

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 OPPOSITION TO
RELATORS MOTION IN LIMINE TO
LIMIT THE USE OF AND EXCLUDE
CERTAIN EVIDENCE**

INTRODUCTION

Relators' Motion in Limine to Limit the Use of and Exclude Certain Evidence ("Motion") seeks to exclude evidence that post-dates the Minnesota Pollution Control Agency's ("MPCA") approval of Poly Met Mining, Inc.'s ("PolyMet") National Pollutant Discharge Elimination System ("NPDES") permit. The Motion should be denied. At its core, Relators' Motion attacks the weight of the evidence that Relators seek to exclude. That is the role of this Court after the evidentiary hearing. The exhibits are relevant, are not unduly prejudicial, and should not be excluded.

ARGUMENT

Relators move to exclude two sets of PolyMet exhibits. First, Relators move to exclude exhibits that post-date MPCA's decision to grant PolyMet's NPDES permit. Second, Relators move to exclude a PolyMet exhibit that is a complaint filed by Relator Fond du Lac Band of Lake Superior Chippewa in federal court. Each of the exhibits that Relators move to exclude are relevant and not otherwise subject to exclusion.

I. Relators' Motion should be denied to the extent that the challenged documents appear on Relators' Exhibit List.

Relators seek to exclude three exhibits for which the content is already included in exhibits on Relators' Exhibit List. For example, Relators' Exhibit 324 is an email forwarding without comment the email that is PolyMet Exhibit 2026. The entirety of the content in PolyMet Exhibit 2025 can similarly be found in Relators' Exhibit 269. And all but the very top email in PolyMet Exhibit 2027—which forwards the emails below and says “FYI”—is contained in Relators' Exhibit 145. Relators' Motion should be denied with respect to PolyMet Exhibits 2025, 2026, and 2027, since the content of the exhibits that Relators apparently find objectionable is already in exhibits on Relators' own exhibit list.

II. PolyMet's exhibits post-dating the permit application should not be excluded.

Relators seek to exclude five PolyMet exhibits because they post-date MPCA's issuance of the NPDES permit. These exhibits should not be excluded because they are relevant, are not unduly prejudicial, and do not violate the best evidence rule.

Relators first argue that the so-called “post-hoc exhibits” contain “post hoc justifications [that] are irrelevant.”¹ The Rules of Evidence provide that “[a]ll relevant evidence is admissible,” except as otherwise provided by law. Minn. R. Evid. 402. The definition of “relevant evidence” is broad. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401

¹ Relators' Motion *In Limine* to Limit the Use of and Exclude Certain Evidence at 2 (Dec. 27, 2019).

(emphasis added). In other words, evidence is relevant if it enables a fact finder to “draw[] a logical inference assisting, even though remotely, the determination of the issue in question.” *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

The fact finder may draw a “logical inference” regarding the permitting procedure from the way in which MPCA and EPA described the permitting process, before, during, and after that process. It is the fact finder’s role, not Relators’, to determine “[t]he convincing power of that inference.” *Id.* at 478. For this reason, courts routinely conclude that evidence that post-dates an event has evidentiary value. Indeed, if Relators’ rule were correct, then no admission of guilt or assertion of innocence could ever be admissible in a criminal case, because they are after-the-fact descriptions of whether and how an event occurred. That is not the law. *See, e.g., id.* (“There is no question that the voicemail evidence is probative of a material fact—it is an implied admission of guilt by the appellant, and directly advances the inquiry in forceful way.”).

Relators have not and cannot argue that the exhibits do not make it more or less probable that the permitting process occurred in a certain way. In fact, Relators’ argument relies not on cases concerning the evidentiary value of after-the-fact descriptions of events, but rather on a case concerning the amount of deference a court should give to an agency’s after-the-fact explanation for a decision. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). But the question of how much deference to give a position presumes that the position is relevant in the first place.

Moreover, Relators’ argument is inconsistent with Relators’ own exhibit list. The exhibit list contains multiple exhibits in which, to use Relators’ words, individuals are

attempting to put an after-the-fact “spin” on the propriety of the procedures used by MPCA and EPA.² Relators’ Exhibit 535, for example, is an article from the Ely, Minnesota-based “Timberjay” newspaper critiquing MPCA’s conduct in the permitting process.³ Another exhibit contains a June 2019 statement by MPCA Commissioner Laura Bishop—who appears on Relators’ witness list, despite taking her role at MPCA *after* the permit issued—regarding MPCA’s commitment to the permitting process.⁴ If Relators truly believed that statements that post-date, but relate to, the permitting process are irrelevant, then they would not have listed so many similar exhibits on their exhibit list.

Relators argue in the alternative that, even if relevant, the five exhibits’ “probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues.”⁵ Otherwise relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Minn. R. Evid. 403. Rule 403 “favors admission of relevant

² Relators’ Motion *In Limine* to Limit the Use of and Exclude Certain Evidence at 4 (Dec. 27, 2019).

³ Relators’ Exhibit 535 at MPCA(62-cv-19-4926)_0063645. Relators listed as exhibits many other post-permitting critical news articles. In fact, Relators’ Exhibits 536 to 567 are *all* post-permitting news articles.

⁴ Relators’ Exhibit 142 at MPCA(62-cv-19-4926)_016328. *See also* Relators’ Exhibit 233 at MPCA(62-cv-19-4926)_019241. There are other similar examples. *See, e.g.*, Relators’ Exhibit 146 at MPCA(62-cv-18-4626)_016491 (containing a post-permitting “statement”); Relators’ Exhibit 156 at MPCA(62-cv-19-4926)_016574 (describing “congressional outreach” and “media outreach”); Relators’ Exhibit 258 at MPCA(62-cv-19-4926)_019843 (discussing “messaging”); Relators’ Exhibit 271 at MPCA(62-cv-19-4926)_020338 (discussing “talking points”).

⁵ Relators’ Motion *In Limine* to Limit the Use of and Exclude Certain Evidence at 2 (Dec. 27, 2019).

evidence.” *Schulz*, 691 N.W.2d at 478. Evidence is not unduly prejudicial just because it might result in “damage to the opponent’s case that results from the legitimate probative force of the evidence.” *State v. Hallmark*, 927 N.W.2d 281, 299 (Minn. 2019) (quotation marks omitted). Rather, to be unduly prejudicial, the evidence’s proponent must gain an “unfair advantage . . . from the capacity of the evidence to persuade by illegitimate means.” *Id.* (quotation marks omitted).

The evidence that Relators seek to exclude does not persuade by illegitimate means, and it will not confuse the issues before this Court. Relators express a concern that the evidence is prejudicial because it “allows the Agency’s spin to become the story.”⁶ Apart from PolyMet’s objection to that characterization of the evidence, Relators’ primary point seems to be that the evidence does not fit *their* narrative of events. Of course, all evidence that does not accord with a party’s theory of the case is, in a certain sense, “prejudicial.” That does not mean that the evidence is “unfairly prejudicial,” much less that there is adequate ground to exclude the evidence under Rule 403. This Court is more than capable of sorting out the relative probative value of evidence that is contemporaneous with, and post-dates, MPCA’s issuance of the NPDES permit.

Finally, the exhibits do not violate the best evidence rule, which is inapplicable here. As Relators acknowledge, the best evidence rule “prohibits the introduction of secondary evidence to establish the contents of a writing where the writing itself is

⁶ *Id.* at 4.

available.”⁷ See Minn. R. Evid. 1002. The best-evidence rule is therefore alternatively described as “the original writings rule.” Minn. Practice Series § 1002.01. The best-evidence rule “is not a broad, general principle applicable throughout the law of evidence,” and it does not require a party “to produce the best, in the sense of the most trustworthy and credible, evidence.” *Buffalo Ins. Co. v. United Parking Stations, Inc.*, 152 N.W.2d 81, 84 (Minn. 1967).

To the extent that PolyMet introduces these exhibits, it will be because of the contents of the writing in the exhibits themselves, not the content of the writing in some different document (such as, as Relators suggest, the findings of fact and conclusions of law supporting the NPDES permit). Relators’ best-evidence objection misconstrues the best evidence rule and should be denied or, at a minimum, determined at the time that PolyMet moves to admit the exhibits into evidence.⁸ PolyMet Exhibits 2025 through 2030 should not be excluded.

III. The Complaint should not be excluded.

Relators also move to exclude PolyMet Exhibit 2029, which is a copy of the complaint that Relator Fond du Lac Band of Lake Superior Chippewa filed in federal

⁷ *Id.* at 4 (quoting *State v. Degidio*, 152 N.W.2d 179, 180 (Minn. 1967)).

⁸ Relators request in the alternative that they be permitted to add RELATORS_0064181 to their exhibit list. The propriety of that request is addressed separately in PolyMet’s response to Relators’ informal motion to add exhibits to its exhibit list and PolyMet’s informal motion to add the proposed exhibits to its Motion in Limine to Exclude Certain Exhibits for Which no Witness Has Foundation to Testify.

district court on September 10, 2019 (“Complaint”). The Complaint is relevant and should not be excluded.

The Complaint contains factual allegations that overlap with Relators’ allegations here and is therefore relevant to this proceeding. For example, the Complaint alleges that “EPA political appointees . . . suppressed the comments and concerns of experienced career staff at EPA Region 5 regarding the NPDES Permit.”⁹ By comparison, Relators’ third procedural irregularity alleges that “MPCA and EPA leadership acted in concert and used irregular and unusual procedures to prevent EPA staff from submitting written comments on the draft NPDES Permit.”¹⁰ The Complaint accordingly sheds light on issues before this Court, and easily passes Rule 401’s low relevance threshold. Minn. R. Evid. 401.

In arguing that the Complaint is irrelevant or unduly cumulative, Relators improperly make assumptions about the purpose for which PolyMet might seek to introduce and use the Complaint. Relators assert that the Complaint is irrelevant because it arises under federal law, and “[t]he only issue in dispute in this proceeding is whether state officials engaged in irregular procedures.”¹¹ But those procedures are determined, in part, by federal law. Moreover, the Complaint could be relevant for many other purposes. For example, the Complaint could shed light on the propriety of Relators’ assertions in this matter. In order “to protect the integrity of the judicial process,” courts prohibit

⁹ Exhibit 2029 at 004, ¶ 8.

¹⁰ Relators’ List of Alleged Procedural Irregularities at 2 (Aug. 14, 2019).

¹¹ Relators’ Motion *In Limine* to Limit the Use of and Exclude Certain Evidence at 5 (Dec. 27, 2019).

parties “from deliberately changing positions according to the exigencies of the moment.” *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (quotation marks omitted). The Complaint also could be relevant to the weight which should be given certain positions taken by Relators, since it demonstrates that the Band has an interest in this case’s outcome that extends beyond the Court’s rulings in this matter. *Cf. State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn.1995) (explaining that partiality “is always relevant as discrediting the witness and affecting the weight of his testimony” (quotation marks omitted)).

The Complaint is relevant and should not be excluded. In the alternative, at a minimum, this Court should defer ruling on Relators’ motion until it sees for what purpose PolyMet moves to admit Exhibit 2029.

CONCLUSION

This Court should deny Relators’ Motion to exclude PolyMet Exhibits 2025 through 2030. Each of these exhibits is relevant and not otherwise subject to exclusion.

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GREENE ESPEL PLLP

/s/ Monte A. Mills

Monte A. Mills, Reg. No. 030458X
Caitlinrose H. Fisher, Reg. No. 0398358
Davida S. McGhee, Reg. No. 0400175
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
mmills@greeneespel.com
cfisher@greeneespel.com
dwilliams@greeneespel.com
(612) 373-0830

VENABLE LLP

Kathryn A. Kusske Floyd, DC Reg. No. 411027
(admitted pro hac vice)
Jay C. Johnson, VA Reg. No. 47009
(admitted pro hac vice)
Kyle W. Robisch, DC Reg. No. 1046856
(admitted pro hac vice)
600 Massachusetts Avenue, NW
Washington, DC 20001
kkfloyd@venable.com
jcjohnson@venable.com
kwrobisch@venable.com
(202) 344-4000

Attorneys for Poly Met Mining, Inc.