

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 BRIAN
BRANFIREUN, EMILY ONELLO, AND
MARGARET SARACINO**

INTRODUCTION

This Court should preclude Relators from admitting the testimony of Brian Branfireun, Emily Onello, and Margaret Saracino regarding alleged procedural irregularities. Branfireun, Onello, and Saracino cannot testify as fact witnesses because they have no personal knowledge of any non-privileged matter relevant to the alleged procedural irregularities. Minn. R. Evid. 602. Nor can they testify as expert witnesses. First, Branfireun, Onello, and Saracino lack any special expertise regarding EPA's or MPCA's typical permitting procedures. Second, to the extent Branfireun, Onello, and Saracino can be considered experts on the technical elements of the permit at issue in this case, such merits questions are outside the scope of the Court's jurisdiction under Minnesota Statutes Section 14.68. Finally, even if Branfireun, Onello, and Saracino are established as experts, their 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 Branfireun, Onello, and Saracino in their entirety.

BACKGROUND

A. Branfireun’s Background

According to Relators, Branfireun is a professor of ecohydrology, biogeochemistry and wetland ecosystem science at Western University in London, Ontario.¹ Public documents indicate that Branfireun is an associate professor at University of Western Ontario and currently serves as the Canada Research Chair in Environment and Sustainability.² Branfireun was previously employed as a professor at the University of Toronto.³

Documents in the administrative record and produced by the parties suggest Branfireun co-authored a number of documents for Relators, including Relators’ comments on the Supplemental Environmental Impact Statement (“EIS”),⁴ Relators’ comments on the Final EIS,⁵ Relators’ comments on the Section 401 certification,⁶ and

¹ Relators’ Witness List.

² Brian Branfireun, LinkedIn Profile, *available at* <https://www.linkedin.com/in/brian-branfireun-ba58237/?originalSubdomain=ca> (Ex. 8 to McGhee Declaration).

³ *Id.*

⁴ WATER_0004379.

⁵ WATER_0000001 (Evidentiary Hearing Exhibit (“EX.”) 660).

⁶ RELATORS_0064752 (EX. 681).

scientific articles cited by Relators.⁷ Relator WaterLegacy holds Branfireun out as an “international mercury expert” that “reviewed the PolyMet sulfide mine plan ([Supplemental Environmental Impact Statement]) for WaterLegacy and concluded that the PolyMet sulfide mine could increase methylmercury in the St. Louis River.”⁸

B. Onello’s Background

Onello is an assistant professor in the Department of Family Medicine and BioBehavioral Health at the University of Minnesota Duluth.⁹ Like Relators, Onello submitted comments opposing the NorthMet Project.¹⁰ Onello’s only interest in the NorthMet Project appears to pertain to the sulfate limits in the NPDES permit. She has published anti-sulfide mining articles on which Relators rely,¹¹ and opposed MPCA’s effort to amend the rules governing Minnesota’s water quality standard to protect wild rice from sulfate.¹² In particular, Onello believes that “[s]ulfide mining (specifically copper-nickel sulfide mining) represents a significant departure from Minnesota’s iron mining tradition,”¹³ and she has “express[ed] concerns that increases in sulfate could lead to

⁷ See, e.g., WATER_0004468; WATER_00038512 at 38566, 38580.

⁸ *Mining Impacts to the Lake Superior Basin*, WaterLegacy (May 23, 2014), available at <https://www.glri.us/sites/default/files/20140523-letter-water-legacy-mining.pdf> (McGhee Dec. Ex. 9).

⁹ RELATORS_0064787 (EX. 682).

¹⁰ See, e.g., WATER_0001416 (EX. 661); RELATORS_0064071 (EX. 582); RELATORS_0064064 at 64068 (EX. 581).

¹¹ See, e.g., RELATORS_0064081 (EX. 585).

¹² See, e.g., WATER_0003796 at 3848.

¹³ RELATORS_0064081 (EX. 585).

increases in methyl mercury, which bio-accumulates in fish, has long-term serious health effects on humans, and is especially dangerous to developing fetuses.”¹⁴

C. Saracino’s Background

Saracino is a staff psychiatrist at the Human Development Center in Duluth. Relators rely on Saracino as an authority on “[m]orbidity [a]ssociated with [m]ethylmercury [e]xposure and other [n]eurotoxic [c]hemicals [p]otentially [r]eleased by the PolyMet NorthMet Copper-Nickel Mine Project.”¹⁵ To assist Relators’ argument that the permit limits on methylmercury are inadequate, Saracino co-authored Relators’ comments on the EIS¹⁶ and articles on which Relators rely.¹⁷ Saracino “defer[s] to [Brian] Branfireun . . . to evaluate the extent of risk that the PolyMet mine project poses in terms of producing substantial increases in levels of mercury, methylmercury or other toxic metals in fish tissue or drinking water,” and “focuses [her opinion] on the consequences to human health.”¹⁸ Saracino “ha[s] grave concerns about copper-nickel mining and its inherent deleterious effects not only on the environment in Northern Minnesota, but also on human health of those living in that area.”¹⁹

¹⁴ WATER_0003796 at 3848.

¹⁵ WATER_0038606 at 38609.

¹⁶ WATER_0038606 at WATER_0039290; EX. 662.

¹⁷ *See, e.g.*, WATER_00038512 at 38563.

¹⁸ WATER_0038606 at WATER_0039290; EX. 662.

¹⁹ WATER_0038606 at 39290; EX. 662.

D. Expected Testimony

It is highly unlikely that any of these witnesses has relevant, first-hand knowledge regarding the mandatory procedures of EPA or MPCA or the agencies' alleged deviances from such procedures. It is far more likely that Relators will call on them to offer expert opinions on the merits of the challenged permit—an issue outside of this Court's jurisdiction and reserved solely for the court of appeals—under the guise of discussing each agency's response to Relators' comments. Such testimony should not be permitted. This Court is not tasked with determining whether MPCA appropriately resolved comments from EPA or Relators, or whether the permit is scientifically sound, but instead whether MPCA committed irregularities in procedure under Minnesota law. To the extent Branfireun, Onello, and Saracino have any expertise, it is not relevant to the inquiry within this Court's jurisdiction.

ARGUMENT

Relators should be prohibited from introducing any testimony from Branfireun, Onello, and Saracino. The Court's sole task is to 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). The testimony of these witnesses will not aid the Court in reaching its determinations. Instead, they are far more likely to derail the hearing into an inquisition on the merits of the final permit and on Relators' belief that the technical specifications of the final permit do not appropriately address Relators' concerns or what Relators believe to be EPA's questions. Putting aside

that none of these witnesses are experts on the interactions of MPCA and EPA, the only expert testimony they could offer will be inadmissible legal conclusions or irrelevant testimony. In light of these considerations, the Court should exclude the entirety of Branfireun's, Onello's, and Saracino's proposed testimony.

II. BRANFIREUN, ONELLO, AND SARACINO SHOULD BE PRECLUDED FROM OFFERING TESTIMONY AS FACT WITNESSES

This Court should preclude Branfireun, Onello, and Saracino from testifying as fact witnesses. Minnesota Rule of Evidence 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.” (Emphasis added.) Relators cannot introduce any evidence that would qualify Branfireun, Onello, and Saracino to testify as fact witnesses at the evidentiary hearing. Indeed, these witnesses were never employed by either MPCA or EPA. They have no first-hand knowledge of the non-public interactions between MPCA and EPA. Nor do they have first-hand knowledge of how the agencies apply their governing procedures in practice. Any fact testimony Branfireun, Onello, and Saracino could possibly offer on the NPDES permitting process would necessarily be public information, based on hearsay, or duplicative of other witness testimony. Because Branfireun, Onello, and Saracino have no personal knowledge of any non-privileged matter relevant to the alleged procedural irregularities, the Court should preclude them from testifying as fact witnesses.

III. BRANFIREUN, ONELLO, AND SARACINO SHOULD BE PRECLUDED FROM OFFERING EXPERT OPINIONS

Relators have not yet claimed, but will likely claim, that Branfireun, Onello, and Saracino are expert witnesses. Even if Branfireun, Onello, and Saracino were qualified to testify as experts in this matter—they are not—their 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.

Assuming Relators attempt to establish that Branfireun, Onello, and Saracino are qualified to testify as expert witnesses under Minnesota law, the Court should deny their motions. Although Branfireun, Onello, and Saracino may have expertise regarding the technical aspects of the NPDES permit,²⁰ they are not qualified to opine on the procedures that MPCA uses to issue water quality permits. An expert must be qualified “by knowledge, skill, experience, training, or education,” Minn. R. Evid. 702—all of which Branfireun, Onello, and Saracino lack with respect to NPDES permitting procedures, the Memorandum of Agreement between MPCA and EPA, and the interactions of MPCA and EPA either generally or with respect to PolyMet's NPDES permit. Whether the NPDES Permit is scientifically debatable is not an issue before this Court and these witnesses' testimony on such scientific questions would not be probative of procedural irregularities.

Even if Branfireun, Onello, and Saracino are qualified to testify as experts in this case, their 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

²⁰ PolyMet does not concede this is the case.

law and fact.” *State v. Dao Xiong*, 829 N.W.2d 391, 396 (Minn. 2013). Insofar as Branfireun, Onello, and Saracino have no first-hand knowledge of the interactions of MPCA and EPA, they could only testify as to what they believe is an irregularity in procedure during EPA oversight of NPDES permits in general. But Relators may not use such testimony as if it 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 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 Branfireun, Onello, and Saracino might offer regarding the meaning and application of statutes, regulations, and case law are not admissible evidence. As the Minnesota Rule of Evidence 704 comments explain, “[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 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, Branfireun, Onello, and Saracino may not testify that EPA or MPCA has or has not complied with its legal obligations under federal regulations.²¹ Nor may they 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

²¹ This point applies equally to all witnesses Relators call at the hearing.

Minnesota Rule of Evidence is similar to Federal Rule of Evidence, courts “look to federal caselaw for guidance in construing the Minnesota rule”).

The proceeding before this Court is not about the merits of the NPDES permit. To the extent Branfireun, Onello, and Saracino have any expertise about Clean Water Act issues, water-quality requirements, or any other substantive issue related to the decision to approve the NPDES permit, such technical expertise is beyond the “limited” scope of this Court’s jurisdiction to determine “irregularities in procedure.”²² Relators may not litigate the merits of their certiorari appeal 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.”²³ 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. This Court should not allow Branfireun, Onello, or Saracino to testify that the permit should have included this or that (or that the permit

²² Court of Appeals Order of June 25, 2019 at 4.

²³ Court of Appeals Order of June 25, 2019 at 4.

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. Branfireun, Onello, and Saracino should not be allowed to offer any expert opinions at the hearing.

CONCLUSION

The Court should exclude the testimony of Branfireun, Onello, and Saracino and preclude Relators from calling Branfireun, Onello, and Saracino as fact or expert witnesses at the evidentiary hearing beginning January 21, 2020. Branfireun, Onello, and Saracino lack firsthand knowledge of the alleged procedural irregularities. Indeed, they do not even have personal knowledge of the permitting agencies' relevant procedures. While they may be qualified to offer scientific opinions on issues like methylmercury, sulfate bioaccumulation, or neurotoxicity, those issues are not before this Court.

Dated: December 27, 2019

GREENE ESPEL PLLP

By: 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.