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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	**DECLARATION OF MICHAEL SCHMIDT** Appellate Case Nos. A19-0112 A19-0118 A19-0124

I, MICHAEL SCHMIDT, in accordance with section 358.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

Background

1. I served as Staff Attorney, State Program Administrative Coordinator for the Minnesota Pollution Control Agency ("MPCA") from March 2015 until February 1, 2019. My responsibilities included, among other things, legally advising MPCA leadership and staff on permit development, permit enforcement, administrative rulemaking, and general agency matters. My legal work covered industrial wastewater, industrial stormwater, mining, Clean Water Act section 401 certifications, septic systems, and underground storage tanks. My primary focus was on water-quality matters.

2. I was involved in legally advising MPCA throughout the permit-development and issuance process for the Poly Met NorthMet mining project NPDES/SDS Permit No. MN0071013 (the "Poly Met Permit").

3. Before working at MPCA, I worked as a Water Quality Associate for the Minnesota Center for Environmental Advocacy ("MCEA"), one of the relators in this appeal.

4. I make this Declaration based on my personal knowledge and in support of MPCA's sur-reply to WaterLegacy's motion to transfer or stay this case.

MPCA-EPA Conference Calls Throughout the Permit-development Process

5. MPCA and EPA conducted twice-monthly conference calls about the Poly Met Permit from August 2016 until August 2017 and then conducted conference calls and meetings as necessary to resolve any concerns EPA had about different iterations of the draft permit.

6. Early on in the process, the conference calls were more conceptual than about specific permit language, problems, or solutions. At this early stage, MPCA permit-development staff would develop general permit approaches and ask EPA for feedback on a general approach. After those calls, MPCA staff members would use EPA's feedback to draft permit language. As we approached the summer of 2017, the conference calls became less abstract and focused on particular permit language, specific concerns, and solutions to those concerns.

7. The purpose of these discussions through 2017 was to enable MPCA and EPA to collaborate effectively and efficiently to produce a good NPDES permit. From MPCA's perspective, it would not have made sense to unilaterally develop a permit that

EPA was likely to eventually object to. We sought EPA's feedback throughout the permit-development process to avoid having to change course after investing resources in developing a permit that did not satisfy EPA. We believed that it was more efficient to work together with EPA throughout the process and considered EPA's feedback in developing the draft permit that we put out for public comment. Given the complexity of the NorthMet project and Poly Met Permit, it would have been a waste of time, effort, and resources to proceed otherwise. The permit-development process works better if MPCA and EPA are on the same page.

The April 5, 2018, Conference Call Between MPCA and EPA

8. I was present for the April 5, 2018, conference call where EPA read comments about the pre-proposed draft version of the Poly Met Permit to MPCA staff. To my recollection, I was the only MPCA staff member to take notes during that call.

9. EPA's comments in the April 5, 2018, call consisted of concerns that EPA had already discussed with MPCA during the permit-development process. Those comments also overlapped with written comments that MPCA had received on the draft Poly Met Permit during the public-comment period that had ended on March 16, 2018 (about three weeks before the call).

10. Shortly before the April 5, 2018, conference call with EPA, I had reviewed written comments submitted by, among others, several of the relators in this appeal, including WaterLegacy, MCEA, and at least one of the tribes. As I took notes on the EPA

call, I saw that (except for an issue concerning domestic wastewater) EPA's feedback overlapped with relators' written comments; thus, the issues raised by EPA's comments had already been raised by relators and other stakeholders.

WaterLegacy's Accusations Regarding EPA Feedback on the Poly Met Permit

11. At several points in WaterLegacy's Motion for transfer, WaterLegacy accuses MPCA of efforts to "suppress[]" EPA's feedback and to mislead the public by not disclosing in MPCA's response to comments that EPA's feedback overlapped with stakeholders' written comments that the latter had submitted during the public-comment period. *See* WaterLegacy Reply, at 1, 17–18. Those accusations are misguided. MPCA responded to comments received during the comment period, which satisfies MPCA's obligations under Minnesota law. MPCA provided oral responses to EPA feedback throughout the permit development process.

12. WaterLegacy cites approvingly to the process that MPCA undertook in the U.S. Steel Corporation Minntac tailings basin (the "Minntac Permit") as a model for how to address EPA written comments into responses and the draft permit, noting that "EPA's comments on the draft Minntac permit were provided in writing to MPCA, discussed in MPCA's Findings of Fact on the Minntac permit, and included in the administrative record for the public and this Court to review, along with MPCA's detailed responses to the substance of EPA's comments." *Id.* at 7. WaterLegacy argues that "MPCA's practices and the resulting deficiencies in the record are a marked divergence from other

Minnesota NPDES permitting cases, where EPA's comments and MPCA's responses to those comments are part of the public record." *Id.* at 6.

13. I was also the staff attorney who worked on the Minntac Permit. MPCA applied exactly the same criteria addressing public comments and preserving the administrative record for the Minntac Permit as for the Poly Met Permit. The difference between the two is that EPA submitted written comments during the public comment period for the Minntac Permit but did not do so for the Poly Met Permit.

14. MPCA did respond to the "content of [EPA's] comments," *see* WaterLegacy Reply, at 6, in its responses to overlapping written comments by public commenters. It just did not attribute those comments to EPA, because EPA did not submit comments during the public comment period. In MPCA's responses to comments, we cross-referenced where multiple commenters raised the same issue. Had we included EPA comments in the responses to comments, we would only have cross-referenced to the responses that we had already made because EPA's concerns overlapped with the concerns of other stakeholders who submitted written comments. As a substantive matter, MPCA had already responded in writing to all of the concerns that EPA voiced to us orally. Thus, had we attributed certain substantive comments to EPA, we would not have changed the substance of the MPCA's responses at all. We would have just cross-referenced answers to the concerns EPA shared with other stakeholders (who actually submitted written comments that we could cite to).

15. Based on my experience at MPCA, I cannot speak to whether it was common practice for EPA Region 5 to submit written comments on draft individual NPDES/SDS permits for complex projects like the NorthMet mining project. However, in my experience at MCEA—where we routinely submitted written comments on proposed NPDES/SDS permits to MPCA during the public-comment period—it was unusual for EPA to submit written comments on the projects that MCEA commented on.

16. Jeffry Fowley's declaration in support of WaterLegacy's reply states, "In my experience, if the EPA had agreed that all issues were resolved, it would have sent MPCA an email or letter confirming such a key fact." WaterLegacy Reply Ex. F (Fowley Decl.) ¶ 17. I cannot speak to EPA Region 1's practices, but in my experience, it was unusual for EPA Region 5 to send a letter to MPCA stating that, in its opinion, all issues with a proposed permit had been resolved and that EPA did not intend to object to the permit. Typically, we never expected any written communication of this kind from EPA Region 5. Generally, if EPA Region 5 did not have a problem with an MPCA permit, it wrote nothing at all.

17. At no point in time did MPCA ever have any intention or make any effort to conceal EPA's involvement or concerns with the Poly Met Permit from the public. That was never once discussed. I was involved throughout the Poly Met Permit development-and-issuance process and worked closely with staff and leadership on these efforts. I never had any conversations, and I am not aware of any conversations among

staff or leadership about suppressing EPA public comments or concealing EPA's involvement in the permit-development process. I have no knowledge of the alleged telephone call between former MPCA Commissioner John Linc Stine and EPA Region 5 Administrator Cathy Stepp "to complain about EPA's planned EPA staff written comments on the NorthMet permit." *See* WaterLegacy Reply, at 5. I never participated in, or heard of, any conversation in which EPA was discouraged from submitting written comments. I only learned after the close of the public comment period that EPA had not submitted written comments.

Minnesota Data Practices Act Policy and Best Practices

18. At several points in its reply, WaterLegacy states in reference to my handwritten notes from the April 5, 2018, conference call with EPA that "MPCA did not retain the notes MPCA staff took during this critical phone call, even though a Minnesota Government Data Practices Act request had already been made explicitly requesting any notes of phone conversations with EPA." *See* WaterLegacy Reply, at 1; *see generally id.* at 15–17.

19. My handwritten notes from the conference call with EPA were not covered under WaterLegacy's Data Practices Act ("DPA") request, because—as WaterLegacy acknowledges—it filed its request for "meeting notes and phone conversation notes pertaining to written or oral communications with EPA . . . on March 26, 2018, before the April 5, 2018 call and notetaking." *See id.* at 6. It was MPCA's policy, which was

consistent with the Data Practices Act, that a records request applies only to documents in existence on or before the date of the request. MPCA's obligation to release responsive documents is not an ongoing obligation; if it were, there would be no way to adequately respond to and complete a records release, because more responsive records may always be created. My notes from the EPA conference call did not exist when WaterLegacy made its DPA request. Accordingly, my April 5, 2018, handwritten notes were not subject to release under WaterLegacy's March 26, 2018, DPA request.

20. I do not remember specifically what I did with my handwritten notes from the April 5 conference call, but I believe that I treated notes from this call the same way I treated other legal notes that I created during my time at MPCA. The notes that I would take on calls and in meetings were not verbatim transcriptions or notes about issues outside my purview as staff attorney. They were notes about the legal issues that the call or meeting raised in my mind so that I could properly advise MPCA in my capacity as a staff attorney. It was my general practice to "go paperless." I would not retain my handwritten notes, because I would integrate those notes into my typed legal work product. As a result, the handwritten notes would become superfluous because the relevant points were incorporated into my legal research and other legal work product.

21. Accordingly, when WaterLegacy made requests after the April 5, 2018, conference call, the handwritten notes themselves would have been gone and their remaining substance would have been properly withheld under the privilege exceptions

of DPA section 13.393. Under this provision, if (as here) a record—such as attorney work product or the contents of a privileged attorney-client communication—would be protected in court, it is properly withheld under the DPA. Because I was acting in my capacity as attorney for MPCA, my notes and resulting legal work fall within this exception to the DPA. As our records releases to WaterLegacy show, MPCA would distinguish between non-legal documents (such as emails) and legal work product or advice. We would withhold records only pursuant to DPA section 13.393, under which my April 5, 2018, notes and subsequent legal research and work product fall. WaterLegacy states that "even data that might otherwise be shielded from view must be maintained as public data once a [DPA] request has been made." *Id.* at 16. Insofar as I know, my legal research and resulting work product that grew out of my notes from the conference call may still exist, but they would not be subject to disclosure under DPA section 13.393.

22. WaterLegacy's reply also cites to Minnesota Statutes section 15.17, which governs record preservation and retention, again approvingly citing to MPCA's practices concerning the Minntac Permit. But I was responsible for advising MPCA staff and leadership on records preservation and retention requirements for both the Minntac Permit and Poly Met Permit. I provided the same advice, and MPCA's processes and procedures were the same, in both instances.

23. With respect to record preservation, when MPCA would receive a DPA request, it was agency practice for the records management staff or the staff attorney to (1) send an email to everyone who may have responsive records about preservation requirements, and (2) create a folder on a shared drive where everyone could deposit responsive records for compilation and my review. This process was identical for the Minntac Permit and the Poly Met Permit. For WaterLegacy's DPA request, I reviewed every record in the shared drive to ensure that all responsive records that were not otherwise subject to an exception were turned over. I ensured that we released every responsive record that we were required to disclose under the law.

24. With respect to record retention, I would regularly review MPCA's record-retention policy and advise MPCA staff and leadership on recordkeeping best practices. I gave staff-wide training on the retention policy and best practices, and I gave refresher advice to the staff working on the Minntac Permit (which process WaterLegacy cites as a model) and the Poly Met Permit.

My Email Exchange with Kevin Reuther

25. As WaterLegacy did in its original motion to transfer or stay, WaterLegacy continues to erroneously contend that MPCA acted in bad faith based on my reply to an email. In a December 17, 2018, email exchange I had with MCEA's Kevin Reuther, he asked whether I had "hear[d] anything from EPA on the PolyMet permit" and to forward to him "anything in writing" from EPA. *See id.* Ex. C, at 28. I responded, "We did not get

any feedback from EPA on the PolyMet permit." *Id.* WaterLegacy writes in its reply, "The *post hoc* characterization by MPCA's counsel of the email to relator [MCEA] denying that any feedback had been received by [MPCA] on the permit as relating only [to] the permit's October 25, 2018 version is nether supported by the evidence nor demonstrative of MPCA's candor." *Id.* at 17.

26. WaterLegacy persists in making an unfounded accusation. In fact, MPCA's response memorandum accurately captured the context of this email exchange. *See* MPCA Response, at 9. Before receiving Mr. Reuther's December 17, 2018, email, I had earlier communicated with him about the timing of EPA's pending review of both the air-quality and water-quality permits for the NorthMet project. Before responding to him, I needed to check with Leslie Fredrickson (the staff attorney working on the air-quality permit) about the timing for the air permit. I interpreted the context of Mr. Reuther's question as following up on EPA's October 25, 2018, pre-proposed permit-review process (which MPCA had announced publicly), not about prior EPA review or feedback. I did not interpret Mr. Reuther's email as an all-encompassing Data Practices Act request, which MCEA has regularly filed in the past. It was no secret that we had been working with EPA to develop the Poly Met Permit. Had I interpreted Mr. Reuther's email as an inquiry into whether we had *ever* received any feedback from EPA about the Poly Met permit (a question that Mr. Reuther had no need to ask), I would have, of course, responded that we had.

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Dated: June 12, 2019
Polk County
Des Moines, Iowa

Michael Schmidt
Former Staff Attorney, Program Admin. Coordinator
Minnesota Pollution Control Agency