

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

INTRODUCTION

Pursuant to the Court's Amended Order of November 19, 2019, Relators¹ respectfully make the following motion *in limine* to (1) limit the use of Minnesota Pollution Control Agency's ("MPCA") and PolyMet Mining Inc. ("PolyMet") proposed exhibits that provide improper post hoc justification regarding MPCA's interactions with the U.S. Environmental Protection Agency ("EPA") during the permitting process and (2) exclude PolyMet's proposed Exhibit 2029 which is not relevant to this proceeding.

ARGUMENT

"The purpose of a motion *in limine* is to prevent 'injection into trial of matters which are irrelevant, inadmissible and prejudicial.'" *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 418 (Minn. App. 2003) (quoting Black's Law Dictionary 1013 (6th ed. 1991)); *accord see State v. Smallwood*, 594 N.W.2d 144, 152 (Minn. 1999); *State v. Yates*, 392 N.W.2d 30, 32 (Minn. 1986) (both upholding district court's decision to grant motion *in limine* to exclude inadmissible

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

evidence). It is well established that evidence is only admissible if it is relevant. Minn. R. 1400.7300, subp. 1; *see also* Minn. R. Evid. 402. It is equally well established that relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or by considerations of . . . needless presentation of cumulative evidence.” Minn. R. Evid. 403.² “Relevant” evidence is “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.” *Id.* R. 401 (quoted in *State v. Hopperstad*, 367 N.W.2d 546, 549 (Minn. App. 1985)).

1. The Use of Exhibits Containing Post Hoc Justifications Should be Limited.

MPCA and PolyMet have identified various documents that they plan to use at the evidentiary hearing which are all either communications that occurred or documents created after MPCA issued the PolyMet water pollution permit, NPDES/SDS Permit No. MN0071013 on December 20, 2018. These proposed exhibits are as follows: MPCA Exhibits 1120 through 1127; and PolyMet Exhibits 2025 through 2030 (collectively, the “post hoc exhibits”).³ This Court should limit MPCA and PolyMet from presenting evidence of post hoc justifications for permit issuance using these exhibits. Any such post hoc justifications are irrelevant and any possible probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. The purpose of the evidentiary hearing is to determine the alleged procedural irregularities that occurred during the permitting process. Relators seek to limit the use of the post hoc exhibits

² By citing to the Minnesota Rules of Evidence, Relators do not waive their argument that this administrative proceeding should be governed by the evidentiary standard of the Minnesota Administrative Procedures Act. *See* Relators’ Motion *in Limine* to Admit Evidence Pursuant to the Minnesota Administrative Procedures Act’s Rules of Evidence (filed Dec. 27, 2019).

³ To the extent MPCA or PolyMet advance post hoc justifications in this proceeding, Relators reserve the right to attack the relevance, credibility and weight of such justifications.

because they contain improper post hoc justification purporting to explain how MPCA interacted with EPA, and also purport to explain that MPCA addressed EPA's comments and concerns. These documents, however, were created well after the events they purport to explain.

The use of post hoc exhibits as evidence of what occurred during the permitting process should not be allowed. The post hoc exhibits involve communications or statements beginning in January of 2019 that were in direct response to news and congressional inquiries calling into question MPCA's conduct during the permitting process, and were specifically manufactured to defend against these inquiries. *See e.g.*, MPCA Exhibit 1120 (Jan. 18, 2019 Email from Shannon Lotthammer to Laura Bishop regarding talking points and response to Congressional press release regarding suppression of EPA comments by MPCA); MPCA Exhibit 1126 (Jun. 12, 2019 Email from Darin Broton to Kristin Beckmann re Statement on new EPA allegations). Neither MPCA nor PolyMet should get the substantive benefit of the after-the-fact and self-serving rationales contained in those documents. *See, e.g., Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012) (agency does not get deference "when it appears that the interpretation is nothing more than a 'convenient litigation position' or a 'post hoc rationalization[]' advanced by an agency seeking to defend past agency action against attack.").

Moreover, MPCA's after-the-fact statements are prejudicial to Relators and will only cause confusion. As the Court of Appeals explained in *Hurtle v. County of Sherburne ex. Rel. Board of Comm'rs*, "[t]he purpose for requiring that findings be contemporaneous is to prevent the decision-making entity from later providing reasons that are 'completely unconnected with the actual basis for the [decision].' The better the record of the meeting kept by the entity, the less probability that the entity will engage in post hoc justification." 594 N.W.2d 246, 250 (Minn. App. 1999) (internal

citations omitted). Allowing MPCA or PolyMet to use the post hoc exhibits as substantive proof of what happened allows the Agency's spin to become the story.

Finally, use of post hoc exhibits as evidence of permitting events or intentions should be excluded as violating the best evidence rule. This rule "prohibits the introduction of secondary evidence to establish the contents of a writing where the writing itself is available." *State v. DeGidio*, 152 N.W.2d 179, 180 (Minn. 1967). The original findings of fact and conclusions of law that form the basis of MPCA's decision to issue the NPDES/SDS Permit are available to the Court because they are exhibits identified by MPCA and PolyMet in this proceeding. Similarly, documentary evidence produced by the parties in this proceeding that was contemporaneous with meetings or discussions with EPA provide the best evidence of how MPCA interacted with EPA during the permitting process.⁴

For these reasons, Relators request that the Court limit the use of proposed MPCA Exhibits 1120 through 1127 as well as, proposed PolyMet Exhibits 2025 through 2030 and not allow these exhibits to be used as substantive evidence of what occurred during the permitting process. However, if Court declines to limit the use of the post hoc exhibits, Relators respectfully request that they be permitted to add RELATORS_0064181 to their exhibit list. *See* Exhibit A (RELATORS_0064181) (attached). This is because MPCA has identified as MPCA Exhibit 1125 a letter from the EPA to the Fond du Lac Band of Lake Superior Chippewa ("Band") relating to the release of EPA comments. Relators believe the EPA letter contains improper post hoc

⁴ To the extent that MPCA, or PolyMet for that matter, might assert an exception to the best evidence rule applies, *see State v. Dienger*, 176 N.W.2d 528, 530 (Minn. 1970) (exception to best evidence rule applies only where original writings have been lost or destroyed), the Court should reject that position. It would be prejudicial to Relators to allow MPCA to rely on post hoc justifications because contemporaneous evidence has been destroyed by MPCA. Indeed, Relators have moved for adverse inferences regarding the destruction of this evidence. *See* Relators' Motion *in Limine* for Spoliation Sanctions (filed Dec. 27, 2019).

justification from EPA regarding the permitting process. But if the use of that document is not limited during the hearing, RELATORS_0064181 is necessary to show the complete record of communications between the Fond du Lac Band and EPA relating to the release of EPA comments in June 2019.

2. PolyMet Exhibit 2029 should be excluded.

PolyMet's Exhibit 2029 is a copy of the complaint that the Band filed in the federal District of Minnesota in *Fond du Lac Band of Lake Superior Chippewa v. Stepp*, No. 19-2489 (D. Minn. filed Sept. 10, 2019). In that complaint, the Band alleges that federal officials employed by the EPA and Army Corps of Engineers violated federal laws, including the federal Administrative Procedure Act, in relation to federal actions and decisions relating to PolyMet's NPDES Permit and 404 Wetlands Permit. The Band's complaint should be excluded.

First, the complaint is entirely irrelevant. The only issue in dispute in this proceeding is whether state officials engaged in irregular procedures to approve a state law permit. The outcome of this case is unaffected by whether the Band has made allegations that federal officials violated federal law, or the substance of those allegations. The Band's federal complaint is against federal officials who are under the proper jurisdiction of the federal district court. While there may be some similarity between the Band's federal complaint and this case based on underlying facts, the Band's federal complaint relates only to violations of federal law and is not relevant to the Band's state claims before this Court.

Second, to the extent that the Band's federal complaint contains factual allegations, those factual allegations have already been made in Relators' Allegations of Procedural Irregularities filed with this Court on August 14, 2019. As such, the federal complaint is needlessly cumulative of facts already alleged in this case. Moreover, the alleged facts at issue in this case are best

addressed through the testimony of witnesses and use of contemporaneous records made at the time. And the Band's conduct is not at issue in this case, and no representative of the Band is a witness in this case.

Lastly, inserting allegations of violation of federal laws into the case would needlessly confuse the issues by inserting federal law claims into a state court proceeding adjudicating state law. For these reasons, Relators respectfully request that the Court exclude the use of proposed PolyMet Exhibit 2029.

CONCLUSION

Relators respectfully request that the Court limit the use of proposed MPCA Exhibits 1120 through 1127, and proposed PolyMet Exhibits 2025 through 2030 so that they cannot be admitted as substantive evidence of what occurred during the permitting process, and Relators also respectfully request that the Court exclude PolyMet's proposed Exhibit 2029. In the event that the Court denies this Motion, Relators request that they be allowed to add RELATORS_0064181 to their exhibit list as well as raise objections based on testimony and evidence presented during the evidentiary hearing.

[Signature blocks next page]

DATED: December 27, 2019

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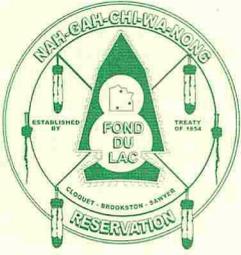
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June 18, 2019
Via E-Mail

Cathy Stepp
Regional Administrator
U.S. EPA, Region 5
77 West Jackson Blvd
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Re: PolyMet Mining Inc. NorthMet Mine

Dear Regional Administrator Stepp:

The Fond du Lac Band of Lake Superior Chippewa (“Band”) is in receipt of your June 12 letter responding to the Band’s May 15 in-person request for documents related to EPA’s review of the National Pollutant Discharge Elimination System (“NPDES”) permit issued for the NorthMet mining project. The Band appreciates receiving the eight page “Enclosure” document with EPA comments to the Public Notice Draft Permit Received January 17, 2018. Upon review of the disclosure, the Band was disappointed to learn that the disclosure of information EPA provided to it does not contain all of the relevant pages or copies of documents that were provided to WaterLegacy. WaterLegacy received additional information on June 12 as a result of pending litigation over a Freedom of Information Act request.

Based on the documents EPA provided to WaterLegacy, which were shared with the Band, it appears that EPA prepared and was ready to send written comments to the Minnesota Pollution Control Agency (“MPCA”) detailing its concerns on the draft NPDES permit. Although your June 12 letter notes that EPA staff are encouraged to work more collaboratively and speak face-to-face with state officials, it is not clear why EPA did not send the written comments to MPCA. The documents provided to WaterLegacy confirm that the comments were in final form and ready to send. Indeed, the handwritten note on the transmittal letter provided to WaterLegacy states that the comments were read word for word over the phone to MPCA. As such, the Band does not agree that those documents were subject to any applicable privilege.

Cathy Stepp
June 18, 2019
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The Band is also concerned about the lack of transparency regarding the EPA's communications with MPCA and its unwillingness to publicly share its concerns related to the NorthMet project throughout the permitting process. Based on recent news articles it also appears that EPA staff developed a memorandum to the file dated December 18, 2018 which documents how many of the issues raised by EPA were not resolved. *See* StarTribune Article dated June 14, 2019 (attached). The Band hereby requests that memorandum be promptly released to the Band. If EPA believes that the memorandum is privileged, we would appreciate a detailed explanation as to EPA's reasoning.

Thank you.

Sincerely,



Kevin R. Dupuis
Chairman

LOCAL

Federal watchdog opens inquiry into EPA handling of Minnesota PolyMet pollution permit

Retired agency attorney calls permit process "unethical" and "bizarre."

By Jennifer Bjorhus (<http://www.startribune.com/jennifer-bjorhus/34031274/>) Star Tribune

JUNE 14, 2019 — 10:28PM

The Environmental Protection Agency Office of Inspector General has opened an investigation into the agency's handling of a crucial pollution permit for Minnesota's first copper mine after a retired agency attorney raised questions about the episode.

The [investigation \(https://www.epa.gov/office-inspector-general/notification-hotline-complaint-epa-review-polymet-mining-companys-national\)](https://www.epa.gov/office-inspector-general/notification-hotline-complaint-epa-review-polymet-mining-companys-national) was announced June 12, the same day the Environmental Protection Agency (EPA) released documents related to the water quality permit requested by several parties, including the Minnesota-based advocacy group WaterLegacy and U.S. Rep. Betty McCollum, D-Minn.

Release of the documents shows that written comments by EPA regulators, challenging key parts of the permit, were never formally submitted for the public record and were never sent to officials at the Minnesota Pollution Control Agency (MPCA). Instead, the comments were read to MPCA staff over the telephone last spring, a practice that the retired EPA attorney described as "bizarre."

The Star Tribune has also requested the documents, but the EPA hasn't yet provided them.

The documents relate to a crucial state water quality permit issued to PolyMet Mining, a Toronto-based minerals firm that wants to build a \$1 billion copper-nickel mine in northeast Minnesota. After years of review, PolyMet cleared most of Minnesota's regulatory hurdles in late 2018. The newly released documents include seven pages of detailed criticism by EPA Region 5 staff in Chicago, which oversees Minnesota's enforcement of federal pollution laws, outlining deficiencies in the permit that the MPCA issued to PolyMet last December. It is the first time the EPA's official comments on the permit, which will regulate dangerous pollutants in effluent from the mine, have been made public.

The written comments note that the permit would "authorize discharges that would exceed Minnesota's federally-approved human health and/or aquatic life water quality standards for mercury, copper, arsenic, cadmium, and zinc." In one core passage, they said the permit lacked specific effluent limits, known as WQBELs, which are numeric limits on how much of a pollutant can be in the effluent pumped out a discharge pipe.

A retired EPA attorney from Boston, Jeffrey Fowley, learned of the phoned-in comments from confidential sources in January and filed a complaint with the EPA's Office of Inspector General.

The sources told him EPA leadership in Region 5 were suppressing staff comments. Fowley has called it "serious improper conduct" and "unethical."

"In all my years of experience, I have never heard of a situation where EPA personnel have read written comments on a permit to state personnel over the phone," Fowley said in a sworn declaration filed with the Minnesota Court of Appeals.

MPCA officials told the Star Tribune there was nothing unusual about their exchange with the EPA, and that they did incorporate many of the agency's concerns into the final permit for PolyMet.



ANTHONY SOUFFLE — STAR TRIBUNE

The Polymet tailings ponds could be seen over a small berm.

In an interview Friday, Fowley said he and Minnesota's Fond du Lac Band of Lake Superior Chippewa, which also filed a complaint, were pleased with the Inspector General's decision.

"I think the fact that they're taking up this one indicates they think there is something seriously wrong," Fowley said.

McCollum, who waged a monthslong public battle to obtain the EPA documents, had only brief comments. In a statement to the Star Tribune she said her role was to "ensure transparency."

"Now the courts and the public have the information needed to determine whether the final permit adequately addresses the many concerns raised by the EPA," said McCollum, who leads a House subcommittee that oversees the EPA.

Differing documents

In a letter to McCollum with the documents, EPA Acting Associate Administrator Joseph Brazauskas said it's common practice for complex permitting decisions to be handled verbally rather than in writing.

"EPA Region 5 Administrator Cathy Stepp has specifically encouraged EPA staff to work more collaboratively and speak 'face-to-face' with state officials," Brazauskas wrote.

Brazauskas also said the EPA hadn't planned to release the written comments because it considers them private under the "deliberative process privilege" exemption to the federal Freedom of Information Act.

However, he said, the agency had given the comments voluntarily to the Fond du Lac tribe, so it could no longer withhold them.

The EPA's written comments were also sent to WaterLegacy, an advocacy group in St. Paul, and the Fond du Lac Band, whose land is downstream from PolyMet's proposed mine near Babbitt.

The parties together have challenged the water permit over its lack of stringent, federally enforceable limits on nearly two dozen pollutants regulated by the Clean Water Act.

The documents received by WaterLegacy, however, differ slightly from those sent to McCollum; they include a separate letter from Kevin Pierard, a senior official in the EPA's Chicago office, to Jeff Udd, the MPCA's director of metallic mining, which underscores the fact that the EPA's concerns were conveyed by phone, not in writing.

Many sections in this copy of the written comments were underlined and numbered; across the top Pierard wrote by hand that the underlined sections were "conveyed verbally" to the MPCA on April 5, 2018, and lists the MPCA staff on the phone call.

The phone conversation occurred several weeks after the public comment period on PolyMet's draft permit closed in March 2018, meaning that the EPA-written criticisms were never entered in the public record.

The EPA's criticisms should have been public from the start, said WaterLegacy lawyer Paula Maccabee.

"They are some of the strongest comments I've ever seen," she said. "It's like one of the most important documents in this entire case, and it's not in the administrative record."

'Rigorous' review

MPCA officials and former MPCA Commissioner John Linc Stine said nothing improper occurred in the episode and that the final PolyMet permit did reflect some of the EPA comments.

In an interview, Stine said nothing requires the EPA to submit written comments during the public comment period. He also said that the concerns the EPA read over the telephone were similar to comments other stakeholders had filed previously.

EPA watchdog will investigate key permit for PolyMet mine - S...

<http://www.startribune.com/federal-watchdog-opens-inquiry-into-epa-permit-12472019>

"It didn't strike me that there was anything that was plowing new ground," he said.

In a statement, MPCA spokesman Darin Broton described the PolyMet permit process as "rigorous" and said the agency discussed technical issues with the EPA frequently.

"Based on those conversations, as well as other comments received ... during the official comment period, the MPCA made substantive changes to the draft permit, including additional limits for arsenic, cobalt, lead, nickel and mercury; and new language was added that clearly states that the discharge must not violate water quality standards," Broton said. "That's why the EPA did not object to the MPCA's final permit."

Several MPCA staff members have filed sworn statements as part of an appeal filed by WaterLegacy, making similar arguments.

Former MPCA staff attorney Michael Schmidt said in his declaration that no one tried to conceal anything. They noted how quickly the EPA staff read the comments on the phone that day, making note-taking difficult.

In an interview Friday, Fowley, the former EPA attorney, accused both the EPA and the MPCA of a "coverup." He said confidential sources told him that the EPA's Region 5 staff were so frustrated about their unheeded concerns that they filed a memo Dec. 18 — just before the permit was issued — documenting the issues that had not been resolved. Fowley said the memo contained sufficient information to justify an EPA objection to the permit.

Fowley characterized PolyMet's permit as weak, and "an end run around the ... requirements of the Clean Water Act."

"It's kind of like if instead of speed limits they told people not to drive too fast," Fowley said. "I've never seen this situation before."

Jennifer Bjorhus is a reporter covering the environment for the Star Tribune. She was a business reporter for much of her career but in recent years focused on criminal justice issues, including police use of force and responses to sexual assault.

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