

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT  
Case Type: Civil Other/Misc.

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis County Hoyt Lakes and Babbitt Minnesota

Case No. 62-CV-19-4626

The Honorable John H. Guthmann

**POLY MET MINING, INC.'S  
MEMORANDUM IN OPPOSITION TO  
RELATORS' MOTION IN LIMINE FOR  
SPOILIATION SANCTIONS**

**INTRODUCTION**

Poly Met Mining, Inc. (“PolyMet”) opposes Relators’ motion seeking spoliation sanctions against Respondent Minnesota Pollution Control Agency (“MPCA”), in which they allege that MPCA destroyed physical and electronic evidence during anticipated litigation. The heart of Relators’ claim is that “MPCA breached its duty to preserve evidence pertaining to conversations between EPA and MPCA regarding the PolyMet water permit.”<sup>1</sup> Relators thus ask “to have inferences drawn against MPCA in favor of Relators” where there is a “lack of evidence” showing irregularities in procedure or “missing information.”<sup>2</sup>

Relators’ motion asks this Court to make premature factual findings with respect to MPCA’s document-preservation procedures—the same findings that this Court will be asked to make after the evidentiary hearing. Indeed, Relators’ list of alleged procedural

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<sup>1</sup> Relators’ Motion in Limine for Spoliation Sanctions at 11 (Dec. 27, 2019).

<sup>2</sup> *Id.* at 15 n.12.

irregularities includes the allegation that “MPCA improperly destroyed, discarded, and failed to retain portions of the written record of communications with EPA regarding the NPDES Permit . . . and other records reflecting phone conferences, meetings, emails, and other communications with EPA pertaining to the NPDES Permit.”<sup>3</sup> Any finding on whether MPCA “breached its duty to preserve evidence” would be a premature finding on the merits of Relators’ allegation.<sup>4</sup> Further, any finding or factual inference against MPCA would harm PolyMet, which is not alleged to have engaged in any spoliation and whose permit is at stake. The Court should thus deny Relators’ motion or at least reserve a ruling until all evidence presented at the evidentiary hearing has been heard.

## ARGUMENT

### **I. Relators’ motion seeks a determination on the merits.**

Relators have repeatedly identified MPCA’s alleged failure to properly preserve documents and thus “critical documents are missing from the administrative record” as a procedural irregularity.<sup>5</sup> In both form and substance, there is no difference between that alleged irregularity in procedure and Relators’ spoliation claims. Therefore, to rule on Relators’ request for sanctions, this Court would have to make factual findings about what MPCA did to preserve documents and whether its actions complied with its governing

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<sup>3</sup> Relators’ List of Alleged Procedural Irregularities at 2–3 (Aug. 14, 2019).

<sup>4</sup> See Relators’ Motion in Limine for Spoliation Sanctions at 8 (“MPCA destroyed, discarded, and failed to preserve documentary evidence in a manner that amounts to spoliation.”) (Dec. 27, 2019).

<sup>5</sup> Relators’ List of Alleged Procedural Irregularities at 2–3, 6 (Aug. 14, 2019).

regulations and procedures. Any such findings would circumvent the evidentiary hearing process. Relators bear the burden to prove their alleged irregularities at the hearing, with evidence, not based on their description of what documents they believe should exist in MPCA's records.

Relators' motion itself essentially acknowledges the need for an evidentiary hearing on these issues. In Footnotes 11 and 12 to their motion, Relators admit that they "do not have conclusive evidence that MPCA directed the deletion of certain evidence outside a normal retention policy,"<sup>6</sup> and that there will likely be "gaps" in the evidence or "missing information."<sup>7</sup> The fact that MPCA adhered to its document retention policy does not justify any adverse inferences—especially when it is possible that any allegedly "missing" documents never existed in the first place, because MPCA did not depart from the requisite procedures. That is what the evidentiary hearing is meant to determine.

**II. Even if the Court has authority to sanction MPCA, it should not do so in a manner that would harm Polymet.**

Putting aside the propriety of Relators' motion, even if this Court has authority to impose sanctions for spoliation, it should not make adverse inferences against MPCA that would harm PolyMet. In asking that this Court impose sanctions on MPCA, Relators ignore that MPCA and Relators are not the only parties to this proceeding. Any adverse finding against MPCA will harm PolyMet, which is not alleged to have engaged in any spoliation. Imposing such sanctions would undermine the purpose of spoliation sanctions by

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<sup>6</sup> Relators' Motion in Limine for Spoliation Sanctions at 13 n.11 (Dec. 27, 2019).

<sup>7</sup> *Id.* at 15 n.12.

punishing an unwitting third party. This is the exact kind of case in which “the power to sanction” must be “tempered by a ‘duty to impose the least restrictive sanction available under the circumstances.’” *Patton v. Newmar Corp.*, 538 N.W.2d 116, 118 (Minn. 1995).

In determining whether to impose a sanction for spoliation of evidence, courts should consider “the nature of the item lost in the context of the claims asserted and the potential for remediation of prejudice.” *Id.* at 119. The evidence this Court receives during the evidentiary hearing likely will resolve Relators’ alleged irregularities in procedure, which include allegations that MPCA failed to properly preserve documents and that “critical documents are missing from the administrative record.”<sup>8</sup> The resolution of those allegations likewise would address the merits of Relators’ spoliation motion. Allegations about missing documents must be proven at the evidentiary hearing—with witness testimony and exhibits—not simply on Relators’ motion arguing about what documents should exist. And Relators suffer no prejudice by having to prove their allegations at the hearing. After this matter is transferred back to the court of appeals after the hearing, Relators will still have the chance to ask the court of appeals to decide whether MPCA’s decisions prejudiced Relators’ substantial rights under Section 14.69. Therefore, this Court should not make any adverse inferences against MPCA before the evidentiary hearing begins. At a minimum, the Court should reserve any findings and rulings until after all of the evidence has been presented at the hearing, so that PolyMet’s interests in a fair and full adjudication of the issues are preserved.

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<sup>8</sup> Relators’ List of Alleged Procedural Irregularities at 2–3, 6 (Aug. 14, 2019).

## CONCLUSION

The Court should deny Relators' motion for spoliation sanctions or reserve a ruling on the motion until after the conclusion of the evidentiary hearing.

Dated: January 10, 2020

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