

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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, Babbitt,
Minnesota.

Court File Number: 62-CV-19-4626

Honorable Judge John H. Guthmann

**MINNESOTA POLLUTION CONTROL AGENCY’S RESPONSE TO
RELATORS’ MOTION *IN LIMINE* TO LIMIT THE USE OF AND EXCLUDE
CERTAIN EVIDENCE**

The Minnesota Pollution Control Agency (“MPCA”) requests that the Court deny Relators’ Motion *in Limine* to Limit the Use of and Exclude Certain Evidence. In this motion, Relators seek to limit MPCA’s and PolyMet’s use of certain exhibits that Relators characterize as “post hoc justification” of MPCA’s actions during the NorthMet permitting process.¹ Relators’ Mot. at 1.

Relators argue that the so-called “post hoc exhibits involve communications or statements beginning in January of 2019” and that they should be excluded because “[n]either MPCA nor PolyMet should get the substantive benefit of the after-the-fact and self-serving rationales contained in those documents.” *Id.* at 3. The challenged exhibits help to explain MPCA’s actions during the NorthMet permitting process and are thus

¹ The challenged exhibits are MPCA Exhibits 1120 through 1127 and PolyMet Exhibits 2025 through 2030.

plainly relevant to this Court's determination as to whether MPCA engaged in procedural irregularities during that process. If MPCA introduces such exhibits through witness testimony, Relators are free to cross-examine the witness about the exhibits. However, there is no basis for excluding such exhibits.

Notably, MPCA issued the NorthMet Permit on December 20, 2018. As a result, communications starting in January 2019 could not have been relied upon in issuing the permit and therefore were not included in the administrative record. Because these communications are not in the administrative record before the Court of Appeals, it is nonsensical to conclude—as Relators suggest—that these communications constitute a “convenient litigation position” created by MPCA to retroactively justify its actions in the permitting process. Relators' Mot. at 3.

As for the instant proceeding, Relators did not move the Court of Appeals to transfer the case for an evidentiary hearing until June 25, 2019, nearly half a year after the challenged communications took place. Thus, it is likewise nonsensical to conclude that the challenged communications were made as a “convenient litigation position” in the instant proceeding.

Indeed, if any MPCA statement postdating the issuance of the NorthMet Permit was considered an inadmissible post hoc rationalization, then all MPCA witnesses would be precluded from testifying at the evidentiary hearing, as the hearing is set to take place over a year after the permit was issued. Of course, such a result would be absurd. Just as witness testimony from January 2020 is permissible, so too are documents from 2019.

And many of these exhibits will serve an important function in the hearing. For example, Exhibit 1123, an email chain from June 2019, comprises correspondence demonstrating that EPA's draft comments were provided, in written form, to the Fond du Lac Band. This exhibit bears on the question as to whether Relators suffered any prejudice. In a similar vein, Exhibit 1125 is the cover letter by which EPA released the comments to the Fond Du Lac Band. In Exhibit 1120, an internal email chain recounts the process that accompanied issuance of the discharge permit and explains in a fashion consistent with MPCA's explanations in this litigation that "no information in what we provided [] suggests that EPA was directed to suppress comment (by MPCA or anyone else)" and that "MPCA provided additional time to EPA to review the final draft permit documents prior to any final decision on the permit issuance." (emphasis in original). Finally, this exhibit notes that, "we [MPCA] are obligated to address [EPA's] concerns, and we did so." (emphasis in original). This exhibit thus corroborates the testimony that MPCA will adduce at trial and is highly relevant to this proceeding.

In addition to claiming that the challenged exhibits should be excluded as post hoc rationalizations, Relators further contend that their admission would violate the best evidence rule, which "prohibits the introduction of secondary evidence to establish the contents of a writing where the writing itself is available." Relators' Mot. at 4 (quoting *State v. DeGidio*, 152 N.W.2d 179, 180 (Minn. 1967)). The best evidence rule does not apply here because MPCA does not seek to use the challenged exhibits to prove the contents of any writings. Rather, MPCA seeks to use the communications to help explain MPCA's actions during the NorthMet permitting process.

Relators request that, if the Court permits MPCA to introduce the challenged exhibits, it should also allow Relators to add a letter from the Fond du Lac Band of Lake Superior Chippewa (RELATORS_0064181) to its exhibit list. MPCA opposes this request. Relators have failed to show good cause why they did not include this exhibit on their initial exhibit list.

Finally, MPCA takes no position with respect to Relators' request to exclude PolyMet Exhibit 2029—a copy of the federal complaint that the Fond du Lac Band of Lake Superior Chippewa filed against the Environmental Protection Agency and Army Corps of Engineers. MPCA notes, however, that Exhibit 2030, much like the testimony that will be adduced at trial, explains in summary form how MPCA responded to the EPA's comments. This document may serve as a useful reference for the Court. Similarly, Exhibit 2025, a January 2019 email chain, confirms that MPCA had responded to EPA's comments and that MPCA was entirely consistent in its explanation of the process it undertook in response to EPA's concerns. Much like the witnesses' testimony, this exhibit documents MPCA's actions in response to the comments that EPA chose to read to the MPCA staff on April 5, 2018. Moreover, this internal document confirms that, "[t]here is no information in what we provided that suggests that EPA was directed to suppress comment[s]."

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/s/ John C. Martin

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

/s/ Richard E. Schwartz

Richard E. Schwartz (*Pro Hac Vice*)

1001 Pennsylvania Avenue NW

Washington, D.C. 20004-2595

Telephone: 202.624.2500

rschwartz@crowell.com

*Attorneys for Respondent Minnesota
Pollution Control Agency*