IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Fond du Lac Band of Lake Superior Chippewa,

Plaintiff,

v.

Kurt Thiede, et al.,

Defendants,

and

Poly Met Mining, Inc.,

Defendant-Intervenor.

Case No. 19-cv-2489 (PJS/LIB)

REPLY IN SUPPORT OF POLY MET MINING, INC.'S MOTION TO DISMISS PLAINTIFF'S FIRST, SECOND, THIRD, AND FOURTH CAUSES OF ACTION

INTRODUCTION

"[A]gency *in*action," the Eighth Circuit recently said, "is generally unreviewable." *Chong Toua Vue v. Barr*, 953 F.3d 1054, 1058 (8th Cir. 2020). That general rule applies here. EPA did not act against PolyMet's water quality permit, and it did not act to notify the Band of potential water quality impacts from PolyMet's project. The Band effectively concedes that the former decision is unreviewable. The latter decision is too—both because EPA's role under section 401(a)(2) of the Clean Water Act is committed to agency discretion by law and because the Band does not allege a discrete agency action EPA was required to take. In this case, EPA's job involved oversight, not obligation.

The Eighth Circuit has also held that the process and reasoning that EPA used when it decided not to act are unreviewable. Otherwise, anyone could avoid the Administrative Procedure Act's reviewability restrictions just by attacking the way a decision was made. Absent any reviewable actions, the Band's claims against EPA should be dismissed. That includes its challenges to EPA's decisional process and its claim that EPA should have explained its decision in writing.

ARGUMENT

I. The process and reasoning that led EPA not to object to PolyMet's NPDES permit are unreviewable.

A. The Eighth Circuit has rejected partial reviewability when an action is committed to agency discretion by law.

In its opening brief, PolyMet showed that courts lack jurisdiction under APA section 701(a)(2) when EPA does not object to an NPDES permit.[1] *See District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980). The Band does not disagree. Instead, it argues that "[e]ven if an action is committed to agency discretion by law, collateral or separable issues *are* reviewable."[2] Chasing that logic, the Band says that the first claim in its Amended Complaint "challenges EPA's review of" PolyMet's NPDES permit, not the absence of an EPA objection to that permit.[3]

Given this description of the Band's first claim, the question becomes whether the Band can challenge an agency "review" that culminates in a decision committed to agency discretion by law. Two Eighth Circuit decisions indicate that it cannot. In *State of North Dakota v. Yeutter*, the Court of Appeals found it "self-evident that [section] 701(a)(2) necessarily deprives a court of jurisdiction to review the sufficiency of the reasons underlying a particular agency action that is committed to the agency's discretion by law." 914 F.2d 1031, 1036 (8th Cir. 1990). In *Chong Toua Vue v. Barr*, the Court of

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[1] PolyMet Br. at 4-6. *See Great Rivers Habitat Alliance v. FEMA*, 615 F.3d 985, 989 (8th Cir. 2010) ("The APA waives sovereign immunity as to suits seeking judicial review . . . except when either the statute precludes judicial review or agency action is committed to agency discretion by law." (Internal quotation marks omitted.))

[2] Fond du Lac Br. at 5 (emphasis in original).

[3] Fond du Lac Br. at 7.

Appeals held that when a decision is committed to agency discretion, the only review available is review of a colorable constitutional claim. 953 F.3d at 1057. The court explained that a broader exception "would be a retreat" from its prior cases and from "the general principle that there is no 'theory of partial reviewability' for actions committed to agency discretion." *Id*. (quoting *Schilling v. Rogers*, 363 U.S. 666, 674-75 (1960)).

The court in *Chong Toua Vue* summarized the relevant rule: "[W]hen the law commits certain actions to agency discretion, [courts] cannot pick and choose what to review depending on the particulars of each case. This is particularly true for agency *in*action, which is generally unreviewable." *Id*. at 1057-58 (emphasis in original) (citations omitted). Because the Band is asking the Court to do exactly what the Eighth Circuit has said it cannot do—"pick and choose what to review"—its first claim should be dismissed.

B. Newer decisions have supplanted the older cases cited by the Band.

The Band's argument against dismissing its first claim mentions neither *Yeutter* nor *Chong Toua Vue*. Instead, it leans on the Eighth Circuit's decision in *Story v. Marsh*, 732 F.2d 1375 (8th Cir. 1984).[4] *Story* held that "[e]ven where a court ascertains that a matter has been committed to agency discretion by law, it may entertain charges that the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influences, such as fraud or bribery, or that the decision violates a constitutional, statutory or regulatory command." *Id*. at 1381 (quoting *Local 2855 AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 580 (3d Cir. 1979)). Later cases have pared back that holding.

[4] Fond du Lac Br. at 5, 8, 23.

The U.S. Supreme Court's *Webster v. Doe* decision made the largest change to *Story*'s list of "charges" that courts may "entertain" when a decision is committed to agency discretion. In *Webster*, the lower court found an employee was unlawfully discharged because the agency "had not followed the procedures described in its own regulations." 486 U.S. 592, 597 (1988). Observing that the applicable statute "fairly exude[d] deference" to the agency, the Supreme Court held the discharge decision unreviewable under section 701(a)(2). *Id*. at 600. And despite the lower court's finding that the agency had used improper procedures—the same kind of claim the Band is making here—the Court in *Webster* acknowledged just one exception to the rule limiting review of decisions committed to agency discretion by law: "review of constitutional claims." *Id*. at 603.[5]

The Eighth Circuit's en banc decision in *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008), reached a similar conclusion. After holding that it lacked jurisdiction to review a decision that was committed to agency discretion, the court said that it still had "jurisdiction over any colorable constitutional claim." *Tamenut*, 521 F.3d at 1005 (citing cases, including *Webster*, 486 U.S. at 603). It did not recognize any other exceptions to section 701(a)(2)'s rule of unreviewability.

After *Webster* and *Tamenut*, the Band's citation of *Story* and other older cases is unpersuasive. Nor do the Supreme Court's recent decisions in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* and *Department of Commerce v. New York* aid the Band, because neither says anything about "collateral"

[5] As *Yeutter* noted, *Webster* "did not examine the merits of the particular agency action at issue after finding it came within the § 701(a)(2) exception to judicial review." 914 F.2d at 1036 n.4.

review of decisions otherwise committed to agency discretion by law.[6] The rule in the Eighth Circuit is that "when the law commits certain actions to agency discretion," courts "cannot pick and choose what to review depending on the particulars of each case." *Chong Toua Vue*, 953 F.3d at 1057. The Band's first claim cannot survive under that rule.

II. EPA's inaction under section 401(a)(2) of the Clean Water Act is unreviewable.

The Band does not concede that EPA's role under Clean Water Act section 401(a)(2) is committed to agency discretion by law. Relying on the "strong presumption in favor of judicial review," the Band's second, third, and fourth claims challenge EPA's failure to notify it about potential downstream water quality effects from PolyMet's mine.[7] Some of those claims directly address the absence of notification, while others focus on how EPA decided not to act. None are reviewable under the APA.

A. EPA's role under section 401(a)(2) is committed to agency discretion by law.

The APA's committed-to-agency-discretion-by-law exception to reviewability should be read "narrowly." *Weyerhaeuser*, 139 S.Ct. at 370. It applies only in "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id*. (citation omitted). The cases where the exception has applied "involve[] agency decisions that courts have traditionally regarded as unreviewable . . . ." *Id*. EPA's notice to downstream states under section 401(a)(2) is that sort of decision.

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[6] *Weyerhaeuser*, -- U.S. --, 139 S.Ct. 361, 371-72 (2018) (holding that APA section 701(a)(2) did not apply); *Dep't of Commerce*, -- U.S. --, 139 S.Ct. 2551, 2568-69 (2019) (same).

[7] Fond du Lac Br. at 11-12; *see* Am. Compl. ¶¶ 254-74.

1. Section 401(a)(2) contains no meaningful standard for a reviewing court to apply.

The Supreme Court in *Weyerhaeuser* did not purport to list every kind of decision traditionally regarded as unreviewable. Instead, it gave two examples: "allocation of funds from a lump-sum appropriation" and "a decision not to reconsider a final action." *Id*. (citations omitted). The Eighth Circuit has identified another: "agency inaction, which is generally unreviewable." *Chong Toua Vue*, 953 F.3d at 1058 (emphasis omitted). As the Eighth Circuit pointed out in another case, "a decision to do nothing is entitled to more deference than a decision to act." *Minn. Milk Producers Ass'n v. Glickman*, 153 F.3d 632, 642 (8th Cir. 1998).

EPA's section 401(a)(2) inaction in this case fits the Supreme Court's and the Eighth Circuit's definition of an unreviewable decision. That conclusion flows first from the statute, the relevant part of which says:

> Whenever such a discharge may affect, as determined by the [EPA] Administrator, the quality of the waters of any other State, the Administrator . . . shall so notify such other State, the licensing or permitting agency, and the applicant.

33 U.S.C. § 1341(a)(2). The structure of this sentence, by interposing an explanatory phrase, emphasizes that the question of whether a discharge "may affect" a downstream state is authoritatively answered "by the Administrator."

The word "determined" also frequently signals an unreviewable decision. For instance, the statute in *Yeutter* provided an exception to a general rule "if '*the Secretary determines*'" that the rule's purpose was unmet. 914 F.2d at 1035 (quoting 16 U.S.C. § 3835(a)(1)(C)) (emphasis in original). That language, the Eighth Circuit explained, "'fairly exudes deference' to the

Secretary." *Id*. (quoting *Webster*, 486 U.S. at 600). The Eighth Circuit reached a similar conclusion in an earlier case where the statute at issue authorized federal loans "[i]f the Secretary determines that an applicant is eligible . . . ." *Woodsmall v. Lyng*, 816 F.2d 1241, 1243 n.2 (8th Cir. 1987) (quoting 42 U.S.C. § 1472(a)(1)); *see id*. at 1245-46 (holding that the Secretary's determination was committed to agency discretion by law). These cases illustrate how expressly conditioning a finding on an agency's determination can place that finding beyond the reach of APA review.[8]

The fact that section 401(a)(2) requires EPA to notify a downstream state if the agency makes the requisite determination does not change the discretionary nature of that determination.[9] The Second Circuit held as much in a Clean Air Act case where the agency's "nondiscretionary obligation only [arose] after a discretionary determination by the EPA." *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 330-31 (2d Cir. 2003). Section 401(a)(2) may require EPA to notify a downstream state when it makes a "may affect" determination. But the statute offers no meaningful standard to apply in assessing whether EPA properly "determined" that a discharge "may affect" a downstream state, and that is what the Band is challenging in this case.[10]

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[8] Effective September 11, 2020, 40 C.F.R. § 121.12 provides that "the [EPA] Administrator at his or her discretion may determine that the discharge from the certified project may affect water quality in a neighboring jurisdiction."

[9] *See* Fond du Lac Br. at 14-16.

[10] The fact that Endangered Species Act regulations also use "may affect" language is irrelevant. *See* Fond du Lac Br. at 19-20. The Endangered Species Act itself uses mandatory language that does not make consultation contingent on any agency determination. *See, e.g.*, 16 U.S.C. § 1536(a)(3) ("[A] Federal agency *shall consult* with the Secretary on any prospective agency action . . . if the applicant has reason to believe that an endangered species or threatened species may be present in the area . . . and that implementation of such action will likely affect such species.") (emphasis added).

The Band counters that section 401(a)(2) does reference meaningful standards—namely, the water quality standards that the Band has adopted.[11] That misses the point. Section 401(a)(2) does not require EPA to give notice whenever a permitted discharge may violate downstream water quality standards. Rather, section 401(a)(2) requires EPA to give notice if a discharge "may affect, *as determined by the Administrator*," those water quality standards. 33 U.S.C. § 1341(a)(2) (emphasis added). Like the statute in *Yeutter*, section 401(a)(2) draws a "distinction between the objective existence of certain conditions and the agency's determination that such conditions are present." *Yeutter*, 914 F.2d at 1035 (quoting *Kreis v. Secretary of Air Force*, 866 F.2d 1508, 1513 (D.C. Cir. 1989)).[12] Because section 401(a)(2) conditions notice to downstream states on EPA's "may affect" determination—as opposed to the objective possibility of a downstream effect—EPA's inaction is committed to agency discretion by law under section 701(a)(2).

2. Because EPA's section 401(a)(2) role is unreviewable, so is the manner in which it carries out that role.

Should the Court conclude that EPA's inaction under section 401(a)(2) is committed to agency discretion by law, the process and reasoning underlying that inaction are also unreviewable. As with EPA's unreviewable non-objection to PolyMet's NPDES permit, "when the law commits certain actions to agency discretion, [courts] cannot pick and choose what to review

[11] *See* Fond du Lac Br. at 16-18.

[12] *See also Webster*, 486 U.S. at 600 ("[I]t should be noted that § 102(c) allows termination of an Agency employee whenever the Director 'shall *deem* such termination necessary or advisable to the interests of the United States' (emphasis added), not simply when the dismissal *is* necessary or advisable to those interests. This standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review." (emphasis in original)).

depending on the particulars of each case. This is particularly true for agency *in*action, which is generally unreviewable." *Chong Toua Vue*, 953 F.3d at 1057-58 (emphasis in original) (citations omitted). This rule guards against efforts, like the Band's, to circumvent the APA's jurisdictional provisions. Actions—or inactions—committed to agency discretion by law are off-limits in court, including the processes that led up to them.

B. The Band cannot show that EPA unlawfully withheld agency action under section 401(a)(2).

Regardless of whether EPA's role under section 401(a)(2) is committed to agency discretion by law, its inaction in this case does not support an APA cause of action for a different reason. As PolyMet argued in its opening memorandum, APA review of agency inaction is narrow. If the plaintiff cannot identify a "*discrete* agency action that [the agency] is *required to take*," its claims should be dismissed. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original). The Band disagrees—not by arguing that its Amended Complaint meets *Norton*'s pleading requirement, but by arguing that the requirement is inapplicable. That argument misreads the APA's approach to reviewing agency inaction.

1. The Band must proceed under APA section 706(1), and it cannot satisfy that section's requirements.

The APA authorizes two distinct judicial remedies. 5 U.S.C. § 706. Section 706(1) empowers courts to "compel agency action unlawfully withheld or unreasonably delayed." *Id*. § 706(1). Section 706(2) empowers courts to "hold unlawful or set aside agency action, findings, and conclusions found to" meet one of six criteria. *Id*. § 706(2). The remedy available in a given case depends on the type of "agency action" at issue.

The APA defines "agency action" to include not only affirmative agency actions like the issuance or denial of licenses, but also the "failure to act." 5 U.S.C. § 551(13).[13] That does not mean, as the Band reasons, the plaintiff gets to choose whether it is proceeding under section 706(1) or 706(2).[14] A plaintiff would never ask a court to "compel agency action" under section 706(1) if it thought the agency had improperly issued a permit. Because the relevant "action" would already have happened, a plaintiff in that position inherently seeks to "hold unlawful or set aside" the action under section 706(2). By the same token, it makes no sense to "hold unlawful or set aside" agency *inaction* under section 706(2). If a plaintiff believes that an agency should have acted, but did not, its remedy must be to "compel" action under section 706(1). *See Org. for Competitive Markets v. U.S. Dep't of Agric.*, 912 F.3d 455, 462 (8th Cir. 2018) ("[A] claim will lie under [section] 706(1) to redress an agency's failure to act . . . .").

Several courts have recognized that the applicability of section 706(1) or 706(2) turns on the substance of the plaintiff's claims, not the framing of the complaint. The Ninth Circuit, for example, has prohibited a plaintiff from using section 706(1) as an "end run" around section 706(2) when its claim was "better phrased" as an argument that the agency's action was "arbitrary and capricious." *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 593 F.3d 923, 933-34 (9th Cir. 2010). The Fourth Circuit similarly questioned whether efforts to compel agency action were properly "styled" as claims under section 706(2). *NAACP v. Bureau of the Census*, 945 F.3d 183, 190 (4th Cir. 2019). The Sixth Circuit put it bluntly: "Because the gravamen of the [plaintiffs'] claim is

[13] Fond du Lac Br. at 21.

[14] Fond du Lac Br. at 20-22.

that the [agency] failed to act . . . [section] 706(1) is the relevant provision." *Sheldon v. Vilsack*, 538 Fed. Appx. 634, 649 n.3 (6th Cir. 2013) (unpublished).

It is true the district court in *Alliance to Save Mattaponi v. U.S. Army Corps of Engineers* found that agency failures to act could also be addressed under section 706(2).[15] 515 F.Supp.2d 1, 10 (D.D.C. 2007). But that court misinterpreted the lone appellate case on which it relied, *National Association of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005). *Home Builders* actually emphasized that "a party seeking to challenge an agency's *failure to act* faces a different burden from that borne by a challenger of agency *action*." *Id*. at 1280 (emphasis in original). That statement matches the Ninth, Fourth, and Sixth Circuits' view of the distinction between sections 706(1) and 706(2).

The same principles apply here. Because the Band is challenging EPA's failure to give notice under Clean Water Act section 401(a)(2), it must seek relief under APA section 706(1). By disclaiming any effort to satisfy the standard for relief under that section,[16] the Band effectively concedes that its Amended Complaint does not allege the elements necessary under *Norton*. It could not have done so anyway.[17] As a result, the Band's second and third claims should be dismissed.

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[15] Fond du Lac Br. at 21-22.

[16] Fond du Lac Br. at 20 ("The Band's Second and Third Causes of Action do not seek to 'compel agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. § 706(1).")

[17] *See* PolyMet Br. at 9-11.

2. The APA does not authorize review of the process leading to agency inaction.

The Band's memorandum spends several pages recounting the ways in which it thinks EPA's section 401(a)(2) review process was flawed.[18] But if the Band cannot identify a discrete action EPA was legally required to take, it cannot win relief on those procedural sub-issues either.

The U.S. Supreme Court's decision in *Dalton v. Specter*, 511 U.S. 462 (1994), governs this situation. There, the Court held that action taken by the President failed to state a claim "because the President is not an 'agency' within the meaning of the APA." *Id*. at 469. The respondents sought to avoid dismissal by focusing instead on the recommendation prepared by an acknowledged agency. *Id*. The Supreme Court was unconvinced. The agency actions leading up to the President's final decision, the Court explained, were "not final and therefore not subject to review." *Id*. at 470 (quoting *Franklin v. Mass.*, 505 U.S. 788, 798 (1992)).

Here, for the reasons just discussed, the Band cannot state an APA claim concerning EPA's failure to act under section 401(a)(2). But it still argues that EPA's review of section 401(a)(2) involved "a highly unusual process"[19] and that the agency's failure to consult with the Band was arbitrary and capricious.[20] Under *Dalton*, however, EPA's review and consultation processes are "not final and therefore not subject to review." 511 U.S. at 470.

The Band portrays PolyMet's *Dalton* argument as a claim that "EPA has not completed its decision-making process."[21] That was never PolyMet's

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[18] Fond du Lac Br. at 30-40.

[19] Fond du Lac Br. at 34.

[20] Fond du Lac Br. at 36-38.

[21] Fond du Lac Br. at 10 n.3.

position. PolyMet agrees that EPA's process is complete.[22] Its point is that EPA not notifying the Band under section 401(a)(2) is unreviewable, either because it is committed to agency discretion by law or because the Band cannot show that notice is a discrete action required by law.[23] *Dalton* applies in this context because it prohibits APA review of the non-final process *leading up to* the Band not receiving notice.

III. APA section 555(e) does not create an independent cause of action.

Finally, the Band contends that under APA section 555(e), it "was entitled to notice denying its request by EPA and the Corps."[24] And while the Band's brief only expressly mentions its fourth claim in the opening paragraph,[25] its description of the Amended Complaint's first, second, and third claims suggests that the Band views its fourth claim as resting on section 555(e).

The Band defends its section 555(e) claim without mentioning the Tenth Circuit case that PolyMet cited: *High County Citizens Alliance v. Clarke*, 454 F.3d 1177 (10th Cir. 2006).[26] *High County* explains that section 555(e) is meant "to allow a reviewing court to assess the agency's decision." *Id*. at 1192. It does not grant a "right of review" where the agency's decision is otherwise unreviewable. *Id*.

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[22] *See* PolyMet Br. at 6, 11.

[23] *See supra* at 5-11.

[24] Fond du Lac Br. at 41; *see id*. at 40 (arguing that EPA is "attempt[ing] to avoid [its] obligation under 5 U.S.C. § 555(e) to provide the Band even a 'brief statement' for why they denied the Band's requests for notice and a hearing"); Amended Compl. ¶¶ 270-74.

[25] Fond du Lac Br. at 2.

[26] PolyMet Br. at 12.

Since PolyMet filed its brief, the Tenth Circuit has reiterated that "the right to a response under [section] 555(e) merely facilitates judicial review" when a plaintiff otherwise has a right to it. *Kan. Nat. Res. Coal. v. U.S. Dep't of Interior*, -- F.3d --, 2020 WL 4931375, at *6 (10th Cir. Aug. 24, 2020). That case involved an attempt to use section 555(e) to create standing where no injury otherwise existed, but the idea applies here too. *Id*. Section 555(e) simply "does not independently entitle a plaintiff to relief." *Id*. If the Band's APA claims are unreviewable, section 555(e) cannot save its suit against EPA.

IV. The Band's factual allegations are irrelevant to this motion.

Responding to its reading of EPA's arguments for dismissal, the Band spends more than 15 pages of its brief describing its factual allegations.[27] Setting aside the Band's questionable interpretation of EPA's arguments, the Amended Complaint's factual allegations do not affect PolyMet's arguments for dismissal. As explained above, the process EPA used when it decided not to act against PolyMet's NPDES permit is unreviewable if the inaction itself is unreviewable.[28] The same goes for the way EPA carried out its role under section 401(a)(2).[29] If PolyMet prevails on those points, the Band's alleged procedural problems are irrelevant.

It remains noteworthy, however, that the Ramsey County District Court rejected many of the Band's key factual allegations after a seven-day hearing in January 2020.[30] For example, the Band contends in this case that

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[27] Fond du Lac Br. at 23-40.

[28] *See supra* at 2-3.

[29] *See supra* at 8-9, 12-13.

[30] *In the Matter of the Denial of Contested Case Hearing Requests and Issuance of NPDES/SDS Permit No. MN0071013 for the Proposed NorthMet Project*, Case No. 62-cv-19-4626, Findings of Fact, Conclusions of Law and Order

MPCA made an "improper request" when it asked EPA to delay comment on PolyMet's draft NPDES permit.[31] That contention was also a "central focus of the hearing" in Ramsey County.[32] But the District Court found "no evidence that the MPCA attempted to suppress all EPA comments."[33] In fact, the court said that "MPCA's efforts to convince EPA not to send comments on the draft permit during the public comment period [were] not an irregularity in procedure."[34] The court concluded that "there is no statute, rule, regulation, or other formally adopted policy or procedure that prohibited the MPCA from asking the EPA to delay an optional course of action or for the EPA to agree to such a request."[35]

More broadly, the Ramsey County District Court rejected the premise of the Band's allegations in this case: "MPCA did not engage in a systematic effort to keep evidence out of the administrative record . . . ."[36] The Band and other relators "failed to satisfy their burden of proving that there was some sort of broad effort by the MPCA to keep evidence out of the administrative record or to prevent the EPA from submitting written comments."[37] Again, the facts alleged in the Band's Amended Complaint make no difference to PolyMet's arguments for dismissal. But to the extent the Band is trying to

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(Sept. 3, 2020) (Guthmann, J.). A copy of this Order is attached as Exhibit A to the Declaration of Monte A. Mills.

[31] Fond du Lac Br. at 26.

[32] Findings of Fact, Conclusions of Law and Order at 74.

[33] Findings of Fact, Conclusions of Law and Order at 31.

[34] Findings of Fact, Conclusions of Law and Order at 75.

[35] Findings of Fact, Conclusions of Law and Order at 75.

[36] Findings of Fact, Conclusions of Law and Order at 104.

[37] Findings of Fact, Conclusions of Law and Order at 101. *See id.* ("The Court finds no overarching effort by the MPCA to keep evidence out of the administrative record . . . .")

allege a conspiracy so vast and important that it should override the APA's rules of reviewability, the Ramsey County District Court's factual findings should lay those concerns to rest.

CONCLUSION

"[A]gency inaction" is "generally unreviewable." *Chong Toua Vue*, 953 F.3d at 1058 (emphasis omitted). But EPA inaction is the only thing the Band's first four claims challenge. As a result, those claims should be dismissed.

Dated: September 21, 2020

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