, 1097 (9th Cir. 2017). The Band brought this limited proceeding before the Court based on allegations of MPCA's procedural irregularities. The Band produced responsive documents in its possession that could prove or disprove those allegations.

Rather than address its own irregular procedures, which are properly the subject of these proceedings, MPCA launched an unfounded attack. The Court should reject this distraction and MPCA's invitation to turn a certiorari appeal into an assault on Relators seeking to protect the public interest in the integrity of state permitting processes as well as their own interests in preserving natural resources.

CONCLUSION

Relators have fully responded to MPCA's deposition on written questions as required by the Court in these proceedings and have submitted a complete privilege log. Relators respectfully request that the Court deny MPCA's Motion to Compel in all respects.

Dated: November 8, 2019

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CERTIFICATION

The undersigned hereby acknowledges that sanctions may be imposed under Minn. Stat.
§ 549.211.

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