

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

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

Case No. 62-CV-19-4626

The Honorable John H. Guthmann

**POLY MET MINING, INC.'S
MEMORANDUM IN SUPPORT OF ITS
MOTION IN LIMINE TO EXCLUDE
TESTIMONY OF CATHERINE
KUHLMAN**

INTRODUCTION

This Court should preclude Relators from admitting any testimony of Catherine Kuhlman. While it is undisputed that Kuhlman may testify as a fact-witness about non-privileged matters within her personal knowledge, Minn. R. Evid. 602, Kuhlman has no personal knowledge of any non-privileged matter relevant to the alleged procedural irregularities—the only fact issues in this case. Kuhlman never worked for EPA Region 5. And, to the best of PolyMet's knowledge, she never worked for MPCA. PolyMet thus moves to preclude Relators from calling Kuhlman as a fact witness. Relators also have not established that Kuhlman is qualified to testify as an expert witness under Minnesota Law. *See* Minn. R. Evid. 702–03. But even if Kuhlman is established as an expert, Kuhlman's opinions are barred either because expert testimony regarding a legal conclusion is barred, or because—as the comment to Minnesota Rule of Evidence 704 reflects—expert testimony regarding the application of law to fact is of no help to the trier of fact. *See, e.g.,*

Burger v. Mays, 176 F.R.D. 153, 157 (E.D. Pa. 1997) (“[E]xpert testimony that expresses a legal conclusion should be excluded.”). PolyMet thus moves to exclude the testimony of Kuhlman in its entirety.

KUHLMAN’S EXPECTED TESTIMONY

Relators’ witness list indicates that Kuhlman is a former U.S. Environmental Protection Agency (“EPA”) manager but offers little else.¹ According to public searches,² Kuhlman served as Water Division director for EPA’s Pacific Southwest Office—part of Region 9—in the early 2000s.³ Kuhlman then served as Executive Officer of the North Coast Regional Water Quality Control Board, one of California’s state water quality control boards.⁴ In 2012, former Governor of California Edmund G. Brown, Jr., appointed Kuhlman to serve as assistant deputy secretary for oceans and coastal matters at the California

¹ See RELATORS_0065273 (Evidentiary Hearing Exhibit (“EX.”) 721). PolyMet’s review of the administrative record revealed no mention of Kuhlman.

² See Cat Kuhlman, LinkedIn Profile, available at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/dcdd28b16ffd0ef4852570d8005e153f.html (Declaration of Davida S. McGhee in Support of Defendant Poly Met Mining, Inc.’s Memorandum in Support of Its Motion in Limine to Exclude Testimony of Catherine Kuhlman (“McGhee Dec.”) Ex. 2)

³ See *California Holds First Coastwide Water Quality Monitoring Event*, EPA Press Release (May 16, 2003), available at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/dcdd28b16ffd0ef4852570d8005e153f.html (McGhee Dec. Ex. 3).

⁴ See Cat Kuhlman, LinkedIn Profile (McGhee Dec. Ex. 2); see also *State, U.S. EPA and Tribes warn against blue-green algae in the Klamath River from Copco Reservoir to the confluence with the Trinity River (Weltchpec). Contact with blue-green algae can cause eye irritation, skin rash. Caution urged when consuming fish.*, California Regional Water Quality Control Board, North Coast Region, Press Release (Sept. 9, 2010), available at <https://19january2017snapshot.epa.gov/www3/region9/water/watershed/pdf/klamath-river-press-release.pdf> (McGhee Dec. Ex. 4).

Natural Resources Agency.⁵ Afterward, Kuhlman was Executive Director of the California Ocean Protection Council and Deputy Secretary for Ocean and Coastal Policy.⁶ Kuhlman currently serves as CEO of a retirement plan administrator.⁷ While Kuhlman may be familiar with California water policy, nothing indicates that she possesses personal knowledge about Minnesota procedures, EPA Region 5, or the Memorandum of Agreement between MCPA and EPA Region 5.

Although Relators have not yet indicated the scope of Kuhlman's expected testimony, Relators submitted to the court of appeals a declaration of another former EPA employee—Jeffrey Fowley—that previews the scope of the testimony Relators will likely call Kuhlman to provide. In his declaration, Fowley claims to be an expert:

I have applied my expertise as a long-time Clean Water Act attorney[.]” Fowley Decl. ¶ 1 (McGhee Dec. Ex. 7).

Fowley offered his fact and “expert” opinions despite admitting that they are not based on first-hand knowledge:

“My statements in this Declaration are based on written materials that are in the administrative record” or on “information that I have obtained from confidential sources.” *Id.* ¶ 1.

“I am a retired attorney who worked for the U.S. Environmental Protection Agency (EPA) in the Office of Regional Counsel in the Region I (Boston) office from 1980-2017.” *Id.* ¶ 2.

⁵ See *Governor Brown Announces Appointments*, Office of Governor Edmund G. Brown Jr. (Apr. 17, 2012), available at <https://www.ca.gov/archive/gov39/2012/04/17/news17496/index.html> (McGhee Ex. 5).

⁶ See Cat Kuhlman, LinkedIn Profile (McGhee Dec. Ex. 1); see also California Ocean Protection Council (OPC) Executive Director's Report (Aug. 27, 2014), available at http://www.opc.ca.gov/webmaster/ftp/pdf/agenda_items/20140827/140815_Item2_OPC_Aug2014_ED_report.pdf (McGhee Dec. Ex. 6).

⁷ See Cat Kuhlman, LinkedIn Profile (McGhee Dec. Ex. 2).

“Although I did not personally work on the reviews of state NPDES permits . . . I have spoken on various occasions with EPA staff who conducted such reviews.” *Id.*

“I acknowledge that parts of my complaint [to the EPA Office of Inspector General] are based on information passed along from other persons.” *Id.* ¶ 6.

And, in many cases, Fowley’s “opinions” are thinly veiled legal conclusions:

“I think that the information I have obtained . . . could be grounds for a court to order an investigation[.] I believe that there is proof of improper practices based solely on the written records before this Court.” *Id.* ¶ 1.

“I believe that this Court could determine that there are such ‘irregularities in procedure’ based solely on the written record before it.” *Id.* ¶ 7.

“I believe that there is clear evidence of ‘irregularities in procedure.’” *Id.* ¶ 8.

“In my opinion, the misconduct by the MPCA has been compounded in the papers filed with this Court.” *Id.* ¶ 15.

“The administrative record filed by the MPCA with this Court is misleading.” *Id.* ¶ 24.

Or, at several points, Fowley’s “opinions” attempt to litigate technical issues not at issue in this proceeding:

“I am thoroughly familiar with the legal and technical requirements for NPDES permits.” *Id.* ¶ 2.

“I have been told by various person that . . . the EPA staff and career management had significant concerns about the planned permit which were not resolved in phone calls and meetings.” *Id.* ¶ 6.

“The key problem with the permit—the lack of an adequate ‘reasonable potential’ analysis and the resulting lack of pollutant specific and enforceable water quality based permit

limits—was not fixed by the state in the final permit developed by the fall 2018.” *Id.*

“The final permit is defective. It is not backed by the federally required ‘reasonable potential’ analysis used to determine whether strict water quality based limited are needed in a permit, and does not have the kind of federally required pollutant specific and enforceable water quality based limits that should have resulted from doing this right kind of analysis.” *Id.* ¶ 17.

Notably, Fowley has no first-hand experience with EPA’s NPDES permitting procedures in Region 5—the region in charge of overseeing PolyMet’s NPDES permit. Nor does he have any understanding of the Memorandum of Agreement (“Agreement”)⁸ between EPA Region 5 and MPCA and its effect on the agencies’ interactions. Perhaps for these reasons, Relators chose not to list Fowley as a witness and have substituted him with Kuhlman, another EPA outsider who will likely testify with similar “expert” opinions. But Kuhlman’s testimony fares no better than Fowley’s, and this Court should exclude it.

ARGUMENT

Relators should be prohibited from introducing any testimony from Kuhlman. The Court’s task is to determine whether any irregularities in procedure occurred at MPCA during the permitting process. In other words, the Court must determine “whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process.” *Mampel v. E Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977). Kuhlman’s testimony—whether as a fact witness or an expert—will not aid the Court in accomplishing

⁸ Ex. 2001.

that task. First, as a former EPA employee, Kuhlman cannot testify about EPA's official positions on MPCA's role in the permitting process. Second, Kuhlman lacks personal knowledge about EPA's interactions with MPCA during the permitting process. Kuhlman's testimony should thus be excluded in its entirety. Third, Kuhlman is not an expert on the interactions of MPCA and EPA. Fourth, Kuhlman is only capable of offering inadmissible legal conclusions or testimony of no value to the finder of fact. In light of these considerations, the Court should exclude the entirety of Kuhlman's proposed testimony.

I. KUHLMAN'S TESTIMONY AS FACT WITNESS SHOULD BE EXCLUDED

This Court should preclude Kuhlman from testifying as a fact witness because she cannot testify on behalf of EPA and because she lacks personal knowledge of the fact issues to be determined at the evidentiary hearing.

Federal law precludes Kuhlman from testifying as a fact witness about EPA's official positions. 40 C.F.R. §§ 2.401, 2.402(b); *see, e.g., Boron Oil Co. v. Downie*, 873 F.2d 67, 6970 (4th Cir. 1989) (approving the EPA housekeeping rules). “[W]hen an EPA employee is requested or subpoenaed to provide testimony concerning information acquired in the course of performing official duties or because of the employee’s official status . . . [the] employee[] must state for the record that their testimony does not necessarily represent the official position of EPA.” 40 C.F.R. § 2.401. This requirement is not relaxed “[w]here employees voluntarily testify as private citizens with respect to environmental matters.” *Id.* § 2.401(b)(4). Even then, “employees must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA.” *Id.* The purpose of this statute is to prevent giving an air of credence to an employee’s

partial, uninformed opinions because of her affiliation with the agency. *See Boron Oil Co.*, 873 F.2d at 70 (“The policy behind such prohibitions on testimony of agency employees is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business.”). For that reason, the statute applies just as equally to former employees like Kuhlman. *Pleasant Gardens Realty Corp. v. H. Kohnstamm & Co.*, Civ. No. 08-5582 (JHR/JS), 2009 WL 2982632, at *4 n. 8 (D.N.J. Sept. 10, 2009) (McGhee Dec. Ex. 12) (“Although the EPA’s *Touhy* regulations do not specifically refer to former employees (see 40 C.F.R. § 2.401), the ‘official’ knowledge of former employees still belongs to the United States. The ownership of the EPA’s ‘official’ information is not dependent on whether the information is possessed by a present or former employee.”). Because Kuhlman cannot testify on behalf of the agency, she cannot provide any testimony about EPA’s typical procedures and whether EPA departed from those procedures in this case.

While in theory Kuhlman might be capable of testifying about the procedures she personally observed as a former EPA employee, she cannot do so without EPA permission. Kuhlman’s ability to offer such testimony is not a foregone conclusion. Insofar as federal courts have acknowledged that 40 C.F.R. § 2.401 *et seq.* applies to former EPA employees, it is PolyMet’s position that Relators must subpoena EPA for approval for Kuhlman to testify about non-public information she gained during the course of her employment. *See* 40 C.F.R. § 2.402 (“[N]o EPA employee may provide testimony or produce documents in any proceeding . . . concerning information acquired in the course of performing official duties or because of the employee’s official relationship with EPA, unless authorized by the

General Counsel.”); *Pleasant Gardens*, 2009 WL 2982632 at *4 (finding that EPA had non-party standing to challenge a subpoena directed at former EPA employees “to the extent the deponents address ‘official’ information they acquired in the course of performing their duties with the EPA”) (McGhee Dec. Ex. 8).

In any event, Kuhlman lacks first-hand knowledge of any facts relevant to this case. She thus fails to meet the threshold to testify as a fact witness under Minnesota Rule of Evidence 602. Rule 602 provides that “[a] witness may not testify to a matter *unless* evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Minn. R. Evid. 602 (emphasis added). Relators cannot introduce any evidence that would qualify Kuhlman to testify as a fact witness at the evidentiary hearing because Kuhlman has no personal knowledge of EPA’s review of PolyMet’s permit. Kuhlman did not work in EPA Region 5. She did not work on the NPDES permit granted to PolyMet. She was not even employed by EPA at the time the permit was issued or at the time the alleged procedural irregularities occurred. She has no understanding of the terms of the Agreement or how EPA and MPCA interacted under its terms. Indeed, any testimony Kuhlman could possibly offer on the NPDES permit would necessarily be based on hearsay or her irrelevant experiences as an EPA employee in a different EPA region (Region 9), almost two decades ago, operating under another agreement (if any). In other words, Kuhlman has no personal knowledge of any non-privileged matter relevant to the alleged procedural irregularities and the Court should preclude her from testifying as a fact witness.

II. KUHLMAN'S TESTIMONY AS AN EXPERT SHOULD BE EXCLUDED

Relators have not yet claimed, but will likely claim, that Kuhlman is an expert witness. In addition to the fact that Relators cannot establish Kuhlman as an expert because she cannot testify on behalf of EPA, Kuhlman's opinions will be barred as inadmissible legal conclusions or because they are of no help to this Court's determination of whether procedural irregularities occurred.

To begin, Relators have not attempted to establish that Kuhlman is qualified to testify as an expert witness under Minnesota law. Minn. R. Evid. 702. As a former EPA employee, Kuhlman is not qualified to opine on the procedures that MPCA uses to issue water quality permits. Moreover, the same federal law that precludes Kuhlman from testifying as a fact witness precludes her from testifying as an expert witness in this matter. 40 C.F.R. § 2.401(b)(3). Although EPA employees are able to "provide expert witness services as approved outside activities," they must still "state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA." *Id.* Such testimony might make sense if the issues here were technical or scientific in nature. But when the primary question is compliance with EPA procedures, any expert testimony will necessarily involve a statement of Kuhlman's views about EPA policy. Those are the precise opinions she is prohibited from giving. Because Kuhlman cannot testify on behalf of the agency, she cannot offer any expert opinions on EPA's procedures.⁹ The Court should not permit Kuhlman to testify as an expert.

⁹ PolyMet also notes that one of the Relators in this case has sued EPA in federal court, alleging that the agency "violated [its] duties" under the Clean Water Act when it decided

Even if Kuhlman is qualified to testify as an expert in this case, her opinions will be of no value to the Court. As the Minnesota Supreme Court has recognized, “an expert may not offer an opinion as to a legal issue or a mixed question of law and fact.” *State v. Dao Xiong*, 829 N.W.2d 391, 396 (Minn. 2013). Insofar as Kuhlman has no first-hand knowledge of the interactions of MPCA and EPA, Kuhlman could only testify as to what she believes is an irregularity in procedure during EPA oversight of NPDES permits in general. But Relators may not use Kuhlman’s testimony as if she were a source of authority. Whether something is an “irregularit[y] in procedure” under Minnesota Statutes Section 14.68 is a question of law for this Court.

Any testimony by Kuhlman regarding the law, or regarding the application of law to fact, invades the Court’s exclusive province to determine what statutes, regulations, and cases mean and how they apply. *Dao Xiong*, 829 N.W.2d at 396. Moreover, any opinions Kuhlman might offer regarding the meaning and application of statutes, regulations, and case law are not admissible evidence. According to the comment to Minnesota Rule of Evidence 704 “[i]n determining whether or not an opinion would be helpful or of assistance under these rules a distinction should be made between opinions as to factual matters, and opinions involving a legal analysis or mixed questions of law and fact. Opinions of the latter nature are not deemed to be of any use to the trier of fact.” Minn. R. Evid. 704, 1977 comm. cmt.; see also *State v. Chambers*, 507 N.W.2d 237, 238–39 (Minn. 1993) (relying on this sentence of the comment in concluding that the district court should not have permitted

not to object to PolyMet’s water quality permit. As with the testimony of Kevin Pierard, whatever Kuhlman says here will likely be raised in that case too.

an expert to testify as to whether the defendant had the requisite means rea, because it was a mixed question of law and fact). Under state and federal legal principles, such testimony invades the court's exclusive province. *See United States v. Scop*, 846 F.2d 135, 139 (2d Cir. 1988) (holding that expert's "repeated statements embodying legal conclusions exceeded the permissible scope of opinion testimony under the Federal Rules of Evidence").

In light of these principles, Kuhlman may not testify that EPA or MPCA has or has not complied with its legal obligations under federal regulations. Nor may she testify that either EPA's or MPCA's conduct constituted "irregularities in procedure" under Minnesota law. *See Behlke v. Conwed Corp.*, 474 N.W.2d 351, 359 (Minn. Ct. App. 1991) (affirming the exclusion of an expert's testimony that the defendant violated an OSHA regulation, after noting that "[l]egal analysis by an expert is 'ordinarily inadmissible'" (quoting *Conover v. N. States Power Co.*, 313 N.W.2d 397, 403 (Minn. 1981)); *Gaylor v. Georgia Dep't of Nat. Res.*, No. 2:11-CV-288-RWS, 2014 WL 4545810, at *7 (N.D. Ga. Sept. 12, 2014) (granting motion in limine to exclude expert testimony of a witness who opined that the defendant had "complied with its legal obligations under" a particular title of a federal anti-discrimination regulatory regime) (McGhee Dec. Ex. 10). "[T]he judge's expert knowledge of the law makes any such assistance at best cumulative and at worst prejudicial." *Nieves- Villanueva v. Soto-Rivera*, 133 F.3d 92, 100 (1st Cir. 1997). Such opinions therefore fail to satisfy the requirements under Minnesota Rules of Evidence 701 and 702 that opinion testimony must be helpful. *See Scop*, 846 F.2d at 139-40 (citing Fed. R. Evid. 704 advisory committee's note); *see also State v. Head*, 561 N.W.2d 182, 186 (Minn. Ct. App. 1997) (recognizing that where Minnesota Rule of Evidence is similar to Federal Rule of Evidence, courts look to

federal caselaw for guidance in construing the Minnesota rule”). If Relators cannot convince the Court to adopt their view of the law through its attorneys’ analysis of the language in the statutes, regulations, established canons of construction, and governing caselaw, then Relators’ interpretation is incorrect and should be rejected by the Court, whether or not Kuhlman is willing to attempt to lend credence to their interpretation based on her irrelevant experience in a separate region of EPA.

Finally, to the extent that Kuhlman may claim to have technical expertise on Clean Water Act issues or federal water-quality requirements due to her experience at EPA, such merits issues about the regulatory review of the NPDES permit are beyond the scope of this Court’s jurisdiction. Relators may not use witnesses like Kuhlman to litigate the merits of their certiorari appeal, which challenges MPCA’s December 2018 decision to grant PolyMet the NPDES permit, before this Court because only the court of appeals has jurisdiction to decide violations of the Minnesota Administrative Procedure Act. Minn. Stat. § 14.63 (“A petition for a writ of certiorari . . . for judicial review under sections 14.63 to 14.68 must be filed with the Court of Appeals . . .”). The court of appeals’ order transferred this matter to this Court “for the limited purpose of an evidentiary hearing and determination of irregularities in procedure.”¹⁰ Minnesota law limits the scope of a district court’s jurisdiction after such a transfer: “The district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure.” Minn. Stat § 14.68. That statutory, jurisdictional limit is irreconcilable with Relators’ attempt to litigate the substantive merits of the regulatory decision to approve the NPDES permit. No

¹⁰ Court of Appeals Order of June 25, 2019 at 4.

witness—whether labelled expert or otherwise—should be allowed to testify that the permit should have included this or that (or that the permit should *not* have included this or that). Nor should any witness be allowed to testify that EPA should have exercised its discretionary authority to object to the NPDES permit. Any expert’s supposed technical expertise on Clean Water Act issues, water-quality requirements, or any other substantive issue related to the decision to approve the NPDES permit, exceeds the limited scope of this Court’s jurisdiction.

CONCLUSION

The Court should exclude the testimony of Catherine Kuhlman and preclude Relators from calling Catherine Kuhlman as a fact or expert witness at the evidentiary hearing beginning January 21, 2020.

Dated: December 27, 2019

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