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OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA
IN COURT OF APPEALS

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

Consolidated Appeal Case Nos.
A19-0112
A19-0118
A19-0124

RESPONDENT MINNESOTA POLLUTION CONTROL AGENCY'S RESPONSE TO RELATOR WATERLEGACY'S MOTION FOR TRANSFER TO THE DISTRICT COURT OR, IN THE ALTERNATIVE, FOR STAY DUE TO IRREGULAR PROCEDURES AND MISSING DOCUMENTS

In accordance with rule 127 of the Minnesota Rules of Civil Appellate Procedure, Respondent Minnesota Pollution Control Agency ("MPCA") respectfully submits this Response to Relator WaterLegacy's Motion for Transfer to the District Court or, in the Alternative, for Stay Due to Irregular Procedures and Missing Documents.

INTRODUCTION

Four years ago, shortly before Poly Met Mining, Inc. ("Poly Met") submitted its completed Clean Water Act ("CWA") NPDES/SDS permit application for the NorthMet Mine project, MPCA and the U.S. Environmental Protection Agency ("EPA") agreed to enter into a thorough collaborative process to develop that permit (the "Poly Met Permit"). Normally, MPCA has limited (if any) interaction with EPA during the permit-development period, but MPCA Supervisor Richard Clark recounts that "MPCA wanted a method of receiving consistent EPA feedback throughout the permit-development process." See Ex.

1 (Clark Decl.), ¶¶ 5, 9. As EPA Region 5 Chief of Staff Kurt Thiede wrote during this process, MPCA and EPA were "work[ing] toward a NPDES permit that both parties could support." WaterLegacy Motion, Ex. C, at 16–17.

EPA never relinquished its right to veto the Poly Met Permit before completing its final review. EPA's final review was extended from 15 to 60 days by agreement with MPCA. EPA ultimately had no objection to the issuance of the 479-page Poly Met Permit that MPCA produced.

WaterLegacy challenged the Poly Met Permit in this Court on January 18, 2019, and MPCA submitted a supplemented itemized list of the voluminous administrative record on April 12, 2019. Now WaterLegacy has moved to halt its own appeal and transfer it to the district court so WaterLegacy can explore whether, due to alleged "irregularities in procedure," one EPA document that was never submitted to MPCA and that MPCA has never seen, should be added to the administrative record in this case.

WaterLegacy's motion should be denied for numerous reasons, including:

- This Court does not need to transfer the case to the district court to determine that EPA's internal written comments are not properly part of the administrative record on appeal;
- Even if EPA's April 5, 2018, comments were added to the administrative record, those comments would still be moot because they were part of an ongoing process. Either (1) MPCA subsequently modified the draft to address them, or (2) EPA's concerns were allayed for some other reason.

Had significant concerns remained, EPA could have simply vetoed the permit; and

- For the foregoing reasons, staying this litigation or the underlying permit would be pointless. Additionally, WaterLegacy has previously petitioned MPCA to stay the permit, but MPCA denied that petition on March 11, 2019. WaterLegacy has not challenged MPCA's denial of a stay.

BACKGROUND

WaterLegacy has requested that the Minnesota Court of Appeals transfer this case to the district court "due to irregularities in procedure." *See* WaterLegacy Motion, at 8. The only unusual procedure in the development of the Poly Met Permit, however, was the degree of EPA involvement. EPA was far more involved in the development of the Poly Met Permit than in any other Minnesota NPDES/SDS permit that MPCA staff recalls working on in the last several decades. *See* Ex. 1 (Clark Decl.), ¶¶ 5–6; Ex. 2 (Handeland Decl.), ¶ 5.

EPA can veto any State-issued NPDES/SDS permit, and normally EPA does not involve itself in the early development of such a permit. *See* Ex. 1 (Clark Decl.), ¶ 5. The Poly Met Permit was different.

A. Regular Conference Calls Begin in 2016

Because the NorthMet mining project required many permits and extensive environmental review, both MPCA and EPA had been aware of this project since 2005. *See* Ex. 1 (Clark Decl.), ¶ 8. MPCA and EPA Region 5 had discussions about development of the Poly Met Permit in 2015—a year before it received Poly Met's NPDES/SDS permit

application in the summer of 2016. *see* Ex. 1 (Clark Decl.), ¶¶ 3, 10. Shortly before Poly Met submitted its permit application, MPCA and EPA agreed to discuss development of the Poly Met Permit during twice-monthly conference calls, which they held (subject to occasional scheduling difficulties) through the close of the public-comment period in March 2018. *See* Ex. 1 (Clark Decl.), ¶¶ 10–14. These routine discussions between MPCA and EPA were unique to the Poly Met Permit and reflected an unprecedented degree of EPA involvement in a State-issued NPDES/SDS permit in Minnesota. *See* Ex. 1 (Clark Decl.), ¶¶ 5–6; Ex. 2 (Handeland Decl.), ¶ 5.

B. Development of the Public-comment Draft Permit in 2017-18

These twice-monthly conference calls were held regularly from the summer of 2016 until August 2017, when further calls were postponed so that MPCA could devote its time to developing the first draft of the Poly Met Permit and fact sheet. By that time, MPCA and EPA had discussed all of EPA's major issues with the prospective permit, and MPCA had integrated solutions into its draft as the issues were resolved. *See* Ex. 1 (Clark Decl.), ¶ 10. MPCA spoke with EPA twice in November 2017 while it was working on this draft. *Id.* ¶ 12.

1. *The January-March 2018 Public Comment Period*

MPCA completed work on the public-comment-period draft and sent the completed draft to EPA on January 18, 2018. *Id.* ¶ 13. The public-comment draft was made public on MPCA's website on January 31, 2018, and the 45-day public-comment period ran from January 31, 2018, to March 16, 2018. During this period, MPCA had additional conference

calls with EPA on January 31, February 13, and March 5, 2018, where EPA raised issues with that draft permit. *Id.* ¶14.

2. *EPA Summarizes Its Concerns During an April 5, 2018, Call*

EPA repeated its concerns in an April 5, 2018, conference call with MPCA. Notably, EPA did not introduce those comments as "final" comments, but simply said that these were its comments on the public-comment draft of the permit. *See* Ex. 2 (Handeland Decl.), ¶ 7. On that call, there was no discussion or debate between EPA and MPCA. *See* Ex. 1 (Clark Decl.), ¶ 15. MPCA simply listened. *See id.* MPCA staff found "nothing new or surprising in EPA's comments, all of which had been covered and discussed in previous meetings or conference calls, except for one small concern about domestic wastewater, which MPCA summarized and addressed in the fact sheet." Ex. 2 (Handeland Decl.), ¶ 7. EPA "treated the call as a summary or compendium of all of its previous concerns about the Public Comment draft permit." Ex. 1 (Clark Decl.), ¶ 15. Jeff Udd, Manager of the relevant Section of MPCA, concluded, "My impression of this set of summary comments was that EPA was alerting MPCA to the issues it would be looking at most carefully when MPCA responded to the public comments. As of April 5, 2018, most of these issues had been discussed, but some had not been finally resolved." Ex. 3 (Udd Decl.), ¶ 5. Because MPCA staff found "nothing new or surprising in EPA's comments, all of which had been covered and discussed in previous meetings or conference calls," Ex. 2 (Handeland Decl.), ¶ 7, it did not retain the notes from this call.

3. *MPCA Responds to Public Comments and EPA Concerns*

MPCA received 1,637 individual comments relevant to the public-comment draft permit. *See* Findings of Fact, at 19. After the April 5, 2018, call, MPCA focused on finishing all of its draft responses to significant public comments and how to address EPA's concerns so it could discuss all of the issues with EPA. *See* Ex. 3 (Udd Decl.), ¶ 6.

MPCA discussed the significant open issues with EPA at a two-day, in-person meeting between the agencies on September 25–26, 2018, in St. Paul. At that meeting, MPCA explained "how it was addressing all of the substantial public comments it had received during the public-comment period, and how MPCA was addressing EPA's concerns with the draft permit that EPA had repeated in the April 5, 2018, conference call." Ex. 3 (Udd Decl.), ¶ 7.

At the September 25–26, 2018, meeting, MPCA took eight pages of notes. *See* WaterLegacy Motion, Ex. C, at 18–25. These notes are part of the certified administrative record and reflect the primary remaining issues between MPCA and EPA. Of the many issues discussed, Richard Clark noted three that he felt were most important. First, "EPA wanted MPCA to add operating limits for additional parameters." Ex. 1 (Clark Decl.), ¶ 18. In response, MPCA added new operating limits for cobalt and mercury. *See* Ex. 3 (Udd Decl.), ¶ 8. Second, EPA had concerns about the federal enforceability of the Poly Met Permit. In response, MPCA "committed to add a permit condition prohibiting the violation of any water-quality standard, which commitment satisfied EPA's concern about enforceability. *Id.* Third, EPA wanted to ensure that there would be public participation if the Poly Met Permit was modified due to submittals on engineering, groundwater,

monitoring reports, or adaptive-management changes. *See* Ex. 1 (Clark Decl.), ¶ 19. In response, MPCA added language to the draft permit to provide increased assurance that any such changes would be subject to notice and comment. *Id.* After the meeting, "all the key issues had been discussed, and MPCA and EPA were in fundamental agreement on the required contents of the permit." *Id.* ¶ 20. Manager Jeff Udd explains that "[a]t the conclusion of the meeting, I believed that no unmanageable issues remained, and we were in a position to finalize the draft permit." Ex. 3 (Udd Decl.), ¶ 8.

These same issues were raised separately by other stakeholders in public comments, and MPCA responded to those comments in its "Response to Comment" document. With respect to additional operating limits, MPCA responded at Responses 'Water-719,' 'Water-720-C,' 'Water-729,' and 'Water-752.' The broader issue of Reasonable Potential and Operating Limits, which was an underlying concern to EPA on this issue, is addressed in Response 'Water-718-C.' The prohibition against violating water-quality standards is discussed at Responses 'Water-729,' 'Water-719-A,' and 'Water-752.' The issue of review of adaptive-management proposals to determine whether a permit modification is needed is discussed at Response 'Water-716C.' The foregoing are examples of responses to public-comment issues that EPA had also raised. Other responses in the "Response to Comments" document also touched on these topics.

C. EPA Review of the Proposed Permit

The Memorandum of Agreement ("MOA") between MPCA and EPA governs the relationship between MPCA and EPA during the NPDES permit process.[1] The MOA does not require EPA to comment on a permit that it does not object to. *See* MOA, Ex. 4, at 26–28. It does not require MPCA to respond to EPA comments or other feedback about a version of an NPDES/SDS permit that MPCA is not ready to issue. *Id.* And the MOA provides that EPA will have 15 days to enter a general objection after receiving a proposed NPDES/SDS permit from the State. *See id.*, at 27. CWA section 402(d)(2)(B) gives EPA 90 days to veto a permit, but EPA's regulations at 40 C.F.R. §123.44 explain that an MOA can give EPA a shorter time to make a general objection, which must be followed by a specific objection within the statutory 90-day period.

On October 25, 2018, a month after the September 25–26, 2018, meeting between MPCA and EPA, MPCA sent to EPA a "pre-proposed" permit for EPA's review. *See* Ex. 3 (Udd Decl.), ¶ 10. EPA had requested an extra 45 days to make any general written objection to the issuance of the permit, and MPCA agreed to give EPA that extra time. *See id.*; WaterLegacy Motion, Ex. C, at 16. As Jeff Udd explains, "It turned out that EPA did not need the entire 45 extra days. On December 4, 2018, EPA notified MPCA that it was ready to begin its 15-day review of the proposed permit. Thus, rather than limit EPA's review to the 15-day review period provided under the MOA, MPCA agreed to extend

[1] *Memorandum of Agreement Between the United States Environmental Protection Agency and the Minnesota Pollution Control Agency for the Approval of the State NPDES Permit Program* (signed May 7, 1974 (EPA) and April 16, 1974 (MPCA)) (attached hereto as Ex. 4).

EPA's review to 60 days total. During this 60-day review period, EPA did not veto or otherwise object to the permit." Ex. 3 (Udd Decl.), ¶ 11.

MPCA made the October 25, 2018, "pre-proposed" permit publicly available on-line *and* publicly announced that it had sent this version of the permit to EPA for review. *See* WaterLegacy Motion, Ex. C, at 26. Therefore, when Kevin Reuther of relator Minnesota Center for Environmental Advocacy ("MCEA") emailed MPCA's Michael Schmidt on December 17, 2018, asking, "Did you hear anything from EPA on the PolyMet Permit," WaterLegacy Motion, Ex. C, at 28, it was obvious what he was referring to—the October 25, 2018, "pre-proposed" permit that MPCA had sent to EPA. Michael Schmidt's response—"We did not get any feedback from EPA on the [October 25, 2018] PolyMet permit"—was correct.[2]

EPA did not object to the Poly Met Permit, and MPCA issued it on December 20, 2018—15 days after sending an "essentially identical" December 4, 2018, version of the permit to EPA. *See* Ex. 1 (Clark Decl.), ¶ 23.

ARGUMENT

Minnesota law creates "a presumption of administrative regularity, and the party claiming otherwise has the burden of proving a decision was reached improperly." *In re Khan*, 804 N.W.2d 132, 137 (Minn. Ct. App. 2011) (citation and internal quotation marks omitted). This presumption likewise imposes a high burden on a relator's efforts to supplement the administrative record. *See Stephens v. Bd. of Regents of Univ. of Minn.*,

[2] WaterLegacy's Motion mistakenly implies that this response was not candid. *See* WaterLegacy Motion, at 8.

614 N.W.2d 764, 769–70 (Minn. Ct. App. 2000). As set forth below, Minnesota law places additional burdens on a relator's efforts to transfer a case to the district court or to stay the implementation of a validly issued NPDES/SDS permit.

I. This Court Should Not Transfer the Case to the District Court Under Minnesota Statutes Section 14.68.

WaterLegacy first contends that the Court of Appeals should transfer this case to the district court under Minnesota Statutes section 14.68, alleging "substantial evidence of irregularities in procedure." WaterLegacy Motion, at 9. WaterLegacy alleges three "irregularities" that, it argues, merit transfer to the district court for investigation and fact finding. First, it argues that "CWA regulations require a response to comments," and MPCA failed to respond to EPA's written comments. *Id.* at 10–11. Second, it argues that "MPCA failed to provide critical notes of EPA comments" under the Data Practices Act. *See id.*, at 10–11. Finally, it argues that MPCA violated its duty of candor under rule 7000.0300 of the Minnesota Administrative Rules. *Id.* at 12–13. The Court should reject these arguments.

A. MPCA responded to all significant input made during the public-comment period.

WaterLegacy first argues that "MPCA's procedures in the NorthMet permit decision-making process were inconsistent with CWA regulations and state statutes and rules," alleging that none of EPA's input made during the public-comment period were mentioned in MPCA's publicly available response to comments. *See* WaterLegacy Motion, at 10–11.

1. *The MOA was not violated.*

First, the MOA governs the relationship between MPCA and EPA with respect to NPDES/SDS permitting. That MOA was not violated here. The MOA does not require EPA to provide input on a permit that it does not object to. *See* MOA, Ex. 4, at 26–28. And it does not require MPCA to respond to EPA feedback, if given, about a version of an NPDES/SDS permit that MPCA is not ready to issue. *Id.* The MOA provides that EPA will have 15 days to enter a general objection after receiving from the State a proposed NPDES/SDS permit:

> [EPA] shall respond within 15 days from the date of receipt of the letter requesting final approval to issue or deny the proposed permit. . . . If no written comment is received by [MPCA] from [EPA] within the 15 days, [MPCA] may assume, after verification of the proposed permit, that the EPA has no objection to the issuance of the NPDES permit.

See id., at 27. Thus, MPCA's lack of response to EPA's input or *interim* input is consistent with the MOA.

2. *The Minnesota Administrative Rules were not violated.*

Second, assuming that the Minnesota Administrative Rules apply at all to the discussions between EPA and MPCA, MPCA responded to EPA's input in a manner consistent with those Rules. MPCA never received the (unseen) written comments that WaterLegacy seeks, so they are not part of the administrative record. *See Nat'l Audubon Soc. v. MPCA*, 569 N.W.2d 211, 216 (Minn. Ct. App. 1997).

Under the Minnesota Administrative Rules, "[d]uring the public comment period established in the public notice of an agency permit, an interested person, including the

applicant, may submit written comments on the application or on the draft permit." Minn. R. 7001.0110(1). "Comments submitted *in writing* by interested persons or the applicant during the public comment period must be retained and considered in the formulation of final determinations concerning the permit application." Minn. R. 7001.0110(4) (emphasis added). Under these Rules, MPCA must respond, *either* orally *or* in writing, to all significant comments received during the public-comment period:

> The commissioner shall respond to all significant comments received under part 7001.0110 during the public comment period. The response may be made either orally or in writing.

Minn. R. 7001.1070(3). Thus, because EPA did not submit written comments—that is, "significant comments received under part 7001.0110 during the public comment period"—MPCA has no obligation to respond, either orally or in writing, under rule 7001.1070(3); *see also Nat'l Audubon Soc. v. MPCA*, 569 N.W.2d 211, 216 (Minn. Ct. App. 1997) ("A reviewing agency is not required to consider or include in the administrative record documents never submitted or received by it.").

Finally, even if the MOA and rule 7001.1070(3) obligate MPCA to respond to EPA's oral input as non-written feedback, MPCA complied by responding both orally and in writing to the input it received from EPA during the public-comment period. MPCA responded orally in real time to feedback EPA submitted orally *during* the public-comment period during conference calls on January 31, February 13, and March 5, 2018, where EPA raised issues with that draft permit. *See* Ex. 1 (Clark Decl.), ¶ 14.

MPCA also responded to EPA's oral input in writing in its publicly available responses to comments. WaterLegacy alleges that "[n]one of these comments made during

the public comment period were mentioned on MPCA's publicly available response to comments." WaterLegacy Motion, at 11. This is incorrect. While MPCA did not attribute those comments to EPA, it responded to them in writing in its publicly available responses to comments when it responded to overlapping substantive comments submitted by other stakeholders during the public-comment period. With respect to additional operating limits, MPCA responded at Responses 'Water-719,' 'Water-720-C,' 'Water-729,' and 'Water-752.' The broader issue of Reasonable Potential and Operating Limits, which was an underlying concern to EPA on this issue, is addressed in Response 'Water-718-C.' The prohibition of violating water-quality standards is discussed at Responses 'Water-729,' 'Water-719-A,' and 'Water-752.' The issue of review of adaptive-management proposals to determine whether a permit modification is needed is discussed at Response 'Water-716C.' MPCA's decision to respond in writing, but not to attribute public comments to all stakeholders who may have made them, does not mean that it failed to respond in accordance with the MOA or the Minnesota Administrative Rules.

MPCA even responded in writing to oral feedback that EPA made *outside* of the public-comment period. When EPA raised issues related to domestic wastewater in the April 5, 2018, call, MPCA revised its fact sheet to address this particular concern, even though it was not obligated to do so. *See* Ex. 2 (Handeland Decl.), ¶ 7. And at the September 25–26, 2018, meeting, EPA wanted to ensure that there would be public participation if the Poly Met Permit was modified due to submittals on engineering, groundwater, monitoring reports, or adaptive-management changes. *See* Ex. 1 (Clark

Decl.), ¶ 19. In response, MPCA added language to the draft permit to provide increased assurance that any such changes would be subject to notice and comment. *Id.*

MPCA also responded orally to EPA's input throughout the entire permit-development period. From the summer of 2016 to August 2017, MPCA and EPA held regular conference calls to discuss and resolve EPA's concerns with the Poly Met Permit. *See* Ex. 1 (Clark Decl.), ¶ 10–14. MPCA spoke with EPA twice in November 2017, while MPCA was working on its first draft of the permit. *Id.* ¶ 12. After the public-comment period—when MPCA and EPA conducted three conference calls—the two agencies met in person on September 25–26, 2018, to discuss and resolve the remaining issues with the permit. At the conclusion of the meeting, "all the key issues had been discussed, and MPCA and EPA were in fundamental agreement on the required contents of the permit." *Id.* ¶ 20. Manager Jeff Udd felt that "[a]t the conclusion of the meeting, I believed that no unmanageable issues remained, and we were in a position to finalize the draft permit." Ex. 3 (Udd Decl.), ¶ 8.

In short, MPCA responded both orally and in writing to input EPA communicated to MPCA both within and outside of the public-comment period. Accordingly, MPCA's response to EPA input more than complies with 7001.1070(3), and the Court should reject WaterLegacy's argument.

3. *40 C.F.R. section 124.17 does not apply to discussions between a State permitting authority and EPA.*

Finally, WaterLegacy cites to 40 C.F.R. section 124.17 but provides no support for the proposition that this rule applies to input made by a federal agency with veto power

over the Poly Met Permit. The context of section 124.17 refers to public comments, not concerns voiced by EPA. *See* 40 C.F.R. § 124.10 (governing public notice of permit actions and the public-comment period); §124.11 (governing public comments and requests for public hearings); §124.12 (governing public hearings); §124.13 (creating the obligation to raise issues and provide information during the public-comment period); §124.14 (governing the reopening of the public comment period). Section 124.17 requires a response to comments only at the time the permit is issued, which can occur only after EPA has already determined that the permit complies with the Clean Water Act. 33 U.S.C. §402(d)(2). Section 124.17 cannot fairly be read to require MPCA to prepare formal responses to concerns voiced by EPA.[3]

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[3] WaterLegacy misconstrues MPCA's handwritten notes from one of the November 2017 conference calls between MPCA and EPA. *See* WaterLegacy Motion, at 5. Those notes, which are part of the administrative record, emphasized that "EPA wants to make sure <u>all things considered</u> are available to the public." *See id.*, Ex. C, at 2 (emphasis in original). WaterLegacy cites to this language to suggest that EPA wanted MPCA to make everything that it considered throughout the entire permit-development process publicly available. But as Stephanie Handeland explains, EPA's statement was in reference to the permit application, which had a number of supporting documents that were available only electronically and that were not submitted as part of the permit application. EPA wanted to ensure that these supporting documents were made publicly available, which MPCA did by placing them on its Poly Met Permit website. *See* Ex. 2 (Handeland Decl.), ¶ 8.

WaterLegacy similarly mischaracterizes a November 3, 2016, letter from EPA to MPCA concerning Poly Met's permit application. *See* WaterLegacy Motion, at 3. WaterLegacy quotes an incomplete portion of the letter, stating, "On November 3, 2016, EPA staff wrote to MPCA citing deficiencies in in PolyMet's NorthMet NPDES permit application, highlighting EPA's oversight role and emphasizing that 'it is important that the content of the application be fully documented and the record before the permitting Agency be complete and transparent.'" *See id.* Again, WaterLegacy quotes this language to suggest that EPA wanted MPCA to make everything that it considered throughout the entire permit-development process publicly available, but the full quotation shows that EPA's

B. MPCA did not fail to provide notes of EPA input under the Data Practices Act.

WaterLegacy next argues that "MPCA failed to comply with WaterLegacy's requests for critical data" under the Data Practices Act. WaterLegacy Motion, at 11–12. Though puzzling as an argument in support of a motion to transfer under section 14.68, MPCA believes it has complied fully with all of WaterLegacy's Data Practices Act requests, many of which are reflected in the exhibits to WaterLegacy's motion. Indeed, the only way that WaterLegacy was aware of those documents—and of the existence of the non-record document it seeks—is because of MPCA's disclosures under the Data Practices Act.[4] Documents released pursuant to a Data Practices Act request are not necessarily part

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recommendation was also in reference to the materials in the permit application and supplemental materials submitted by the applicant:

> Finally, we emphasize that it is important that the content o the application be fully documented and that the record before the permitting Agency be complete and transparent. As MPCA continues to receive supplemental information from the applicant (including, any materials provided by the applicant after July 11), we strongly recommend that this information be added to the permitting record and be made available to the public and to EPA in a timely manner.

See id., Ex. C, at 7–8. MPCA followed this recommendation by placing all of the materials on its Poly Met Permit website.

[4] WaterLegacy seeks MPCA notes from the April 5, 2018, conference call from EPA and for those notes to be included in the administrative record. But because MPCA staff found "nothing new or surprising in EPA's comments, all of which had been covered and discussed in previous meetings or conference calls," Ex. 2 (Handeland Decl.), ¶ 7, it did not retain the notes and therefore could not have released them as part of a Data Practices Act request.

of an administrative record and thus do not leave "a critical gap in the record." *Id.* at 12. Accordingly, the Court should reject this argument.

C. MPCA did not violate its duty of candor under rule 7000.0300 of the Minnesota Administrative Rules.

WaterLegacy next argues that MPCA violated its duty of candor under rule 7000.0300 of the Minnesota Administrative Rules through "MPCA's reported efforts to keep EPA's comments on the NorthMet permit out of the written record, MPCA's public failure to disclose the existence of EPA comments, as well as MPCA's flat denial that it had received feedback on the permit from EPA." WaterLegacy Motion, at 12–13. These factual allegations mischaracterize the actual factual record, and the Court should reject this argument.

Rule 7000.0300 of the Minnesota Administrative Rules imposes a duty of good faith—including truthfulness, accuracy, disclosure, and candor—on MPCA and on others in their dealings with MPCA:

> In all formal or informal negotiations, communications, proceedings, and other dealings between any person and any member, employee, or agent of the board or commissioner, it shall be the duty of each person and each member, employee, or agent of the board or commissioner to act in good faith with complete truthfulness, accuracy, disclosure, and candor.

Minn. R. 7000.0300. MPCA has not violated this duty. MPCA did not receive written comments from EPA, did not take efforts to keep EPA's written comments out of the administrative record, or fail to disclose the existence of EPA comments. Instead, MPCA and EPA collaborated throughout the permit-review process and disclosed as much publicly.

The discussions between MPCA and EPA were a good-faith effort to resolve NPDES/SDS permitting issues in an efficient, collaborative, and timely way. The State and EPA Region 5 had discussions about development of the Poly Met Permit in 2015—a year before it received Poly Met's permit application in the summer of 2016. *See* Ex. 1 (Clark Decl.), ¶¶ 3, 10. As Richard Clark explains: "MPCA wanted a method of receiving consistent EPA feedback throughout the permit-development process," so MPCA and EPA decided to hold twice-monthly conference calls on permit development even before the permit application was submitted. *See* Ex. 1 (Clark Decl.), ¶ 9. They held these calls (subject to occasional scheduling difficulties) through the close of the public-comment period in March 2018. *See id.* ¶¶ 10–14.These routine discussions between MPCA and EPA allowed the parties to discuss permitting issues and work toward resolving them in a way that "both parties could support." *See* WaterLegacy Motion, Ex. C, at 16–17 (reproducing email from EPA Region 5 Chief of Staff Kurt Thiede).

Finally, MPCA did not issue a "flat denial that it had received feedback on the permit from EPA." WaterLegacy Motion, at 12–13. This allegation grossly mischaracterizes the factual record. *See* WaterLegacy Motion, Ex. C, at 28. On October 25, 2018, MPCA sent its "pre-proposed" draft to EPA. *See* Ex. 3 (Udd Decl.), ¶ 10. As WaterLegacy notes in its motion, when MPCA sent that draft to EPA, it placed the draft on its website and publicly announced that (1) members of the public could review the draft permit, and (2) the fact that MPCA had sent the draft to EPA for review. *See* WaterLegacy Motion, Ex. C, at 26.

In response to a December 17, 2018, email from Kevin Reuther of the Minnesota Center for Environmental Advocacy, asking whether MPCA had received written feedback on the October 25, 2018, "pre-proposed" version of the Poly Met Permit, MPCA attorney Mike Schmidt responded, "We did not get any feedback from EPA on the PolyMet permit." WaterLegacy's motion cites to this exchange for the apparent purpose of claiming that MPCA had denied that it had received *any* feedback on the Poly Met Permit from EPA *at any time* during the permit-development process. It is clear from the context of the exchange, however, that MPCA was stating only that it had not received any written feedback on the *October 25, 2018, pre-proposed version* of the Poly Met Permit that MPCA had recently sent to EPA—which was true. MPCA's response did not mislead Mr. Reuther, or anyone else. Accordingly, the Court should reject this argument.

D. The caselaw does not support WaterLegacy's request for transfer under Minnesota Statutes section 14.68.

Section 14.68 of the Minnesota Statutes provides for the transfer of a case from the Court of Appeals to the district court upon evidence of alleged procedural irregularities in a regulatory decision for which the record is insufficient to review:

> 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.

Minn. Stat. Ann. § 14.68.

1. *No additional evidence is necessary to develop the record.*

The Court of Appeals will transfer a matter to the district court only if it determines that additional evidence is "necessary" to further develop the record. *State ex rel. Friends of Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 591 (Minn. Ct. App. 2008). Where the record is sufficient to review the alleged procedural irregularities, the Court of Appeals will decline to transfer the matter to the district court for additional fact finding. *See In re Deeb*, 2016 WL 4723345, at *8, n.3 (Minn. Ct. App. Sept. 12, 2016) (unpublished opinion) (declining to transfer a matter to the district court because the relator did not establish that the record was insufficient to review any alleged procedural irregularities).[5] In determining whether transfer to the district court is appropriate, the Court of Appeals "examine[s] the extra-record materials to determine whether there is substantial evidence of irregularities. *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 174 (Minn. Ct. App. 2001).

2. *The Hard Times Café decision does not support the requested transfer.*

WaterLegacy discusses *Hard Times Café*, arguing that it supports WaterLegacy's argument for transferring the case to the district court. But *Hard Times Café* is distinguishable and, in fact, supports MPCA's argument against transfer. In *Hard Times Café*, this Court transferred a case to the district court for investigation into alleged procedural irregularities regarding the Minneapolis City Council's decision not to renew

[5] *In re Deeb* is an unpublished decision and thus can be cited to only in accordance with Minnesota Statutes section 480A.08(3) ("If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond."). Accordingly, a copy of *In re Deeb* is attached hereto as Ex. 5.

relator's business license. There, the relator challenged the denied renewal of a business license by the Minneapolis City Council after a contested-case hearing before an administrative-law judge. *Id.* at 169–71. This Court transferred the case to the district court (1) because of alleged procedural irregularities in the city council's decision, and (2) because the record was insufficient to review the alleged irregularities. *Id.* at 174–75.

At a contested-case hearing regarding relator Hard Time Café's business license, the Administrative Law Judge ("ALJ") found that a police investigation and search did not reveal evidence of involvement by the café in the selling of controlled substances on the premises. But because "every business is responsible for illegal activity on its premises," the police had demonstrated good cause to subject relator to some level of discipline. *Id.* at 169. The ALJ declined to make a recommendation regarding any specific disciplinary action, deciding instead to deliver its findings of fact and conclusions of law to the Minneapolis City Council for a disciplinary determination. *Id.* at 170. Because the matter was to be adjudicated under newly promulgated procedures contained in the License Adverse Action Procedures Manual ("Manual"), a city attorney sent a letter to the committee chair, including excerpts of the Manual instructing the committee to avoid ex parte contacts, base its decision solely on the record, and not to make its final decision until after the hearing. *Id.* But the Court's examination of "extra-record materials" revealed that it was "undisputed that the city council violated both the procedures set forth in the Manual and the explicit instructions of the attorney." *Id.* Further evidence suggested that "council members made up their minds before the license revocation process was completed, and

that members promoted the consideration of information that was not presented to the ALJ," again in violation of Manual procedures. *Id.* In light of these alleged procedural irregularities, the Court of Appeals transferred the case to the district court for additional fact finding. *Id.* at 175.

The Court of Appeals transferred the *Hard Times Café* case to the district court because of "undisputed" extra-record evidence that the Minneapolis City Council "violated both the procedures set forth in the Manual and the explicit instructions of the city attorney" in taking a particular regulatory action. *Hard Times Café*, 625 N.W.2d at 174. The Court of Appeals transferred the case to the district court only because the Minneapolis City Council ran afoul of the express procedures set forth in the Manual and the city attorney's letter. As a result, the Court of Appeals was unable to "determine whether the evidence in the record support[ed] the council's decision." *Id.* In contrast, here the process and procedures that MPCA and EPA followed to arrive at the terms of the Poly Met Permit complied with the MOA and with all relevant regulations under the Minnesota Administrative Rules. WaterLegacy does not allege, much less demonstrate, that the collaborative process that MPCA and EPA undertook to develop the Poly Met Permit ran afoul of the MOA or the Minnesota Administrative Rules, the controlling authority here. Accordingly, the Court should reject WaterLegacy's argument and retain jurisdiction over this appeal.

II. This Court Should Not Stay this Appeal or the Poly Met Permit Pending Resolution of WaterLegacy's FOIA Litigation in Federal Court.

WaterLegacy next contends that the Court of Appeals should stay this appeal and implementation of the Poly Met Permit pending resolution of its federal FOIA litigation over access to EPA's written comments on the Poly Met Permit. *See* WaterLegacy Motion, at 14–15. The Court should reject these arguments because EPA's comments, which MPCA has never seen, cannot become part of the administrative record under Minnesota law.

1. The Court should decline to stay the appeal because EPA's written comments on the Poly Met Permit cannot be part of the administrative record in this appeal.

Even assuming WaterLegacy succeeds in its federal FOIA litigation,[6] because EPA's written comments were never submitted to MPCA, they cannot be part of the administrative record in this appeal. A stay of this appeal pending resolution of the federal FOIA litigation would thus serve no purpose. EPA never submitted—and MPCA never received—written comments on the Poly Met Permit. "A reviewing agency . . . is not required to consider or include in the administrative record documents never submitted to or received by it." *Nat'l Audubon Soc. v. MPCA*, 569 N.W.2d 211, 216 (Minn. Ct. App. 1997). Furthermore, MPCA is "not required to look beyond the official comment issued by another commenting agency." *Id.* After consistent communication and deliberation with

[6] WaterLegacy filed suit in the U.S. District Court for the District of Columbia seeking EPA's written comments on the Poly Met Permit after filing a FOIA request with EPA Region 5 and receiving no response. WaterLegacy alleges that EPA Region 5 failed to respond to the FOIA request within the statutory time limit. *See WaterLegacy v. EPA*, Case No. 1:2019-cv-004512 (D. D.C. Feb. 19, 2019).

MPCA over several years, EPA rendered its final judgment by declining to veto the Poly Met Permit, which it was entitled to do under the CWA and the MOA. Accordingly, the Court should reject this argument and decline to stay the appeal pending resolution of the federal FOIA litigation.

2. The Court should decline to stay implementation of the Poly Met Permit, because it cannot demonstrate that MPCA abused its discretion when it administratively denied MPCA's prior stay request.

WaterLegacy petitioned MPCA for reconsideration and a stay of the Poly Met Permit on December 31, 2018, alleging violations of the CWA and various procedural irregularities. *See* WaterLegacy Motion, at 15 n.4. MPCA denied these requests on March 11, 2019. *See id.* "An appellate court reviewing the decision regarding a stay pending appeal will interfere only when there is a demonstrated abuse of discretion." *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 144 (Minn. Ct. App. 2007). WaterLegacy has not alleged, much less demonstrated, that MPCA abused its discretion in denying WaterLegacy's December 31, 2018, request for a stay. Accordingly, the Court should reject this argument.

CONCLUSION

For the reasons set forth herein, the Court of Appeals should deny WaterLegacy's motion to transfer the case to the district court or, in the alternative, to stay the appeal or the implementation of the Poly Met Permit.

RESPECTFULLY SUBMITTED this 31st day of May 2019.

Crowell & Moring LLP

/s/ Richard E. Schwartz
Richard E. Schwartz (*Pro Hac Vice*)
A. Xavier Baker (MN #0337894)
1001 Pennsylvania Avenue NW
Washington, D.C. 20004-2595
Telephone: 202.624.2500
Email: rschwartz@crowell.com
xbaker@crowell.com

Attorneys for Respondent Minnesota Pollution Control Agency

Exhibit 1

STATE OF MINNESOTA
IN COURT OF APPEALS

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	**DECLARATION OF RICHARD CLARK, P.G.** Appellate Case Nos. A19-0112 A19-0118 A19-0124

I, RICHARD CLARK, in accordance with section 38.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

Background

1. My job title is Supervisor, Metallic Mining Sector Unit, Water and Mining Section, Industrial Division, for the Minnesota Pollution Control Agency ("MPCA"). I have been employed by MPCA since July 23, 1986.

2. My job responsibilities have included developing and drafting National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 ("Water Permit") for the Poly Met Mining, Inc. NorthMet Mine Project.

3. I was involved in developing the Water Permit from the beginning of preliminary discussions in 2015 until issuance on December 20, 2018. I also participated in regular meetings and conference calls with EPA during the development of the Water Permit, including the April 5, 2018, telephone call with EPA referenced in WaterLegacy's May 17, 2019, Motion for Transfer to the District Court or, in the Alternative, for Stay Due to Irregular Procedures and Missing Documents ("Motion").

4. I submit this Declaration based on my personal knowledge and in support of MPCA's Response to WaterLegacy's Motion.

Development of the Water Permit in Consultation with EPA

5. Under normal circumstances, MPCA typically has limited, if any, discussions, meetings, or interactions with EPA during the permit-development period. Normally, MPCA drafts the permit and submits the draft permit to EPA shortly in advance of the public-comment period. EPA then has the opportunity to submit comments on the permit prior to the permit being placed on notice, or as is more typically the case, during the notice period itself. After the public comment period, MPCA may revise the draft permit as appropriate and then submits the proposed permit to EPA, which has the right to object to the issuance of the proposed permit. MPCA usually has limited, if any, discussions with EPA during the permit-development stage and does not interact with EPA about a permit until the public-comment period, if at all. MPCA always makes information about a permit available to EPA, however, and if EPA has comments, there may be (usually one) meeting or a conference call about EPA's comments.

6. However, in the case of the Water Permit, in my 33 years of experience developing NPDES/SDS permits with MPCA, EPA has never been as involved in the development of a permit from start to finish as it was with this permit.

7. MPCA and EPA began having discussions about the NorthMet project in 2015, long before Poly Met even submitted its permit application in the summer of 2016.

8. The proposed NorthMet Project went through extensive environmental review with the Department of Natural Resources with input from MPCA and EPA as early as 2005.

9. MPCA wanted a method of receiving consistent EPA feedback throughout the permit-development process, so shortly before Poly Met submitted its completed permit application, MPCA and EPA jointly decided to hold twice-monthly conference calls that would take place throughout the permit-development process. These twice-monthly conference calls were unique to this permit. I have never before worked on a permit where MPCA and EPA had routine discussions throughout the entire permit-development process.

10. MPCA and EPA held the first conference call in August 2016, within a month of receiving PolyMet's permit application package. These calls were scheduled to be held twice monthly, but on occasion there was only one call per month due to scheduling issues. But there was always at least one call per month. These calls were held regularly until August 2017, when MPCA and EPA took a break from the calls so that MPCA could focus on drafting the permit and the fact sheet in light of discussions over the previous year with EPA. By that time, MPCA and EPA had discussed together all of the major issues that EPA had with the pre-proposed permit and MPCA fully understood and considered EPA's positions.

11. MPCA had begun drafting portions of the Water Permit long before August 2017. As MPCA and EPA resolved different issues on the twice-monthly conference calls, MPCA would integrate those solutions into the relevant parts of the draft permit. But after

discussing all issues by August 2017, MPCA began to actively draft the remaining parts of the permit and the fact sheet and to tie together the parts of the permit that had already been drafted.

12. During this drafting period, MPCA and EPA met twice: on November 1, and November 9, 2017.

13. After completing the pre-comment draft permit, MPCA sent this version to EPA on January 18, 2018.

14. MPCA and EPA again had a conference call to discuss this version of the draft permit on January 31, 2018, and again during the public-comment period on February 13, 2018, and March 5, 2018.

15. On April 5, 2018, MPCA and EPA had a conference call in which EPA told us that it would read from its draft written comments. Mike Schmidt, an attorney with MPCA and another member of the Water Permit team, took notes on the call. After the call, MPCA reviewed the notes and we confirmed our impression of the call, which was that EPA had not raised any new, substantial concerns about the January 2018 public comment draft permit but had instead reiterated the principal concerns that it had previously raised in the twice-monthly calls and in-person meetings. In effect, EPA treated the call as a summary or compendium of all of its previous concerns about the public comment draft permit. There was no discussion or debate about the permit provisions on this call. It was simply an opportunity for EPA to summarize its feedback on the draft permit.

16. One primary focus of EPA's comments involved the prohibition against unauthorized discharges. MPCA had included that prohibition in the draft permit, but EPA wanted to include more explicit conditions in the Water Permit. MPCA agreed to revise the phrasing to address this concern.

17. After the call and after reviewing the notes, MPCA found that EPA had not raised any issues during the call that had not already been fully discussed in previous calls. A number of these issues were not finally resolved, however, until a September 2018 meeting between MPCA and EPA.

18. On September 25 and 26, 2018, MPCA and EPA met for a two-day, in-person meeting about the appropriate terms for the next draft of the Water Permit - the post-public comment draft. At these meetings, there was an exchange of views about a number of issues concerning the draft permit. For instance, EPA wanted MPCA to add operating limits for additional parameters and had some concerns about the federal enforceability of the Water Permit. MPCA added the additional operating limits and committed to add a permit condition prohibiting the violation of any water-quality standard, which commitment satisfied EPA's concern about enforceability.

19. At the September 2018 meeting, EPA also wanted to ensure that there would be public participation if there were subsequent modifications to the Water Permit as a result of submittals such as engineering, groundwater, or monitoring reports etc., or as a result of adaptive-management changes. MPCA added language to the draft permit that increased EPA's assurance that any changes meeting the threshold for public review would be subject to notice and comment.

20. At the conclusion of the September 2018 meeting, all the key issues had been discussed, and MPCA and EPA were in fundamental agreement on the required contents of the permit.

21. MPCA and EPA both left the meetings satisfied that they had made progress in developing a final version of the Water Permit. MPCA agreed to the remaining changes that EPA recommended, and I believe that EPA came away with a better understanding of what MPCA was trying to accomplish in the Water Permit. I had the impression that there were no remaining unresolvable issues.

22. On October 25, 2018, MPCA sent EPA a new draft of the Water Permit. This new draft, which MPCA made available for public review on its website, incorporated the issue resolutions that MPCA and EPA reached at the September 2018 meeting. This initiated a 45-day review period by EPA. Towards the end of this review period EPA indicated they did not have any comments on the new draft permit.

23. On December 4, 2018, per previous agreement with EPA, MPCA sent EPA a final draft of the Water Permit for their final 15 day review. Except for some stylistic revisions and corrections of some typographical errors, the December 4 draft was essentially identical to the October 25 draft. Again, MPCA received no comments or objections from EPA.

24. Although MPCA gave EPA a total of 60 days (instead of the typical 15) to object to the draft permit, EPA did not object to MPCA issuing the draft Water Permit, which MPCA did on December 20, 2018.

Dated: May 28, 2019
Ramsey County
St. Paul, Minnesota

Richard Clark, P.G.
Supervisor, Metallic Mining Sector Unit
Water and Mining Section, Industrial Div.
Minnesota Pollution Control Agency

12538885_v1

Exhibit 2

STATE OF MINNESOTA
IN COURT OF APPEALS

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	**DECLARATION OF STEPHANIE HANDELAND** Appellate Case Nos. A19-0112 A19-0118 A19-0124

I, STEPHANIE HANDELAND, in accordance with section 38.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

Background

1. My job title is Environmental Specialist 4, Permit Writer, for the Minnesota Pollution Control Agency ("MPCA"). I have been employed by MPCA since May 1995.

2. My job responsibilities have included developing and drafting National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 ("Water Permit") for the Poly Met NorthMet Mine project.

3. I was involved in developing the Water Permit from the beginning of preliminary discussions in 2015 until issuance on December 20, 2018. I also participated in regular meetings and conference calls with EPA during the development of the Water Permit, including the April 5, 2018, telephone call with EPA referenced in WaterLegacy's May 17, 2019, Motion for Transfer to the District Court or, in the Alternative, for Stay Due to Irregular Procedures and Missing Documents ("Motion").

4. I submit this Declaration to the Court based on my personal knowledge and in support of MPCA's Response to WaterLegacy's Motion.

MPCA Discussions With EPA

5. EPA was by far more involved in the development of this Water Permit than it had been in any other permit I have worked on in my previous 23 years with MPCA.

6. I participated in essentially all of the phone calls and meetings that MPCA had with EPA about the Water Permit, including the April 5, 2018, conference call between MPCA and EPA in which EPA read from its draft written comments.

7. During the April 5 call, EPA did not refer to its comments as "final" comments, but said, "These are our comments." There was nothing new or surprising in EPA's comments, all of which had been covered and discussed in previous meetings or conference calls, except for one small concern about domestic wastewater, which MPCA summarized and addressed in the fact sheet. In the April 5 call, EPA just restated all of the major concerns that EPA had raised throughout the process, all of which MPCA had already heard and taken into consideration.

8. I looked through the WaterLegacy submittal and found the notes she referenced on P. 3 as "EPA wants to make sure all things considered are available to the public." That statement was in reference to the permit application. (See WL Motion Ex. C, Page 2). The application had a number of supporting documents which were available electronically, but were not submitted with the permit application, such as water management plans and Design & Operation Reports. The EPA wanted us to make these

references or supporting documents available to the public, which we did by putting the relevant documents on the MPCA Poly Met Permit website.

Dated: May 28, 2019
Ramsey County
St. Paul, Minnesota

Stephanie Handeland
Environmental Specialist 4, Permit Writer
Minnesota Pollution Control Agency

Exhibit 3

STATE OF MINNESOTA
IN COURT OF APPEALS

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	**DECLARATION OF JEFF UDD** Appellate Case Nos. A19-0112 A19-0118 A19-0124

I, JEFF UDD, in accordance with section 38.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

Background

1. My job title is Manager of the Water and Mining Section for the Minnesota Pollution Control Agency ("MPCA"). I have been employed by MPCA since February 2002.

2. My job responsibilities have included oversight of developing and drafting National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 ("Water Permit") for the Poly Met NorthMet Mine Project.

3. I was involved in oversight of the Water Permit from January 2018 until issuance on December 20, 2018. I also participated in regular meetings and conference calls with EPA during this time period, including the April 5, 2018, telephone call with EPA referenced in WaterLegacy's May 17, 2019, Motion for Transfer to the District Court or, in the Alternative, for Stay Due to Irregular Procedures and Missing Documents ("Motion").

4. I submit this Declaration to the Court based on my personal knowledge and in support of MPCA's Response to WaterLegacy's Motion.

MPCA and EPA Process and Procedures to Arrive at the Terms of the Water Permit

5. I participated in the April 5, 2018, conference call between MPCA and EPA in which EPA read from its written comments. EPA summarized all of the issues it had previously raised about the pre-public comment draft permit. My impression of this set of summary comments was that EPA was alerting MPCA to the issues it would be looking at most carefully when MPCA responded to the public comments. As of April 5, 2018, most of these issues had been discussed, but some had not been finally resolved.

6. After the April 5 call, MPCA focused on finishing all of its draft responses to significant public comments and EPA's concerns, so it could discuss all of the issues with EPA.

7. That comprehensive discussion, which was the culmination of the entire collaboration between MPCA and EPA on the Water Permit, took place at a two-day, in-person meeting with EPA on September 25 and 26, 2018, where MPCA explained to EPA how it was addressing all of the substantial public comments it had received during the public-comment period and how MPCA was addressing EPA's concerns with the draft permit that EPA had repeated in the April 5, 2018, conference call.

8. There was a lot of discussion during the two-day meeting. MPCA agreed to add new operating limits for cobalt and mercury. MPCA also agreed to add express language prohibiting discharges from violating water quality standards. EPA expressed

satisfaction with the results of the meeting. At the conclusion of the meeting, I believed that no unmanageable issues remained, and we were in a position to finalize the draft permit.

9. Under the Memorandum of Agreement ("MOA") between MPCA and EPA, once MPCA has completed a "proposed" permit—which in this context refers to a post-public-comment draft permit—MPCA sends the proposed permit to EPA, and it is this version that EPA officially comments on. The MOA allows EPA 15 days to decide whether or not to veto the proposed permit.

10. On October 25, 2018—a month after the September 25-26 meeting—MPCA sent a pre-proposed version of the permit to EPA. The pre-proposed permit reflected all of the discussion points from the two-day, in-person meeting in September 2018. While the May 1974 Memorandum of Agreement ("MOA") between MPCA and EPA provides for a 15-day period for EPA to object to (veto) the issuance of a proposed NPDES permit, EPA requested an extra 45 days from October 25, 2018, to review this pre-proposed version of the permit, and MPCA agreed to the extended review period.

11. It turned out that EPA did not need the entire 45 extra days. On December 4, 2018, EPA notified MPCA that it was ready to begin its 15-day review of the proposed permit. Thus, rather than the required 15-day review under the MOA, MPCA agreed to extend EPA's review to 60 days total. During this 60-day review period, EPA did not veto or otherwise object to the permit.

12. MPCA issued the final Water Permit and fact sheet on December 20, 2018.

Dated: May 28, 2019
Ramsey County
St. Paul, Minnesota

Jeff Udd
Manager, Water and Mining Section
Minnesota Pollution Control Agency

Exhibit 4

✓ Org. : WATER
~~SC: A. ROWAN~~

Minnesota Pollution Control Agency

RECEIVED

MAY 08 2000

U.S. EPA REGION 5
OFFICE OF REGIONAL ADMINISTRATOR

May 1, 2000

Mr. Francis X. Lyons
Regional Administrator
U.S. Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Re: Addendum to the National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement for GLI

Dear Mr. Lyons:

Enclosed is the Addendum to the NPDES Memorandum of Agreement between the U.S. Environmental Protection Agency (EPA) and the Minnesota Pollution Control Agency (MPCA). The addendum amends the agreement to ensure that the provisions of Minn. R. Ch. 7052 for the Lake Superior Basin are implemented in a manner consistent with the Water Quality Guidance for the Great Lakes System required by section 118 (c) (2) of the Clean Water Act.

Also enclosed is a letter from the office of the Attorney General of Minnesota certifying the legal authority of the MPCA to interpret and implement the provisions described in the addendum.

The process of implementing the Guidance has been a long one, but it is a pleasure to finally complete these protections for what is arguably the finest water body in the world. The real work is still ahead.

Sincerely,

Gordon E Wegwart

Gordon E. Wegwart, P.E.
Assistant Commissioner
Commissioner's Office

GW:jmn
Enclosures

520 Lafayette Rd. N.; St. Paul, MN 55155-4194; (651) 296-6300 (Voice); (651) 292-5332 (TTY)
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AMENDMENT
TO THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN
THE MINNESOTA POLLUTION CONTROL AGENCY
AND THE
UNITED STATED ENVIRONMENTAL PROTECTION AGENCY, REGION V

The Memorandum of Agreement between the United States Environmental Protection Agency, Region V (hereafter EPA) and the Minnesota Pollution Control Agency (hereafter MPCA) is hereby amended to include MPCA and EPA responsibilities for the development, issuance and enforcement of National Pollutant Discharge Elimination System (hereafter NPDES) general permits as follows:

The MPCA has the responsibility for developing and issuing NPDES general permits. After identifying dischargers appropriately regulated by a general permit, the MPCA will collect sufficient effluent data to develop effluent limitations and prepare the draft general permit.

Each draft general permit will be transmitted to the following EPA offices:

Water Division Director
U.S. Environmental Protection Agency, Region V
230 South Dearborn Street
Chicago, Illinois 60604

Director, Office Water Enforcement and Permits*
U.S. Environmental Protection Agency (EN-335)
401 M Street S.W.
Washington, D.C. 20460

EPA will have up to ninety (90) days to review draft general permits and provide comments, recommendations and objections to the MPCA. Each draft general permit will be accompanied by a fact sheet setting forth the principal facts and methodologies considered during permit development. In the event EPA does object to a general permit it will provide, in writing, the reasons for its objection and the actions necessary to eliminate the objection. The State has the right to a public hearing on the objection. Upon receipt of EPA's objection, the State may request a public hearing. If EPA's concerns are not satisfied

*General permits for discharges from separate storm sewers need not be sent to EPA Headquarters for review.

and the State has not sought a hearing within 90 days of the objection, exclusive authority to issue the general permit passes to EPA.

If EPA raises no objections to a general permit, it will be publicly noticed in accordance with Minnesota Rules Chapter 7001 and 40 CFR § 124.10, including publication in a daily or weekly newspaper circulated in the area to be covered by the permit. The MPCA will issue general permits in accordance with Minnesota Rules Chapter 7001 and 40 CFR § 122.28.

The MPCA may require any person authorized by a general permit to apply for, and obtain an individual NPDES permit. In addition, interested persons, including dischargers otherwise authorized by a general permit, may request that a facility be excluded from general permit coverage. Dischargers wishing exclusion must apply for an individual NPDES permit within ninety (90) days of publication of the general permit. Finally, a discharger with an effective or continued individual NPDES permit may seek general permit coverage by requesting its permit to be revoked.

The MPCA also has the primary responsibility for conducting compliance monitoring activities and enforcing conditions and requirements of general permits.

All specific State commitments regarding the issuance and enforcement of general permits will be determined through the annual 106 workplan/SEA process.

This Amendment to the Memorandum of Agreement will be effective upon approval of the MPCA general permits program application by the Administrator of EPA Region V.

FOR MINNESOTA POLLUTION CONTROL AGENCY:

Commissioner

9/17/87
Date

FOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Regional Administrator
U.S. EPA, Region V

10/8/87
Date

ADDENDUM
TO THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN
THE MINNESOTA POLLUTION CONTROL AGENCY
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION V

The federal Water Quality Guidance for the Great Lakes System (hereafter Federal Guidance) required by section 118(c)(2) of the Clean Water Act (33 U.S.C. §§ 1251 *et. seq.*) is set out in 40 C.F.R. Part 132. The Federal Guidance identifies minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System to protect human health, aquatic life, and wildlife. The Federal Guidance requires Great Lakes states and tribes to adopt provisions consistent with the Federal Guidance for their waters within the Great Lakes system. The Minnesota Pollution Control Agency (hereafter MPCA) adopted Lake Superior Basin Water Standards in Minnesota Rules chapter 7052 as Minnesota's response to that requirement. Chapter 7052 became effective on March 9, 1998. EPA has conducted its review of Minnesota's response for compliance with Federal Guidance.

The Memorandum of Agreement between the United States Environmental Protection Agency, Region V (hereafter EPA), and the MPCA for the approval of the state National Pollutant Discharge Elimination System (hereafter NPDES) is hereby amended to ensure that Minnesota's Lake Superior Basin Water Standards and implementation procedures in chapter 7052 are implemented in a manner that is consistent with the Federal Guidance.

The duties assumed by the MPCA in this Addendum apply only to those portions of Minnesota's NPDES program applicable to Lake Superior.

1. 40 C.F.R. § 132.2, Definition of "New Great Lakes Discharger"/Minn. R. 7052.0010, subp. 33

MPCA and EPA agree that if the MPCA receives any application for a NPDES permit for any Great Lakes discharge associated with any building, structure, facility, or installation, the construction of which commenced after March 23, 1997, the MPCA will treat the discharger as if it were a "new discharger."

2. 40 C.F.R. Part 132, Appendix A, Tier II Values for Aquatic Life/Minn. R. 7052.0100

MPCA and EPA agree that, in situations where data have become available that would result in more stringent aquatic life criteria or values than the criteria listed in Minn. R. 7050.0222, the MPCA will utilize its Tier II methodologies in Minn. R. 7052.0110 to develop criteria or values, and those criteria or values shall be used rather than those listed in Minn. R. 7050.0222, for implementing Minnesota's narrative criteria, establishing total maximum daily loads, establishing water quality based effluent limitations, and making reasonable potential determinations.

3. 40 C.F.R. Part 132, Appendix E, Antidegradation/Minn. R. 7052.0300, subp. 3

EPA and MPCA agree that, in making NPDES permitting decisions regarding new or increased discharges into class 7 waters in the Lake Superior basin, MPCA shall always apply and comply with the nondegradation provisions for high quality waters set forth at Minn. R. 7052.0300, subp. 4, and in Minn. R. 7052.0310, subp. 3, for class 7 waters for all pollutants covered by Appendix E to Part 132 because application and compliance with those provisions will always be necessary to ensure compliance with the antidegradation requirements applicable to downstream outstanding international resource waters and outstanding resource value waters.

4. 40 C.F.R. Part 132, Appendix F, Procedure 5, Reasonable Potential To Exceed Water Quality Standards, Paragraph B.2./Minn. R. 7052.0220, subp. 3

EPA and MPCA agree that MPCA will use only alternative statistical procedures for deriving PEQ that meet the criteria in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2. EPA and MPCA further agree that EPA retains the authority to review any specific statistical procedures Minnesota intends to use for deriving PEQs and to object to permits that have been developed using statistical procedures that do not meet the requirements of Paragraph B.2. of Procedure 5.

5. 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph D.3.c.i., Information Regarding Intake Credits in NPDES Permit Fact Sheets/Minn. R. 7052.0220, subp. 5, and 7001.0100, subp. 3

EPA and MPCA agree that MPCA will include the information required by Paragraph D.3.c.i of Procedure 5 in Appendix F to 40 C.F.R. Part 132 whenever the MPCA determines there is no reasonable potential for the discharge of an intake pollutant to cause or contribute to an excursion above water quality criteria.

6. 40 C.F.R. Part 132, Appendix F, Procedure 8, Paragraph D, Water Quality-Based Effluent Limitations (WQBELs) Below the Quantification Level: Pollutant Minimization Program/Minn. R. 7052.0250, subp. 4

EPA and MPCA agree that Minnesota will include in NPDES permits for discharges into Lake Superior where there is a WQBEL for a pollutant that is below the level of quantification a requirement for at least semiannual monitoring of potential sources of the pollutant at issue and quarterly influent monitoring, unless less frequent monitoring is justified based upon information generated in conducting a pollutant minimization program.

7. 40 C.F.R. Part 132, Appendix F, Procedure 9 and 40 C.F.R. § 122.47(a)(1), Compliance Schedules for New or More Restrictive WQBELs/Minn. R. 7001.0150, subp 2.A and Minn. R. 7052.0260, subp. 2 and 3

EPA and MPCA agree that Minnesota will not allow compliance schedules for WQBELs in NPDES permits where none is needed or appropriate. For example, Minnesota will not allow compliance schedules where a permittee is able to meet the WQBEL at the time of permit issuance or where the permit contains a new but less restrictive WQBEL.

8. 40 C.F.R. § 122.47, Compliance Schedules for New or Improved Analytical Methods/Minn. R. 7052.0260, subp. 2 and 3

Minnesota rules require compliance schedules when permits that are issued contain new or improved analytical methods. Minn. R. 7052.0260, subp. 2 and 3. The Federal Guidance does not address compliance schedules for using analytical methods. That issue is governed by EPA's NPDES program regulations at 40 C.F.R. § 122.47, which provides that permits may include a schedule of compliance so long as the permit "require[s] compliance as soon as possible." 40 C.F.R. § 122.47(a)(1). This provision authorizes Minnesota to allow compliance schedules for use of a new or improved analytical method if such schedules require use of the new analytical method "as soon as possible." Minn. R. 7001.0150, subp. 2.A., provides that a compliance schedule "must require compliance in the shortest reasonable period of time."

EPA and Minnesota agree that "the shortest reasonable period of time" for use of a new or improved analytical method would generally be the period of time necessary to allow a permittee to develop or obtain the analytical services or undertake any other activities necessary to allow the permittee to actually use the new analytical method. EPA and Minnesota also agree that it would be unreasonable to establish a compliance schedule for using a new or improved analytical method that includes additional time based upon the permittee's ability to comply with its WQBEL.

This Addendum to the Memorandum of Agreement will be effective upon final approval of the United States Environmental Protection Agency.

FOR THE MINNESOTA POLLUTION CONTROL AGENCY:

Gordon E. Wegwart — 5/1/00

Gordon E. Wegwart
Assistant Commissioner

Date

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION V:

7/28/00

Francis X. Lyons
Regional Administrator

Date

AG: 377902,v. 01

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH
ATTORNEY GENERAL

SUITE 900
445 MINNESOTA STREET
ST. PAUL, MN 55101-2127
TELEPHONE: (651) 297-1075

May 1, 2000

Mr. Francis X. Lyons
Regional Administrator
U. S. Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Re: MPCA's Legal Authority to Interpret and Implement the Specific Provisions of Minnesota Rules Chapter 7052 Addressed in the Addendum to the NPDES Memorandum of Agreement Between MPCA and EPA

Dear Mr. Lyons:

I have reviewed the agreements that the Minnesota Pollution Control Agency (MPCA) has made in the Addendum to the NPDES Memorandum of Agreement between the MPCA and EPA. It is my opinion that the MPCA has the legal authority to interpret and implement the specific rules at issue as it has agreed to in the Addendum.

The authority of the MPCA is found in the statutes and rules of the State cited in the following text. They are in full force and effect on the date of this statement.

1. 40 C.F.R. § 132.2, Definition of "New Great Lakes Discharger"/Minn. R. 7052.0010, subp. 33

40 C.F.R. § 132.2 defines "New Great Lakes discharger" as "any building, structure, facility, or installation from which there is or may be a 'discharge of pollutants' (as defined in 40 C.F.R. 122.2) to the Great Lakes System, the construction of which commenced after March 23, 1997." Minn. R. 7052.0010, subp. 33, in pertinent part, defines a "new discharger" as "any building, structure, facility, or installation from which there is or may be a 'discharge of pollutants,' as defined in Code of Federal Regulations, title 40, section 122.2, to surface waters of the state in the Lake Superior Basin . . . the construction of which commenced after" March 9, 1998. The only problem identified in comparing the two definitions arises from the difference in the effective dates in the two definitions.

MPCA and EPA have agreed in the Addendum to the National Pollutant Discharge Elimination System Memorandum of Agreement between the MPCA and the EPA (Addendum) that if the MPCA receives any application for a NPDES permit for any Great Lakes discharge associated with any building, structure, facility, or installation, the construction of which commenced after March 23, 1997, the MPCA will treat the discharger as if it were a "new discharger."

As of the date of this certification, in late April 2000, Minnesota has not received any application for a NPDES permit for any Great Lakes discharge associated with any building, structure,

facility or installation, the construction of which commenced between March 23, 1997, and March 9, 1998.

Minn. Stat. § 115.03, subd. 1(e), authorizes the MPCA to adopt, issue, modify, deny, revoke, and enforce reasonable permits, under such conditions as the agency may prescribe, for the prevention of water pollution and for the operation of disposal systems and other facilities. Under Minn. Stat. § 115.07, subd. 1, and rules adopted under that statute, it is unlawful for any person to construct, install, or operate a disposal system, or any part thereof, until it has received a permit from the MPCA. *See* Minn. R. 7001.0030 and 7001.1040.

The definitions of "disposal system" and the terms used in that definition, all in Minn. Stat. § 115.01, signify that sections 115.03 and 115.07, and rules adopted under those statutes, impose a comprehensive permitting requirement on all buildings, structures, facilities and installations covered by the state and federal requirements. By operation of those statutory provisions any construction during the subject period without a permit would have been contrary to law and could not serve as the basis for an argument that the "new discharger" deadline had not passed as to that construction or resulting discharge. As a result, the MPCA would have to treat any application received now or later for a NPDES permit for any Lake Superior discharge associated with any building, structure, facility or installation the construction of which commenced after March 23, 1997, as an application from a "new discharger."

2. 40 C.F.R. Part 132, Appendix A, Tier II Values for Aquatic Life/Minn. R. 7052.0100

40 C.F.R. Part 132, Appendix A, contains a methodology for deriving Tier II aquatic life values to be used in lieu of Tier I criteria in situations where there are insufficient data to calculate Tier I criteria. 40 C.F.R. § 132.4 (c) and (d) provide that, if Tier I criteria are not available, Tier II aquatic life values calculated in accordance with the Tier II methodology apply in the Great Lakes System and must be used when implementing narrative water quality criteria.

Under Minn. R. 7052.0100, Tier I aquatic life criteria apply to the Great Lakes System. If Minnesota has not adopted Tier I aquatic life criteria for a particular pollutant, but there are criteria listed in Minn. R. 7050.0222 for that pollutant that Minnesota previously adopted, then Minnesota uses the previously adopted aquatic life criteria. That is, Minnesota does not generate Tier II values utilizing its methodology for developing Tier II values in Minn. R. 7052.0110 if Minnesota has previously adopted criteria listed in Minn. R. 7050.0222. If there are no Tier I aquatic life criteria or previously adopted criteria listed in Minn. R. 7050.0222, Minnesota utilizes its Tier II methodologies to develop Tier II aquatic life values.

However, new data could become available subsequent to the date that Minnesota adopted its criteria at Minn. R. 7050.0222 that would result in more stringent Tier II aquatic values under the Minnesota and Federal Guidance Tier II aquatic life methodologies. Unlike in the Federal Guidance, nothing in Minnesota's rules requires the MPCA to develop new Tier II values based upon those new data in situations where there are criteria in Minn. R. 7050.0222. Thus, the Minn. R. 7050.0222 criteria may not be as stringent as the criteria would be if derived using the more current data, assuming the data were to indicate that more stringent values were appropriate.

To resolve that potential inconsistency, MPCA and EPA have agreed that, in situations where data have become available that would result in more stringent aquatic life criteria or values than the criteria listed in Minn. R. 7050.0222, the MPCA will utilize its Tier II methodologies in Minn. R. 7052.0110 to develop criteria or values to be used for implementing its narrative criteria, establishing total maximum daily loads, establishing water quality based effluent limitations, and making reasonable potential determinations.

The authority for MPCA to make that agreement appears in Minn. Stat. § 115.03, subd. 5, which authorizes the MPCA to do all things, including adopting, amending and applying standards and rules, consistent with and not less stringent than the Clean Water Act applicable to the participation by Minnesota in the NPDES. The MPCA has agreed in the Addendum to apply its standards in a manner consistent with the Clean Water Act and Minnesota's participation in the NPDES, exactly what the Minnesota statute contemplates. *See also* Minn. Stat. § 115.44, subd. 8, as further support for the State's authority to utilize its Tier II methodologies.

Minn. R. 7001.0150, subp. 2 and 3.B., require the MPCA to include in permits conditions necessary for the permittee to achieve compliance with applicable federal law and allow the MPCA to adopt and enforce more stringent standards and apply them to existing permits.

3. 40 C.F.R. Part 132, Appendix E, Antidegradation/Minn. R. 7052.0300, subp. 3

40 C.F.R. Part 132, Appendix E, regarding the Great Lakes Water Quality Initiative Antidegradation Policy, requires that the decision whether a water body is high quality for purposes of antidegradation be made on a parameter by parameter basis. Minnesota's nondegradation standards at Minn. R. 7052.0300, subp. 4, limit high quality waters in the Lake Superior basis to those designated as Outstanding International Resource Waters (OIRWs). Minnesota rules define OIRWs at subpart 3 of part 7052.0300 as, "[a]ll surface waters of the state in the Lake Superior Basin, other than Class 7 waters and designated ORVWs." That definition appears to raise a conflict with the Federal Guidance because Class 7 waters cannot be considered high quality waters by definition, regardless of water quality for individual bioaccumulative chemicals of concern (BCCs) as required by the Federal Guidance. However, Minn. R. 7052.0300, subp. 1.C., requires that the nondegradation procedures at Minn. R. 7052.0310, 7052.0320, and 7052.0330 must be applied to Class 7 waters as necessary to protect downstream waters.

EPA and MPCA have agreed in the Addendum that in making NPDES permitting decisions regarding new or increased discharges into class 7 waters in the Lake Superior basin, MPCA shall always apply and comply with the nondegradation provisions for high quality waters set forth at Minn. R. 7052.0300, subp. 4, and in Minn. R. 7052.0310, subp. 3, for class 7 waters for all pollutants covered by Appendix E to Part 132 because application and compliance with those provisions will always be necessary to ensure compliance with the antidegredation requirements applicable to downstream outstanding international resource waters and outstanding resource value waters.

The authority for MPCA to make that agreement appears in Minn. Stat. § 115.03, subd. 5, which authorizes the MPCA to do all things, including applying standards and rules consistent with

and not less stringent than the Clean Water Act applicable to the participation by Minnesota in the NPDES. Further authority is found in the rule, Minn. R. 7052.0300, subp. 1.C., cited as the resolution to the potential inconsistency, in Minn. R. 7052.0005 B., and in Minn. R. 7001.0150, subp. 2 and 3.B, as described in the preceding section of this letter.

4. 40 C.F.R. Part 132, Appendix F, Procedure 5, Reasonable Potential To Exceed Water Quality Standards, Paragraph B.2./Minn. R. 7052.0220, subp. 3

The Federal Guidance at 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2., and Minnesota's program at Minn. R. 7052.0220, subp. 3, both allow for use of alternative statistical procedures for deriving preliminary effluent quality (PEQ). The Minnesota rule provides that any alternate PEQ procedure used must fulfill the requirements of 40 C.F.R. § 122.44, para. (d)(1). While any alternate procedure that meets the requirements of Paragraph B.2. of Procedure 5 would meet the requirements of 40 C.F.R. § 122.33(d)(1), certain procedures that meet the Minnesota requirements, i.e., 40 C.F.R. § 122.33(d)(1), may not satisfy the requirements of Paragraph B.2. of Procedure 5.

EPA and MPCA have agreed that MPCA will use only alternative statistical procedures for deriving PEQ that meet the criteria in 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph B.2.

The authority for the MPCA to make that agreement appears in Minn. Stat. § 115.03, subd. 5, which authorizes the MPCA to do all things, including applying standards and rules consistent with and not less stringent than the Clean Water Act applicable to the participation by Minnesota in the NPDES. The MPCA has agreed in the Addendum to apply its standards in a manner consistent with the Clean Water Act and Minnesota's participation in the NPDES. Further the action MPCA has agreed to lies within an administrative agency's generally accepted enforcement discretion. Minn. R. 7001.0150, subp. 2 and 3.B, as described in Section 3, express further authority for the MPCA's agreement.

5. 40 C.F.R. Part 132, Appendix F, Procedure 5, Paragraph D.3.c.i., Information Regarding Intake Credits in NPDES Permit Fact Sheets/Minn. R. 7052.0220, subp. 5, and 7001.0100, subp. 3

Paragraph D.3.b. of Procedure 5 in Appendix F to 40 C.F.R. Part 132, allows permitting authorities to determine that there is no reasonable potential for identified intake pollutants to cause or contribute to an excursion above water quality criteria when a permittee can demonstrate that five specified conditions are met. Paragraph D.3.c.i. requires the NPDES permit fact sheet to state the basis for and document the finding of no reasonable potential for chemical-specific water quality based effluent limitation. While Minnesota's "intake credit" provisions require meeting the same five conditions as in the Federal Guidance, they do not contain anything comparable to the requirement in Paragraph D.3.c.i. to document in the permit fact sheet the basis for a finding of no reasonable potential for chemical-specific water quality based effluent limitation.

However, Minnesota's general permitting rule at Minn. R. 7001.0100, subp. 3, requires the MPCA to include in the fact sheet "the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit, . . . a summary of the

basis for the draft permit conditions, including references to applicable statutory or regulatory provisions, . . . and the preliminary determinations made by the commissioner on the permit application." These general provisions include the information required by Paragraph D.3.c.i. in the Federal Guidance whenever the MPCA determines there is no reasonable potential for the discharge of an intake pollutant to cause or contribute to an excursion above water quality criteria.

EPA and MPCA have agreed that MPCA will include the information required by Paragraph D.3.c.i. of Procedure 5 in Appendix F to 40 C.F.R. Part 132 whenever the MPCA determines there is no reasonable potential for the discharge of an intake pollutant to cause or contribute to an excursion above water quality criteria.

The authority for the MPCA to make that agreement appears in Minn. Stat. § 115.03, subd. 5, which authorizes the MPCA to do all things, including applying standards and rules consistent with and not less stringent than the Clean Water Act applicable to the participation by Minnesota in the NPDES. The MPCA has agreed in the Addendum to apply its standards in a manner consistent with the Clean Water Act and Minnesota's participation in the NPDES. The authority also resides in Minn. R. 7001.0100, subp. 3, which requires inclusion in the fact sheet for each draft MPCA permit facts such as agreed to here.

6. 40 C.F.R. Part 132, Appendix F, Procedure 8, Paragraph D, Water Quality-Based Effluent Limitations (WQBELs) Below the Quantification Level: Pollutant Minimization Program/Minn. R. 7052.0250, subp. 4

Paragraph D of Procedure 8 in Appendix F to 40 C.F.R. Part 132, requires inclusion of pollutant minimization programs (PMPs) in permits where there is a WQBEL for a pollutant that is below the level of quantification. Paragraph D.1. requires semiannual monitoring of potential sources of the pollutant while Paragraph D.2. requires quarterly monitoring for the pollutant in the effluent of the wastewater treatment system. Finally, Paragraph D.6. allows a permitting authority to reduce monitoring frequencies based upon information generated as a result of a PMP.

Minn. R. 7052.0250, subp.4, requires only that PMPs include requirements for "periodic monitoring" of potential pollutant sources and of wastewater treatment system influent.

EPA and MPCA have agreed that Minnesota will require in its NPDES permits for discharges into Lake Superior where there is a WQBEL for a pollutant that is below the level of quantification a requirement for at least semiannual monitoring of potential sources of the pollutant at issue and quarterly influent monitoring, unless less frequent monitoring is justified based upon information generated in conducting a pollutant minimization program.

The authority for the MPCA to make that agreement appears in Minn. Stat. § 115.03, subd. 5, which authorizes the MPCA to do all things, including adopting, amending and applying standards and rules, consistent with and not less stringent than the Clean Water Act applicable to the participation by Minnesota in the NPDES. The MPCA has agreed in the Addendum to apply its standards in a manner consistent with the Clean Water Act and Minnesota's participation in the NPDES. The Minnesota rule requires periodic monitoring. Making that general requirement specific as to the period at which

monitoring shall take place lies within the MPCA's generally accepted enforcement discretion. Further, Minn. Stat. § 115.03, subd. 1(e), authorizes the MPCA to adopt, issue, modify, deny, revoke, and enforce reasonable permits, under such conditions as the agency may prescribe, for the prevention of water pollution and for the operation of disposal systems and other facilities. *See also*, Minn. R. 7001.0150, subp. 2 and 3.B, as described in section 3 of this letter.

7. 40 C.F.R. Part 132, Appendix F, Procedure 9 and 40 C.F.R. § 122.47(a)(1), Compliance Schedules for New or More Restrictive WQBELs/Minn. R. 7001.0150, subp 2.A and Minn. R. 7052.0260, subp. 2 and 3

Federal Guidance mentions compliance schedules only in Procedure 9 of Appendix F. Paragraph A of Procedure 9 requires that any WQBEL included in a permit to a new discharger must be complied with upon the commencement of the discharge. Minn. R. 7052.0260, subp. 2, also requires that any WQBEL included in a permit to a new discharger must be complied with upon commencement of the discharge.

EPA and MPCA agree that Minnesota will not allow compliance schedules for WQBELs in NPDES permits where none is needed or appropriate. For example, Minnesota will not allow compliance schedules where a permittee is able to meet the WQBEL at the time of permit issuance or where the permit contains a new but less restrictive WQBEL.

Neither the Federal Guidance nor Minn. R. ch. 7052 expressly prohibits inclusion of a compliance schedule in an existing permit that is reissued or modified to contain a new or more restrictive WQBEL where a compliance schedule is not needed, i.e., when the permittee can comply with the new or more restrictive WQBEL upon reissuance of the permit. However, separate provisions of federal regulations and Minnesota rules do require compliance upon reissuance when possible. *See* 40 C.F.R. § 122.47(a)(1) ("schedules of compliance . . . shall require compliance as soon as possible") and Minn. R. 7001.0150, subp. 2.A ("schedule of compliance must require compliance in the shortest reasonable period of time"). The latter provision is prefaced with the condition "[i]f applicable to the circumstances." Further, Minn. R. 7001.0100, subp. 2, regarding draft permits, provides, "If the preliminary determination is to issue a permit, the commissioner shall prepare a draft permit, including a proposed schedule of compliance *if a schedule is necessary* to meet all applicable standards and limitations imposed by statute or rule."

The only reasonable reading of the cited provisions of Minnesota law is that the State will not allow compliance schedules for WQBELs in NPDES permits where none is needed or appropriate. Minnesota is fully authorized to agree with the EPA that it will not allow compliance schedules in those circumstances. The implication of the agreement is that Minnesota will not allow compliance schedules where a permittee is able to meet the WQBEL at the time of permit issuance or where the permit contains a new but less restrictive WQBEL.

8. 40 C.F.R. § 122.47, Compliance Schedules for New or Improved Analytical Methods/Minn. R. 7052.0260, subp. 2 and 3

Minnesota rules require compliance schedules when permits that are issued contain new or improved analytical methods. Minn. R. 7052.0260, subp. 2 and 3. Federal Guidance does not address compliance schedules for using analytical methods. That issue is governed by EPA's NPDES program regulations at 40 C.F.R. § 122.47, which provides that permits may allow a schedule of compliance so long as the permit "require[s] compliance as soon as possible." 40 C.F.R. 122.47(a)(1). This provision authorizes Minnesota to allow compliance schedules for use of a new or improved analytical method if such schedules require use of the new analytical method "as soon as possible."

Minn. R. 7001.0150, subp. 2.A., provides that a compliance schedule "must require compliance in the shortest reasonable period of time." EPA and Minnesota agree that "the shortest reasonable period of time" for use of a new or improved analytical method would generally be the period of time necessary to allow a permittee to develop or obtain the analytical services or undertake any other activities necessary to allow the permittee to actually use the new analytical method. EPA and Minnesota also agree that it would be unreasonable to establish a compliance schedule for using a new or improved analytical method that includes additional time based upon the permittee's ability to comply with its WQBEL.

The authority for the MPCA to make that agreement appears in Minn. Stat. § 115.03, subd. 5, which authorizes the MPCA to do all things, including applying standards and rules consistent with and not less stringent than the Clean Water Act applicable to the participation by Minnesota in the NPDES. The MPCA has agreed in the Addendum to interpret its standards in a manner consistent with the Clean Water Act and Minnesota's participation in the NPDES. Further, Minn. Stat. § 115.03, subd. 1(e), authorizes the MPCA to adopt, issue, modify, deny, revoke, and enforce reasonable permits, under such conditions as the agency may prescribe, for the prevention of water pollution and for the operation of disposal systems and other facilities.

The MPCA has the authority to interpret, implement and enforce the proposed agreements it has made in the Addendum to the NPDES Memorandum of Agreement with the EPA.

Very truly yours,

DWIGHT S. WAGENIUS
Assistant Attorney General

(651) 296-7345

AG: 351538,v. 01

MODIFICATION TO NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF MINNESOTA AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION V

The Memorandum of Agreement approved June 28, 1974, by the Administrator of the United States Environmental Protection Agency between the Minnesota Pollution Control Agency (hereinafter, the "State") and the United States Environmental Protection Agency (hereinafter, "U.S. EPA") Region V is hereby modified to define State and U.S. EPA responsibilities for the establishment and enforcement of National Pretreatment Standards for existing and new sources under Section 307 (b) and (c) of the Clean Water Act (hereinafter the Act) as follows:

The State has primary responsibility for: (a) enforcing against discharges prohibited by 40 C.F.R. Section 403.5; (b) applying and enforcing any National Pretreatment Standards established by the U.S. EPA in accordance with Section 307 (b) and (c) of the Act; (c) reviewing, approving, and overseeing Publicly Owned Treatment Works (POTW) Pretreatment Programs to enforce National Pretreatment Standards in accordance with the procedures discussed in 40 C.F.R. Section 403.11; (d) requiring a POTW Pretreatment Program in National Pollutant Discharge Elimination System (NPDES) Permits issued to POTWs as required in 40 C.F.R. Section 403.8 and as provided in Section 402(b)(8) of the Act; (e) reviewing and approving modification of categorical Pretreatment Standards to reflect removal of pollutants by a POTW and enforcing related conditions in the POTWs NPDES Permit. U.S. EPA will overview and approve State pretreatment program operations consistent with 40 C.F.R. 403 regulations and this Memorandum of Agreement.

The State shall carry out inspection, surveillance and monitoring procedures which will determine, independent of information supplied by the POTW, compliance or noncompliance by the POTW with pretreatment conditions incorporated into the POTW permit, and carry out inspection, surveillance and monitoring procedures which will determine, independent of information supplied by the Industrial User, whether the Industrial User is in compliance with Pretreatment Standards. The number of inspections to determine compliance shall be agreed upon as part of the annual section 106 program plan process.

The State shall not issue, reissue, or modify any NPDES permit for a major POTW with pretreatment requirements until it receives an approval for such issuance, reissuance, or modification from U.S. EPA. If no comment is received by the State from U.S. EPA within 90 days from the date of receipt of such a request for permit issuance, reissuance, or modification, the State may assume that U.S. EPA has no objection to the issuance of the NPDES permit. It is Regional policy to attempt to process each request for approval within 30 days. To assure that no request for a major POTW is lost or not acted upon, the State shall contact the U.S. EPA Regional Permit Program by telephone within 35 days after it transmits such a request in the event the State has not received a response from the U.S. EPA by that time. The State shall take final action on NPDES Permits for minor POTWs with pretreatment requirements without the need to obtain U.S. EPA approval.

Section 403.6 National Pretreatment Standards: Categorical Standards

The State shall review requests from industrial users for industrial subcategories, make a written determination whether the Industrial User does or does not fall within a particular categorical pretreatment standard and state the reasons for this determination. The State shall forward its findings together with a copy of the request and necessary supporting information to the U.S. EPA Regional Enforcement Division Director for concurrence. If the Enforcement Division Director does not modify the State's decision within 60 days after receipt thereof, the State's finding is final. Where the request is submitted to the Enforcement Division Director or where the Enforcement Division Director elects to modify the State's decision, the Enforcement Division Director's decision will be final. Where the final determination is made by the Enforcement Division Director, the Director shall send a copy of this determination to the State.

Section 403.7 Categorical Pretreatment Standards Credit Removal and Section 403.9 POTW Pretreatment Program Approvals

The State shall review and act on POTW applications to revise discharge limits for industrial users who are or may in the future be subject to categorical pretreatment standards and requests for approval of POTW Pretreatment Programs. The State shall not take a final action on a major POTW's application to revise categorical pretreatment standards until it receives approval for such action from the U.S. EPA. If no comment is received by the State from U.S. EPA during the 45 day (or extended) evalution period provided for in 40 C.F.R. 403.11(b)(1)(ii), the State may assure that U.S. EPA has no objection. To assure that no request is lost or not acted upon, the State shall contact the U.S. EPA Permit Program by telephone within 30 days after it transmits its determination in the event the State has not received a response from the U.S. EPA by that time. No major POTW request for revised discharge limits shall be approved by the State if during the 45 day (or extended) evaluation period, the U.S. EPA objects in writing to the approval of such submission. The State shall take final action on minor POTWs requests to revise categorical pretreatment standards without the need to obtain U.S. EPA approval.

Section 403.13 Variances From Categorical Pretreatment Standards for Fundamentally Different Factors

The State shall conduct an initial review of all cateogrical pretreatment standards fundamentally different factors requests from industrial users. If the State's determination is to deny the request, this determination shall be forwarded to the industrial user with a copy of the determination and request also forwarded to the U.S. EPA Regional Enforcement Division Director. If the State's determination is that fundamentally different factors do exist, the request and recommendation that the request be approved shall be sent to the U.S. EPA Regional Enforcement Division Director for final action. If the Director's determination differs from that of the State, the Director shall notify the State in writing indicating reasons why the determinations differ and allow the State a reasonable amount of time to respond. The State shall be provided a copy of the Director's final determination.

Miscellaneous

The State shall submit a list of POTWs requiring pretreatment, identifying those municipalities with flows greater than 5 MGD and less than 5 MGD separately. This list may be revised from time to time and any addition or deletion will not require modification to the Memorandum of Agreement. The list of POTWs requiring pretreatment may be modified at any time upon the mutual agreement of the State and the U.S. EPA Regional Enforcement Division Director.

For minor POTWs, the U.S. EPA Regional Enforcement Division Director will be afforded the opportunity to review and comment on pretreatment program submissions and the State's preliminary determinations as provided in 40 C.F.R. 403.11.

Nothing in this agreement is intended to affect any Pretreatment requirement including any standards or prohibitions, established by state or local law as long as the state or POTW requirements are not less stringent than any set forth in the National Pretreatment Standards, or other requirements or prohibitions established under the Act or this regulation.

Nothing in this Modification shall be construed to limit the authority of U.S. EPA to take action pursuant to Sections 204, 208, 301, 304, 306, 307, 308, 309, 311, 402, 404, 405, 501, or other Sections of the Clean Water Act of 1977 (33 USC § 1251 et seq).

This Modification will become effective upon approval of the Administrator.

STATE AGENCY

By Terry Hoffman

Date: 5-22-79

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION V

By J. C. McDuffie

Date: 6-7-79

Approved:

Administrator
United States Environmental Protection Agency

Date: JUL 16 1979

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

9 DEC 1978

OFFICE OF ENFORCEMENT

Honorable Rudy Perpich
Governor of Minnesota
St. Paul, Minnesota 55155

Dear Governor Perpich:

On June 30, 1974, Minnesota received authority to administer the National Pollutant Discharge Elimination System (NPDES) within its borders. EPA's approval letter indicated that we would retain authority to issue permits for Federal facilities within the State. The reservation of authority over Federal facilities was necessary because the Federal Water Pollution Control Act (FWPCA) precluded State regulation of these facilities.

The 1977 amendments to the FWPCA specifically authorize the States to administer the NPDES permit program as to Federal facilities. Accordingly, I hereby approve the State of Minnesota's request to assume this responsibility. This approval overrides any contrary language in EPA's June 30, 1974, letter approving the State NPDES program.

We are glad to transfer the administration of the NPDES permit program for Federal facilities to the State of Minnesota. Region V will be working with the Minnesota Pollution Control Agency to facilitate the timely transfer of the background information and documents for Federal facilities.

Sincerely yours,

Marvin B. Durning

Marvin B. Durning
Assistant Administrator
for Enforcement

cc: Ms. Sandra S. Gardebring
Executive Director
Minnesota Pollution Control Agency

D Schmidt

MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE MINNESOTA POLLUTION CONTROL AGENCY FOR THE APPROVAL OF THE STATE NPDES PERMIT PROGRAM

I. RECITALS

(1) Parties. The parties to this agreement (hereinafter, the Agreement) are the United States Environmental Protection Agency (hereinafter, the EPA) and the Minnesota Pollution Control Agency (hereinafter, the Agency).

(2) Purpose. It is the purpose of this Agreement to provide the terms and conditions for approval by the EPA of the State of Minnesota's National Pollutant Discharge Elimination System (hereinafter, NPDES) permit program under the Federal Water Pollution Control Act Amendments of 1972 (hereinafter, the Act) and the EPA's guidelines for "State Program Elements Necessary for Participation in National Pollutant Discharge Elimination System" (hereinafter, the Guidelines) promulgated in the Federal Register, Vol. 37. No. 247, Friday, December 22, 1972, 40 C.F.R. Part 124. Various sections of the Guidelines require the Chief Administrative Officer of a state water pollution control agency and the Regional Administrator of EPA to reach agreement on the manner in which the Guidelines are to be implemented. To satisfy the requirements of the Guidelines, the following procedures are hereby agreed to by the Director of the Agency (hereinafter, the Director), the Agency, and the Regional Administrator of the EPA for Region V (hereinafter, the Regional Administrator). The Sections of this Agreement are numbered in accordance with the Sections of the Guidelines.

II. AGREEMENT

General

Section 124.4 (Authority for State program procedures).

(1) The Agency adopted on March 19, 1974, WPC 36, an Agency regulation relating to NPDES permit procedures consistent with the Guidelines.

(2) The Agency shall employ the procedures of WPC 36 pending its becoming properly filed and thus having the force and effect of law. The Agency expects that WPC 36 will have the force and effect of law on or before May 1, 1974.

Acquisition of Data

Section 124.22 (Receipt and Use of Federal Data).

(1) The purposes of this section are: (a) to provide for the transfer of data bearing on NPDES permit determinations from the EPA to the Agency, and (b) to insure that any deficiencies in the transferred NPDES forms shall be corrected prior to issuance of a NPDES permit.

(2) Commencing immediately after the effective date of this Agreement the Regional Administrator shall transmit to the Director a list of all NPDES permit applications received by EPA. This list shall include the name of each discharger, SIC Code, application number, and indicate whether EPA has determined which applications are complete.

(3) After receipt of the list, the Director shall identify

the priority order to be used by the EPA to transmit the application files to him. The application file shall include the NPDES permit application and any other pertinent data collected by EPA. The application files shall be transmitted to the Director according to the priority order identified, and the EPA shall retain one copy of each file transmitted to the Director.

(4) For an application identified as incomplete or otherwise deficient by the EPA, the Director shall obtain from the discharger the information identified by the EPA as being necessary to complete the application. The Director, at his discretion, may also obtain additional information for those applications identified by the EPA as complete or incomplete to update or process the application.

(5) Once the Director determines that an application is complete, he shall transmit two copies of the completed application and a cover letter indicating that the application has been determined to be complete to the Regional Administrator, Attention: Permit Branch. If the EPA concurs that the application is complete, one copy shall be routed to the Regional Data Management Section, Surveillance Division, through the Compliance Section, Enforcement Division, for processing into the National Data Bank and the other copy shall be placed in the NPDES Permit Branch file.

(6) The Director shall be timely advised by letter that the Regional NPDES Permit Branch concurs with his determination and that a copy of the application has been transmitted to the Data Management Section. If the EPA determines that the application is not

complete, the Regional NPDES Permit Branch shall identify the deficiencies by letter to the Director. The Director shall attempt to resolve all deficiencies within 20 days of date of receipt of notification.

(7) The Regional Administrator shall provide written comment on an application for a NPDES permit no later than 20 days from the date of receipt of application from the Agency. The Regional Administrator may within this 20 day period request additional time not to exceed a total of 40 days. The Director may assume, after verification of receipt of the application, that no comment is forthcoming if he has received no response from the Regional Administrator at the end of 20 days.

(8) No NPDES application shall be processed by the Agency until all deficiencies identified by the EPA are corrected and the Director receives a letter from the EPA concurring with the Director that the application is complete.

Section 124.23 (Transmission of Data to Regional Administrator).

(1) The Director shall transmit to the Regional Administrator copies of completed NPDES application forms submitted by the applicant to the State. When the State determines that the NPDES application forms received from the discharger are complete, two copies of the forms with a cover letter indicating that the forms are complete shall be transmitted to the Regional Administrator, Attention: Permit Branch. If EPA concurs with the Director, one

copy shall be routed to the Regional Data Management Section, Surveillance and Analysis Division, through the Compliance Section, Enforcement Division for processing into the General Point Source File (hereinafter, GPSF) and the other copy shall be placed in the Regional NPDES Permit Branch file. The Director shall be advised by letter that the EPA concurs with his determination and that a copy of the NPDES application form has been transferred to the EPA Regional Data Management Section. The State may input directly into the GPSF subject to prior approval of procedures by the NPDES Permit Branch and Data Management Section. If the EPA determines that the NPDES application form is not complete, the deficiencies shall be identified by letter to the Director. No NPDES application shall be processed by the Agency until the deficiencies are corrected and it has been advised in writing by the EPA that the NPDES application form is complete.

(2) Upon receiving a NPDES application form from the Director, should the Regional Administrator identify any discharge which has a total volume of less than 50,000 gallons on every day of the year as a discharge which is not a minor discharge, and notifies the Director, the Director shall require the applicant for the discharge to submit additional NPDES application forms or any other information requested by the Regional Administrator.

(3) When requested by the Regional Administrator, the Director shall transmit copies of notice received by him from publicly-owned treatment works pursuant to Section 124.45(d) and (e) of the Guidelines within 15 days of receipt of the request.

Section 124.35(b) and (c) (Public Access to Information).

(1) The Director shall protect any information (other than effluent data) contained in such NPDES form, or other records, reports or plans as confidential upon a showing by any person that such information if made public would divulge methods or processes entitled to protection as trade secrets of that person. If, however, the information being considered for confidential treatment is contained in a NPDES form, the Director shall forward such information to the Regional Administrator for his concurrence in any determination of confidentiality. If the Regional Administrator does not agree that some or all of the information being considered for confidential treatment merits such protection he shall request advice from the EPA's Office of General Counsel, stating the reasons for his disagreement with the determination of the Director. The Regional Administrator shall simultaneously provide a copy of the request to the person claiming trade secrecy. The General Counsel shall determine whether the information in question would, if revealed, divulge methods or processes entitled to protection as trade secrets. In making such determinations, he shall consider any additional information submitted to the Office of General Counsel within 30 days of receipt of the request from the Regional Administrator. If the General Counsel determines that the information being considered does not contain trade secrets he shall so advise the Regional Administrator and shall notify the person claiming trade secrecy of such determination by certified mail. No sooner than 30 days

following the mailing of such notice, the Regional Administrator shall communicate to the Agency his decision not to concur in the withholding of such information, and the Agency and the Regional Administrator shall then make available to the public upon request, that information determined not to constitute trade secrets, unless an appeal is made to EPA by the person claiming trade secrecy. Following an appeal, the determination made by EPA shall be conclusive unless reviewed in an appropriate district court of the United States.

(2) Any information accorded confidential status whether or not contained in a NPDES form, shall be disclosed by the Agency upon written request therefor, to the Regional Administrator, or his authorized representative, who shall maintain the disclosed information as confidential.

Terms and Conditions of NPDES Permits

The Agency has the authority under this Memorandum of Agreement to include special conditions in permits for municipal dischargers that will not be able to achieve the effluent limitations of Section 301(b)(1) of the Act due to the lack of Title II Federal grant money for publicly owned treatment works. If Federal money is essential for capital improvements to meet the requirements of Section 301(b)(1) and is not available, the permit would not require any such improvements. The special permit conditions shall include, but not be limited to, the following: (a) stringent operation and maintenance conditions

and needed minor facilities modifications, to the full extent of State and local capabilities and available funds; (b) interim compliance objectives to be achieved before July 1, 1977; and (c) upon the availability of Federal funding, the permit shall be immediately subject to reconsideration and modification with a schedule for compliance at the earliest possible dates. The Agency shall keep all such permits under close review to insure compliance with the special conditions.

Section 124.44(d) (Schedule of Compliance in Issued NPDES Permits).

On the last day of the months of February, May, August, and November, the Director shall transmit to the Regional Administrator, Attention: Compliance Section, Enforcement Division, a list of all instances, as of 30 days prior to the date of such report, of failure or refusal of a NPDES permittee to comply with an interim or final requirement or to notify the Director of compliance or noncompliance with each interim or final requirement (as required pursuant to Section 124.44(b) of the Guidelines), and any revision or modification of a schedule of compliance. The list shall be available to the public for inspection and copying and shall contain at least the following information with respect to each instance of noncompliance:

(1) The name and address of each noncomplying NPDES permittee;

(2) A short description of each instance of noncompliance (e.g. failure to submit preliminary plans, 2 week delay in commencement of construction of treatment facility, failure to notify the Direc-

tor of compliance with an interim requirement to complete construction by June 30th, etc.);

(3) A short description of any action or proposed actions by the permittee or the Director to comply or enforce compliance with an interim or final requirement; and

(4) Any details which tend to explain or mitigate an instance of noncompliance with an interim or final requirement (e.g., construction delayed due to materials shortage, plan approval delayed by objections, etc.).

Section 124.86 (Transmission to Regional Administrator of Proposed NPDES Permits).

(1) At the time a public notice required by Section 124.32 of the Guidelines is issued, the Director shall transmit one copy of the NPDES public notice, fact sheets, proposed NPDES permit and a list of all persons receiving the public notice, fact sheets and proposed NPDES permit, together with a description of any other procedure used to circulate the public notice, to the Regional Administrator, Attention: NPDES Permit Branch. The information transmitted with the proposed permit shall include any and all terms, conditions, requirements, or documents which are part of the proposed NPDES permit or which affect the authorization by the proposed NPDES permit of the discharge of pollutants.

(2) After a public notice period has expired, the Agency shall consider all comments received as a result of the public notice and may modify the proposed NPDES permit as it considers appropriate. Public hearings may be held as provided for in Section 124.36 of the Guidelines. If a public hearing is held, the Agency shall consider all comments and may modify the proposed

NPDES permit as it considers appropriate. If a public hearing is requested and should the Agency decide not to hold a public hearing, the Director shall provide the Regional Administrator and all parties requesting the hearing, a written explanation of why the hearing was not held before submitting the proposed NPDES permit to the Regional Administrator for approval.

(3) If a proposed NPDES permit issued with a public notice is modified as a result of the public notice or public hearing, a revised copy of the proposed NPDES permit shall be transmitted to the Regional Administrator, Attention: NPDES Permit Branch, together with a copy of all statements received from the public notice, and where a public hearing is held, a summary of all objections with a request for approval to issue the NPDES permit. In lieu of a summary, the Director may provide a verbatim transcript of the entire public hearing.

(4) If a proposed NPDES permit is not revised after a public notice or where held, a public hearing, the Director shall notify the Regional Administrator, Attention: NPDES Permit Branch, by letter that the proposed NPDES permit issued with the public notice has not been revised and request approval to issue the NPDES permit. The request for approval shall include a copy of all written statements received from the public notice.

(5) The Regional Administrator shall respond within 15 days from the date of receipt of the letter requesting final approval to issue or deny the proposed permit. The Regional Administrator pursuant to any right to object provided in Section 402(d)(2) of the

Act, may comment upon, object to or make recommendations with respect to the proposed NPDES permit. If no written comment is received by the Agency from the Regional Administrator within the 15 days, the Director may assume, after verification of receipt of the proposed permit, that the EPA has no objection to the issuance of the NPDES permit.

(6) The Agency shall not issue a NPDES permit for a discharge to which the Regional Administrator has objected in writing pursuant to any right to object. The resolution by the Director of these objections shall be communicated in writing by the Director within 20 days to the Regional Administrator and no permit shall be issued before written approval of such resolution by the Regional Administrator is received by the Director. If the Regional Administrator does not respond within 20 days after receipt of the Director's resolution, the Director may assume that the EPA has no objection to the issuance of the NPDES permit, and may issue such permit, as resolved.

(7) No later than 120 days from the effective date of this agreement the Regional Administrator shall consider the waiver of his rights to review, object to, or comment upon the proposed NPDES permit for any application which relates to minor discharges, except for any application which involves the discharge of toxic wastes or discharges to the waters that intersect or form a portion of Minnesota's borders. The Regional Administrator shall promptly notify the Agency of his decision. This initial waiver shall not be construed as limiting the right of the Regional Administrator to waive in writing at a later date other categories, classes or

types of permits upon an evaluation of the Agency's performance in implementing the permit program.

Section 124.47 (Transmission to Regional Administrator of Issued NPDES Permits).

(1) The Director shall transmit to the Regional Administrator two copies of every issued NPDES permit, Attention: NPDES Permit Branch, together with any and all terms, conditions, requirements, or documents which are a part of the NPDES permit or which affect the authorization by the NPDES permit of the discharge of pollutants.

(2) The Director shall transmit the above information at the same time the NPDES permit is issued by the Agency to the applicant, together with a copy of the Director's letter to the applicant forwarding the NPDES permit.

Monitoring, Recording, and Reporting

Section 124.61(b) (Monitoring).

(1) Permit conditions issued by the Agency for any discharge authorized by a NPDES permit which (a) is not a minor discharge, (b) the Regional Administrator requests, in writing, be monitored, or (c) contains toxic pollutants for which an effluent standard has been established by the Administrator pursuant to Section 307(a) of the Act, shall require monitoring by the permittee for at least the following:

(i) Flow (in gallons per day); and

(ii) All of the following pollutants:

(a) Pollutants (either directly or indirectly through the use of accepted correlation coefficients or equivalent measurements) which are subject to reduction or elimination under the terms and conditions of the permit;

(b) Pollutants which the Agency finds, on the basis of information available to it, could have a significant impact on the quality of navigable waters;

(c) Pollutants specified by the Administrator, in regulations issued pursuant to the Federal Act, as subject to monitoring; and

(d) Any pollutants in addition to the above which the Regional Administrator requests, in writing, be monitored.

(2) At any time before a NPDES permit is issued, the Regional Administrator may make the requests specified in paragraphs 1(b) and (c) herein.

(3) The Director shall transmit to the Regional Administrator data submitted by NPDES permittees on self-monitoring report forms, either by (a) forwarding copies of the reporting forms to the Regional Administrator, Attention: Compliance Section, Enforcement Division, or (b) by direct entry into the GPSF data system.

Section 124.62(c) (Recording of Monitoring Activities and Results).

During the period of a NPDES permit and any unresolved litigation, upon the written request of the Regional Administrator, the Director shall notify and require the permittee to extend the normal three year retention of any records of monitoring activities and results.

Enforcement Provisions

Section 124.71 (Receipt and Follow-up of Notification and Reports).

(1) The Agency shall evaluate data submitted by NPDES permittees in NPDES reporting forms and other forms supplying monitoring data, for possible enforcement or remedial action. The Director shall transmit to the Regional Administrator, Compliance Section, Enforcement Division, copies of the forms together with his evaluation on the last day of the months of February, May, August and November, as of 30 days prior to the date of such report, where the data shows that effluent limits in the NPDES permits are exceeded. Where monitoring data show that effluent limits are exceeded, the Director shall identify the effluent limits exceeded, describe briefly any actions or proposed actions by the NPDES permittee or the Agency to comply or enforce compliance with the limits and describe any details which tend to explain or mitigate an instance of non-compliance.

(2) If the Director determines that any condition of the permit for publicly-owned treatment works is violated, he shall notify the Regional Administrator and the Agency shall consider taking action relating to proceedings to restrict or prohibit the introduction of pollutants into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

Section 124.72 (Modification, Suspension and Revocation of NPDES Permits).

The Director may, upon request of the permittee, revise or modify a schedule of compliance in an issued NPDES permit if he

determines good and valid cause (such as an act of God, strike, flood, materials shortage, or other circumstances over which the permittee has little or no control) exists for such revision and if within 30 days following receipt of notice from the Director, the Regional Administrator does not object in writing to any modifications.

Section 124.73(b)(2) (Emergency Notification).

The Director or his authorized representative shall notify the Regional Administrator by telephone as soon as he is notified of any actual or threatened endangerments to the health or welfare of persons resulting from the discharge of pollutants. The Director or his authorized representative shall utilize the telephone numbers identified in the current Regional Oil and Hazardous Materials Contingency Plan to notify the Regional Administrator. Telephone contact may be made with either the district offices or the regional offices, as the Director determines appropriate.

Section 124.80(d) (Control of Disposal of Pollutants into Wells).

The Regional Administrator shall transmit to the Director any policies, technical information or requirements promulgated by the Administrator in regulations issued pursuant to the Act or in directives issued to EPA Regional Offices concerning the disposal of pollutants into wells.

Miscellaneous

(1) Attached hereto is a list of major dischargers which

shall be given priority in processing and a schedule for such processing. Also attached is a six month schedule covering all permits to be processed in the six month period. This is the first part of the schedule aimed at issuing all principal and the majority of all non-principal NPDES permits in the State of Minnesota by December 31, 1974, and all remaining non-principal NPDES permits by June 30, 1975. The schedule shall be expanded by the Director on a quarterly basis thereafter to identify the remainder of the NPDES permits to be processed until all permits are issued. A copy of each quarterly schedule shall be forwarded by the Director to the Regional Administrator for review.

(2) This Memorandum of Agreement may be modified by the Agency and the Regional Administrator following the public hearings to evaluate the State's Section 402(b) program submittal and the hearing on the proposed NPDES regulation on the basis of issues raised at the hearings. The hearing records shall be left open for a period of 20 days following the hearings to permit any person to submit additional written statements or to present views or evidence tending to rebut testimony presented at the public hearings. Any revisions of the Agreement following each of the public hearings or otherwise shall be finalized, reduced to writing, approved by the Agency, and signed by the Director, and Chairman of the Agency, and the Regional Administrator prior to forwarding of the recommendations of the Regional Administrator to the Administrator of EPA for review and approval. The Director and Regional Administrator shall make any such revised agreements available to the public for inspection and copying.

(3) All agreements between the State of Minnesota and the Regional Administrator are subject to review by the Administrator of EPA. If the Administrator of EPA determines that any provisions of such agreements do not conform to the requirements of Section 402(b) of the Act, or Guidelines, he shall notify the State and the Regional Administrator of any revisions or modifications which must be made in the written agreements.

(4) This Agreement shall be construed pursuant to the law of the United States and the State of Minnesota.

(5) This Agreement shall take effect upon the date of approval of Minnesota's NPDES permit program by the Administrator pursuant to Section 402(b).

(6) This Agreement may be terminated by the Administrator pursuant to Section 402(c) of the Act or, if the present level of EPA program grant funds for the NPDES permit program described in this Agreement is reduced substantially, by the Agency upon 30 days written notice to the Administrator and Regional Administrator. This Agreement may be modified at any time upon written agreement of the parties.

(7) The Regional Administrator may waive in writing his rights to receive, review, object to, or comment upon, forms, applications, notices and proposed NPDES permits for classes, types, or sizes within any category of point sources. Such written waiver must be issued by the Regional Administrator before the Agency can issue a NPDES permit without EPA approval. In the event of such written waiver by the Regional Administrator, the Agency

shall, until subsequent written notice to the contrary from the Regional Administrator, discontinue transmitting copies of such forms to the Regional Administrator as otherwise provided herein.

DATED: May 7, 1974

UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY
REGION V

By Francis T. Mayo
FRANCIS T. MAYO
Regional Administrator

DATED: April 16, 1974

STATE OF MINNESOTA
POLLUTION CONTROL AGENCY

By Harold D. Field, Jr.
HAROLD D. FIELD, JR.
Chairman

By Grant J. Merritt
GRANT J. MERRITT
Executive Director

Exhibit 5

2016 WL 4723345
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In the Matter of 2015 Class C License Application of Dr. Mohamed El DEEB.

No. A15–1534.
|
Sept. 12, 2016.

Minnesota Racing Commission.

Attorneys and Law Firms

Josh Casper, St. Paul, MN; and Todd Young, Roseville, MN, for relator Dr. Mohamed El Deeb.

Lori Swanson, Attorney General, Joan M. Eichhorst, Assistant Attorney General, St. Paul, MN, for respondent Minnesota Racing Commission.

Considered and decided by LARKIN, Presiding Judge; SMITH, TRACY M ., Judge; and KLAPHAKE, Judge. *

UNPUBLISHED OPINION

SMITH, TRACY M., Judge.

***1** Relator Dr. Mohamed El Deeb challenges respondent Minnesota Racing Commission's (MRC) denial of his 2015 application for a Class C racehorse-owner license. El Deeb argues that (1) the MRC's decision is not supported by substantial evidence, (2) the MRC's decision is arbitrary and capricious because the MRC considered an outstanding account without a creditor complaint and because the MRC's decision reflected its will and not its judgment, (3) the MRC deprived him of his rights to due process and equal protection, and (4) the MRC was statutorily prohibited from considering El Deeb's criminal charges for false statements on his prior applications. The MRC filed a motion to strike three portions of El Deeb's reply brief. We affirm and deny the motion to strike.

FACTS

In February 2015, El Deeb applied for a Class C racehorse-owner license from the MRC. El Deeb's 2014 Class C license application had been denied due to El Deeb's failure to maintain workers' compensation insurance; failure to disclose animal-mistreatment and traffic-law-violation charges; horse neglect and death as evidenced by a Minnesota Animal Humane Society report; a written complaint of animal neglect from an out-of-state party with substantiating photos; complaints and information regarding El Deeb's business practices; and concerns about his competence as an owner and breeder, financial responsibility, and reputation for honesty. The 2014 denial constituted prima facie evidence of El Deeb's unfitness for licensure, placing the burden on El Deeb to prove his fitness for licensure in 2015. *See* Minn. R. 7877.0125, subp. 2 (2015).

In March and April 2015, the MRC sent El Deeb four notices, one via certified mail, one via first-class mail, and two via e-mail, that his 2015 license application would be on the agenda at an upcoming meeting of the MRC's Administrative Affairs Committee (the committee) and a subsequent MRC meeting. El Deeb did not attend either meeting, and the MRC denied El Deeb's 2015 license application.

In its order denying El Deeb's 2015 application, the MRC incorporated the basis for the 2014 license denial as part of the basis for its 2015 decision. The MRC also cited several new matters: (1) a barn fire at one of El Deeb's farms in December 2014 in which ten horses perished, (2) El Deeb's lender placing force-placed insurance coverage on El Deeb's property because his previous policy had been cancelled, and (3) an outstanding account of more than $38,000 with Prairie Farm Supply. The MRC also found that it had sent multiple notices to El Deeb via e-mail and mail and that it had posted meeting notices and agendas referencing his license application at the MRC office and on the MRC website. The MRC concluded that, due to the 2014 license denial, El Deeb bore the burden of proving his fitness for licensure and that he failed to meet that burden.

After the MRC denied his 2015 application, El Deeb e-mailed the MRC's executive director claiming that he had not received notice of the meetings concerning his application "in a timely fashion." In the same e-

mail, El Deeb requested that the MRC reconsider its decision to deny his 2015 application. The executive director replied that the MRC placed El Deeb's request for reconsideration on the agenda for the MRC's next regularly scheduled meeting and informed El Deeb of the meeting's time and location. El Deeb responded that he would attend if the executive director would "let [him] know" if he should, and the executive director confirmed that El Deeb should attend the meeting.

***2** At its next meeting, the MRC discussed El Deeb's request for reconsideration; El Deeb did not attend. After deliberation, the MRC voted and agreed to give El Deeb an opportunity to explain why the MRC should reconsider its decision to deny El Deeb's 2015 application. El Deeb's request was referred to the committee, and the MRC gave El Deeb notice of the committee meeting scheduled for July 2, 2015.

El Deeb appeared at the committee meeting, and the committee heard from the executive director and from El Deeb and his witnesses. The executive director summarized the proceedings that had occurred to date, including the MRC's order denying El Deeb's 2015 application. The executive director informed the committee that "the burden of proof is on [El Deeb], having once been denied a license, to overcome the presumption that he does not meet licensing requirements in Minnesota." El Deeb offered four exhibits and the testimony of several witnesses, including himself.

El Deeb's first witness was K.O., a veterinarian. K.O. testified that she goes to El Deeb's farms "a couple times a month" and that, on her most recent visit, she observed that the horses were "in good health" and that "[t]hey had good hay and water in front of them." K.O. stated that "[t]here were some things lacking" such as shavings in the stalls and overdue farrier work. K.O. acknowledged that the horses she most recently saw at El Deeb's farm were not race horses. K.O. was also asked about a written statement in which she had stated that El Deeb's "farms are both under-staffed and in desperate need of maintenance." K.O. tempered this statement by saying that the farms could use "general repair" and that "[an] extra person at each farm would be beneficial."

Several other witnesses testified favorably about El Deeb and his treatment of horses. C.B., a certified hunter-jumper trainer, testified that she has known El Deeb for approximately ten years and has trained and sold "dozens" of El Deeb's horses. C.B. has visited El Deeb's farms more than a dozen times per year and stated that she has never seen a neglected horse on El Deeb's farms but agreed that his farms are in need of maintenance. At the time of the hearing, C.B.'s business relationship with El Deeb was no longer ongoing because she had closed her horse business. T.B. testified that he has known El Deeb for 20 years and has been to his farms several times. T.B. stated that he has never had trouble getting paid by El Deeb and that El Deeb's horses were "typically in good care." L.C., a Class C license holder, testified that he kept horses at El Deeb's farm ten years ago. L.C. did not observe any maltreatment and found El Deeb to be "very friendly and very respectable."

Another witness, F.M., testified concerning the report of animal neglect at issue in the denial of El Deeb's 2014 application. F.M. is a former employee of B.W. B.W. had received horses from El Deeb and had sent a written complaint to the MRC in 2014 with photos of the apparently maltreated horses. F.M. testified that he thought the horses looked "fine." F.M.'s testimony was consistent with his written submission in which he stated that one of the horses was "normal and healthy."

***3** Two witnesses testified about the December 2014 barn fire. C.G., who worked and lived at the Buffalo farm with R.W., stated that on the night of the barn fire she was getting ready for bed and noticed the lights flickering in the house and heard a clicking sound. C.G. woke up R.W., and they noticed the flames as they walked outside to check a fuse box. R.W. ran toward the barn and told C.G. to call 911.

R.W. testified that he has worked at one of El Deeb's farms for five years and that he thought the fire was just "bad luck." The executive director read R.W. a statement he had previously given to the Wright County Sherriff's Office in which he stated that he believed that the cause of the fire "was faulty, old wiring." [1] R.W. then stated that he still thought the fire started "at that breaker box area." R.W. also stated that when he first started working for El Deeb, he noticed that one breaker in the box made a "sharp sound" when it was turned on but that it "was shut off immediately and hadn't been touched." Additionally, R.W. stated that he and another individual built new stalls in the barn five to six months before the fire and moved some wiring without assistance from an electrician.

Building permits were not obtained for the project and no inspections were conducted, aside from an unnamed electrician who looked at the wiring and stated that "it looked good to him."

El Deeb was the final witness. The committee asked El Deeb about his outstanding account with Prairie Farm Supply. El Deeb submitted five years of transaction history with Prairie Farm Supply and explained that the interest portion of the bill was "in dispute." El Deeb stated that he and Prairie Farm Supply's owner had agreed to settle the account for $14,000. With respect to the December 2014 fire, El Deeb stated that he was out of the country when it occurred and that he had no reason to start the fire because the barn and horses were uninsured. El Deeb explained that his insurance policy had been cancelled because he had too many horses on his farm and that his lender put force-placed coverage on the property until he secured a new policy. El Deeb also explained the workers' compensation issue and a criminal charge for insufficient animal shelters that figured into the 2014 license denial, but the committee stopped El Deeb because "[t]hose matters have been adjudicated and they're in the past" and the focus needed to be on the "2015 license application and [the MRC's] action to deny and [El Deeb's] request to reconsider."

El Deeb expressed concern that he had not been allowed adequate time to discuss the past matters, and El Deeb was informed that he had until the end of the business day on July 13, 2015 to supplement the record. On July 13, El Deeb e-mailed a 12–page argument and exhibits 1A–41A to the MRC. On July 14, El Deeb sent additional documents to the MRC office via courier. The executive director notified El Deeb that the documents sent on July 14 were not the same as those that had been timely submitted on July 13 and that one of the MRC commissioners had stated that they should not be part of the record.

***4** On August 20, the MRC issued an order denying El Deeb's request for reconsideration. The MRC found that El Deeb's witnesses were "in some instances, not credible and, in other instances, not persuasive in light of the record taken as a whole." The MRC discredited R.W.'s testimony that the December 2014 barn fire was "bad luck" and found K.O.'s written statement that El Deeb's farms are "under-staffed and in desperate need of maintenance" to be "more credible and consistent with the record" than her testimony that "the farms need general maintenance work." Furthermore, the MRC found that much of El Deeb's evidence "was not relevant or material" to his 2015 application. Finally, the MRC found that El Deeb's July 14 submissions were not part of the record and, in any event, the materials were not "relevant or material." The MRC concluded that El Deeb failed to "carry his burden of proof" and denied his request for reconsideration.

This certiorari appeal follows.

DECISION

We review an agency's decisions to determine whether the decision is (1) in violation of constitutional provisions, (2) in excess of the agency's statutory authority or jurisdiction, (3) the product of unlawful procedure, (4) affected by an error of law, (5) unsupported by substantial evidence in the record, or (6) arbitrary and capricious. Minn.Stat. § 14.69 (2014). We presume the correctness of an agency's decision and defer to an agency's conclusions in its area of expertise. *In re Review of 2005 Annual Automatic Adjustment of Charges for all Elec. & Gas Utils.*, 768 N.W.2d 112, 119 (Minn.2009).

I.

El Deeb first contends that the MRC's decision should be reversed because it is not supported by substantial evidence.

"The burden of proving that an agency's decision is not supported by substantial evidence is on the relator. If the commission engaged in reasoned decisionmaking, this court will affirm." *In re Class A License Appl. of N. Metro Harness, Inc.*, 711 N.W.2d 129, 137 (Minn.App.2006) (citations omitted), *review denied* (Minn. June 20, 2006). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency,* 644 N.W.2d 457, 466 (Minn.2002).

The MRC has the discretion to issue Class C licenses to applicants "qualified for the occupation for which licensing is sought and [who] will not adversely affect the public health, welfare, and safety or the integrity of racing in Minnesota." Minn.Stat. § 240.08, subd. 4 (Supp.2015). Before issuing a license, the MRC is obligated to

> determine that the applicant's age, experience, reputation, competence, record of law abidance, and financial responsibility are consistent with the best interests of horse racing, the provisions of Minnesota Statutes, chapter 240, and that licensure will not adversely affect the public health, welfare, and safety within Minnesota.

***5** Minn. R. 7877.0100, subp. 2 (2015).

In its order denying El Deeb's 2015 application, the MRC concluded that the evidence before it "overwhelmingly supports the conclusion that El Deeb does not meet [the] criteria for licensing." That decision was based on several concerns: (1) the problems highlighted in the denial of El Deeb's 2014 license application, (2) the December 2014 barn fire that resulted in the deaths of several race horses, (3) El Deeb's outstanding account with Prairie Farm Supply, and (4) the imposition of force-placed insurance coverage on El Deeb's property by his lender because El Deeb's previous policy had been cancelled. In its order denying El Deeb's request for reconsideration, the MRC determined that El Deeb did not present evidence to refute these concerns.

El Deeb contends that the MRC should not factor into its 2015 decision the reasons for the 2014 license denial. But that is what the MRC's rules require it to do:

> If an applicant for a Class C license has had a license denied or had his or her license suspended or revoked or been excluded by another racing jurisdiction, or has engaged in conduct that the [MRC] determines would adversely affect the public health, welfare, and safety or the integrity of racing in Minnesota, the [MRC] *shall* consider such fact as prima facie evidence that the applicant is unfit to be granted a Class C license, and the burden of proof shall rest upon the applicant to establish his or her fitness. In reviewing such applications, the [MRC] shall consider the factors provided in part 7877.0100, subpart 2.

Minn. R. 7877.0125, subp. 2 (emphasis added). The 2014 license denial was prima facie evidence of El Deeb's unfitness for licensure, and the MRC was obligated to consider that denial in its decision on 2015 licensure. *See id.*

El Deeb also argues that the decision to deny his 2015 application is not supported by substantial evidence because the individuals who testified against his 2014 license application did not testify in connection with his 2015 application, and because he presented F.M.'s testimony refuting B.W.'s 2014 complaint of animal maltreatment. But it was not the MRC's obligation to reestablish the basis of its 2014 order, which became prima facie evidence of El Deeb's unfitness; rather, El Deeb bore the burden of establishing his fitness for licensure. *See id.* And the MRC determined that much of El Deeb's evidence was irrelevant to accomplishing that task.

El Deeb also takes issue with the MRC's consideration of the force-placed insurance coverage as evidence of his lack of financial responsibility. While it is true that El Deeb did not lose his policy for financial reasons, his violation of the original policy's terms combined with his failure to timely secure new coverage, requiring his mortgage company to acquire force-placed insurance, demonstrates a lack of financial care and was a relevant consideration in the calculus of El Deeb's fitness for licensure. *See* Minn. R. 7877.0100, subp. 2.

***6** In his reply brief, El Deeb also contends that the MRC's consideration of the December 2014 barn fire was inappropriate because the fire investigation did not reveal the fire's cause. We disagree. The MRC has a duty to determine whether licensing an applicant is "consistent

with the best interests of horse racing, the provisions of Minnesota Statutes, chapter 240, and that licensure will not adversely affect the public health, welfare, and safety within Minnesota." *Id.* The MRC considered that the fire resulted in the deaths of several horses and that this was the fourth fire El Deeb has had on his farms, and discredited R.W.'s testimony that the 2014 fire was "bad luck" due to his earlier statement to the police that the fire was likely caused by old wiring. The MRC did not impermissibly consider the December 2014 barn fire in its decision to deny El Deeb's 2015 license application. *See id.*

Given the 2014 license denial and the additional information considered by the MRC in its 2015 decision, we conclude that El Deeb has failed to establish that the MRC's decision is not supported by substantial evidence in the record. *See N. Metro Harness,* 711 N .W.2d at 137.

II.

El Deeb also argues that the MRC's decision is arbitrary and capricious because the MRC considered an outstanding account without a written complaint from the creditor and because the MRC's decision is a product of its will and not its judgment.

Financial responsibility

El Deeb argues that the MRC's decision in its order denying his 2015 application is arbitrary and capricious because the MRC considered his outstanding account with Prairie Farm Supply as evidence of his lack of financial responsibility without a written complaint from Prairie Farm Supply.

We discern no arbitrary and capricious action in the MRC's consideration of El Deeb's outstanding account with Prairie Farm Supply. The MRC's rules provide for financial-responsibility complaints against a licensee and for subsequent investigations by the MRC's stewards. *See* Minn. R. 7897.0100, subp. 10 (2015) (requiring a written complaint from the licensee's creditors before an investigation). But the legislature also gave the MRC broad discretion to promulgate rules regarding any aspect of horse racing that "affects the integrity of racing or the public health, welfare, or safety." Minn.Stat. § 240.23(k) (Supp.2015). One of the rules promulgated by the MRC establishes the criteria for licensure, and among those criteria is that the "applicant's ... financial responsibility [is] consistent with the best interests of horse racing." Minn. R. 7877.0100, subp. 2. Accordingly, the MRC carried out its obligation to evaluate El Deeb's financial responsibility and found that he had an outstanding account of more than $38,000 with Prairie Farm Supply.

Decision product of will and not of judgment

El Deeb also contends that the MRC's decision is a product of its will and not its judgment. "An agency's decision is arbitrary and capricious when it represents the agency's will and not its judgment...." *Brinks, Inc. v. Minn. Pub. Util. Comm'n,* 355 N.W.2d 446, 452 (Minn.App.1984).

*7 El Deeb contends that the MRC's questioning of K.O. reflects the MRC's will to deny his Class C license application. K.O. testified that she manages to care for 20 horses despite working full time, but she submitted a written statement that El Deeb's farms are understaffed even though he has a full-time employee at each location. A committee member asked K.O., "So you have ... 20 horses and you can maintain it. But in this particular situation, there is a full-time person at each place and that's not enough?" The question is not evidence of bias but of an attempt to clarify the apparent inconsistency between K.O.'s two statements.

In his reply brief, El Deeb contends that the MRC's decision is the product of its will because the MRC ignored favorable portions of his witnesses' testimony and credited other unfavorable portions. Determining credibility and weighing evidence are not indicia of willful or arbitrary decisionmaking but of the MRC performing its duties as the factfinder. *See Cannon v. Minneapolis Police Dep't,* 783 N.W.2d 182, 189 (Minn.App.2010) (stating that "[w]e defer to [the factfinder's] conclusions regarding conflicts in testimony ... and the inferences to be drawn from testimony" (quotation omitted)).

III.

El Deeb also argues that the MRC violated his rights to due process and equal protection.

A.Due Process

"Quasi-judicial proceedings do not invoke the full panoply of procedures required in regular judicial proceedings." *N. Metro Harness, Inc.,* 711 N.W.2d at 136. "The due-process rights required are simply reasonable notice of a hearing and a reasonable opportunity to be heard." *Id.*

El Deeb contends that he did not receive an adequate opportunity to be heard because the MRC prohibited him from addressing the issues highlighted in the 2014 license denial. El Deeb mischaracterizes the record. El Deeb's witnesses were allowed to, and almost exclusively did, talk about the past. And El Deeb's explanations of his prior behavior were not relevant to showing how he had remediated the concerns highlighted in the 2014 license denial. Moreover, the MRC gave El Deeb time to supplement the record. El Deeb timely submitted a written argument and a number of documents on July 13, 2015 that addressed matters underlying the 2014 license denial, and those documents were made part of the MRC's record on his 2015 license application. We conclude that El Deeb had ample opportunity to be heard.

El Deeb also contends that the MRC's investigation process violated his right to due process because the MRC's executive director and an MRC member participated in both the 2014 and 2015 license decisions. El Deeb cites two e-mails from September 2014 establishing that at least two of the people who participated in the decision on his 2014 application also participated in the decision on his 2015 application. The fact that the MRC's executive director and an MRC member participated in El Deeb's 2014 and 2015 license applications is not evidence of a due-process violation. *See id.* As the MRC argues, "It would be an absurd result if the commission, once it decides to deny a license application, might never again have any input regarding that applicant." We conclude that El Deeb has not established that the MRC violated his right to due process.

B. Equal Protection

***8** El Deeb raises several arguments, without supporting legal citation, that he was denied his right to equal protection.

The Equal Protection Clauses of the United States and Minnesota Constitutions require that similarly situated individuals be treated alike. *State v. Richmond,* 730 N.W.2d 62, 71 (Minn.App.2007), *review denied* (Minn. June 19, 2007). The "threshold question" in an equal-protection claim "is whether the claimant is treated differently from others who are similarly situated." *Odunlade v. City of Minneapolis,* 823 N.W.2d 638, 647 (Minn.2012). "[W]e routinely reject equal-protection claims when a party cannot establish that he or she is similarly situated to those whom they contend are being treated differently." *Id.* (quotation omitted).

El Deeb makes several allegations in support of his claim that the MRC violated his right to equal protection: (1) the MRC's investigation into his outstanding debt with Prairie Farm Supply unfairly targeted El Deeb, (2) the MRC did not adequately consider the fact that he settled his account with Prairie Farm Supply, (3) the MRC erroneously considered the cancellation of his property insurance as evidence of his lack of financial responsibility, (4) the MRC referred his case to Scott County for criminal prosecution, (5) an e-mail from an MRC commissioner supporting the denial of El Deeb's 2015 license application "omits the shenanigans [the MRC] is perpetrating on [El Deeb] by selecting [him] out for punishment," and (6) the MRC does not routinely inspect other applications to determine if they contain false statements. [2]

We find no merit to El Deeb's equal-protection arguments. El Deeb makes many allegations that he was treated differently than other Class C license applicants, but El Deeb has failed to establish that he was treated differently than similarly-situated individuals. El Deeb came to the 2015 application process not as a new, unblemished applicant, but as an applicant who was presumed to be unfit for licensure based on the problems highlighted in the 2014 license denial. *See* Minn. R. 7877.0125, subp. 2. The MRC was not obligated to treat El Deeb the same as a new applicant; rather, the MRC conducted an appropriate investigation given El Deeb's licensing history. *See* Minn.Stat. § 240.08, subd. 3 (2014) (stating that the MRC "shall investigate each applicant for a class C license to the extent it deems necessary"). Consequently, El Deeb's equal-protection argument fails. *See Odunlade,* 823 N.W.2d at 647. [3]

IV.

El Deeb also contends that the MRC was statutorily prohibited from considering the criminal charges against him for making false statements on his prior applications.

El Deeb suggests that the requirement that a Class C applicant submit an affidavit confirming that the applicant has not been "found guilty of fraud or misrepresentation in connection with racing or breeding," Minn.Stat. § 240.08, subd. 2(a)(4) (Supp.2015), means that the MRC could not consider that El Deeb is facing charges stemming from false statements on his prior applications. We disagree. The MRC may broadly consider anything relevant to an applicant's "reputation" and "record of law abidance," which presumably includes criminal charges for lying on prior license applications. *See* Minn. R. 7877.0100, subp. 2. And, in any event, neither the order denying El Deeb's 2015 application nor the order denying his request for reconsideration contains a finding regarding criminal charges for false statements on El Deeb's prior applications. El Deeb's argument fails.

V.

***9** Finally, we address the MRC's motion to strike three portions of El Deeb's reply brief: (1) El Deeb's reference to the financial value of the horses killed in the December 2014 barn fire, (2) El Deeb's allegation that the MRC has never reviewed an applicant's financial responsibility to the extent it did with him, and (3) El Deeb's reference to a 2007 study regarding his contributions to Minnesota's horse racing industry.

Each statement of a material fact in an appellate brief "shall be accompanied by a reference to the record." Minn. R. Civ.App. P. 128.02, subd. 1(c). "Appellate courts may not consider matters outside the record on appeal and will strike references to such matters from the parties' briefs." *Stageberg v. Stageberg,* 695 N.W.2d 609, 613 (Minn.App.2005), *review denied* (Minn. July 19, 2005). We may deny a motion to strike as moot, however, if we do not rely on the challenged material to reach our decision. *Drewitz v. Motorwerks, Inc.,* 728 N.W.2d 231, 233 n. 2 (Minn.2007).

Although the cited portions of El Deeb's reply brief fail to cite supporting materials in the record, we need not rely on them to reach our decision. Neither the value of the horses that died in the barn fire nor El Deeb's alleged historical contributions to Minnesota horse racing is relevant to our analysis of the MRC's decision to deny El Deeb's 2015 Class C license application. El Deeb's allegation regarding the MRC's review of his financial responsibility merely restates one of El Deeb's unsubstantiated claims in his primary brief. Because we need not rely on these portions of El Deeb's reply brief, we deny the MRC's motion to strike as moot. *See id.*

Affirmed; motion denied.

All Citations

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Footnotes

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

1 The record also contains the fire investigation report and postfire photographs. The report concludes that the fire's cause could not be determined due to the level of destruction. The report and photos were considered by the MRC in its order denying El Deeb's 2015 license application and in its order denying El Deeb's request for reconsideration.

2 El Deeb also cites to extra-record material to support his equal-protection arguments and moved to supplement the record on appeal. We denied that motion and do not consider those materials in our discussion here.

3 Additionally, El Deeb argues that we should transfer his case to a district court to further develop the record and cites to *Hard Times Cafe, Inc. v. City of Minneapolis,* 625 N.W.2d 165 (Minn.App.2001). In *Hard Times Cafe,* the relator challenged the denied renewal of a license by the Minneapolis City Council after a contested-case hearing in front of an administrative-law judge. 625 N.W.2d at 169–71. We transferred the case to a district court, as is authorized under the Minnesota Administrative Procedure Act, because of alleged procedural irregularities in the city council's decision and because the record was insufficient to review the alleged irregularities. *Id.* at 174–75; *see* Minn.Stat. § 14 .68 (2014) ("[I]n cases of alleged irregularities in procedure, not shown in the record, the [c]ourt of [a]ppeals 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."). Even if the MRC's consideration of and hearing on El Deeb's 2015 application constituted a contested case, El Deeb has not established that the MRC's record is insufficient to review any alleged procedural irregularities, and we therefore decline El Deeb's request to transfer the case to a district court. *See Hard Times Cafe,* 625 N.W.2d at 174–75.

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