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State of Minnesota
12/23/2019 3:26 PM

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 SUPPORT OF PRODUCTION OF DOCUMENTS IDENTIFIED IN MPCA'S PRIVILEGE LOGS

Relators[1] submit the foregoing brief pursuant to the Court's order dated December19, 2019. Relators request immediate disclosure of certain documents listed by the Minnesota Pollution Control Agency ("MPCA") on privilege logs and that the Court consider other documents for disclosure following an in-camera review. As the Court directed, Relators discuss our legal theories supporting immediate disclosure of certain documents and in-camera review of others. Relators then apply these legal principles to categories of documents on MPCA's privilege log to request immediate disclosure of certain documents and in-camera review of others, including the April 17, 2018 memo written by Michael Schmidt. Relators also suggest the process the Court should use in-camera to determine what is protected and what should be disclosed.

INTRODUCTION

For months, MPCA has failed to turn over relevant documents, claiming the documents are attorney-client privilege communications or attorney work product. In doing so, MPCA has

[1] Relators are the Fond du Lac Band of Lake Superior Chippewa, WaterLegacy, Friends of the Boundary Waters Wilderness, Minnesota Center for Environmental Advocacy, and Center for Biological Diversity.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

failed to establish that either privilege applies. Many documents listed on MPCA's November 26, 2019 and December 16, 2019 privilege logs[2] lack indicia of attorney-client privilege. They have no attorney identified as author or recipient; were provided to a third party, so were not made in confidence; merely include an attorney on a string of recipients without demonstrating that legal advice was provided; or lack the most basic information, such as author, recipient, and subject matter. No affidavits accompany any MPCA privilege logs explaining or attesting to privilege.

Most documents authored by an attorney during the PolyMet permitting period from July 11, 2016 through December 20, 2018 lack any indication that the document is attorney work product. Documents produced in the ordinary course of the administrative process or in compliance with permitting requirements, rather than created because of anticipated litigation, are not attorney work product. To the extent that MPCA documents authored by lawyers during the permitting period are or may be attorney work product prepared in anticipation of litigation, Relators have clearly established substantial need and undue hardship. Only mental impressions, opinions, and theories concerning that anticipated litigation should be redacted.

Further, to the extent that attorney-client privilege or attorney work product would otherwise apply to certain documents, the Court should still require disclosures. MPCA has waived both attorney-client privilege and attorney work product immunity for certain issues and categories of documents by raising affirmative defenses to alleged procedural irregularities in declarations filed with the Minnesota Court of Appeals and in deposition testimony in these proceedings. Finally, Minnesota recognizes a crime-fraud exception to both the attorney-client privilege and the

[2] MPCA submitted an amended privilege log on November 26, 2019 and submitted its privilege log derived from its unilateral forensic search on December 16, 2019. Without waiving any rights with respect to the forensic search ordered by the Court on December 19, 2019 and, anticipating that documents on the current log will be captured again, Relators present arguments for disclosure despite the shortcomings of the forensic search conducted to date.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

attorney work product doctrine, which exception applies to civil misrepresentations as well to criminal violations. Legal advice sought or documents prepared in furtherance of alleged procedural irregularities involving MPCA's breach of candor, prevention of a written record of critical comments prepared by the U.S. Environmental Protection Agency ("EPA"), concealment of MPCA communications with EPA, or other misrepresentations would not be entitled to privilege or protection.

DISCUSSION AND APPLICATION OF LEGAL THEORIES

This Court has broad discretion in determining matters related to discovery, including the process for in-camera review. *State ex rel. Humphrey v. Phillip Morris*, 606 N.W.2d 676, 686 (Minn. App. 2000).

A. ATTORNEY-CLIENT PRIVILEGE

1. Legal Standard. MPCA has the burden to establish attorney-client privilege by demonstrating that each requirement for privilege has been met.

MPCA has claimed a multitude of documents are protected by attorney-client privilege. But for each such document, MPCA must prove the factual basis for the assertion. *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998). In Minnesota, the attorney-client privilege applies

> (1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Id. at 440 (*quoting* 8 John Henry Wigmore, Evidence § 2292, at 554 (1961)).

Where MPCA's privilege log is insufficiently descriptive to allow the court or Relators to determine if there is a basis to assert an attorney-client privilege, the MPCA has not met its burden and the documents must be produced. *Pacific Gas & Elec. Co. v. United States)*, 69 Fed. Cl. 784, 812 (2006). *See also Smithkline Beecham Corp. v. Apotex Corp*., 232 F.R.D. 467, 475 (E.D. Penn.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

2005) (where descriptions in the privilege log fail to identify basic information such as author and recipient, "then disclosure is an appropriate sanction").

a. MPCA's claims of attorney-client privilege must be strictly construed because they create a barrier against public access to public affairs.

Under Minnesota law, "as a barrier to testimonial disclosure, the privilege tends to suppress relevant facts and must be strictly construed." *Kobluk,* 574 N.W.2d. at 440 (quoting *Kahl v. Minn. Wood Specialty, Inc.*, 277 N.W.2d 395, 399 (Minn. 1979)). This admonition is particularly strong when privilege is applied to block access to a public agency decision. In discussing whether the attorney-client exception to Minnesota's Open Meeting Law allowed closure of a meeting to decide whether an environmental impact statement was required, the Minnesota Supreme Court emphasized that the attorney-client privilege is narrow when applied to public decisions, stating:

> As a barrier against public access to public affairs, [the privilege] has precisely the same suppressing effect, hence here too must be strictly construed. . . We cannot emphasize too strongly that should this exception be applied as a barrier against public access to public affairs, it will not be tolerated.

Prior Lake Am. v. Mader, 642 N.W.2d 729, 736 (Minn. 2002) (citing *Minneapolis Star & Tribune Co. v. Hous. & Redev. Auth.* ("*HRA*"), 251 N.W.2d 620, 624, 626 (Minn. 1976).)

The Court stated that a "narrower privilege for governmental clients" may be warranted since "[o]pen-meeting and open file statutes reflect a public policy against secrecy in many areas of governmental activity." *Prior Lake*, 642 N.W.2d at 737. Invocation of an attorney-client privilege before a substantive decision is made on a public issue is "fraught with peril":

> If a public body closes its deliberations to obtain confidential advice of counsel during the course of its work on a public issue, review of its ultimate decision for arbitrariness and capriciousness is nearly impossible and the attorney-client exception could swallow the rule of public access.

Id at 741, 742.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

b. MPCA's privilege logs lack basic indicia of attorney-client privilege.

A threshold matter in determining privilege is whether the communication is one "in which legal advice is sought or rendered." *Kobluk*, 574 N.W.2d at 444. Where no attorney is identified as author or recipient on a privilege log, the attorney-client privilege is not demonstrated and documents must be produced. *See MediaTek Inc. v. Freescale Semiconductor, Inc.*, No. 4:11-cv-05341, 2013 WL 5594474, at *2, *5 (N.D. Cal. Oct. 10, 2013) (a courtesy copy is attached); *see also In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 83 (S.D.N.Y. 2006) ("Without information identifying the individuals involved in the particular communications, it is impossible for the plaintiffs to meet their burden of establishing the 'attorney' element of the attorney-client privilege.")

Where a document is disclosed to a third party, any legal advice contained in that document is no longer made in confidence and any privilege that might have applied is waived. *Kobluk*, 574 N.W.2d at 440; *United States v. Hyles*, 479 F.3d 958, 971 (8th Cir. 2007). Further, a "communication is not privileged simply because it is made by or to a person who happens to be a lawyer." *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) ("*Diversified I*"), *rev'd in part on other grounds* 572 F.2d at 606 (8th Cir. 1978) (en banc) ("*Diversified II*"). "[S]imply including an attorney as a recipient of a written communication does not of itself necessarily invoke the privilege." *Wells Fargo & Co. v. United States*, Civ. No. 09-cv-02764, 2014 WL 2855417, at *6 (D. Minn. June 16, 2014). The party asserting the privilege must also show that the document was shared to secure legal advice. *Diversified II*, 572 F.2d at 609.

To establish attorney-client privilege, a party cannot rest on conclusory arguments. The party must provide competent evidence, including detailed privileged logs that state the author, the recipient, the subject matter, and the applicable privilege, along with a "comprehensive, sworn

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

statement" from counsel. *Triple Five of Minn., Inc.*, 212 F.R.D. 523, 528 (D. Minn. 2002); *see also Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 565 (8th Cir. 1997) (party asserting the privilege submitted a detailed privilege log stating the basis of the claimed privilege, together with an accompanying explanatory sworn affidavit from counsel).

c. The attorney-client privilege only applies to legal advice, not to business or technical advice.

The attorney-client privilege only protects legal advice of counsel, not business or technical advice. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987); *see also SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 515 (D. Conn. 1976) *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976) ("Legal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality."). Business documents sent to various officers and employees, as well as attorneys, do not automatically become privileged. *Simon*, 816 F.2d at 403.

Courts in other jurisdictions have explained that for the attorney-client privilege to apply, "legal advice must predominate . . . . The privilege does not apply where the legal advice is merely incidental to business advice." *Pac. Gas & Elec.* 69 Fed. Cl. at 811 (alteration in original) (*quoting Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 484 (D. Kan. 1997)). Although communications made by and to in-house lawyers to obtain legal advice are protected by attorney-client privilege as they are with outside counsel, "communications made by and to the same in-house lawyer with respect to business matters, management decisions or business advice are not protected by the privilege." *Id*. (*quoting Boca Investerings P'ship v. United States*, 31F. Supp.2d 9, 11 (D.D.C. 1998)).

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

Application: MPCA should immediately disclose documents for which requirements for attorney-client privilege have not been demonstrated.

On December 19, 2019, Relators sent MPCA a meet-and-confer email with spreadsheets[3] identifying the documents we requested be immediately produced or submitted to the Court for in camera review, requesting that MPCA respond by the end of the day on Friday. That timing did not prove feasible. Documents proposed for immediate disclosure are listed by the privilege log numbers on the November 26, 2019 (Exhibit 3) and by supplemental ("Supp") privilege numbers on the December 16, 2019 forensic search privilege log.

a. MPCA should disclose documents where no author or recipient is an attorney.

MPCA's privilege logs claim attorney-client where neither the identified author nor recipient are attorneys. These documents lack privilege and should be immediately disclosed to Relators: 1114, 1118 1162, Supp-90, Supp-108, Supp120, Supp-126, Supp.-127, Supp-129, Supp-130, Supp-167, Supp-209, Supp-211, Supp-217, Supp-218, Supp-230, Supp-240, Supp-243.

b. MPCA should disclose documents shared with third parties.

Documents that MPCA's shared with third parties lack the confidentiality required to establish an attorney-client privilege and should be immediately disclosed to Relators: Supp-132, Supp-136, Supp-137, Supp-138, Supp-139, Supp-141, Supp-142, Supp-143, Supp-145, Supp-163, Supp-172, Supp-173, Supp-174, Supp-176, Supp-179, Supp-180, Supp-184, Supp-186.

c. MPCA should disclose documents lacking basic indicia of privilege.

Documents on MPCA's privilege log lacking basic information as to the author or recipient should be immediately disclosed to Relators: Supp-81, Supp-83, Supp-87, Supp-88, Supp-92,

[3] The meet-and-confer email and spreadsheets are provided in **Ex. A**

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

Supp-103, Supp-105, Supp-107, Supp-109, Supp-112, Supp-113, Supp-121, Supp. 125, Supp-140, Supp-165, Supp-169, Supp-181, Supp-188, Supp-189, Supp-193, Supp-194, Supp-207, Supp-210, Supp-213, Supp-221, Supp-224, Supp-226, Supp-232, Supp-234, Supp-235, Supp-236, Supp-237, Supp-239, Supp-241, Supp-244, Supp-247, Supp-248, Supp-250.

d. MPCA should disclose documents where an attorney is merely included among other recipients.

MPCA's privilege logs claim attorney client and even, in some cases, attorney work product privilege for documents authored by a non-attorney and merely sent to an attorney among a string of recipients. No subject matter descriptions on the privilege log and no explanatory affidavits or declarations establish that these communications were for the purpose of seeking or providing legal advice. In fact, these documents are most frequently described as "attorney communications with agency personnel" or "communications between agency personnel."

Documents merely including one or more attorneys in a string of recipients demonstrate no attorney-client privilege and should be immediately disclosed to Relators: 1117, 1168, 1169, 1170, 1247, 1249, Supp-75, Supp-80, Supp-82, Supp-86, Supp-89, Supp-101, Supp-102, Supp-104, Supp-106, Supp-110, Supp-111, Supp-114, Supp-115, Supp-116, Supp-117, Supp-118, Supp-119, Supp-124, Supp-131, Supp-133, Supp-134, Supp-135, Supp-144, Supp-146, Supp-147, Supp-148, Supp-149, Supp-150, Supp-151, Supp-152, Supp-153, Supp-154, Supp-155, Supp-156, Supp-157, Supp-158, Supp-159, Supp-160, Supp-161, Supp-162, Supp-163, Supp-164, Supp-166, Supp-168, Supp-170, Supp-171, Supp-174, Supp-175, Supp-176, Supp-177, Supp-178, Supp-182, Supp-183, Supp185, Supp-187, Supp-190, Supp-191, Supp-192, Supp-195, Supp-212, Supp-214, Supp-215, Supp-216, Supp-219, Supp-220, Supp 225, Supp-227, Supp-228, Supp-229, Supp-231, Supp-233, Supp-238.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

B. ATTORNEY WORK PRODUCT PROTECTION

1. MPCA documents written during and for administrative permitting rather than because of anticipated litigation are not attorney work product.

MPCA's mere indication on a privilege log that a document was authored by an attorney is insufficient to establish that the document is "attorney work product." The Minnesota Rules of Civil Procedure, legal precedent, and equivalent federal rules limit define attorney work product as documents and tangible things "*prepared in anticipation of litigation or for trial*." Minn. R. Civ. P. 26.02(d)(emphasis added); *see also* Fed. R. Civ. P. 26(b)(3)(A).

MPCA cannot claim attorney work product protection for "documents prepared in the regular course of business rather than for the purposes of litigation." *City Pages v. State*, 655 N.W.2d 839, 845 (Minn. App. 2003); *see also Simon*, 816 F.2d at 401 (quoting Wright & Miller, *supra*, § 2024, at 198-99) ("[T]here is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation."); *Petersen v. Douglas County Bank & Trust Co*., 967 F.2d 1186, 1189 (8th Cir. 1992) ("Documents are not protected under the work product doctrine, however, merely because the other party transferred them to their attorney. . . . Nor are documents protected that were assembled in the ordinary course of business or for other nonlitigation purposes.") The work product rule also "does not come into play merely because there is a remote prospect of litigation." *Diversified I*, 572 F.2d at 604.

Most federal courts apply a straightforward test to determine whether a document authored by an attorney is attorney work product – the court considers whether the document was created "because of" the anticipated litigation. *United States v. Deloitte* LLP, 610 F.3d 129, 136 (D.C. Cir. 2010); *see also Simon,* 816 F.2d at 401; *Diversified I,* 572 F.2d at 604. This must be a factual determination based on "the nature of the document and the factual situation in the particular case."

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

Deloitte, 610 F.3d at 137. "The fact that litigation later resulted does not change the ordinary business nature of the attorney's legal advice into litigation work product." *Geissel v. Moore Med. Corp*., 192 F.R.D. 620, 625 (E.D. Mo. 2000).

MPCA appears to have claimed that any documents authored in whole or in part by an attorney are attorney work product. But, administrative and regulatory matters often produce documents written by lawyers that are not attorney work product. A federal claims court recently summarized case law from a number of regulatory contexts, including securities regulation, patents, litigation under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and regulatory proceedings for electric rates, power plant licensing, and permitting before the California Coastal Commission. *Pac. Gas & Elec.,* 69 Fed. Cl. at 784-808.

In a regulatory setting, documents and materials "that are required to be prepared to comply with the law" may be excluded from work product protection "even if the party is aware that the document may also be useful in the event of litigation." *Id*. at 792 (quoting *In re Raytheon Secs. Litig.*, 218 F.R.D. 354, 359 (D. Mass. 2003)). In *Pacific Gas*, documents required to be created to comply with federal securities laws or with CERCLA were not protected as attorney work product. *Id.*, at 793-94, 796-97. The documents were not created because of litigation, but "because of a public or business duty" and "made in the ordinary course of business" under regulations. *Id*. at 796-97 (citations omitted). The documents did not become work product "simply because a litigation involving that information is probable or in existence." *Id*. at 797.

The court found that the following categories of documents should *not* be protected as work product: documents otherwise not privileged created in anticipation of permit proceedings, *id*. at 804; documents created in the ordinary course of business or that would have been created in essentially similar form irrespective of potential adversarial proceedings, *id* at 805 (citations

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

omitted); documents created in preparation for a filing or "pursuant to regulatory requirements," since their "primary motivating purpose" is to address issues in an ex parte proceeding, *id*. at 807; "[i]n-house" documents prepared in order to file or submit accurate information during the administrative proceedings, *id.* at 807; and documents prepared or generated "because of a public or business duty," *id*. at 808. In summary, "[i]f a document was prepared *in order to* obtain a permit or license, an undoubtedly business-related purpose, rather than in order to respond to, rebut, strategize for, or otherwise 'litigate' *against* a known adversary, it should not be protected under the work product doctrine." *Id.* (citations omitted).

Application: MPCA response to comments documents and other permitting records are not protected as attorney work product.

Many documents withheld according to MPCA privilege logs appear to pertain to the agency's preparation of responses to comments on the draft PolyMet water pollution permit. Federal regulations implementing the Clean Water Act require that MPCA prepare responses to comments on a draft water pollution (NPDES) permit. 40 C.F.R. § 124.17.

Irrespective of attorney authorship or co-authorship, documents preparing responses to comments on the draft PolyMet water pollution permit are prepared pursuant to regulatory requirements and are predominantly ordinary business documents, not litigation work product. Since Relators believe that MPCA has affirmatively waived both attorney-client privilege and work product protection for the entire subject matter of responses to comments, the privilege log documents pertaining to responses to comments will be identified in full when the legal and factual basis for waiver is explained.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

2. Relators have a substantial need for documents prepared during the course of permitting, unlike witness statements that can be duplicated by depositions.

Any documents created during the course of PolyMet water pollution permitting that are classified as attorney work product are discoverable on a showing of "substantial need" and that Relators are unable without undue hardship to obtain the substantial equivalent of the materials by other means. Minn. R. Civ. P. 26.02(d). *State ex rel. Humphrey v. Phillip Morris*, 606 N.W.2d 676, 690 (Minn. App. 2000). The question has been raised whether the case of *Ossenfort v. Associated Milk Producers, Inc*., 254 N.W.2d 672 (Minn. 1977) undermines Relators' substantial need for these documents. To the contrary. The Minnesota Supreme Court's reasoning in *Ossenfort*—along with other precedent—underscores Relators' need for permitting documents from July 2016 through December 2018 that might otherwise be protected as attorney work product.

In *Ossenfort*, the defendant (AMPI) had sought the party statement of a driver (Drenth) whom the jury exonerated in a personal injury case that had left the plaintiff a spastic quadriplegic. Among the errors claimed by the AMPI was that it was entitled to party statements of the driver taken by plaintiff's attorney. 254 N.W.2d at 681-82. The Court held that AMPI's mere surmise that the statement taken by plaintiff's counsel might have impeachment value did not constitute substantial need, that AMPI had "equal access to Drenth at the time the statements were taken," and that the statements sought "were not made immediately after the accident, giving them a spontaneity whose substantial equivalent could not be duplicated with the lapse of time." *Id*. After the Court denied production of the statement gathered by plaintiff's counsel, AMPI served its own interrogatories and deposed the witness. *Id*. at 682.

Eighth Circuit cases have similarly found that discovery of a witness statement to an opposing attorney is generally not allowed if that witness is available to the other party to conduct its own discovery. *Baker v. Gen. Motors Corp*., 209 F.3d 1051, 1054 (8th Cir. 2000). However,

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

there is substantial need for attorney work product where the materials are relevant, have a unique value, was no longer available or movant could not obtain the requested materials themselves. *FTC v. Boehringer Ingelheim Pharms, Inc*., 778 F.3d 142, 155 (D.C. Cir. 2015). The Circuit Court explained that the goal underlying the protection for fact work product is that "each side must undertake its own investigation of the relevant facts and not simply freeload on opposing counsel" which interest is not served when "unique, relevant information is withheld from a party that never had an opportunity to obtain the information on its own." *Id.*

Relators requests for documents written by lawyers from July 2016 through December 2018 meet every one of the tests proposed by the Minnesota Supreme Court and federal authority to show substantial need and undue hardship. The information sought is relevant, has unique value and cannot otherwise be obtained by Relators. The documents are contemporaneous with the permitting process, giving them a spontaneity which could not be duplicated even if Relators had unfettered access to the authors and recipients through interrogatories and discovery depositions, neither of which were allowed in these proceedings. Relators are totally dependent on the MPCA's documentary record for evidence of what took place during the PolyMet permitting process and whether MPCA's procedures were irregular. Documents prepared during permitting are substantially needed by Relators and undue hardship and prejudice would result if they were not produced.

<u>Application</u>: Relators have a substantial need for MPCA documents authored by attorneys and request in-camera review of these documents.

Documents identified on MPCA's privilege logs as attorney work product may include documents prepared in the ordinary course of permitting as well as documents prepared because of anticipated litigation. Relators cannot distinguish between them, and both are likely to contain

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

substantive information relevant to Relators' understanding of the PolyMet permitting process and needed to understand the degree to which MPCA's process was irregular.

Relators are requesting in-camera review of documents authored by attorneys from July 11, 2016 through December 20, 2018, none of which are authored by outside litigation counsel. Relators have a substantial need for these documents, which are likely to contain unique, relevant information not available through other means.

> Supp-84 and Supp-85, are an August 12, 2016 email and attachment, Supp-222 is an August 4, 2016 email, Supp-223 and Supp-224 are an August 2, 2016 email and attachment, Supp-242 is an August 10, 2016 email, Supp-245 and Supp-246 are an August 17, 2016 email and attachment, Supp-247 and Supp-248 are an August 9, 2016 email and attachment and Supp-249 and Supp-250 are an August 12, 2016 email. During August 2016, MPCA was reviewing PolyMet's recently submitted application and, as described in greater detail in Relators' discussion of the crime-fraud exception, circulating MPCA's prior efforts to obtain agreement with EPA to discuss orally, rather than provide written feedback for the PolyMet permit.
>
> 39 is a March 17, 2017 communication involving the staff person who defended MPCA's position that no WQBEL limits on pollution were needed at the September 2018 meeting with PolyMet.
>
> Supp-122, Supp-123, and Supp-128 are emails by or with counsel on February 14 and 15, 2018, when MPCA first learned of EPA's feedback on the draft permit and the likelihood of critical comments
>
> 301, the Schmidt April 17, 2018 Memorandum (**Ex.B**) contains factual information as to meetings, including the March 12, 2018 conference call, and meetings in 2016 and 2017 for which Relators have no other notes.
>
> 597, a May 19, 2018 Word document and 1166 and 1250, which are likely duplicates of the same May 31, 2018 attachment, and Supp-196 a May 31, 2018 email, were after EPA read its comments on the PolyMet draft permit to MPCA and while responses to comments on the PolyMet draft permit were being formulated by MPCA.
>
> 953 a July 16, 2018 document is at the time when Mr. Schmidt was participating in preparing responses to comments on the PolyMet draft water pollution permit.
>
> 1171 and 1172, which are likely duplicates of the same August 16, 2018 attachment, are shortly after PolyMet had a major meeting with the EPA in Chicago on WQBELs and sulfate may indicate whether MPCA was aware of that meeting.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

> Supp-91, Supp-92, Supp-206 and Supp-207 are December 3, 2018 emails and attachment, immediately before the MPCA states they learned that EPA would not object to the PolyMet permit. Relators know of no other contemporaneous MPCA records
>
> 1115 and 1163, which may be duplicates of the same December 11, 2018 attachment, are shortly before the permit was issued.

The process of the Court's in camera review is described more fully in subsequent sections. In brief, Relators request that the Court consider requiring disclosure of the identified documents, redacting only legal advice and mental impressions concerning the anticipated litigation. Where MPCA has affirmatively waived its privilege or has lost its privilege applicable to a document due to the crime-fraud exception Relators would request unredacted disclosure of documents.

3. Only mental impressions, opinions and theories "concerning the litigation" are protected from disclosure as opinion work product.

Relators do not dispute that, even with a finding of substantial need, the court should protect "mental impression, conclusions, opinions, or legal theories of an attorney or other representative of a party *concerning the litigation.*" Minn. R. Civ. P. 26.02(d) (emphasis added). Relators also agree that these mental impression, conclusions, opinions and theories of an attorney are considered "opinion work product" and, absent waiver, application of the crime-fraud exception, or other exceptional circumstances, are almost entirely immune from disclosure. *Baker*, 209 F.3d at 1054.

However, the phrase "concerning the litigation" has a specific meaning, based on the scope of the work product doctrine. When an attorney conducts a witness interview in preparation for trial, that attorney's notes, memoranda, and personal recollections are all "opinion work product" akin to an attorney's determination as to which facts are "important to a case." *Id.* (*citing In re*

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973) (noting that an attorney's personal recollections, notes and memoranda from interviews are absolutely protected work product); *Upjohn Co. v. United States*, 449 U.S. 383, 399-400 (1981) ("Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes.")).

However, when attorneys also prepare documents in the regular course of business, including the business of issuing permits, the attorney work product doctrine does not protect every mental impression or opinion reflected in those documents. In *City Pages v. State*, the Minnesota Court of Appeals held that, once documents are identified that potentially contain work product, "the issue becomes which parts of them were prepared in the regular course of business and which parts were prepared for the purpose of litigation." 655 N.W.2d at 846. The party claiming privilege "must identify for the district court's in camera review those portions of the billing records that it claims are protected by the attorney-client privilege or the work-product doctrine." *Id*. at 847.

"Where an attorney's mental impressions are those that a layman would have as well as a lawyer in these particular circumstances, and in no way reveal anything worthy of the description 'legal theory,' those impressions are not opinion work product." *FTC*, 778 F.3d at 153 (citations and internal quotation marks omitted). Specifically, notes taken during a permitting process are not protected unless they have to do with "strategy or tactics" related to adversarial proceedings or anticipated litigation. *Pac. Gas & Elec*., 69 Fed. Cl. at 807; *see also McCook Metals L.L.C. v. Alcoa, Inc.* 192 F.R.D. 242, 260 (N.D. Ill. 2000) (requiring disclosure of documents, technical information and decisions related to the patent application process, while protecting documents prepared in preparation of a patent appeal).

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

Where work product documents are primarily investigatory materials including "non-legal opinions and thoughts about the facts, as opposed to legal or trial matters," such "'mental processes' are properly treated as part of the ordinary business . . . ." *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 164 (D. Minn. 1986). The court ordered production of the documents with redaction, where necessary, to remove disclosures of the mental impressions of counsel that truly bore on the "anticipated, choate litigation." *Id*.; *see also Deloitte*, 610 F.3d at 139 (vacating the district court's decision that a document was wholly work product and remanding for examination of the document *in camera* to determine if it is entirely protected).

The Court should reject MPCA's overly broad claims for "opinion work product" protection. MPCA's assertion that even factual information should be withheld if an attorney has chosen to write it can "be classified as opinion only on a virtually omnivorous view of the term." *FTC*, 778 F.3d at 152; *see also In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1015 (1st Cir. 1988) ("[N]ot every item which may reveal some inkling of a lawyer's mental impressions, conclusions, opinions, or legal theories is protected as opinion work product.").To the degree that in-camera review of documents written by lawyers during the PolyMet permitting period reveals attorney-client privileged legal advice or opinions related to anticipated litigation, such privileged advice and opinion work product should be redacted. Any other documents or content should be disclosed to Relators.

<u>Application</u>: Relators request that the Court's in-camera reviews redact only those mental impressions that concern the anticipated litigation.

Before Relators received a redacted version of Mr. Schmidt's April 17, 2018 Memorandum ("Schmidt Memorandum"),[4] Relators were unaware that this document was 29 pages long and

[4] Schmidt Memorandum, Rel. 281in **Ex. B**.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

contained notes reflecting factual information on meetings and calls since August 2016, as well as notes from the April 4, 2019 meeting when EPA read its comments on the PolyMet draft permit aloud to MPCA. These notes were not taken at interviews conducted by Mr. Schmidt for litigation, but at permitting conferences at which he was an observer or participant.

Mr. Schmidt's declaration describes his responsibilities as providing advice on "permit development, permit enforcement, administrative rulemaking, and general agency matters," but includes no responsibilities related to anticipated litigation.[5] His declaration states that Mr. Schmidt did not retain handwritten notes "because I would integrate those notes into my typed legal work product."[6] It is unclear from the redacted document available to Relators whether Mr. Schmidt's Memorandum reflects an ongoing factual record developed for permit development or a one-time collection of all preceding notes to ensure, after Relators had already made two Data Practices Act requests for documents, that the "resulting legal work" from his notes would "fall within this exception to the DPA."[7] Unless the memorandum was created because of anticipated litigation outside Mr. Schmidt's scope of responsibility, rather than to create a record for permit development as his role would require, notes reflecting factual information from meetings and conference calls should not be redacted as mental impressions concerning litigation.

Similarly, Relators would request that in the Court's in-camera review of other documents authored by Mr. Schmidt or other in-house counsel that are not solely attorney work product prepared because of anticipated litigation, the Court redact only attorney-client advice and not business, policy or management advice and only redact mental impressions concerning

[5] Schmidt Decl. June 12. 2019, Rel. 574 ¶21, in **Ex. C.**
[6] *Id.* ¶ 20.
[7] *Id.* ¶ 21.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

anticipated litigation. Fact work product and other work product pertaining to the business of permitting would be disclosed to Relators.

C. WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION

Minnesota statutes, rules and case precedent establish that the attorney-client privilege and protections for attorney work product are subject to waiver. Minn. Stat. § 595.02(b); Minn. R. Evid. 502(a); *Kobluk*, 574 N.W.2d at 440 (applying the attorney-client privilege "except the protection be waived.") A client may waive the privilege by "conduct or affirmative consent" and "impliedly waives the privilege where . . . he himself discusses the contents of the professional communication." *State ex rel. Schuler v. Tahash*, 154 N.W.2d 200, 205 (Minn. 1967).

Eighth Circuit cases clarify the two situations where an at-issue waiver is commonly found. The first is when a party's legal contention implicates evidence encompassed in an attorney-client communication, such as when a client relies on legal advice as an element of a defense. *Baker*, 209 F.3d at 1055. The second situation when privilege is waived is when a client's testimony refers to specific documents that would otherwise be privileged. *Id*.

The attorney work product protection from disclosure is not absolute, and may be waived. *United States v. Nobles*, 422 U.S. 225, 239 (1975) (finding party waived work product protection when the party chose to make testimonial use of material contained in work product); *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 732 (8th Cir. 2001). "The privilege is designed to balance the needs of the adversary system to promote an attorney's preparation in representing a client against society's interest in revealing all true and material facts relevant to the resolution of a dispute." *Pamida*, 281 F.3d at 732 *(citing Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)). "When a party seeks a greater advantage from its control over work product than the law must provide to maintain a healthy adversary system, the privilege should give way." *Id.* (quoting *In re*

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982)). In holding that the work product privilege was impliedly waived, the court looked not only at whether the waiver was intended, "but also whether the interests [of] fairness and consistency mandate a finding of waiver." *Id*.

If a waiver is intentional, the subject-matter waiver doctrine provides that the privilege may be extinguished as to the entire subject matter of the disclosed information. *Shukh v. Seagate Tech., LLC*, 848 F. Supp. 2d 987, 990 (D. Minn. 2011). The subject-matter waiver doctrine exists "to prevent a party from using the advice he received as both a sword, by waiving privilege to favorable advice, and a shield, by asserting privilege to unfavorable advice." *Id*. (quoting *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1303 (Fed. Cir. 2006); *see also In re Seagate Tech.*, 497 F.3d 1360, 1372 (Fed. Cir. 2007) (holding subject-matter waiver serves to "prevent[] the inequitable result of a party disclosing favorable communications while asserting the privilege as to less favorable ones.").

If MPCA declarants at the Minnesota Court of Appeals and deponents in the district court transfer proceedings have relied on the advice of counsel for an element of their defense, described the content of attorney advice, or testified as to the contents of documents written by counsel, privilege and protection are waived for such documents and the entire subject matter of the disclosed information.

> **<u>Application</u>: MPCA has waived any privilege applicable to certain content in the Schmidt Memorandum and to the subject matter of preparing responses to comments.**

As previously explained, Relators believe that the Schmidt Memorandum is likely to include additional permitting content not protected from disclosure as attorney work product. In addition, even if this content were otherwise privileged, MPCA has affirmatively waived any attorney-client privilege or attorney work product protection for all portions of the Schmidt

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

Memorandum that reflect concerns that EPA had discussed with MPCA at any time during PolyMet permit development.

Mr. Schmidt's declaration and Richard Clark's declaration, both of which were submitted by MPCA to the Minnesota Court of Appeals as an affirmative defense to WaterLegacy's transfer motion, specifically put Mr. Schmidt's notes recording EPA concerns at issue. Mr. Schmidt's declaration stated, "EPA's comments in the April 5, 2018 call consisted of concerns that EPA had already discussed with MPCA during the permit-development process."[8] Mr. Clark's testimony waiving any privilege otherwise attaching to Mr. Schmidt's notes is definitive:

> ¶15 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. Mike Schmidt, an attorney with MPCA and another member of the Water Permit team, took notes on the call. After the call, MPCA reviewed the notes and we confirmed our impression of the call, which was that EPA had not raised any new, substantial concerns about the January 2018 public comment draft permit but had instead reiterated the principal concerns that it had previously raised in the twice-monthly calls and in-person meetings.
>
> ¶17 After the call and after reviewing the notes, MPCA found that EPA had not raised any issues during the call that had not already been fully discussed in previous calls.[9]

Under applicable case law, MPCA has waived any attorney-client or attorney work product privilege that might otherwise be applicable to Mr. Schmidt's notes of EPA concerns during the permitting process. In the Court's in-camera review of the Schmidt Memorandum, Relator's request that all content reflecting EPA's concerns during the permitting process be disclosed.

Similarly, MPCA has affirmatively and intentionally waived any attorney-client privilege or attorney work product protection that might otherwise apply to documents pertaining to MPCA's preparation of responses to comments on the PolyMet draft permit. The waiver is based

[8] *Id.* at ¶9.
[9] Clark Decl. May 28. 2019, Rel. 569 ¶¶ 15, 17, in **Ex. C.**

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

on Mr. Schmidt's declaration submitted by MPCA to the Minnesota Court of Appeals as an affirmative defense to the transfer motion, which not only describes the process whereby MPCA prepared comments that "overlapped" with EPA's comments, but asserts that MPCA's preparation of responses complied with law:

> ¶ 11 WaterLegacy accuses MPCA of efforts to "suppress[]" EPA's feedback and to mislead the public by not disclosing in MPCA's response to comments that EPA's feedback overlapped with stakeholders' written comments that the latter had submitted during the public-comment period. See WaterLegacy Reply, at 1, 17-18. Those accusations are misguided. MPCA responded to comments received during the comment period, which satisfies MPCA's obligations under Minnesota law.
>
> ¶ 14 MPCA did respond to the "content of [EPA's] comments," see WaterLegacy Reply, at 6, in its responses to overlapping written comments by public commenters. . . Had we included EPA comments in the responses to comments, we would only have cross-referenced to the responses that we had already made because EPA's concerns overlapped with the concerns of other stakeholders who submitted written comments. As a substantive matter, MPCA had already responded in writing to all of the concerns that EPA voiced to us orally. Thus, had we attributed certain substantive comments to EPA, we would not have changed the substance of the MPCA's responses at all.[10]

Under applicable precedent, MPCA's waiver applies broadly to the subject matter of MPCA's responses to comments on the draft PolyMet permit, including legal advice as well as comment preparation. Any documents pertaining to MPCA's preparation of comments should be immediately disclosed.[11]

Relators believe that sequential documents described as co-authored by Stephanie Handeland, Mr. Clark, and Mr. Schmidt or authored by Mr. Schmidt pertain to MPCA's preparation of responses to comments: 949, 950, 951, 952, 953, 954, 955, 956, 057, 958, 959, 960,

[10] Schmidt Decl. June 12. 2019, Rel. 574 ¶¶ 11, 14, in **Ex. C.**

[11] Applying this waiver, the following documents that would otherwise be subject to in-camera review should, instead, be directly disclosed to Relators unless MPCA attests that these documents don't pertain to the subject matter of MPCA's response to comments: 597, 953, 1166, 1250, and Supp-196.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973. Mr. Clark, Ms. Handeland and Mr. Schmidt all participated in drafting and reviewing responses to comments,[12] and responses to comments were prepared in spreadsheets and placed together in a non-public folder.[13] In addition, based on their dates, authors and recipients privilege log documents 1166, Supp-102, Supp-103, Supp-110, Supp-190, Supp-196[14] are likely to pertain to MPCA's preparation of responses to comments.

Relators request that the Court determine all that all privileges and protections for MPCA documents pertaining to the subject matter of responses to comments on the PolyMet draft permit and that all documents listed above be immediately disclosed to Relators, unless MPCA by affidavit or declaration demonstrates that a specific document or documents pertains to a different subject matter and requires individual consideration.

D. CRIME-FRAUD EXCEPTION

Under Minnesota law, "documents are entitled to protection under attorney-client privilege and work-product doctrine only when the protection is properly claimed and is neither waived nor lost." *Phillip Morris*, 606 N.W.2d at 694. Where documents "are tainted by crime-fraud, neither the work-product doctrine nor the attorney-client privilege protects those documents." *Id*. at 696; *citing In re Grand Jury Subpoenas*, 144 F.3d 653, 659-60 (10th Cir. 1998). In *Phillip Morris*, the court affirmed that documents were not privileged either where they related "*directly* to the control or suppression of research, and the creation of privilege shields to conceal possession of dangerous information" or where they "involved safety-related scientific research" which was alleged to have

[12] MPCA Designee (Jeff Udd) Tr. 18:17-19:12. Rel. 702, in **Ex. C**.
[13] See RELATORS_0062584, in **Ex. C.**
[14] Relators have also requested immediate disclosure of some of these documents (Supp-102, Supp-103, Supp-110, Supp-190) due to MPCA's failure to establish indicia of privilege.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

been suppressed and/or "were closely related to crime-fraud." *Id*. at 683. The court held that defendant tobacco companies "improperly claimed the privilege and have lost it." *Id*. at 693.

Although the *Phillip Morris* case used the phrase "crime-fraud" to describe the loss of privilege, the case was a civil suit for damages and injunctive relief, not a criminal prosecution. *Id*. at 680. In the prior case of *Levin v. C.O.M.B. Co*., 469 N.W.2d 512, 515 (Minn. App. 1991), the court found an attorney letter regarding employment records inadmissible, but included the "falsification" of records in a wrongful discharge case as a potential basis to invoke the crime-fraud exception to privilege. The court explained,

> Application of the crime-fraud exception should not be based on a rigid analysis. *See Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 284 (8th Cir. 1984), *cert. dismissed*, 472 U.S. 1022, 105 S. Ct. 3491, 87 L.Ed.2d 625 (1985). Instead, the focus should be on "whether the detriment to justice from foreclosing inquiry into pertinent facts is outweighed by the benefits to justice from a franker disclosure in the lawyer's office." *Id*. The guiding principle is whether the communication abused the attorney-client privilege, thus becoming unworthy of protection. *See Clark v. United States*, 289 U.S. 1, 16, 53 S. Ct. 465, 470, 77 L .Ed. 993 (1933).

Levin, 469 N.W.2d at 515. Other jurisdictions have similarly construed the crime-fraud exception broadly to include conduct other than common law or criminal fraud, including conduct that constitutes a fraud upon the court. *See, e.g., Fellerman v. Bradley*, 493 A.2d 1239, 1245 (N.J. 1985) (construing "fraud" broadly and "not limited to conventional notions of tortious fraud" so as to include "fraud upon the court"); *Volcanic Gardens Mgmt. Co., Inc. v. Paxson*, 847 S.W.2d 343, 347-48 (Tex. Ct. App. 1993) (finding "fraud" under the crime-fraud exception to be broader than common law or criminal fraud, and includes "attempted commission of fraud on the court or on a third person").

Federal cases in the Eighth Circuit similarly apply the crime-fraud exception to prevent assertion of either the attorney-client privilege or attorney work product protections for documents generated "in furtherance of [the client's] misconduct." *In re Green Grand Jury Proceedings*, 492

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

F.3d 976, 979-80 (8th Cir. 2007). Although a party seeking disclosure must make a prima facie showing that the legal advice has been obtained or document produced in furtherance of an illegal or fraudulent activity, the district court's inquiry should not devolve into a mini-trial to weigh the evidence. *Id.* at 982-84. If the client took advantage of an attorney's expertise "in aid of his endeavor to mislead others with a false cover-story regarding his conduct" there is no abuse of discretion in the district court's determination that the crime-fraud exception applies. *Id.* at 986.

Where Relators can make a prima facie showing that certain legal advice or documents were used in furtherance of alleged procedural irregularities involving lack of candor, a false cover-story, or omissions from the record of EPA's criticisms of the PolyMet permit or MPCA's communications to EPA to prevent submission of written comments, such documents may lose any attorney-client privilege or attorney work product protection otherwise available.

> **Application: To the degree that documents reviewed in-camera reveal that legal advice or attorney work product were used in furtherance of lack of candor, concealment, or preventing a record of EPA criticisms, any privilege associated with those documents should be lost and the documents fully disclosed.**

Relators request that the Court consider in the course of in-camera review that documents and statements that would otherwise be privileged lose that privilege if the legal advice or opinion work product in those documents is in furtherance of what is effectively a civil fraud to prevent a record of EPA oversight and concerns from becoming available to the public or any reviewing court. Relators have no access to the documents on MPCA's privilege log, and MPCA has provided no subject matter descriptions of the documents. However, based on the dates of documents for which MPCA has claimed privilege, Relators would ask the Court to give particular scrutiny to documents in August 2016 and February 2018 to determine if the crime-fraud exception

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

applied to except various documents only identified after a forensic search of MPCA's computers from privilege and protection

Relators have reason to believe that documents in August 2016 for which MPCA has claimed privilege may have been prepared or contain statements in furtherance of efforts to prevent a written record of EPA oversight and concerns. Documents produced in MPCA's unilateral forensic search show that MPCA redacted portions of an August 8, 2016 document where Ann Foss distributed to staff efforts made by Ms. Foss in 2013 to change standard operating procedures with EPA so that EPA will "engage MPCA in discussion" and "avoid any major problems between the agencies."[15] Relators exhibits include an August 18, 2016 email from Ms. Foss to the former MPCA Industrial Water Section Manager forwarding her April 2015 admonitions to EPA Region 5 NPDES Program branch manager Kevin Pierard to conduct "discussions" with MPCA rather than to send written documentation of EPA's understandings on permitting issues.[16] MPCA notes on an agenda of a conference call on August 24, 2016 also highlight issues regarding "communication, documentation and record management."[17]

MPCA's supplemental privilege log identifies a flurry of emails and attachments during August 2016: Supp-84, Supp-85, Supp-222, Supp-223, Supp-224, Supp-242, Supp-245, Supp-246, Supp-247, Supp-248, Supp-249, and Supp-250. Should any of these documents serve to further efforts made by Ms. Foss and, potentially, by other MPCA leadership, to prevent or discourage at written record of EPA oversight, Relators would request that the Court determine that any applicable privilege is lost and order that the documents be disclosed.

[15] *See* MPCA(62-cv-19-4626)_021564-021573, in **Ex. D**.
[16] *See* RELATORS_0061919-0061921, in **Ex. D**.
[17] *See* MPCA(62-cv-19-4626)__004146-004149 in **Ex. D**.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

Relators have reason to believe that MPCA considered a plan to request EPA not to provide written comments on the draft PolyMet water pollution permit even before the intense MPCA communications with EPA in March 2018. Ms. Handeland's notes in January and February of 2018 reflect EPA concerns about the draft PolyMet water pollution permit it had just received.[18] Documents obtained from the EPA under the Freedom of Information Act indicate that on March 5, 2018, staff planned to meet with MPCA Commissioner Stine, and EPA was already apprehensive that MPCA "may ask us not to comment."[19] MPCA's supplemental privilege log claims privilege for the following February 2018 documents: Supp-122, Supp-123, and Supp-128.

MPCA's efforts to prevent EPA from submitting written comments on the PolyMet draft water pollution and MPCA's destruction of documents and cover-up pertaining to these efforts are at the heart of Relators' allegations of procedural irregularities.

MPCA represented to the Court of Appeals that it "did not take *any actions* to 'request, encourage or otherwise affect' EPA's decision not to submit written comments on the Poly Met Permit." MPCA Sur-reply to WaterLegacy Transfer Mot. at 7 (emphasis added). MPCA also stated to the Court of Appeals that "[a]ll of the substantive notes of conversations that MPCA relied on in developing the Poly Met Permit are included in the administrative record." MPCA Sur-reply to WaterLegacy Transfer Mot. at 11. This Court should not permit MPCA to withhold documents that contain information contradicting MPCA's representations to the Court of Appeals. Any attorney-client or work product protection has been lost for withheld documents that show MPCA did take actions to "request, encourage or otherwise affect" EPA's decision not to submit written comments. Likewise, there is no protection for documents that show MPCA relied

[18] *See* RELATORS_0049785-0049791, in **Ex. D**.
[19] *See* EPA-R5-2019-002881_0000615, RELATORS_0064275, in **Ex. D**.

Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

on notes of conversations during the permitting process that are not included in the administrative record. Relators request that the Court's in-camera review process require disclosure of such documents.

CONCLUSION

For the reasons set forth above, Relators respectfully request that the Court provide the relief requested herein.

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Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

Respectfully submitted,

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Filed in District Court
State of Minnesota
12/23/2019 3:26 PM

CERTIFICATION

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

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