

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
EVIDENCE OF ALLEGED
IRREGULARITIES THAT EXCEED THE
SCOPE OF THIS MATTER**

INTRODUCTION

This Court should exclude testimony and evidence regarding alleged procedural irregularities that exceed the scope of this matter. Relators' first procedural irregularity alleges that the Minnesota Pollution Control Agency ("MPCA") "used irregular procedures to prevent creation of a record" relating to United States Environmental Protection Agency ("EPA") concerns "during NorthMet Project environmental review and throughout the NPDES Permit process."¹ This alleged procedural irregularity exceeds the scope of the Court of Appeal's transfer. Relators' sixth procedural irregularity alleges that EPA did not send a letter stating that deficiencies in PolyMet's initial 2016 permit application were resolved. This alleged irregularity also exceeds the scope of remand by ignoring the fact that PolyMet submitted a revised permit application in 2017. Equally

¹ Relators' List of Alleged Procedural Irregularities at 2 (Aug. 14, 2019).

problematic, Relators' seventh alleged procedural irregularity complains that PolyMet's NPDES permit is inconsistent with EPA's "substantive expectations and concerns." The Court should exclude evidence relating to alleged procedural irregularities separate from MPCA's approval of the permit that is at issue before the Minnesota Court of Appeals, including alleged irregularities relating to the environmental-review process and PolyMet's initial permit application, and it should not allow Relators to veer into their substantive complaints about the terms of PolyMet's NPDES permit.

FACTUAL BACKGROUND

A. A Memorandum of Agreement governs MPCA and EPA's relationship under the Clean Water Act.

The Clean Water Act, enacted in the 1970s, recognizes the primary role that states play in maintaining the integrity of the nation's waters. It provides that it is "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States" to protect and manage water resources. 33 U.S.C. § 1251(b). It also provides that "[i]t is the policy of Congress that the States . . . implement the permit programs" for national pollutant discharge elimination system ("NPDES") permits. *Id.*; *see also* 33 U.S.C. § 1342.

Minnesota's authority to implement its NPDES permit program—and EPA's role in overseeing that program—is defined by a Memorandum of Agreement ("Agreement") between MPCA and EPA, which the parties entered in 1974.² *See* 40 C.F.R. § 123.24. That

² *See generally* Memorandum of Agreement between the U.S. EPA and the MPCA for the Approval of the Statement NPDES Permit Program (May 7, 1974) (hereinafter

Agreement “provides the terms and conditions” under which the EPA approved Minnesota’s NPDES permitting system.³

The Agreement requires, among other things, the transmittal of NPDES permit applications to EPA, which must include “*the* permit application,”⁴ and provides a procedure by which EPA may provide “written comment” on the particular application.⁵ Under the Agreement, an NPDES permit application may not be processed by MPCA until “all deficiencies identified by the EPA are corrected.”⁶ The Agreement provides that if MPCA has received no response from EPA at the end of 20 days after EPA receives a particular application, MPCA may assume no comment is forthcoming.⁷ In other words, the Agreement contemplates a specific, single permit application.

B. PolyMet submitted two NPDES Permit Applications, only the latter of which was granted.

The NPDES permit at issue on appeal in this matter is one piece in a much larger regulatory puzzle, many other pieces of which are subject to separate litigation brought by Relators. Before PolyMet applied for an initial NPDES permit, the Minnesota Department of Natural Resources (“DNR”), United States Army Corp of Engineers, and

“Agreement”) (Evidentiary Hearing Ex. 2001 at POLYMET_0000099 – POLYMET_0000116). The Agreement includes amendments and addendums since 1974.

³ Mem. of Agreement at 1.

⁴ *Id.* at 3 (emphasis added).

⁵ *Id.* at 4.

⁶ *Id.* at 4.

⁷ *Id.* at 4.

United States Forest Service conducted an environmental review of the proposed NorthMet Project, culminating in a Final Environmental Impact Statement (“Final EIS” or “FEIS”).⁸ Relators did not challenge DNR’s March 2016 “decision determining the FEIS adequate.”⁹

After the environmental review concluded, PolyMet submitted an initial NPDES permit application to MPCA on July 11, 2016 (“2016 Permit Application”).¹⁰ Following the receipt of application feedback, including a November 2016 deficiency letter from EPA, PolyMet revised its NPDES permit application.¹¹ On October 23, 2017, PolyMet submitted a revised NPDES permit application (“2017 Permit Application”).¹² MPCA provided EPA with the updated application shortly thereafter.¹³

⁸ Final Environmental Impact Statement (November 2015), available in the administrative record at WATER_0015250, also *available at* https://files.dnr.state.mn.us/input/environmentalreview/polymet/feis/NMet_FEIS_Complete.pdf.

⁹ *See In re Application for a Supplemental Env’t Impact Statement for Proposed NorthMet Project*, Nos. A-18-1312, A18-1524, A18-1608, 2019 WL 2262780, at *1 (Minn. Ct. App. May 28, 2019).

¹⁰ NPDES/SDS Permit Application Transmittal Forms (July 2016) at WATER_0013116; *see also* Handeland letter re: application receipt (Aug. 2, 2016) at WATER_0006230. The entire 2016 Permit Application is available in the administrative record at WATER_0013107 – WATER_0014990.

¹¹ EPA comment letter re: PolyMet’s NPDES Permit Application (Nov. 3, 2016) at WATER_0048796 (*see also* Evidentiary Hearing Ex. (“EX.”) 306); *see also* PolyMet reply letter to EPA and MPCA (Nov. 9, 2016) at WATER_0006254. (EX. 2003).

¹² Revised NPDES/SDS Permit Application transmittal email (Oct. 23, 2017) at WATER_0040651 (EX. 2004).

¹³ R. Clark (MPCA) email to K. McKim (EPA) re: Updated Permit Application (Oct. 26, 2017) at WATER_0001230 (EX. 2005).

EPA—which had been involved throughout the permitting process and had reviewed the final version of the permit—did not object to or otherwise block MPCA from approving PolyMet’s 2017 Permit Application. As MPCA designee Jeff Udd explained, the 2017 Permit Application superseded the previous one, thereby restarting the requisite process under the Agreement.¹⁴ Although EPA issued a deficiency letter in response to the 2016 Permit Application, PolyMet subsequently “revised the permit application and submitted another one in October of 2017.”¹⁵

C. Relators sought certiorari review of the permit granting PolyMet’s 2017 Permit Application.

After MPCA approved PolyMet’s 2017 Permit Application, Relators sought review by certiorari from the Minnesota Court of Appeals. Based on Relators’ allegations of procedural irregularities, the Court of Appeals exercised its authority under Minnesota Statutes section 14.68 to transfer this matter to this Court. But the Court of Appeals’ transfer was for a “limited purpose.”¹⁶ The Court of Appeals recognized that the certiorari appeal concerned MPCA’s “granting a National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permit”—which was under the 2017 Permit Application—“to respondent Poly Met Mining, Inc. (PolyMet) for its NorthMet Project.”¹⁷

¹⁴ MPCA Designee Udd Dep. Tr. at 14:1-11 (Ex. 1 to McGhee Declaration).

¹⁵ *Id.*

¹⁶ Transfer Order at 4 (June 25, 2019).

¹⁷ Transfer Order at 1 (emphasis added). This Court has recognized the same. *See* August 7, 2019 Hearing Tr. at 91:13-15 (“[MPCA] granted an NPDES/SDS permit. Appeals were taken from that order by certiorari.”).

The Court of Appeals transferred the certiorari matter to this Court “for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure.”¹⁸ As this Court recognized, it has been asked to consider “what are the alleged irregularities, what are the proper procedures for consideration of a permit of this nature, what statutes and rules set forth the proper procedure.”¹⁹ This Court has explained that “the information [the Court] accept[s] in evidence at a hearing is going to be limited to what is needed to resolve those issues.”²⁰

ARGUMENT

Relators should be prohibited from introducing evidence or argument regarding alleged procedural irregularities that pre-date PolyMet’s application for the permit that is at issue on appeal—the 2017 Permit Application. Specifically, Relators should be precluded from introducing evidence regarding alleged irregularities in other processes, such as the environmental review process, or related to the initial 2016 Permit Application, because MPCA did not grant any permit under the 2016 Permit Application and no other process is at issue in this certiorari appeal. Further, Relators should be prohibited from arguing that PolyMet’s permit is “inconsistent with” EPA’s “substantive expectations and concerns”—which, by definition, is not an irregularity *in procedure*. Any evidence on these points is irrelevant and will unduly confuse the issues and delay these proceedings.

¹⁸ *Id.* at 4.

¹⁹ August 7, 2019 Hearing Tr. at 96:5-7.

²⁰ August 7, 2019 Hearing Tr. at 96:7-9.

I. Evidence related to the first, sixth, and seventh alleged irregularities that exceed the limited scope of this matter should be excluded as irrelevant.

Both this Court and the Court of Appeals have described the inquiry before this Court as “limited.”²¹ That limited scope is tied to the procedures leading to issuance of the permit that is being reviewed on appeal—the permit granting PolyMet’s 2017 Permit Application. By invoking the entire “NorthMet Project environmental review,” Relators’ first alleged procedural irregularity far exceeds that limited scope, and evidence exceeding the limited scope should be excluded as irrelevant.

It is a bedrock principle of evidentiary law that “[e]vidence which is not relevant is not admissible.” Minn. R. Evid. 402. Relevant evidence is defined as that “evidence having 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 (emphasis added). Determining whether evidence is relevant “rest[s] within the sound discretion of the trial court.” *State v. Hanks*, 817 N.W.2d 663, 667 (Minn. 2012).

Relators’ first, sixth, and seventh alleged procedural irregularities encompass alleged issues that are of no consequence to the questions facing the Court of Appeals and this Court. The only question before the Court of Appeals is whether the “decision of the agency” to issue an NPDES Permit granting PolyMet’s 2017 Permit Application was lawful under the Minnesota Administrative Procedure Act. *See* Minn. Stat. § 14.69.²² This Court

²¹ August 7, 2019 Hearing Tr. at 95:19-21; Transfer Order at 4.

²² *See also* Transfer Order at 2.

has been asked to resolve a far narrower issue that flows directly from that question: whether there are any irregularities in procedure regarding MPCA's decision to grant the 2017 Permit Application.

Despite the limited nature of the decision on review, Relators' first alleged procedural irregularity concerns the entire "NorthMet Project environmental review" and "NPDES Permit process," a time period that spans more than a decade.²³ The environmental review process included a 2009 draft EIS and culminated in a 2015 Final EIS that was not challenged by certiorari appeal. *See In re Application for a Supplemental Evt'l Impact Statement for Proposed NorthMet Project*, Nos. A-18-1312, A18-1524, A18-1608, 2019 WL 2262780, at *1 (Minn. Ct. App. May 28, 2019). This Court has recognized that expanding this limited proceeding to encompass alleged irregularities in that separate, preceding environmental-review process would not be appropriate, explaining:

I'm not going to be opening up this hearing to procedural irregularities *in other processes*. This is only about procedural irregularities in the permitting process. That doesn't begin until someone wants to have a permit. So that's a hard cutoff date, July 11, 2016. *There can't be procedural irregularities before that date because there is no permitting process before that date*. There's a lot of preliminary processes. There's environmental impact statement processes. *Those are different processes, and none of them are at issue in this case.*²⁴

Evidence of alleged irregularities in other processes, including the environmental-review process, should accordingly be excluded as irrelevant.

²³ Relators' List of Alleged Procedural Irregularities at 2 (Aug. 14, 2019).

²⁴ Sept. 16, 2019 Hr. Tr. at 60:15-25 (emphasis added).

Nor is evidence of alleged irregularities in the permitting process pre-dating the 2017 Permit Application relevant to the ultimate issues before the Court of Appeals and this Court.²⁵ MPCA granted the NPDES Permit to PolyMet under the 2017 Permit Application, which updated and replaced the 2016 Permit Application. That the two applications were distinct is evidenced by the fact that MPCA separately transmitted the 2017 Permit Application to EPA under the Agreement.²⁶ After the 20-day period elapsed following MPCA's transmittal of the 2017 Permit Application to EPA without EPA identifying any deficiencies, under the Agreement, MPCA could assume no EPA comment was forthcoming.²⁷ Consistent with the Agreement, as MPCA designee Jeff Udd explained, the 2017 Permit Application superseded the 2016 Permit Application, meaning that only the 2017 Permit Application is the particular permit, or agency decision, being challenged on appeal.²⁸ Since MPCA never granted or denied PolyMet's 2016 Permit Application, any alleged irregularities in procedure relating to that application are irrelevant and evidence regarding the same should be excluded.

²⁵ Although this Court permitted discovery dated back to the 2016 Permit Application, evidence may be discoverable, but not admissible at trial. *See, e.g., State v. Rambahal*, 751 N.W.2d 84, 91-92 (Minn. 2008); *Shetka v. Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916, 919 (Minn. 1990).

²⁶ *See* EPA comment letter re: PolyMet's NPDES Permit Application (Nov. 3, 2016) at WATER_0048796 (*see also* EX. 306); R. Clark (MPCA) email to K. McKim (EPA) re: Updated Permit Application (Oct. 26, 2017) at WATER_0001230 (EX. 2005).

²⁷ Mem. of Agreement at 4. (EX. 2001)

²⁸ MPCA Designee Udd Dep. Tr. at 14:1-11 (Exhibit 1 to McGhee Declaration).

Relators' seventh alleged procedural irregularity presents similar problems. In fact, that allegation is not procedural at all. Instead, Relators allege that the "final NPDES Permit conditions are inconsistent with EPA expectations, concerns, and communications" ²⁹ To prevail on that claim, Relators presumably intend to introduce evidence concerning EPA's *substantive* concerns, then argue that the terms of PolyMet's permit do not satisfy those concerns. But even if they could show such inconsistency, it would only prove substantive disagreement, not procedural irregularity. Because the Court of Appeals transferred this case "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure," ³⁰ any evidence of substantive disagreements is irrelevant.

II. Evidence related to the first, sixth, and seventh irregularities that exceed the limited scope of this matter should be excluded under Rule 403.

Even if evidence related to alleged irregularities in other processes or substantive questions between MPCA and EPA were marginally relevant, any such evidence should be excluded because it risks unduly delaying this proceeding and confusing the issues.

Under Minnesota Rule of Evidence 403, courts may exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Evidence that is only "marginally

²⁹ Relators' List of Alleged Procedural Irregularities at 3 (Aug. 14, 2019).

³⁰ Transfer Order at 4.

relevant” may be excluded, particularly when such evidence creates the risk of confusion or delay. *In re T.C.J.*, 689 N.W.2d 787, 792 (Minn. Ct. App. 2004).

As explained above, the issue before the Court of Appeals is whether PolyMet’s 2017 Permit Application should have been granted. This Court has described its job on remand from the Court of Appeals as determining “what are the proper procedures for consideration of a permit of this nature, what statutes and rules set forth the proper procedure,” and whether those procedures were followed.³¹ Consistent with this understanding, Relators have described the comment period following the 2017 Permit Application as a “critical period” in this case.³²

Irregularities in other processes, or related to the 2016 Permit Application are not the core issues in this case, since those other processes and that initial permit application are not the decisions that the Court of Appeals is reviewing. Indeed, with respect to the 2016 Permit Application, there is no “decision” granting or denying that application. And even if there were a pattern of irregularities (which there is not), a pattern or practice does not “set forth the proper procedure,” but rather “statutes and rules” do so.³³ Thus even if alleged irregularities in other processes related to the 2016 Permit Application were relevant, they are at best marginally so and risk needlessly drawing out this

³¹ August 7, 2019 Hearing Tr. at 96:5-7.

³² August 7, 2019 Hearing Tr. at 19:2-7.

³³ See August 7, 2019 Hearing Tr. at 96:5-7. Moreover, there is a much more efficient way to address past practices, since MPCA has represented that it is “ready to stipulate that no one has – in their experience, no one has had experience with” EPA reading its written comments on a permit application “aloud during in-person or telephone conversation[s].” *Id.* at 31:18-24; see also *id.* at 33:6-10, 37:4-8.

proceeding and confusing the issues. Any such evidence should be excluded. The same thing is true for evidence intended to show that EPA and MPCA had substantive disagreements about the terms of PolyMet's NPDES permit. Relators are free to introduce evidence about the procedures by which those alleged disputes were aired. But evidence of the substantive disagreements themselves is something that must be reserved for the Court of Appeals, which has jurisdiction over the merits of this case.

CONCLUSION

Relators' first, sixth, and seventh alleged procedural irregularities go far beyond the permitting process. They allege irregularities that are irrelevant to this case and risk needlessly extending the evidentiary hearing. Relators should be precluded from putting on evidence regarding alleged procedural irregularities in environmental review (or other non-NPDES-permitting processes), alleged irregularities pre-dating the 2017 Permit Application, and any evidence intended to prove inconsistency between EPA's "substantive expectations and concerns" and the terms of PolyMet's permit.

Dated: December 27, 2019

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