Case Nos. A19-0112, A19-0118, A19-0124, A20-1271, A20-1380, A20-1385

STATE OF MINNESOTA
IN SUPREME COURT

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.

BRIEF OF AMICUS CURIAE PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY

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CASES

Goyette et al. v. City of Minneapolis et al., 2021 WL 5003065 (D. Minn. 2021) (No. 20-cv-1302) 10
State of Ohio v. US Dept. of Labor, 121 F. Supp. 2d 1155 (S.D. Ohio 2000) 7
Toso v. Minnesota Pollution Control Agency, 2021 WL 5355419 (Minn. Dist. Ct. 2021) (No. 62-CV-21-5991) 8
Vande Hey v. State of Minnesota, (Minn. Dist. Ct. 2016) (No. 62-CV-16-2011) 9
WaterLegacy v. U.S. EPA (D.D.C. 2019) (No. 19-cv-00412) 17, 18

STATUTES

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MINN. STAT. § 138 (2021) 22
MINN. STAT. § 15C.05 (2021) 7
MINN. STAT. § 15C.13 (2021) 7
MINN. STAT. § 181.932 (2021) 7
MINN. STAT. § 182.669 (2021) 7
Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2 (1989) 7

OTHER AUTHORITIES

Andrew C. Call et al., *Whistleblowers and Outcomes of Financial Misrepresentation Enforcement Actions*, MAYS BUS. SCH. RSCH. PAPER 2506418 (2017) 6
Brenda Goodman and Jacqueline Howard, *Whistleblower alerted FDA to alleged safety lapses at baby formula plant months before recalls, complaint shows*, CNN (Apr. 28, 2022, 9:49 PM), https://www.cnn.com/2022/04/28/health/baby-formula-whistleblower/index.html 6
Brian Bakst, *Lawsuit claims harassment, retaliation by MN Commerce exec*, MPR NEWS (Apr. 8, 2016, 7:06 PM), https://www.mprnews.org/story/2016/04/08/suit-mn-commerce-exec-sexually-harassed-employee 9
Brita Bjørkelo, *Workplace bullying after whistleblowing: future research and implications*, 28 J. OF MANAGERIAL PSYCH. 306, 314-15 (2013) 13
Chad A. Atkins, *The Whistleblower Exception to the At-Will Employment Doctrine: An Economic Analysis of Environmental Policy Enforcement*, 70 DEN. U. L. REV. 537, 538 (1993) 6
Dan Kraker, *State court reverses PolyMet water permit, but sides with company on other issues*, MPR NEWS (Jan. 24, 2022, 1:46 PM),

https://www.mprnews.org/story/2022/01/24/state-court-reverses-polymet-water-permit-but-sides-with-company-on-other-issues 21
Ernest Scheyder, *Minnesota court orders review of water permit for PolyMet mine*, REUTERS (Jan. 24, 2022, 4:33 PM), https://www.reuters.com/world/us/minnesota-court-orders-review-water-permit-polymet-mine-2022-01-24/ 21
Gene A. Brewer & Sally Coleman Selden, *Whistle Blowers in the Federal Civil Service: New Evidence of the Public Service Ethic*, 8 J. OF PUB. ADMIN. RSCH. & THEORY 413, 419 (1998) 6, 12
Jacey Fortin, *Minnesota Troopers Deleted Texts and Emails after Floyd Protests, Major Testifies*, N.Y. TIMES (Sep. 6, 2021), https://www.nytimes.com/2021/09/06/us/mn-state-patrol-texts-emails-lawsuit.html 9, 10
James Drew, *Toledo man claims whistleblower status*, THE BLADE (Jan. 5, 2001, 7:20 AM), https://www.toledoblade.com/Print-Furniture/2001/01/05/Toledo-man-claims-whistleblower-status/stories/200101050018 7
Jean Lennane, *What Happens to Whistleblowers, and Why*, 6 SOC. MED. 249, 249-51 (2012). 13
Kate Kenny & Marianna Fotaki, *The Costs and Labour of Whistleblowing: Bodily Vulnerability and Post-Disclosure Survival*, J. of. Bus. Ethics, Dec. 27, 2021 13
Kirsti Marohn, *Longtime MPCA employee alleges retaliation over petroleum complaints*, MPR NEWS (Jan. 11, 2022, 4:00 AM), https://www.mprnews.org/story/2022/01/11/longtime-mpca-employee-alleges-retaliation-over-petroleum-complaints 8
Laura Simoff, *Confusion and Deterrence: The Problems that Arise from a Deficiency in Uniform Laws and Procedures for Environmental Whistleblowers*, 8 DICK. J. OF ENV'T L. & POL'Y 325, 326 (1999) 6
Maheran Zakaria, *Antecedent Factors of Whistleblowing in* Organizations, 28 PROCEDIA ECON. & FIN. 230, 233 (2015). 20
Matt Reeder, *Proceeding Legally: Clarifying the SEC/Dodd-Frank Whistleblower Incentives*, 7 HARV. BUS. L. REV. 269, 313 (2017) 6
OFFICE OF THE LEGISLATIVE AUDITOR, DEPARTMENT OF COMMERCE: DATA PRACTICE ALLEGATIONS 1-3 (2017), https://www.auditor.leg.state.mn.us/sreview/commercedata.pdf 9
PEER, EPA OVERSIGHT OF STATE PERMITS EVAPORATING (FEB. 19, 2019) https://peer.org/epa-oversight-of-state-permits-evaporating/ 16
PEER, SUPPRESSED CONCERNS ABOUT MEGA-MINE SURFACE (Jun. 13, 2019) https://peer.org/suppressed-epa-concerns-about-mega-mine-surface/. 18

Ryan Raiche, *State Patrol engaged in massive 'purge' of emails and texts immediately after George Floyd protests, court records show*, KSTP.COM (Sep. 4, 2021, 2:53 PM), https://kstp.com/kstp-news/top-news/state-patrol-engaged-in-massive-purge-of-emails-and-texts-immediately-after-george-floyd-protests-court-records-show/. 10
Walker Orenstein, *Court of Appeals rescinds key PolyMet permit, says project must get new groundwater analysis*, MINNPOST (Jan. 24, 2022), https://www.minnpost.com/greater-minnesota/2022/01/court-of-appeals-rescinds-key-polymet-permit-says-project-must-get-new-groundwater-analysis/. 21
Yoon Jik Cho & Hyun Jin Song, *Determinants of Whistleblowing Within Government Agencies*, 44 PUB. PERS. MGMT. 450 (2015) 6

INTRODUCTION AND INTEREST OF AMICUS CURIAE

Public Employees for Environmental Responsibility (PEER) is a nonprofit organization that assists federal, state, and local public employees in fighting for the ethical management of natural resources, strong environmental laws and policies, and accountability and transparency in government actions. PEER frequently represents government whistleblowers exposing wrongdoing in agencies. Additionally, PEER has decades of experience with unearthing federal, state, and local agency documents and administrative records to shed light on mismanagement of government resources and legal regimes, in service of public employees and the environment they are charged to safeguard. The issues of ordered agency decision-making, accountability of government to the public, and forming complete and accurate administrative records are central to PEER's mission and work.[1]

This is an extraordinary case. This Court is faced with a state regulatory agency that has gone to great lengths to exercise its will rather than its judgment. The political leadership of the Minnesota Pollution Control Agency (MPCA) sought to suppress legal and factual conclusions drawn by experts at the U.S. Environmental Protection Agency (EPA), the federal agency charged with

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than the amicus curiae and its counsel made a monetary contribution to the preparation or submission of the brief.

overseeing MPCA's implementation of federal law, because those conclusions threatened MPCA's intent to issue a permit which both agencies knew was deficient. Despite securing agreement from political leadership of EPA to suppress the comments which carried those conclusions, EPA's professional staff felt so strongly about the need to warn MPCA of the threat to human health and the environment they were about to permit that they read them aloud over the phone. Ultimately those comments were left out of the record and the permit, leaving parties in this case without necessary information, and the waters of the state unprotected.

But for public employee whistleblowing, the public would never have learned of the actuality or depth of MPCA's attempts to conceal the truth. In an extraordinary proceeding in the court below, PEER's client Kevin Pierard testified to the procedural irregularities at issue in this case because he believed in the integrity of the administrative process. Mr. Pierard was chief of the branch in EPA's Region 5 Office responsible for review and oversight of state implementation of the National Pollutant Discharge Elimination System (NPDES) under § 402 of the Clean Water Act.[2] It is because of his testimony and other records painstakingly unearthed by PEER's and parties' efforts that this Court knows state and federal agencies acted beyond their regular practices in order to reach a

[2] 33 U.S.C. § 1342 (2018).

predetermined permitting outcome. The "irregularities in procedure" included an agreement in secret by regulatory enforcement agencies to not formally record EPA's critiques of MPCA's Clean Water Act compliance. If facts such as these do not merit a finding of prejudice, then in the future this precedent will greatly discourage public employees from reporting agency wrongdoing and unlawful activities.

Because of the central importance of whistleblowing to a functioning administrative state and the risks to future administrative proceedings of an unreasonably high standard for showing prejudice, PEER submits this brief in support of the Appellants Fond du Lac Band of Lake Superior Chippewa, WaterLegacy, Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness, and Center for Biological Diversity. The Court of Appeals' finding of no prejudice to Appellants beggars belief in light of the extraordinary efforts that went into revealing the truth of agency misconduct.

ARGUMENT

The issue before the court is whether Appellants have shown that irregular and unlawful agency procedures may have prejudiced their substantial rights under Minnesota Statute § 14.69. The irregular and unlawful procedures have been

established by the lower courts,[3] therefore the issue of whether this may prejudice the parties is a pure question of law for the Court. PEER believes the Court should find that the proven irregular and unlawful procedures may have prejudiced parties' substantial rights—denying parties access to the oversight and expertise of EPA in order to force a permit through on terms that violate the Clean Water Act cannot be said to be a harmless outcome.

Without a strong statement from this Court that irregular and unlawful agency procedures are likely to prejudice parties and the public, the Court of Appeals' ruling has a chilling effect on whistleblowing and will encourage backroom dealing between agencies and regulated industries. The decision below

[3] *See*, *e.g.*, MCEA Br. Add. 073 ("Neither Comm'r Stine, Mr. Clark, nor Mr. Pierard could recall another instance when the EPA drafted written comments during the public comment period and then read them to the MPCA over the phone instead of sending them to the MPCA."); MCEA Br. Add. 063 ("It seemed odd to Mr. Pierard that Ms. Lotthammer 'would suggest that it was somehow inappropriate for us to comment during the public comment period. EPA makes comments all the time, inside and outside the comment period.'"); MCEA Br. Add. 085 ("A legal hold was not placed when four requests for a contested case hearing were made during the public notice period, (ex. 350 at 1 of 43), when Relators filed a petition for writ of certiorari on January 18, 2019, or on May 17, 2019 when Relators moved for a transfer hearing under section 14.68. MPCA first implemented a legal hold in connection with the NorthMet NPDES permit on June 25, 2019, the day of the Transfer Order."); MCEA Br. Add. 121 ("If the emails had not been destroyed, the MPCA would have had to disclose them as public records in response to Relators' DPA requests. The act of destroying exhibits 58 and 333 was an irregularity in procedure not shown in the record.").

cuts ethical employees and the public out of the administrative process, contrary to Minnesota laws promoting transparency in agency decision-making.

PEER participated in this case as legal counsel to Mr. Pierard and in a parallel filing of federal litigation against EPA for concealing records subject to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Due to its experience with both whistleblower representation and with transparency law, PEER's brief focuses on the significant costs and risks that went into both the whistleblowing and collection of records that ultimately proved the wrongdoing of MPCA. By not acknowledging the significant role that whistleblowing and formal data requests played in this case, the Court of Appeals decision misapprehends the prejudice to parties and society that comes from the agency's faulty procedure. This brief first discusses the value of whistleblowing and the risk posed to whistleblowers, before addressing the significant efforts that went into obtaining key evidence that the government sought to conceal.

I. Whistleblowers provide a uniquely valuable function in government at great personal risk, and should be encouraged in line with Minnesota law.

From Watergate and the space shuttle Challenger to the Pentagon Papers and the recent whistleblower report on unsanitary conditions in baby formula

factories,[4] whistleblowers have altered public perception and shaped policy.[5] Whistleblower disclosures serve to "fill gaps in an imperfect system," and are relied on as part of the regulatory enforcement apparatus.[6] Whistleblowers are often among the best employees at their organization, acting out of a sense of belief in their organization's mission rather than personal motives.[7]

Whistleblowers' presence leads to quicker enforcement actions and greater penalties for violations in financial fraud enforcement cases,[8] and improves enforcement across the board. Without further expenditures of tax dollars on additional regulatory requirements or staff, whistleblowing results in greater compliance with environmental law.[9] Landmark cases like that of Paul Jayko, who

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[4] Brenda Goodman and Jacqueline Howard, *Whistleblower alerted FDA to alleged safety lapses at baby formula plant months before recalls, complaint shows*, CNN (Apr. 28, 2022, 9:49 PM), https://www.cnn.com/2022/04/28/health/baby-formula-whistleblower/index.html.

[5] Gene A. Brewer & Sally Coleman Selden, *Whistle Blowers in the Federal Civil Service: New Evidence of the Public Service Ethic*, 8 J. OF PUB. ADMIN. RSCH. & THEORY 413, 419 (1998).

[6] Matt Reeder, *Proceeding Legally: Clarifying the SEC/Dodd-Frank Whistleblower Incentives*, 7 HARV. BUS. L. REV. 269, 313 (2017).

[7] *See* Brewer, *supra* note 5; Yoon Jik Cho & Hyun Jin Song, *Determinants of Whistleblowing Within Government Agencies*, 44 PUB. PERS. MGMT. 450 (2015).

[8] *See* Andrew C. Call et al., *Whistleblowers and Outcomes of Financial Misrepresentation Enforcement Actions*, MAYS BUS. SCH. RSCH. PAPER 2506418 (2017).

[9] Laura Simoff, *Confusion and Deterrence: The Problems that Arise from a Deficiency in Uniform Laws and Procedures for Environmental Whistleblowers*, 8 DICK. J. OF ENV'T L. & POL'Y 325, 326 (1999); Chad A. Atkins, *The Whistleblower Exception to the At-Will Employment Doctrine: An Economic Analysis of Environmental Policy Enforcement*, 70 DEN. U. L. REV. 537, 538 (1993).

blew the whistle on the Ohio Environmental Protection Agency after increased rates of cancer appeared from public schools built on former Army dump sites, have raised the alarm to the public to enforce environmental laws and save lives.[10]

Congress has noted as much in the Whistleblower Protection Act (WPA), declaring federal employees who make disclosures to be serving the public interest, and that protecting them is a "major step towards a more effective civil service."[11] Minnesota's legislature, too, has recognized the value of whistleblowers, first enacting a law to prevent reprisal for disclosures in 1987,[12] as well as other worker safety antiretaliation rights and statutes encouraging private enforcement against false claims against the state.[13] The case before this Court is a sterling example of the importance of courageous whistleblowing to a functioning administrative state in Minnesota.

A. Minnesota has seen the value whistleblowing has on government transparency, and the costs of destruction of records in terms of lost public trust and rights.

Recent instances of whistleblowing and the destruction of government records have served to demonstrate the value whistleblowers have to the

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[10] *See* James Drew, *Toledo man claims whistleblower status*, THE BLADE (Jan. 5, 2001, 7:20 AM), https://www.toledoblade.com/Print-Furniture/2001/01/05/Toledo-man-claims-whistleblower-status/stories/200101050018; *State of Ohio v. US Dept. of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000).

[11] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2 (1989).

[12] MINN. STAT. § 181.932 (2021).

[13] MINN. STAT. § 182.669 (2021); MINN. STAT. §§ 15C.05, C.13 (2021).

Minnesota public, including within the MPCA. Late last year, a longtime MPCA hydrologist resigned when he was retaliated against for expressing concerns with the agency's handling of leaking underground petroleum tanks.[14] He alleges that the agency claims to clean up underground tanks when they in fact do not, endangering groundwater and the public.[15] When he went public with this information, the mayor of Paynesville, an affected town named in the employee's lawsuit, took action to protect his town's groundwater and began an independent testing program.[16] Without the whistleblower's efforts that community could still be in the dark about the dangers posed to their source of drinking water. Information like that provided by this MPCA whistleblower is often invaluable for public health and safety.

Even whistleblowing that does not reveal obvious wrongdoing can enhance trust in government. In 2016, a deputy commissioner at the Minnesota Commerce Department alleged improper practices of document destruction and filed suit

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[14] *See* Complaint, *Toso v. Minnesota Pollution Control Agency*, 2021 WL 5355419 (Minn. Dist. Ct. 2021) (No. 62-CV-21-5991); Kirsti Marohn, *Longtime MPCA employee alleges retaliation over petroleum complaints*, MPR NEWS (Jan. 11, 2022, 4:00 AM), https://www.mprnews.org/story/2022/01/11/longtime-mpca-employee-alleges-retaliation-over-petroleum-complaints.
[15] *See* Marohn, *supra* note 14.
[16] *Id.*

against the agency.[17] Citing fears that coming forward "would wreck his career," his case illustrates the difficult decisions potential whistleblowers face.[18] The Office of the Legislative Auditor studied these claims with the seriousness they deserve and conducted an investigation by Special Review in 2017, putting agency management under oath as to their record retention practices.[19] Though ultimately finding no wrongdoing, following through on this process reinforced public trust in the state's institutions.[20]

The 2016 Commerce Department investigation and actions by MPCA in the case before this Court are not the only recent examples of alleged government destruction of records affecting the substantial rights of Minnesotans. In 2020, following widespread protests in Minneapolis, state police engaged in "a purge of emails and text messages," according to a police major.[21] Without testimony provided in federal court by a government official, this purge would never have

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[17] OFFICE OF THE LEGISLATIVE AUDITOR, DEPARTMENT OF COMMERCE: DATA PRACTICE ALLEGATIONS 1-3 (2017), https://www.auditor.leg.state.mn.us/sreview/commercedata.pdf (citing Complaint at 3-4, *Vande Hey v. State of Minnesota*, (Minn. Dist. Ct. 2016) (No. 62-CV-16-2011)).
[18] Brian Bakst, *Lawsuit claims harassment, retaliation by MN Commerce exec*, MPR NEWS (Apr. 8, 2016, 7:06 PM), https://www.mprnews.org/story/2016/04/08/suit-mn-commerce-exec-sexually-harassed-employee.
[19] *Id.*
[20] *Id.*
[21] Jacey Fortin, *Minnesota Troopers Deleted Texts and Emails after Floyd Protests, Major Testifies*, N.Y. TIMES (Sep. 6, 2021), https://www.nytimes.com/2021/09/06/us/mn-state-patrol-texts-emails-lawsuit.html.

become public knowledge,[22] nor the fact that the state police purged their records as a "standard practice."[23] Unlike in this case, the purged records were unrecoverable, and their absence affects the rights of those asserting state police used excessive force and violated journalists' constitutional rights.[24] It is sadly still the case that public officials in Minnesota regularly and routinely destroy records to achieve outcomes they prefer—which, if unchecked, results in harm to fundamental rights, trust in government, and, often, environmental protection.

B. The Whistleblowers testimony in this case served the people of Minnesota and the public interest.

Public participation in the NPDES permitting process is guaranteed by the Clean Water Act, but ordinary citizens may lack the requisite technical knowledge to understand all of the issues under consideration in these permitting processes. Citizens rely on specialized organizations and agencies to advocate for their best interests during the comment period. And as the agency tasked with overseeing state implementation of the federal Clean Water Act and staffed with technical

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[22] *Id.*

[23] Ryan Raiche, *State Patrol engaged in massive 'purge' of emails and texts immediately after George Floyd protests, court records show*, KSTP.COM (Sep. 4, 2021, 2:53 PM), https://kstp.com/kstp-news/top-news/state-patrol-engaged-in-massive-purge-of-emails-and-texts-immediately-after-george-floyd-protests-court-records-show/.

[24] *Id.* (citing Transcript of testimony at 259-66, *Goyette et al. v. City of Minneapolis et al.*, 2021 WL 5003065 (D. Minn. 2021) (No. 20-cv-1302), https://www.aclu-mn.org/sites/default/files/field_documents/10118980132.pdf).

experts to understand the complex issues here, the EPA is a key player in the process.

When federal oversight is operating as intended, EPA's comments outlining concerns about a draft permit amplify those concerns to the public by presenting them authoritatively. But instead, in this case, the public was deprived of EPA's comments during the notice and comment period. Absent testimony from Mr. Pierard in a proceeding before the District Court regarding "alleged irregularities in procedure" under Minnesota Statute 14.68, the public would not have learned EPA's concerns about the MPCA's draft NPDES permit for the PolyMet project. In fact, the public would not have understood that those concerns even existed.

Losing the perspective of the federal agency experts is a tremendous blow to the administrative process—and this manufactured absence was only somewhat remedied by the actions of a single whistleblower at significant risk to himself, and cost to the parties that expended resources in bringing the truth to light. The MPCA understood the importance of having EPA's comments in the public record, or they would not have gone to such lengths to ensure their exclusion. PEER and the parties in this case were only able to unearth necessary records with the help of a leak of emails by a union, tireless efforts to recover public records from MPCA and EPA, and ultimately Mr. Pierard's authoritative testimony.

II. Whistleblowers face a difficult decision and will be deterred if risks outweigh the impact of speaking out.

Whistleblowers know that reporting on malfeasance at their workplace is not a decision to be taken lightly. Before speaking out the potential whistleblower must balance the risks of reporting with the potential for incresed transparency and positive change to their organization. If the Court does not assign sufficient weight to Mr. Pierard's testimony, if Minnesota courts do not recognize that such irregularities by their nature may prejudice parties' rights in the administrative process, it will deter future beneficial whistleblowing activity by making it too risky to merit the shrinking possibility of societally-beneficial outcomes. This will chill beneficial disclosure that provides a check on organizations' back-room wrongdoing.

Whistleblowers rarely speak out for selfish reasons. Rather than being a utilitarian instinct, risking one's career and relationships by coming forward is seldom supported by self-interest. To that end, studies have shown that most whistleblowers act out of a sense of organizational loyalty.[25] The risks that accompany the decision to come forward are numerous and well-documented, and often extend far beyond the individual's vocation.

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[25] *See* Brewer, *supra* note 5, at 415.

Whistleblowers who remain at the workplace are, of course, at heightened risk of firing, suspension, and other retaliatory actions.[26] Those individuals who remain at the workplace also have a demonstrated higher incidence of depression and other serious health conditions as a result of workplace retaliation.[27] Studies have also shown increased rates of alcoholism and even suicide for whistleblowers.[28] By waiting until they leave an organization before speaking out, whistleblowers may minimize some of these effects. However, they still face retaliation including lawsuits, isolation from former colleagues, and both formal and informal blacklisting which may carry serious personal and professional consequences.[29]

The many inherent costs in blowing the whistle detailed here indicate the scale of the personal risk to individual whistleblowers and the burden they must carry to speak publicly, even after leaving their former employers. That was equally true of the whistleblower in this case. His disclosures and others like it serve to promote government transparency and the public interest, and the Court should

[26] Jean Lennane, *What Happens to Whistleblowers, and Why*, 6 SOC. MED. 249, 249-51 (2012).
[27] Brita Bjørkelo, *Workplace bullying after whistleblowing: future research and implications*, 28 J. OF MANAGERIAL PSYCH. 306, 314-15 (2013).
[28] Lennane, *supra* note 26, at 253.
[29] Kate Kenny & Marianna Fotaki, *The Costs and Labour of Whistleblowing: Bodily Vulnerability and Post-Disclosure Survival*, J. of. Bus. Ethics, Dec. 27, 2021, at 9.

take care not to discount the seriousness of risks associated with providing these benefits to society.

III. Extracting records of MPCA's concealment and destruction of records took expertise and resources beyond what should be reasonably expected of commenters in a permitting process.

PEER and WaterLegacy went to extraordinary lengths to reveal the agency's efforts to not create written records of EPA's comments and to keep those comments from the public record. This Court should recognize that being forced to overcome agency obstructionism to reveal records that have been intentionally buried is the very definition of "prejudice"—and so these efforts, that never should have been necessary under Minnesota and federal law, rebut the Court of Appeals' laissez-faire attitude to government misconduct.

A. Records MPCA provided regarding its permit process were incomplete and suggested agency irregularities without reflecting all interactions with EPA.

Between March of 2018 and February of 2019 WaterLegacy submitted seven requests for records to MPCA in accordance with the Minnesota Government Data Practices Act (DPA).[30] However, the records were not forthcoming, and the agency's methods of communication ensured that many records were not created at all.[31]

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[30] WaterLegacy Br. 17.

[31] WaterLegacy Br. 17-18.

On November 3, 2016, EPA explained that any legally sufficient NPDES permit for the PolyMet project must cover or prohibit all discharges from NorthMet point sources to surface waters, including those through ground water hydrologic connection.[32] These would be the last written comments made by EPA on the record concerning the NorthMet mine.[33]

Throughout 2017 and 2018, NPDES staff in EPA's Region 5 Office verbally expressed substantive concerns about MPCA's draft NPDES water pollution permit and its ability to protect water quality in Lake Superior watersheds. These concerns were expressed over the phone or in person to employees of MPCA, who memorialized them in handwritten notes obtained by WaterLegacy under one DPA records request.[34] Those notes indicate that the Region 5 staff wanted to provide comments in writing in the administrative record for the NPDES permit for NorthMet, yet they repeatedly failed to do so.[35]

On November 1, 2017, MPCA staff memorialized one such oral conversation as: "EPA wants to send a letter prior to PN [public notice of the draft permit],"

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[32] MCEA Br. Add. 057.
[33] Five days later, on November 8, Donald Trump was elected President of the United States.
[34] MCEA Br. Add. 072.
[35] MCEA Br. Add. 067.

putting its comment in the record.[36] But an email from EPA a few weeks later, on November 20, 2017, suggests that something had changed, and that EPA Region 5 staff would not send a letter prior to the draft NPDES water pollution permit, but would wait to send comments "until after we have a chance to review the draft."[37]

MPCA notes dated March 5, 2018, state: "EPA wants to submit comments – Make clear what EPA concerns are. Clarify permit conditions."[38] But at the close of the comment period, in a March 16, 2018, email, EPA Region 5 staff again put off submitting written comments, but stated that once the *final* NPDES permit was in its "pre-proposal" stage, staff would have 45 days to "provide written comments" to MPCA.[39] Despite assurances that EPA comments would be forthcoming, MPCA received no written EPA feedback on the PolyMet permit. EPA finalized written comments on the draft NorthMet in March 2018 but never transmitted them to MPCA.[40] In April, 2018, Mr. Pierard read those comments over the phone to

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[36] PEER, EPA OVERSIGHT OF STATE PERMITS EVAPORATING (FEB. 19, 2019) https://peer.org/epa-oversight-of-state-permits-evaporating/ (notes located on page B1-2 under the "Look at the state staff notes on EPA calls" link).
[37] MCEA Br. Add. 059.
[38] PEER, *supra* note 36, at B13.
[39] MCEA Br. Add. 068.
[40] WaterLegacy Br. Add. 4.

MPCA,[41] but they were not made available by MPCA within the administrative record or pursuant to the DPA requests.[42]

Because accurate records were unavailable from MPCA, parties were obliged to expend more effort requesting what records were available from EPA, pursuant to FOIA.

B. Records requested under FOIA were withheld without explanation until PEER brought suit to compel EPA's disclosures.

Similar to the DPA requests, WaterLegacy expended resources in submitting records requests to EPA and was forced to follow up with FOIA litigation when the agency was not forthcoming with records—records that have proven central to the facts of this case.

In October 2018, WaterLegacy submitted a FOIA request to EPA seeking the comments read by Mr. Pierard.[43] EPA Region 5 counsel informed them this was "a very simple request, so a response should not take very long."[44] In December, 2018, WaterLegacy was told that someone in Region 5 had escalated the request to EPA's headquarters for review after initially suggesting it would be emailed over the

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[41] MCEA Br. Add. 071.
[42] WaterLegacy Br. 18.
[43] Complaint at 6, *WaterLegacy v. U.S. EPA* (D.D.C. 2019) (No. 19-cv-00412), https://peer.org/wp-content/uploads/attachments/2_19_19_PEER_PolyMet_lawsuit.pdf.
[44] *Id.*

same day.[45] After being unable to get a response in January 2019 about accelerating the response,[46] it became apparent to the requester that EPA was not likely to disclose the information in a timely manner after all.

PEER's federal lawsuit on behalf of WaterLegacy for these records was filed in February 2019. After initially denying the request outright and scheduling briefing on the matter, in June 2019, EPA informed PEER it would release EPA's comments read by Mr. Pierard in full.[47] No reason was given for this sudden change in position. The escalation of what was initially a "very simple request" to federal litigation was yet another "procedural irregularity" surrounding this case that increased costs on parties and delay in the public's understanding of the truth.

Viewed with the snap decision to withhold the written comments EPA finalized in March, 2018, the sudden decision to withhold them from disclosure under FOIA as well underscores the consistent irregularity of state and federal determinations of: how to regulate; and, how much to inform the public about that decision. PEER and its client went to extreme lengths to pull at threads that, after

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[45] Complaint at 8, *WaterLegacy v. U.S. EPA* (D.D.C. 2019) (No. 19-cv-00412), https://peer.org/wp-content/uploads/attachments/2_19_19_PEER_PolyMet_lawsuit.pdf.
[46] *Id.* at 7.
[47] PEER, SUPPRESSED CONCERNS ABOUT MEGA-MINE SURFACE (Jun. 13, 2019) https://peer.org/suppressed-epa-concerns-about-mega-mine-surface/.

numerous attempts and escalations over years, finally led to the truth, and ultimately set the stage for Mr. Pierard's testimony.

IV. The Court of Appeals' handling of Mr. Pierard's testimony and the procedural irregularities will deter future whistleblowers and encourage government misconduct.

Without Mr. Pierard's disclosures and willingness to testify, the agreement between EPA and MPCA to arrange for EPA's NPDES comments off the record and away from the public would never have fully come to light. The Court of Appeals held, despite his testimony as to the emails exchanged between MPCA and EPA which MPCA deleted,[48] meeting notes which MPCA destroyed or claimed as privileged,[49] and EPA comments submitted via phone rather than writing,[50] that the decision to grant the NPDES/SDS permit "was not made upon an unlawful procedure that prejudiced the relators' substantial rights."[51] As the Appellants have demonstrated in their briefs, it is not possible to definitively prove that the absence of a record changed the outcome of a decision—you can't prove a negative—so in some respects this standard (reading out the word "may" in the standard) is not provable, even with the large record of irregularities in this case.

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[48] MCEA Br. Add. 121.
[49] MCEA Br. Add. 055-56.
[50] MCEA Br. Add. 071.
[51] MCEA Br. Add. 039.

This is an unreasonably high standard of prejudice for future petitioners to meet to have their concerns be considered and validated by Minnesota courts. In order to acknowledge the importance of whistleblowers and transparency law in revealing significant information that agencies seek to bury, this Court should decline to affirm the Court of Appeals' uniquely stringent prejudice standard. Reversing the Court of Appeals and remanding this matter to the agency because of the prejudice to parties is the best way to assure continued accountability in Minnesota agencies.

A. The Court of Appeals' standard chills future whistleblower disclosures.

Studies have demonstrated that an important factor in encouraging whistleblowing is the ethical judgement call made by the potential whistleblower as to whether coming forward or not will be more beneficial.[52] This is referred to as a teleological evaluation and involves looking at the positive and negative consequences of blowing the whistle.[53] The potential personal negative consequences of whistleblowing are significant, and a decision like that handed down below reduces the potential upside of whistleblowing to society.

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[52] Maheran Zakaria, *Antecedent Factors of Whistleblowing in* Organizations, 28 PROCEDIA ECON. & FIN. 230, 233 (2015).
[53] *Id.*

A potential whistleblower may look to this legal standard and the considerable reporting on this case,[54] and reason that if a court will normally disregard their testimony as non-prejudicial or insignificant, the positive results of coming forward do not outweigh the negatives. If Mr. Pierard's testimony does not demonstrate irregular procedures that "may" cause prejudice to substantial rights, whistleblowing speech will be chilled—even when conduct is proven both wrong and unlawful, such proof is still unlikely to be sufficiently prejudicial to merit reversal according to the Court of Appeals.

B. State agency misconduct could flourish under the Court of Appeals' standard.

It is undisputed here that the steps taken by MPCA to keep EPA comments from the record, as well as its destruction of emails and notes which speak to that agreement, are "irregular." MPCA carried out this operation with the purpose and effect of limiting public outcry based on EPA comments during the permit's notice

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[54] *See* Ernest Scheyder, *Minnesota court orders review of water permit for PolyMet mine*, REUTERS (Jan. 24, 2022, 4:33 PM), https://www.reuters.com/world/us/minnesota-court-orders-review-water-permit-polymet-mine-2022-01-24/; Dan Kraker, *State court reverses PolyMet water permit, but sides with company on other issues*, MPR NEWS (Jan. 24, 2022, 1:46 PM), https://www.mprnews.org/story/2022/01/24/state-court-reverses-polymet-water-permit-but-sides-with-company-on-other-issues; Walker Orenstein, *Court of Appeals rescinds key PolyMet permit, says project must get new groundwater analysis*, MINNPOST (Jan. 24, 2022), https://www.minnpost.com/greater-minnesota/2022/01/court-of-appeals-rescinds-key-polymet-permit-says-project-must-get-new-groundwater-analysis/.

and comment period.[55] In waiving through MPCA's misconduct without remand this Court would be signaling to all state agencies that back-channel arrangements and destruction of documents in violation of state law may be done with impunity—even when revealed by whistleblowers and proven in court, the agency faces no consequences for unlawful concealment and destruction of records.

Minnesota law requires every agency to maintain a Records Retention Schedule which outlines when the agency may destroy certain types of records, and which must be preserved.[56] And these schedules exist for a reason, as they serve both the public and the agency by preserving information that is subject to disclosure under public records laws. As discussed above, this is not just an issue of pollution, destruction of records could also herald the impunity of police accused of excessive violence, or arbitrary action at agencies overseeing government contracts and fiscal programs. The Court of Appeals' decision allows government agencies to hide or destroy documents so that it can create an administrative record to suit the political or regulatory outcome it is seeking without being accountable for violating across-the-board transparency requirements.[57]

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[55] MCEA Br. Add. 070.

[56] MINN. STAT. § 138 subd. 7 (2021).

[57] As discussed more fully by Appellants, the destruction of records not only violated general Minnesota records laws, it also likely violated the requirement for a litigation hold that would preserve all documents related to this permitting decision.

MPCA's document destruction violates the agency's own schedule[58] as well as the purpose of requiring records retention in the first place, and this Court should decline to endorse this and other agencies' disregard for transparency practices that are required by the Minnesota Legislature.

CONCLUSION

Although the question before the court appears limited to an infrequently-litigated issue of administrative law, its implications extend to all agency decision-making processes. Without a reversal of the Court of Appeals' finding of no potential for prejudice from such unlawful procedures, agencies will be able to disregard transparency and records retention laws when it conveniences their political leadership, and whistleblower speech that is protected and encouraged by law will be chilled.

When a government employee makes the fraught decision to come forward as a whistleblower, they place the interests of the public before their own. When participants in an administrative process perceive that the system is rigged against them, they will cease participating or trusting in the administrative state.

Prioritizing one's conscience over career is invaluable in a public servant and should be encouraged. When these men and women take the brave step to come

[58] MCEA Br. Add. 122.

forward, they must do so with at least some hope of effecting positive change. The ruling of the Court of Appeals would extinguish that hope. Additionally, it harms the purpose of both public records and records retention laws, making efforts to obtain public data futile in Minnesota courts even when they result in disclosures showing agency misconduct.

For the reasons stated herein, amicus PEER respectfully requests that this Court vacate the decision of the Court of Appeals and remand MPCA's NPDES/SDS permit for PolyMet's NorthMet mine project to the agency.

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Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(c). The brief was prepared with proportional font, using Version 2205 Microsoft Word in Office 365, which reports that the brief contains 6135 words.

s/ *Hudson Kingston*
Hudson B. Kingston

CERTIFICATION

In compliance with this Court's March 20, 2020, Order, no paper copies of this brief will be filed with the Court. I hereby certify that, should the Court request a paper copy of this brief, the content of the accompanying paper brief will be identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and any corrections or alterations to this electronically filed brief will be separately served and filed in the form of an errata sheet.

s/ *Hudson Kingston*
Hudson B. Kingston