

State of Minnesota
Ramsey County

District Court
Second Judicial District

Court File Number: 62-CV-19-4626

Center for Biological Diversity, Friends of
the Boundary Waters Wilderness,
MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY,
WaterLegacy, Fond Du Lac Band of Lake
Superior Chippewa,

Plaintiffs,

**MINNESOTA POLLUTION CONTROL
AGENCY'S RESPONSE TO
PLAINTIFFS' MOTION FOR
SCHEDULING ORDER**

vs.

MINNESOTA POLLUTION CONTROL
AGENCY, Poly Met Mining, Inc.,

Defendants.

INTRODUCTION¹

On August 1, 2019, Relators filed a Motion for Scheduling Order requesting wide-ranging discovery in the instant matter, including “depositions by oral examination, written interrogatories, production of documents, and requests for admission.” Mot. at 2. Such discovery should be denied given that it is authorized neither by the transfer order from the Court of Appeals nor by the governing statute—Minn. Stat. § 14.68.

¹ Minnesota Rule of General Practice 115.04 requires that a motion of this sort be filed “at least 14 days prior to the hearing[.]” Though Relators’ motion is well beyond the prescribed deadline for filing, MPCA nonetheless submits this response to assure that the Court has the benefit of MPCA’s views in advance of the status conference. MPCA respectfully reserves the right to supplement this Response with the benefit of time allowed under the Minnesota Rules.

ARGUMENT

I. The Transfer Order Limits the Scope of the Hearing And Precludes Discovery.

In their filings before the Court of Appeals, Relators requested a transfer to this Court and far-reaching discovery regarding alleged procedural irregularities in the Minnesota Pollution Control Agency's issuance of a water quality permit for the NorthMet Project. In particular, Relators requested discovery, including depositions. WaterLegacy Reply Memorandum (June 5, 2019) at 20. Tellingly, the Court of Appeals did not grant Relators' request wholesale. Rather, the Court of Appeals transferred this matter to this Court "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure." Transfer Order (June 25, 2019) at 4. The transfer order made no mention of the discovery that Relators had requested. Moreover, the transfer order stated that the hearing before this Court "shall be scheduled as soon as practicable." Given the time-consuming nature of discovery, discovery is not reconcilable with the appellate court's transfer order.

Furthermore, the issues before this Court are limited to "whether (1) it was unusual for EPA not to submit written comments; and (2) the MPCA sought to keep the EPA's comments out of the public record." Transfer Order (June 25, 2019) at 4. The instant proceeding is limited to those issues, and this Court should reject Relators' efforts to transform this proceeding from a "limited . . . evidentiary hearing" into a full-blown civil action.

II. Minn. Stat. § 14.68 Provides for a Narrow Inquiry and Does Not Authorize Discovery.

The Court of Appeals issued the transfer order pursuant to Minn. Stat. § 14.68, entitled "Procedure on Review" and which provides:

The review shall be confined to the record, except that in cases of alleged irregularities in procedure, not shown in the record, the court of appeals may transfer the case to the district court for the county in which the agency has its principal office or the county in which the contested case hearing was held. The

district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure. Appeal from the district court determination may be taken to the court of appeals as in other civil cases.

Notably, the overarching rule is that review is “confined to the record.” No party disputes this principle. Furthermore, even in cases of alleged procedural irregularities, Minn. Stat. § 14.68 provides only for the taking of testimony; nothing in its text provides for pre-hearing discovery, such as depositions and interrogatories.

The history of the Minnesota Administrative Procedure Act (“MAPA”) instructs that Minn. Stat. § 14.68 does not allow for discovery. Until the early 1980s, MAPA authorized district courts to conduct “proceedings . . . according to the rules of civil procedure” when reviewing “alleged irregularities in procedure.”² This prior version of MAPA was more amenable to discovery than Minn. Stat. § 14.68 given that it explicitly provided that proceedings were governed by the rules of civil procedure.

However, even under this prior, more expansive version, Minnesota courts placed strict limits on the scope of discovery in proceedings regarding alleged procedural irregularities. In *Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375 (Minn. 1977), the Supreme Court issued a writ of prohibition in favor of the Commissioner of Banks and other state officials, voiding a trial court’s discovery order as exceeding the scope of that allowed by MAPA. The Supreme Court concluded that “only limited discovery”—in the form of “depositions of witnesses upon written questions”—was permissible. *Id.* at 378. The Court also mandated that the deposition questions be approved by the trial court prior to submission to the witnesses, in order to “minimize the burden for public officials called upon to answer such interrogation.” *Id.*

² In 1982, Minn. Stat. § 15.0424, subd. 6, was renumbered to Minn. Stat. § 14.68. In 1983, section 14.68 was revised to its current language. *See* 1983 Minn. Laws, Ch. 247, Sec. 14.

As for content, such questions were to be limited to the agency's procedural steps and may not stray into the "mental processes by which an agency decision is made." *Id.*

Likewise, in *Ellingson & Associates, Inc. v. Keefe*, 396 N.W.2d 694, 695 (Minn. Ct. App. 1986), the Court of Appeals held that the trial court abused its discretion when it denied a protective order requested by the Labor and Industry Commissioner in response to a subpoena for his oral deposition. Citing *Mampel*, the *Ellingson* court explained that "[i]nquiry of administrative executives is limited to written query" and that "[i]f respondents can demonstrate ineffectiveness of questioning by interrogatory, deposition upon written questions can be made." *Id.* at 696-97. As in *Mampel*, the *Ellingson* court cited the need to limit discovery in order to protect public officials from undue burdens:

[P]ublic policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases. Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants' access to responsible governmental officials as sources of routine pre-trial discovery would result in a severe disruption of the government's primary function.

Id. at 696-97 (quoting *Community Federal Savings & Loan v. Federal Home Loan Bank*, 96 F.R.D. 619, 621 (D.D.C.1983)).

In the wake of *Mampel* and its progeny, the Minnesota legislature amended MAPA to omit the reference to the rules of civil procedure—thereby precluding even the limited discovery that had previously been allowed in review of procedural irregularities. This amendment is particularly telling in light of the *Mampel* Court's observation that "the legislature may provide for broader discovery." 254 N.W.2d at 377. Rather than expand discovery, the legislature eliminated discovery for referrals regarding procedural irregularities. Because both Minn. Stat. §

14.68 and Minnesota case law establish that discovery is not authorized here, Relators' motion should be denied.

CONCLUSION

Relators' motion for a scheduling order requests pre-hearing discovery, something that is beyond the scope of both the Court of Appeals' transfer order and Minn. Stat. § 14.68. As a result, this Court should deny Relators' motion and schedule the evidentiary hearing "as soon as practicable." Transfer Order (June 25, 2019) at 4.

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/s/ Sarah Koniewicz

Sarah Koniewicz
MN Attorney License No.: 0389375
John C. Martin (*pro hac vice*)
Bryson C. Smith (*pro hac vice*)
Holland & Hart, LLP
25 S Willow St
Jackson, WY 83001
(307) 739-9741
SMKoniewicz@hollandhart.com
JCMartin@hollandhart.com
BCSmith@hollandhart.com

*Attorneys for Respondent Minnesota
Pollution Control Agency*

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