NewRange Request to Supplement Environmental Impact Statement
Finding of Fact 71K - 2023 MN Supreme Court Remand

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.

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

Supreme Court of Minnesota.

August 2, 2023.

Appeal from the Office of Appellate Courts.

Joy R. Anderson, Ann E. Cohen, Minnesota Center for Environmental Advocacy, Saint Paul, Minnesota; and

William Z. Pentelovitch, Margo S. Brownell, Evan A. Nelson, Maslon LLP, Minneapolis, Minnesota, for appellants Minnesota Center for Environmental Advocacy, Center for Biological Diversity, and Friends of the Boundary Waters Wilderness.

Paula Goodman Maccabee, Just Change Law Offices, Saint Paul, Minnesota, for appellant WaterLegacy.

Sean Copeland, Tribal Attorney, Fond du Lac Band of Lake Superior Chippewa, Cloquet, Minnesota; and

Matthew L. Murdock, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, Washington, D.C., for appellant Fond du Lac Band of Lake Superior Chippewa.

Richard E. Schwartz, Bryson C. Smith, Sarah M. Koniewicz, Holland & Hart LLP, Washington, D.C.;

Adonis A. Neblett, Minnesota Pollution Control Agency, Saint Paul, Minnesota; and

Kenya C. Bodden, Thompson Coe, Saint Paul, Minnesota, for respondent Minnesota Pollution Control Agency.

Monte A. Mills, Aaron P. Knoll, Greene Espel PLLP, Minneapolis, Minnesota; and

Kathryn Kusske Floyd, Jay C. Johnson, Venable LLP, Washington, D.C., for respondent Poly Met Mining, Inc.

David Schultz, Mehmet K. Konar-Steenberg, Saint Paul, Minnesota, for amici curiae Administrative Law Professors.

Adam W. Hansen, Apollo Law LLC, Minneapolis, Minnesota, for amicus curiae The American Federation of Government Employees Local 704.

Byron E. Starns, Claire M. Williams, Joshua K. Poertner, Stinson LLP, Minneapolis, Minnesota, for amici curiae MiningMinnesota and Minnesota State Building and Construction Trades Council.

Karuna Ojanen, Ojanen Law Office, Rochester, Minnesota, for amicus curiae Minnesota Well Owners Organization.

Hudson B. Kingston, Kevin H. Bell, Silver Spring, Maryland, for amicus curiae Public Employees for Environmental Responsibility.

Mahesha P. Subbaraman, Subbaraman PLLC, Minneapolis, Minnesota, for amici curiae Public Record Media and The Minnesota Coalition on Government Information.

Anderson, J., Concurring, McKeig, Hudson, Chutich, Thissen, Moore, III, JJ.

SYLLABUS

1. Because the decision of the Minnesota Pollution Control Agency (MPCA) to issue a National Pollutant Discharge Elimination System/State Disposal System permit was arbitrary and capricious due to the presence of several danger signals suggesting the agency did not adequately consider whether the NorthMet project has the reasonable potential to cause or contribute to an exceedance of water quality standards within the Lake Superior watershed, and because

appellants may have been prejudiced by the arbitrary and capricious permitting process, we remand to the MPCA to remedy the procedural irregularities and resulting deficiencies in the administrative record.

2. Because the National Pollutant Discharge Elimination System/State Disposal System permit does not comply with Minn. R. 7060.0600, subp. 2 (2021), which prohibits the discharge of industrial waste to the groundwater "unsaturated zone," we remand the permit to the MPCA for consideration of whether a variance under Minn. R. 7060.0900 (2021) is appropriate for the pollution of unsaturated groundwater within a containment system for the NorthMet project; we affirm, however, that the prohibition in Minn. R. 7060.0600, subp. 1 (2021), on injecting polluted water directly to the groundwater saturated zone for long-term storage, does not apply.

Affirmed in part, reversed in part, and remanded to the Minnesota Pollution Control Agency.

OPINION

ANDERSON, Justice.

Respondent Poly Met Mining, Inc. (PolyMet)[1] proposes to develop a mine and processing plant to extract copper, nickel, and precious metals from the NorthMet Deposit in northeastern Minnesota. These consolidated appeals arise from the decision of respondent Minnesota Pollution Control Agency (MPCA) to issue a water quality permit for the NorthMet project —a combined National Pollutant Discharge Elimination System/State Disposal System permit (NPDES/SDS). The permit would regulate the point source discharges of wastewater within the Lake Superior watershed. The court of appeals has already reversed and remanded to the MPCA for it to do further analysis on one issue—a remand order for which neither PolyMet nor the MPCA sought further review and is therefore not before our court. Instead, what is before us is the appeal from environmental groups and a tribal band challenging those parts of the permit that the court of appeals affirmed, in which they argue that the court of appeals' reversal and remand order should have gone farther in scope.

Appellants are environmental groups and a tribal band that filed three separate certiorari appeals in the court of appeals opposing the permit: (1) Minnesota Center for Environmental Advocacy, Center for Biological Diversity, and Friends of the Boundary Waters Wilderness (collectively, MCEA); (2) WaterLegacy; and (3) Fond du Lac Band of Lake Superior Chippewa (the Band).

Appellants challenged the decision of the MPCA to issue the permit as well as various decisions related to the permit, including decisions to not impose more restrictive conditions on the NorthMet project. While the certiorari petitions were pending, the court of appeals granted the motion of WaterLegacy to transfer this matter to Ramsey County District Court to conduct an evidentiary hearing regarding "alleged irregularities in procedure" under the Minnesota Administrative Procedure Act, Minn. Stat. § 14.68 (2022). Specifically, WaterLegacy alleged in its motion for transfer that the MPCA and the federal Environmental Protection Agency (EPA) had "developed a plan to keep EPA criticism of the NorthMet permit out of the public record." After authorizing limited discovery, the district court conducted an evidentiary hearing and issued findings of fact and conclusions of law. The appellants here filed three separate appeals of the district court order, and the MPCA filed a notice of related appeal.

After consolidating all six appeals, the court of appeals affirmed in part and reversed in part the decision of the MPCA. *In re Denial of Contested Case Hearing Requests & Issuance of NPDES/SDS Permit No. MN0071013,* Nos. A19-0112, A19-0118, A19-0124, A20-1271, A20-1380, A20-1385, 2022 WL 200338, at *1 (Minn. App. Jan. 24, 2022), *rev. granted* (Minn. Apr. 19, 2022). The court of appeals concluded that the MPCA "erred by not properly considering whether the federal Clean Water Act applies to any future discharges from Poly Met's facility to groundwater." *Id.* But the court of appeals concluded that "there is no reversible error" with respect to the other issues that appellants raised. *Id.* The court of appeals remanded to the MPCA "for a determination as to whether any discharges by Poly Met to groundwater are governed by the Clean Water Act." *Id.*

Neither PolyMet nor the MPCA petitioned our court for review of the court of appeals' remand order; only the MCEA, WaterLegacy, and the Band petitioned this court for review on other issues. We granted their petitions for further review, which raise three primary issues: (1) whether the permit must be reversed or remanded because the permitting process was arbitrary or capricious or otherwise procedurally improper; (2) whether the MPCA erred by issuing a permit that did not include water quality-based effluent limitations (WQBELs); and (3) whether the permit complies with a Minnesota rule addressing wastewater discharges to groundwater, Minn. R. 7060.0600 (2021), as required by law under certain

circumstances. On the issue of the permitting process, we conclude there are danger signals suggesting that the MPCA did not take a hard look at whether the permit complies with the Clean Water Act (CWA) and that the MPCA did not genuinely engage in reasoned decision-making in dealing with concerns that were raised by the EPA. We therefore conclude that the action taken by the MPCA in issuing the permit was arbitrary and capricious and remand to the MPCA for further proceedings. Because of our remand on the first issue, we address only in passing the WQBELs requirement, for which the MPCA must create an adequate record of its analysis on remand. Finally, on the groundwater issue, we conclude that part of the groundwater rules prohibits the pollution of groundwater in the unsaturated zone within a containment system. We therefore remand to the MPCA for consideration of whether a variance is available to allow the planned discharge to the unsaturated zone within the containment system. For a different part of the rule, we conclude that the prohibition on injecting polluted water directly to the groundwater saturated zone for long-term storage does not apply here.

FACTS

The NorthMet Project.

These appeals involve the water quality permits needed for PolyMet's NorthMet project—the first copper-nickel mine in Minnesota. The proposed project includes a mine site, a plant site, and transportation and utility corridors. The mine site is located 6 miles south of Babbitt, at the former site of a taconite processing facility. The mine site will be connected by transportation and utility corridors to the plant site, which is located 6 miles north of Hoyt Lakes. Mining will be conducted in three open pits, and ore will be transported to the plant site by rail for processing.

These appeals involve the plans of PolyMet for the collection and treatment of wastewater. The mine and plant sites are upstream from the Band's reservation and Lake Superior. Water from the project will be treated at the onsite wastewater treatment system. At the highest planned volume, the wastewater treatment system will discharge nearly 4 million gallons of wastewater daily into wetlands that flow to the Embarrass and Partridge Rivers. These rivers flow into the St. Louis River, which the MPCA has identified as an impaired water due to "mercury in fish tissue" and "mercury in the water column." The St. Louis River ultimately flows into Lake Superior.

The NorthMet project has been the subject of extensive environmental review by numerous federal and state agencies since review began in 2005. As we explained in a prior appeal involving different permits, the project "brings with it potential environmental impacts unique to this type of mining." *In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 738 (Minn. 2021). "In particular, the mine waste generated by extracting and processing sulfide ore has the potential to release acid rock drainage, which occurs if either the sulfide ore or waste rock is exposed to oxygen or water." *Id.* If this exposure takes place, "the sulfide ore and waste rock would release toxic metals and sulfate that could seep into nearby surface waters and groundwaters." *Id.*

Also relevant to this appeal are two proposed groundwater containment systems, which PolyMet plans to install below a waste-rock stockpile and a tailings basin. These systems will seal off the groundwater below the pollutant storage from the surrounding groundwater, and then route the seepage from within the containment systems to the wastewater treatment system.

Contaminated water from the project, including the mine, the plant, the permanent stockpile, and the tailings basin will be treated at the wastewater treatment system. The permit allows PolyMet to discharge water from the wastewater treatment system to surface waters, subject to technology-based effluent limits and internal operating limits.

Legal Framework.

Federal and state law require PolyMet to obtain certain permits before construction and operation of the NorthMet project. The CWA prohibits the discharge of pollutants from a point source to the waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), 1342. Under the cooperative federalism model of the NPDES permit program, the EPA administers the program, but may authorize states to implement the permit program. *See* 40 C.F.R. pt. 123 (2022); *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 308-09 (Minn. 2009). When authority is transferred, primary responsibility for reviewing and approving NPDES permits shifts to state officials, "albeit with continuing EPA oversight." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551

U.S. 644, 650 (2007). The EPA retains oversight by its ability to remain involved in the permitting process and block the issuance of the permit. 33 U.S.C. § 1342(d); *see also* 40 C.F.R. § 123.44.

To implement its own NPDES permit program, a state enters into a Memorandum of Agreement with the EPA. 40 C.F.R. § 123.24(a). The MPCA and the EPA entered into a Memorandum of Agreement in 1974 and have amended it several times since then. 39 Fed. Reg. 26061 (July 16, 1974). The Memorandum of Agreement sets forth procedures for the MPCA and the EPA to follow when collaborating on NPDES permit review.

A state implementing the NPDES permit program must comply with the CWA as well as "state statutory and regulatory standards." *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 576 (Minn. 2021). Along with the NPDES program, the MPCA is tasked with administering the state disposal system (SDS) permit program under state law. *See* Minn. Stat. §§ 115.03, subd. 1(e), 115.07, subd. 1 (2022). Here, the MPCA issued a combined NPDES/SDS permit.

During the transfer proceedings for this dispute, the district court found that the typical permit application review process begins with the MPCA reviewing an application for completeness and submitting copies of the application to the EPA for its own review for completeness. After the MPCA determines the application is complete, the MPCA establishes a permitting team to produce a draft permit that is then published for a 30-day comment period. Minn. R. 7001.0100 (2021). The MPCA must describe and respond to all significant public comments received during the public comment period and modify the proposed permit as appropriate. 40 C.F.R. § 124.17 (2022); Minn. R. 7001.1070, subp. 3 (2021). The MPCA then submits a proposed final permit to the EPA for review; the EPA may object to the permit if it is "outside the guidelines and requirements." 33 U.S.C. § 1342(d)(2). If the EPA objects to the final permit, the MPCA may not issue the permit and the EPA may take over the permitting process. *See id.,* § 1342(d)(4).

In addition to the required procedure for review, federal law also mandates many substantive requirements for NPDES permits. As relevant here, the CWA requires that an NPDES permit include water quality-based effluent limitations (WQBELs) under certain circumstances. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1) (2022). WQBELs are facility-specific standards that are based on the effect of the discharge on the receiving waters. *See* Office of Wastewater Management, U.S. Env't Prot. Agency, *NPDES Permit Writers' Manual* 6-1 to 6-3 (Sept. 2010).

WQBELs are required if the discharge of a facility has the "reasonable potential" to cause or contribute to an exceedance of a state water quality standard. 40 C.F.R. § 122.44(d)(1). When conducting a "reasonable potential" analysis, the agency must:

> use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

Id., § 122.44(d)(1)(ii). Thus, the reasonable potential analysis is a scientific analysis that requires the agency to apply its technical training, education, and expertise. *See In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater,* 731 N.W.2d 502, 524 (Minn. 2007).

MPCA Permit.

PolyMet applied to the MPCA for an NPDES/SDS permit for the NorthMet project in 2016. At one point during the permitting process, the MPCA asked the federal co-regulator, the EPA, to refrain from submitting written comments during the public comment period and instead to comment during a later period reserved exclusively for EPA comments. The MPCA knew that any written comments submitted by the EPA during the public comment period would become part of the administrative record and require the MPCA to describe and respond in writing to the EPA comments. After some dispute between the MPCA and the EPA over the proposed process, the EPA agreed to the delayed, exclusive, comment period. But the EPA never submitted written comments to the MPCA, either during the extended period or otherwise. And the MPCA issued the permit without making a record of its request that the EPA delay comment.

The MPCA also issued the permit without making a complete record of the substance of the discussions that took place during in-person meetings and phone conversations with the EPA. As discussed in greater detail below, the MPCA and the EPA had numerous conversations about the NorthMet permit, including at least one conversation in which the EPA identified

concerns with the draft permit and the conclusion by the MCPA that the facility did not have the "reasonable potential" to cause or contribute to a violation of water quality standards such that WQBELs would be required.

The MPCA ultimately determined that the anticipated discharges from the NorthMet facility do not have the "reasonable potential" to cause or contribute to any violations of any applicable water quality standards in waters of the state; thus, the MPCA did not include WQBELs in the final permit. And the MPCA concluded that the NorthMet facility did not have the "reasonable potential" to cause or contribute to any violations of downstream water quality standards, including the Band's standards. Under the CWA, the MPCA is required to consider "the applicable water quality requirements of all affected States," 40 C.F.R. § 122.4(d) (2022), and the Band is considered a state for purposes of CWA analysis. *See* 40 C.F.R. § 122.2 (2022); 33 U.S.C. § 1377(e).

The MPCA included the statutorily required technology-based effluent limitations (TBELs) in the final permit. Unlike the site-specific and facility-specific WQBELs that the MPCA did not include, TBELs "aim to prevent pollution by requiring a minimum level of effluent quality that is attainable using demonstrated technologies for reducing discharges of pollutants or pollution into the waters of the United States." Office of Wastewater Management, U.S. Env't Prot. Agency, *NPDES Permit Writers' Manual* 5-1 (Sept. 2010). TBELs are generally a numeric effluent limit based on the possible level of treatment given the available treatment technologies and cost-benefit analysis, "developed independently of the potential impact of a discharge on the receiving water." *Id.* at 5-1 & 5-19; *see also* Nat. Res. Def. Council v. U.S. EPA, 808 F.3d 556, 564-65 (2nd Cir. 2015).

The MPCA issued the final NPDES/SDS permit—which included TBELs, but not WQBELs—to PolyMet on December 20, 2018. After the permit was issued, appellants filed separate petitions for a writ of certiorari to the court of appeals, challenging the permitting decision of the MPCA.

Transfer to the District Court.

While the certiorari petitions were pending, WaterLegacy asked the court of appeals to transfer the matter to the district court "to take testimony and to hear and determine the alleged irregularities in procedure" under Minn. Stat. § 14.68. The motion was predicated on WaterLegacy's claim that credible evidence suggested that the MPCA and the EPA developed a plan to keep the EPA's criticism of the permit out of the public and administrative records—specifically a draft comment letter containing the EPA's proposed written comments that WaterLegacy had received through Freedom of Information Act (FOIA) litigation. The other appellants supported the motion by WaterLegacy.

Under the Minnesota Administrative Procedure Act, judicial review is confined to the administrative record "except that in cases of alleged irregularities in procedure, not shown in the record," the court may transfer the case to the district court for fact finding. Minn. Stat. § 14.68. The court of appeals concluded that WaterLegacy had "provided substantial evidence of procedural irregularities not shown in the administrative record." *In the Matter of the Denial of Contested Case Hearing Requests & Issuance of Nat'l Pollutant Discharge Elimination Sys./State Disposal Sys. Permit No. MN0071013 for the Proposed NorthMet Project St. Louis Cnty. Hoyt Lakes & Babbitt Minn.,* A19-0112, A19-0118, A19-0124, Order at 4 (Minn. App. filed June 25, 2019). The court of appeals accordingly transferred the matter to the district court "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure." *Id.* The court of appeals stayed the certiorari appeals while the district court considered the allegations. *Id.* at 5.

The district court conducted a detailed review of the allegations that provided greater insight into the MPCA and EPA interactions and the permitting decision, although certain aspects of the process remain unclear due to the limited nature of the transfer hearing. At the district court, the appellants alleged the MPCA committed procedural irregularities by failing to follow the proper permitting process, attempting to keep EPA comments and other evidence out of the administrative record, and failing to preserve documentation of communications between the MPCA and the EPA.

The district court conducted a thorough review of the alleged procedural irregularities related to the MPCA's issuance of the permit. The district court allowed limited discovery, held a 7-day evidentiary hearing, and issued findings of fact, conclusions of law, and final determinations. At the same time, the court described the proceedings as limited to "a very narrow issue." The court determined at the outset that "any substantive determinations by the MPCA" as well as "the procedural and substantive actions of the federal EPA" were beyond the scope of the hearing. As the court explained to the parties at the hearing, "[t]he interface between the EPA and the MPCA must always be presented in the context of the duties and obligations of the MPCA." The district court ultimately issued an order that was more than 100 pages in length, including

272 paragraphs of findings of fact and 92 paragraphs of conclusions of law. The district court's factual findings are central to this appeal, and those findings—as well as testimony underlying the same—is summarized next.

MPCA and EPA Communications.

As the district court noted, the MPCA and the EPA have collaborated on many NPDES permits, but the district court found that the MPCA did not follow the typical process here in issuing a permit to PolyMet. The agencies engaged in extensive consultations about the NorthMet project, including frequent phone conferences. The court found that the frequent phone conferences "resulted in significantly more interaction between the EPA and the MPCA than with the usual NPDES permit." The MPCA, however, did not make a thorough record of the communications between the agencies, and the EPA never submitted written comments on the permit.

During a telephone call in March 2018, Kevin Pierard, the NPDES branch chief for the EPA region including Minnesota (Region 5), advised Jeff Udd, the manager of the MPCA Mining Sector, that the EPA was planning to submit written comments on the draft permit during the public comment period, which ended March 16. Udd asked if there was any "wiggle room," apparently wondering if the EPA could avoid submitting written comments during the public comment period. The district court found that the MPCA sought "to procure an agreement from the EPA to forego sending written comments" during the public comment period.

For the next few days, MPCA and EPA officials discussed the issue of EPA written comments on the draft permit. During one phone call, MPCA Assistant Commissioner Shannon Lotthammer said that she was concerned that written comments from the EPA would "confuse the public" and "create a good deal of press." But NPDES branch chief Pierard testified that it was customary for the EPA to comment in writing on a draft permit either before or during the public comment period. He expressed concerns about transparency.

The agencies ultimately agreed that the EPA would not submit written comments during the public comment period; however, after the public comment period had ended, the EPA would have 45 days to comment on a "pre-proposed permit" before the MPCA submitted a final permit. The administrative record does not include any documentation of the communications between the MPCA and the EPA regarding their request that the EPA delay written comments on the permit.[2]

EPA Draft Comment Letter.

Notwithstanding the agreement between the agencies to delay the EPA public comment, NPDES branch chief Pierard felt strongly that it was important for the MPCA to understand the EPA's concerns during the public comment period and he continued to draft written comments. It struck him as odd that the Minnesota water director "would suggest that it was somehow inappropriate for [the EPA] to comment during the public comment period." As the district court found in paragraph 134 of its order, the MPCA Commissioner and Assistant Commissioner Lotthammer were unaware of any prior requests by the MPCA that the EPA not comment on a public draft NPDES permit.

The EPA scheduled a telephone call with the MPCA in April 2018. Pierard explained that the purpose of the call was to "walk through what the comment letter would have said." On the call, Pierard read the draft comment letter "word for word." The letter included seven pages of single-spaced comments, concerns, and recommendations to ensure that the final permit would comply with the CWA. But the MPCA did not include any notes of the call in the administrative record. And the MPCA did not reference the EPA's oral comments in its response to the comments submitted during the public comment period.

According to the findings of the district court, the EPA generally provides comments in writing to promote clear communication and to make the comments part of the public record. For a complex project like the NorthMet project, the EPA prefers to submit comments early to allow the state agency to address significant issues before the public comment period begins. That process is informal. Then the EPA typically uses the public comment period to do a formal review as contemplated by the Memorandum of Agreement. The EPA prefers to comment on draft NPDES permits in writing for clarity and to put comments in the public record to document the role of the EPA in the NPDES permitting process.

The administrative record does not contain any record of the draft EPA comment letter. WaterLegacy discovered the comment letter as a result of filing federal FOIA requests after the MPCA issued the permit.[3]

The parties do not dispute that the draft EPA comment letter is part of the judicial record here because the district court received the letter into evidence at the evidentiary hearing. The comment letter noted several inadequacies in the draft permit, including concerns that the lack of WQBELs would not ensure compliance with the applicable water quality requirements of Minnesota or of all affected states, the reasonable potential analysis did not follow federal statistical requirements, the internal operating limits that the MPCA proposed may not be effective or enforceable, and the permit would not adequately protect downstream waters, including the water quality standards of a downstream tribe. The comment letter also included citations to relevant parts of the CWA and federal regulations. In short, the comment letter reflected the EPA's concerns that the draft permit was not stringent enough to comply with the CWA and the related federal requirements and regulations.

Issuing the Permit.

Despite the agreement between the agencies about delaying the EPA's written comments on the permit, the EPA never submitted written comments on the pre-proposed permit. Instead, the agencies continued to discuss the permit orally. They discussed the permit nine times, including at two in-person meetings, between the beginning of the public comment period on January 31, 2018, and the date that MPCA issued the permit. Even though the EPA never submitted written comments, the district court found that the EPA never agreed that the oral discussions "would take the place of written comments."

After the MPCA sent the final proposed permit to the EPA, the EPA notified the MPCA that it would not object to the permit and that the MPCA should make its final decision. The MPCA issued the permit for the NorthMet project on December 20, 2018. The final permit did not include WQBELs. The MPCA issued a press release related to the permit that stated: "The EPA had no comments during the period allotted."

The administrative record contains very little documentation of the feedback or concerns of the EPA regarding the permit, even though the agencies talked by phone approximately every other week during the 3-year permitting process. Despite the extensive communications between the agencies, in its briefing to our court, the MPCA has cited fewer than 30 pages of the administrative record—an administrative record that totals over 320,000 pages—to support its assertion that the concerns raised by the EPA "are reflected in the administrative record."

District Court Conclusions of Law.

Following the evidentiary hearing, in addition to its extensive factual findings, the district court also made conclusions of law. The court concluded that "the MPCA did not want the EPA to submit a comment letter during the public comment period." As explained by the court, "[t]he MPCA knew it was required to respond to all written EPA comments, its responses would be public, and the public would find out what the EPA's specific concerns about the permit were from the comments and responses." (Footnote omitted.) Although the MPCA had "legitimate reasons for seeking an EPA delay in submitting comments," the court concluded that "the MPCA's primary motivation was its belief that there would be less negative press about the NorthMet Project if EPA comments were delayed until after public comments and verbally expressed EPA concerns were incorporated into the draft permit." The court did not find, however, that the MPCA made any "overarching effort" to keep evidence out of the administrative record or prevent the EPA from submitting written comments.

The district court, based on its definition of "procedural irregularities not shown in the record" as used in Minn. Stat. § 14.68, concluded that most of the MPCA actions were not procedurally irregular. The court determined that the effort to convince the EPA to delay submitting written comments was not an irregularity in procedure because "[t]here is no statute, rule, regulation, or other formally adopted policy or procedure that prohibits the MCPA from asking the EPA to delay an optional course of action." Likewise, the court concluded the agreement to delay comments and failing to respond to the EPA's oral comments were not irregularities in procedure. But the court did determine that three actions of the MPCA were irregularities in procedure: (1) failure to preserve emails documenting the request that the EPA delay submitting written comments; (2) failure to implement a timely litigation hold; and (3) failure to preserve handwritten notes taken during the April 5, 2018, conference call with the EPA.

Court of Appeals Decision.

The environmental groups and the Band, and the MPCA, all appealed the district court's order. The court of appeals consolidated all the pending appeals: the original writ petitions challenging the permit and the notices of appeal from the district court's order. MCEA, WaterLegacy, and the Band challenged the district court's conclusions relating to procedural irregularities. They also asked the court of appeals to reverse the MPCA permit decision under the Minnesota Administrative Procedure Act, Minn. Stat. § 14.69 (2022), arguing that the MPCA made a decision in excess of the agency's statutory authority or jurisdiction, based on unlawful procedure, affected by other errors of law, unsupported by substantial evidence, and that was arbitrary or capricious. In arguing for reversal of the permit decision, they critiqued both the process used in making the permit decision and the substance of the final permit.

The court of appeals rejected the challenges to the district court's conclusions of law on irregularities in procedure (the district court's factual findings were unchallenged). *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *5-7. The court of appeals concluded that determining whether the district court properly characterized a procedure as irregular or not under Minn. Stat. § 14.68, was "inconsequential" to the question of whether the court of appeals should grant appellate relief. *Id.* at *6; *see also* Minn. Stat. § 14.68. The court can grant appellate relief as follows: the court can "reverse or modify the [agency] decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are," among other things, "made upon unlawful procedure," "affected by other error of law," or "arbitrary or capricious." Minn. Stat. § 14.69.

With respect to the arguments made by MCEA, WaterLegacy, and the Band for appellate relief, the court of appeals similarly concluded that it was unnecessary for it to determine whether the permitting process was unlawful or arbitrary or capricious because, in either event, the challenged procedures did not prejudice the substantial rights of the environmental groups or the Band. *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *6-7. As to the arguments about the substantive deficiencies of the permit—that the permit inadequately protected state and tribal water quality standards, in part due to it not including WQBELs—the court did not consider any evidence showing a conflict between the EPA and the MPCA over the interpretation of federal law. The court of appeals limited its review to the administrative record and ultimately deferred to the MPCA's application of federal and state law—concluding the permit adequately protected the state and tribal water quality standards, despite the lack of WQBELs. *Id.* at *10-14. The court of appeals also rejected the argument that the permit issued by the MPCA did not comply with Minn. R. 7060.0600, governing groundwater, with the court concluding that the MPCA had reasonably interpreted its own rule and thus there was no error in it issuing the permit. *Id.* at *9-10. The court of appeals thus affirmed on all of these issues.

The court of appeals reversed and remanded to the MPCA on one issue, however, concluding that the MPCA erred by not properly considering whether the CWA applies to any discharges from the NorthMet project to groundwater. *Id.* at *8-9. Neither PolyMet nor the MPCA petitioned for review of that remand determination, and thus, that conclusion is not at issue here.[4] *Id.* at *17.

We granted review to consider three principal issues raised by MCEA, WaterLegacy, and the Band: (1) whether the permitting process was arbitrary or capricious or otherwise procedurally improper, compelling reversal or remand of the permit; (2) whether the MPCA erred by issuing a permit that does not include WQBELs; and (3) whether the permit complies with Minnesota rules addressing discharges to groundwater.

ANALYSIS

The judicial review provisions of the Minnesota Administrative Procedure Act govern our review of the issuance of the NPDES/SDS permit by the MPCA to PolyMet. Minn. Stat. §§ 14.63-.69 (2022); *see* Minn. Stat. § 115.05, subd. 11 (2022) (providing for judicial review of final MPCA decisions "pursuant to sections 14.63 to 14.69"). In conducting judicial review,

> the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
>
> (a) in violation of constitutional provisions; or
>
> (b) in excess of the statutory authority or jurisdiction of the agency; or
>
> (c) made upon unlawful procedure; or

(d) affected by other error of law; or

(e) unsupported by substantial evidence in view of the entire record as submitted; or

(f) arbitrary or capricious.

Minn. Stat. § 14.69.

Appellants ask us to reverse the MPCA permit decision on both procedural and substantive grounds. Their procedural arguments focus on the communications between the MPCA and the EPA, claiming that those communications reflect that the permitting process was arbitrary or capricious, Minn. Stat. § 14.69(f), was made upon unlawful procedure, Minn. Stat. § 14.69(c), or otherwise involved irregular procedures, Minn. Stat. § 14.68. They also raise numerous challenges to the permit's issuance without WQBELs, claiming it was insufficient to ensure consistency with the CWA and compliance with state and tribal water quality standards. In addition, the MCEA claims that the MPCA made an error of law in its interpretation of Minnesota Rule 7060.0600 governing groundwater. *See* Minn. Stat. § 14.69(d). The MPCA and PolyMet respond that none of the grounds for reversal, modification, or remand apply. They argue that none of their procedures were unlawful or arbitrary or capricious, and that in any event, there is no reversible error because appellants cannot establish prejudice. As to the substantive claims, respondents ask us to defer to the technical expertise and scientific judgment of the MPCA.

To the extent our resolution of any of these issues "turns on the meaning of words in a statute or regulation," we review the agency decision de novo. *In re NorthMet Project Permit to Mine Application,* 959 N.W.2d 731, 757 (Minn. 2021) (quoting *St. Otto's Home v. Minn. Dep't of Human Servs.,* 437 N.W.2d 35, 39-40 (Minn. 1989)). When the language of a statute or regulation is unambiguous, we apply the plain language. *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.,* 954 N.W.2d 572, 576 (Minn. 2021). But when the language is ambiguous, we may, but are not required to, defer to the agency's reasonable interpretation of the statute or regulation. *Id.* We decide deference "on a case-by-case basis" and "only after thoroughly considering multiple factors." *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater,* 731 N.W.2d 502, 525 (Minn. 2007). These factors include but are not limited to "the nature of the regulation at issue and the agency's expertise and judgment in relation to the subject matter of the regulation." *U.S. Steel Corp.,* 954 N.W.2d at 576.

I.

This appeal centers on appellants' claims of unlawful and irregular procedures in the MPCA's consideration of PolyMet's permit application, which they further claim rendered the MPCA's permit decision arbitrary or capricious. We begin by addressing appellants' arguments that the MPCA permit decision was "arbitrary or capricious" under Minn. Stat. § 14.69(f). We do so, in part, because the "arbitrary or capricious" standard may be likened to a "catchall, picking up administrative misconduct not covered by the other more specific paragraphs." *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.,* 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) (analyzing the federal standard). An agency decision is arbitrary or capricious if it "represents the agency's will and not its judgment." *In re Review of 2005 Ann. Automatic Adjustment of Charges for All Elec. & Gas Utils.,* 768 N.W.2d 112, 118 (Minn. 2009). In applying the arbitrary or capricious standard, we consider whether "a combination of danger signals" suggests that "the agency has not taken a `hard look' at the salient problems and `has not genuinely engaged in reasoned decision-making.'" *Reserve Mining Co. v. Herbst,* 256 N.W.2d 808, 825 (Minn. 1977) (quoting *Greater Bos. Television Corp. v. F.C.C.,* 444 F.2d 841, 851 (D.C. Cir. 1970)).[5]

A.

Appellants procedural arguments against the permit's issuance focus on the interactions between the MPCA and the EPA as well as novel procedural decisions the MPCA made during the permitting process. Because this record was developed before the district court, we start by addressing the district court's order and the relationship between that court's determinations as to "irregularities in procedure" under Minn. Stat. § 14.68, and the scope of judicial review under Minn. Stat. § 14.69.

When the case was transferred to the district court for an evidentiary hearing, the district court took a narrow view of the term "irregularities in procedure" under the Administrative Procedure Act. Minn. Stat. § 14.68 (providing that the district court in a transfer proceeding shall determine "the alleged irregularities in procedure"). The district court equated procedural irregularities with "deviation[s] from a formally adopted process," defining "formally adopted" as "a statute, rule, regulation, or any other manual or procedure that has been formally adopted in writing by the agency at issue." Based on this narrow view, the district court identified only three procedural irregularities in the permitting process, all of which related to the MPCA's failure to preserve documents.[6]

The court of appeals, for its part, declined to "determine whether the district court erred by concluding that some of the EPA's procedures were `irregular' and that others were not." *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *6. The court of appeals reasoned that its grounds for granting appellate relief did not rest on Minn. Stat. § 14.68, but were strictly limited to those specified in Minn. Stat. § 14.69. *Id.* Focusing on the "unlawful procedure" language of Minn. Stat. § 14.69(c)—and not addressing the "arbitrary or capricious" ground in Minn. Stat. § 14.69(f)—the court of appeals explained that a court "may not reverse on the ground that an EPA decision was made upon an *irregular* procedure that is not unlawful" and therefore any error in "mischaracterizing a procedure" as regular or irregular "would be inconsequential." *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *6.

We believe that the approach taken by the court of appeals was too constrained. Even if an *irregular* procedure of an agency does not rise to the level of an *unlawful* procedure under Minn. Stat. § 14.69(c),[7] an irregularity in procedure may constitute a "danger signal[]" that may be considered in determining whether an agency decision is "arbitrary or capricious" under Minn. Stat. § 14.69(f). *Reserve Mining,* 256 N.W.2d at 825.

We also conclude that the district court's interpretation of "irregularities in procedure" under Minn. Stat. § 14.68 was too narrow. The district court limited its findings to violations of a "statute, rule, written policy, or other adopted procedure." But it is important for effective judicial review to have a record of any "danger signals" in an agency's conduct. *Reserve Mining*, 256 N.W.2d at 825. An agency's procedures do not have to violate a specific law or written policy to play a part in an agency decision that is arbitrary or capricious. An agency's procedures are at the heart of the Minnesota Administrative Procedure Act. The Act focuses on "procedural rights with the expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained." Minn. Stat. § 14.001 (2022).

We therefore hold that the term "irregularities in procedure" under section 14.68 includes any agency procedure that thwarts the purposes of the Administrative Procedure Act—agency oversight, public accountability, and public access—expressly recognized in Minn. Stat. § 14.001. These "irregularities in procedure" may constitute a danger signal of an arbitrary or capricious decision. We have explained, for example, that evidence of "procedural irregularities raises the specter of pervasive bias" and may signal a process that was arbitrary and capricious. *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 665 (Minn. 2015) (addressing procedural irregularities in a municipal bidding process). Further, an agency's unexplained departure from "prior norms and decisions" may suggest a process that was arbitrary and capricious. *In re Review of 2005 Ann. Automatic Adjustment of Charges for All Elec. & Gas Utils.,* 768 N.W.2d at 120 (concluding that "an agency must generally conform to its prior norms and decisions or, to the extent that it departs from its prior norms and decisions, the agency must set forth a reasoned analysis for the departure that is not arbitrary and capricious"); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (explaining that an agency may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books"). In transfer proceedings from the court of appeals to the district court under section 14.68, the district court should develop a complete factual record and make findings on irregular procedures that extend beyond violations of laws and formally adopted policies.

Here, although we hold that the district court's view of procedural irregularities under section 14.68 was unduly narrow, we nonetheless rely on the extraordinarily thorough factual findings of the district court, which were unchallenged on appeal by any party.[8] Those factual findings inform our analysis of whether there were danger signals in the permitting process that render the permit decision arbitrary and capricious under Minn. Stat. § 14.69(f).

B.

Appellants argue that procedural irregularities in the permitting process are danger signals that show the MPCA permit decision was arbitrary and capricious. These claimed procedural irregularities include (1) the agreement the MPCA made to

delay EPA comments on the draft permit during the public comment process; (2) the failure of the MPCA to document in the administrative record either its request or the EPA's concerns about the draft permit; (3) the lack of explanation in the administrative record regarding if or how the MPCA resolved the EPA's concerns; and (4) the general deficiencies in the administrative record regarding communications between the MPCA and the EPA. For the reasons we discuss below, we conclude that the combination of danger signals in the permitting process renders the permit decision arbitrary and capricious under Minn. Stat. § 14.69(f).

Agreement Regarding EPA's Written Comments on Draft Permit.

The first claimed danger signal we consider is the unusual agreement that the MPCA reached to delay the EPA's written comments on the draft permit. Evidence in the record shows that the MPCA request was atypical. MPCA officials were unaware of any other time that the MPCA had made such a request. And NPDES branch chief Pierard could not recall another state program making such a request. He thought it was odd that the Minnesota water director "would suggest that it was somehow inappropriate for [the EPA] to comment during the public comment period." The EPA usually commented on draft NPDES permits in writing for clarity and to ensure comments were in the public record. And Pierard expressed concerns to the MPCA about transparency if the EPA did not comment during the public comment period.

The district court found that the MPCA request was "based primarily on the intense public interest in the project and the potential impact of public criticism depending on the contents of an EPA written comment letter." According to the district court, although the MPCA did have "legitimate reasons for seeking an EPA delay in submitting comments," the MPCA's "prime motivation" was a "belief that there would be less negative press about the NorthMet Project."

The motivation of the MPCA—to avoid public awareness and scrutiny of the EPA's concerns because of the intense public interest in the NorthMet project—is contrary to the express "purposes of the Administrative Procedure Act" to increase transparency and "public access to governmental information." Minn. Stat. § 14.001(4). We therefore conclude that the MPCA's request that the EPA refrain from providing written comments on the draft permit during the public comment period is an irregularity in procedure that constitutes a danger signal of arbitrary and capricious decision-making. *See* *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (stating that an agency decision is arbitrary and capricious if the agency "relied on factors not intended by the legislature").

Lack of Documentation of Agreement Request and EPA's Concerns About Draft Permit.

The second claimed danger signal we consider is the failure of the MPCA to document its request that the EPA delay submitting written comments on the draft permit or the EPA concerns regarding the draft permit. The MPCA deleted evidence of its request to the EPA, and the administrative record does not explain the reasoning for the request.

We know now, due to the record developed before the district court, that the EPA prepared a draft comment letter on the preliminary permit but did not send it to the MPCA. Instead, the EPA conveyed the substance of the draft comment letter orally to the MPCA during a phone conference in April 2018. According to the letter, the EPA believed that the draft permit was inadequate to ensure consistency with the CWA and insufficient to ensure compliance with state and tribal water quality standards. The letter highlighted the following key concerns:

> • *Water Quality-Based Effluent Limitations (WQBELs).* The EPA stated that the draft permit "does not include WQBELs for key parameters and appears to authorize discharges" that would exceed Minnesota's "water quality standards for mercury, copper, arsenic, cadmium, and zinc." The EPA also noted that the "technology based effluent limitations" in the draft permit "are up to a thousand times greater than applicable water quality standards."
>
> • *Protection of Downstream Waters.* The EPA expressed concern that the draft permit and "supporting materials do not include sufficient information to explain how downstream water will be protected," specifically noting that "a downstream tribe" had notified the EPA that "the project is likely to contribute to exceedances of its downstream [water quality standards], including for mercury."

• *Permit Enforceability.* The EPA stated that the draft permit contains "operating limits" that "may not be enforceable by EPA, citizens, and potentially MPCA and, thus, may be ineffective at protecting water quality under the Clean Water Act."

The letter advised the MPCA that these concerns "must be addressed to ensure that the permit will achieve compliance with all applicable requirements of the CWA, including water quality requirements of Minnesota." The EPA also offered a solution, explaining that many of these concerns "could be resolved," at least in part, if the MPCA established WQBELs for the authorized discharges.

The administrative record does not include documentation of the concerns that the EPA expressed during the April 2018 phone conference. According to the district court, the MPCA "knew" that if the EPA submitted written comments during the public comment period, "the comments would become part of the administrative record" and "the public would find out" about "the EPA's specific concerns about the permit."

It is undisputed that the MPCA failed to make a record of the oral comments the EPA made during the April 2018 phone conference and thus acted directly contrary to the purpose of the Administrative Procedure Act "to increase public accountability of administrative agencies." Minn. Stat. § 14.001(2). This omission is particularly concerning here given the federalism partnership between the federal and state agencies. The CWA—the statute the MPCA implements when issuing an NPDES permit—relies on a cooperative federalism model. *See* *New York v. United States*, 505 U.S. 144, 167 (1992). "The Clean Water Act anticipates a *partnership* between the States and the Federal Government, animated by a shared objective: `to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (emphasis added) (citing 33 U.S.C. § 1251(a)). In other words, what was hidden from the public and the administrative record were key substantive concerns from the MPCA's regulatory partner, the EPA, regarding the permit.

We therefore conclude that the failure of the MPCA to document the request that the EPA delay commenting on the draft permit in the administrative record, along with the ultimate failure to document the substantive concerns of the EPA, are irregularities in procedure that constitute a danger signal of arbitrary and capricious decision-making. *See* *Citizens Advocating Responsible Dev.*, 713 N.W.2d at 832 ("[A]n agency ruling is arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem."); *see also* *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (concluding that it is proper to remand to the agency "if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it"); *cf. In re Review of 2005 Ann. Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d at 125 (Anderson, J., dissenting) (concluding failure to explain departures in norms and providing a reasoned analysis for the departures constituted arbitrary and capricious actions); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (reaffirming the principle "that an agency must cogently explain why it has exercised its discretion in a given manner").

Lack of Documentation of Resolution of the EPA Concerns.

The third claimed danger signal we consider is the failure by the MPCA to document its response to the EPA concerns. As noted, the EPA expressed concerns in the draft comment letter regarding the consistency of the permit with the CWA and compliance with state and tribal water quality standards. The administrative record does not explain if or how the MPCA revised the permit in response to the concerns expressed by the EPA. We do know, however, that the final permit does not include WQBELs as the EPA had recommended. The MPCA explains that it did not have an obligation to respond in the administrative record to the concerns of the EPA because the EPA did not submit comments in writing during the public comment period. *See* 40 C.F.R. § 124.17(a)(2); Minn. R. 7001.1070, subp. 3. But that was precisely why the MPCA asked the EPA not to submit comments in writing during the public comment period. The district court concluded that a "prime motivation" for the agreement was that "the MPCA knew that it would have to describe and respond in writing to the EPA comments" if these comments were submitted during the public comment period, and the MPCA wanted "to avoid what would otherwise be the MPCA's mandate under federal and state regulations."

The failure of the MPCA to document its response to the concerns raised by the EPA is an additional irregularity in procedure that constitutes a danger signal of arbitrary and capricious decision-making. *See* *Citizens Advocating Responsible Dev.*, 713 N.W.2d at 832 (stating that an agency decision is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem"); *see generally* *Dep't of Com. v. New York*, 588 U.S. ___, 139 S. Ct.

2551, 2575-76 (2019) ("The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.").

General Lack of Documentation.

The final claimed danger signal we consider is the general lack of documentation of communications between the MPCA and EPA. The district court found that "the EPA and the MPCA had frequent phone conferences," that "resulted in significantly more interaction between the EPA and the MPCA than with the usual NPDES permit." We agree with the MPCA that "there is nothing unusual or nefarious" about the agencies having frequent phone conferences. The MPCA, however, points to less than 30 pages in the 320,000-page administrative record to support its assertion that the "concerns raised by EPA" during these phone conferences are "reflected in the administrative record."[9] All we have before us are isolated, scattered references to the EPA as well as the conclusory statement in the permit decision that the MPCA had "adequately considered" the EPA's comments, without identifying which EPA comments the MPCA considered or any changes the MPCA made in response to the EPA comments. Notably, if the EPA comments in writing, federal regulations require the MPCA to "specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and [to] [b]riefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing." 40 C.F.R. § 124.17(a).

The district court found that the MPCA "understood that written communications, including emails, between EPA and MPCA could constitute official records." And although the district court concluded that there was "no overarching effort by the MPCA to keep evidence out of the administrative record," we have an extensive administrative record that does not explain, and indeed barely recognizes, significant EPA concerns and disagreements with the MPCA involving an important, complex permitting decision. The conduct of the MPCA here includes both a failure to create records and the failure to preserve records that were created.

Providing "oversight of powers and duties delegated to administrative agencies" is one of the principal purposes of the Administrative Procedure Act. Minn. Stat. § 14.001(1); *cf. Prior Lake Am. v. Mader,* 642 N.W.2d 729, 741-42 (Minn. 2002) (stressing the critical importance of the ability of the public and the courts to review government decisions). And we have warned that "[g]overnmental bodies must take seriously their responsibility to develop and preserve a record that allows for meaningful review by appellate courts." *In re Livingood,* 594 N.W.2d 889, 895 (Minn. 1999). We conclude that the general lack of documentation of the MPCA's communications with the EPA—the federal agency overseeing compliance with the CWA—is an irregularity in procedure that constitutes a danger signal of arbitrary and capricious decision-making.

Combination of Danger Signals.

Based on this combination of danger signals, we conclude that the MPCA did not take a "hard look" at the salient problems and did not genuinely engage in reasoned decision-making. *Reserve Mining,* 256 N.W.2d at 825. The MPCA failed to make a record of or explain the basis for its request that the EPA not provide written comments on the draft permit during the public comment period, the MPCA failed to document significant concerns expressed by the EPA, the MPCA failed to explain its response to the concerns expressed by the EPA, and the MPCA generally failed to document its communications with the EPA. The motivation of the MPCA to avoid public scrutiny, as found by the district court, is not only contrary to the purposes of the Minnesota Administrative Procedure Act but also is inconsistent with the cooperative federalism model of the CWA and the primary objective of the CWA to "restore and maintain" the nation's waters. 33 U.S.C. § 1251.

Under these circumstances, the procedural irregularities in the permitting process suggest that the MPCA exercised "its will and not its judgment," *Markwardt v. State, Water Res. Bd.,* 254 N.W.2d 371, 374 (Minn. 1977), and we therefore hold that the permit decision was arbitrary and capricious. We express no opinion on whether any one of the danger signals, standing alone, would be sufficient to conclude that the permit decision was arbitrary or capricious. We have stressed that "the public has a right to be informed of all actions and deliberations made in connection with activities" that affect the public interest, and the public's knowledge of the bases for government decisions lies "at the heart of a democratic government." *Prior Lake Am.,* 642 N.W.2d at 741. Making a complete administrative record of significant concerns expressed by a co-regulator with oversight authority promotes transparency and accountability, which are key values of the Minnesota Administrative Procedure Act. *See* Minn. Stat. § 14.001; *see also* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in*

the Roberts Court, 130 Yale L.J. 1748, 1758 (2021) ("Political accountability sometimes depends on the public's understanding not only *what* the government has done, but *why.*"). And as we discuss in the next section, the deficiencies in the administrative record hinder our substantive review of the permit decision.

C.

Having concluded that the MPCA permit decision was arbitrary and capricious, we next consider the issue of prejudice. We may reverse or modify an arbitrary or capricious agency decision "if the substantial rights of the petitioners may have been prejudiced" by the decision. Minn. Stat. § 14.69. The court of appeals did not determine whether the conduct of the MPCA was arbitrary or capricious under Minn. Stat. § 14.69(f) because the court of appeals concluded that appellants' substantial rights were not prejudiced. *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *6. According to the court of appeals, even assuming the procedures here were improper under section 14.69, "those procedures did not impede relators' ability to submit comments on the permit" because "the MCEA, WaterLegacy, and the Band each submitted comments to which the [M]PCA provided responses." *Id.* Further, "[t]he EPA's concerns are reflected in the administrative record and the record created in the district court," and "those concerns do not warrant relief on the merits." *Id.*

The court of appeals recitation of the prejudice requirement of section 14.69 placed a higher, and therefore improper, burden on appellants. *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *6. When appellate courts review agency decisions under the Minnesota Administrative Procedures Act, the court may reverse or modify the agency decision "if the substantial rights of the petitioners *may* have been prejudiced." Minn. Stat. § 14.69 (emphasis added). The court of appeals omitted the key word "may" when quoting the prejudice provision. *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *6.[10] The statutory standard, however, is clear and unambiguous—appellants can satisfy the prejudice standard if there is a possibility or probability that their substantial rights have been prejudiced. *See The American Heritage Dictionary of the English Language* 1086 (5th ed. 2018). Appellants need not show *actual* prejudice.

We also disagree with the court of appeals' conclusions regarding the nature and scope of the prejudice. The court of appeals focused upon whether the MCEA's, WaterLegacy's, and the Band's "ability to submit comments on the permit" was impeded. *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *6. But more fundamentally, judicial relief is available if arbitrary or capricious agency action *may* have led to a different substantive outcome by the agency than would have otherwise been reached. Here, once properly framed, we conclude that appellants may have been prejudiced by the arbitrary and capricious permit decision under Minn. Stat. § 14.69(f). First, as we discussed above in our arbitrary or capricious analysis, we disagree with the conclusion reached by the court of appeals that the EPA's concerns were sufficiently reflected in the administrative record. *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *6. Second, as we discuss below, we disagree with the conclusion of the court of appeals that the concerns of the EPA "do not warrant relief on the merits." *Id.* There were apparent conflicts between the MPCA and the EPA on several key issues, and appellants may have been prejudiced because we cannot resolve the substantive claims about the permit decision on the administrative record the MPCA made.

Many of appellants' key substantive challenges to the permit were on items of concern raised by the EPA and apparent conflict with the MCPA. This includes appellants' arguments that the MPCA permit decision is inconsistent with the CWA's requirement for WQBELs, is insufficient to meet state and tribal water quality standards, and does not comply with the requirements of the Great Lakes Initiative.

Appellants' primary arguments relate to the reasonable potential analysis conducted by the MPCA and the need for WQBELs. Federal law "provides that if a proposed discharge to a waterbody will cause or has *the reasonable potential to cause or contribute to the violation of water quality standards,* the agency must establish an effluent limit for the pollutant." *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738,* 763 N.W.2d 303, 308 (Minn. 2009) (emphasis added) (citing 40 C.F.R. § 122.44(d)(1)). The permit must include WQBELs for any pollutants that "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard." 40 C.F.R. § 122.44(d)(1)(i).

The MPCA argues that its reasonable potential analysis was "highly technical" and "must be shown great deference." In prior decisions involving the review of NPDES/SDS permits, after concluding that the MPCA's analysis was reasonable, we have deferred to the technical expertise and scientific judgment of the MPCA. *See Alexandria,* 763 N.W.2d at 313, 316; *In re*

Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 515-16 (Minn. 2007). But in those decisions, there was no evidence that the EPA disagreed with the MPCA's analysis.

Notwithstanding the EPA draft comment letter, which reflected significant reservations about the sufficiency of conditions in the draft permit, the MPCA asks us to infer that the EPA ultimately agreed that the conditions in the final permit were sufficient to ensure consistency with the CWA and compliance with state and tribal water quality standards. The MPCA emphasizes that the agreement with the EPA was simply an agreement to *delay* written comments on the draft permit—not an agreement that prevented the EPA from submitting written comments altogether. The MPCA also stresses that the EPA did not object to the final permit. When the MPCA issued the final permit, it stated that it had "adequately considered the previously submitted EPA comments," announcing that the permit "complies with [CWA] requirements identified by EPA."

The administrative record does suggest that the MPCA considered some of the EPA's concerns in issuing the final permit. But as we explained above, the administrative record does not adequately document either the substance of federal agency concerns or state agency responses to those concerns. Moreover, it is unclear from the administrative record if the MPCA resolved all the concerns of the EPA. We can only speculate about whether the EPA concluded that the final permit was consistent with the CWA and complied with state and tribal water quality standards.

We stress that the views of the EPA represent the views of a co-regulator with unquestioned technical expertise and oversight authority regarding the implementation of the CWA. *See, e.g., BP Exploration & Oil, Inc. (93-3310) v. U.S. EPA,* 66 F.3d 784, 795 (6th Cir. 1995) (noting the deference owed to the EPA, "especially concerning scientific and technical data," in a dispute involving effluent limitations promulgated by the EPA under the CWA); 33 U.S.C. § 1319 (defining actions the EPA may take to enforce the CWA). Accordingly, the opinion of the EPA as to whether the NorthMet project has the reasonable potential to cause or contribute to an exceedance of water quality standards is important—and at least as important as the opinion of the MPCA. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife,* 551 U.S. 644, 650 (2007).

Moreover, given the EPA draft comment and how this permitting decision unfolded, we cannot infer from the later absence of written comment from the EPA, or the absence of an objection by the EPA to the final permit, that the EPA determined that the permit complies with federal law. *See, e.g., District of Columbia v. Schramm,* 631 F.2d 854, 860 (D.C. Cir. 1980) (explaining that the EPA "retains a veto over the issuance of state permits, but it may also waive responsibility for objecting to noncomplying state permits and even waive notice of the NPDES applications"); *see also Fond du Lac Band of Lake Superior Chippewa v. Wheeler,* 519 F. Supp. 3d 549, 559 (D. Minn. 2021) ("There is no dispute that EPA has discretion to choose not to object to a permit *even if* the permit fails to comply with federal regulatory requirements."). When federal and state regulators disagree on the interpretation and application of federal law, some courts defer to the federal regulator. *See Md. Dept. of the Env't v. Cnty. Comm'rs of Carroll Cnty.,* 214 A.3d 61, 94 (Md. 2019) (stating that state agencies administering CWA programs are "`bound to follow [the] EPA's interpretation'" (quoting *Nat. Res. Def. Council, Inc. v. N.Y. State Dep't of Env't Conservation,* 34 N.E.3d 782, 794 n.16 (N.Y. 2015))); *see also Voigt v. Coyote Creek Mining Co., LLC,* 980 F.3d 1191, 1202 (8th Cir. 2020) (Stras, J., dissenting) ("[I]t defies basic constitutional principles to defer to a *state* agency's interpretation of *federal* law."), *vacated,* 999 F.3d 555 (8th Cir. 2021). Thus, we recognize that the opinions and recommendations of both the MPCA and the EPA are important to consider here in this appeal given the extensive cooperation between the two agencies.

In evaluating the opinions of the federal and state agencies on substantive concerns about the permit, we address two documents suggesting a possible conflict between the agencies. Appellants ask us to take judicial notice of two documents that are not part of the administrative or judicial record—a 2021 report issued by the Office of Inspector General of the EPA (OIG report) and a 2022 EPA comment on the U.S. Army Corps of Engineers Section 404 Dredge and Fill Permit for the NorthMet project (2022 EPA comment). Off. of Inspector Gen., U.S. Env't Prot. Agency, *Improved Review Processes Could Advance EPA Regions 3 and 5 Oversight of State-Issued National Pollution Discharge Elimination System Permits* 24 (Apr. 21, 2021); U.S. Env't Prot. Agency Region 5, *Clean Water Act Section 401(a)(2) Evaluation and Recommendations with respect to the Fond du Lac Band's Objection to the Proposed Clean Water Act Section 404 Permit for the NorthMet Mine Project* 29-30 (Apr. 29, 2022). These documents suggest that the MPCA did not resolve all the EPA's concerns in the final permit. We take judicial notice of the OIG report and the 2022 EPA comment for the limited purpose of demonstrating ongoing federal concern over whether, and how, the EPA exercised its oversight authority over the MPCA's permitting decision. *See Bierbach v. Digger's Polaris,* 965 N.W.2d 281, 293 n.9 (Minn. 2021) (Chutich, J., concurring and dissenting) (taking judicial notice of conflicting scientific studies to show the fact that a conflict exists).[11] We do not consider these

documents for their substantive content, and we decline the appellants' invitation to use these documents to reverse the permit.[12]

It is apparent from the EPA draft comment letter that the EPA disagreed with the MPCA about the reasonable potential analysis and the need for WQBELs—the primary substantive issue in this appeal. The draft comment letter recommended that the permit include WQBELs, explaining that "in the absence of WQBELs, there is no assurance that the discharge will meet applicable water quality standards." But the final permit does not include WQBELs. The MPCA explained in its brief to our court that the MPCA appropriately determined that "there is no reasonable potential for discharges to cause or contribute to exceedances of water quality standards," citing "both the mandatory treatment process and the associated Operating Limits." According to the MPCA, the wastewater treatment system of the NorthMet project will use "the proven technologies of mechanical filtration and two kinds of membrane treatment." But the EPA draft comment letter described the treatment technologies as "new" and stressed that the data in the application materials were merely "estimates based on assumptions and modeling outputs." The EPA also recommended including WQBELs in the permit because of concerns that the operating limits "may not be enforceable."

In addition, the EPA expressed concerns in the draft comment letter about compliance with downstream water quality standards. The Band's reservation is downstream from the NorthMet project and is treated as a "State" for purposes of the CWA. *See* 33 U.S.C. § 1377(e); *Fond du Lac Band of Lake Superior Chippewa,* 519 F. Supp. 3d at 564 (explaining that the Band's "federally approved water-quality standards `are part of the federal law of water pollution control'" (quoting *Arkansas v. Oklahoma,* 503 U.S. 91, 110 (1992))). The draft comment letter does not mention the Fond du Lac Band by name, but the draft comment letter does note that "a downstream tribe" had notified the EPA that "the project is likely to contribute to exceedances of its downstream [water quality standards], including for mercury." Because members of the Band rely on subsistence fishing, the Band's water quality standard for mercury is more stringent than Minnesota's water quality standard. The final permit does not include a WQBEL for mercury, but the permit does include a TBEL for mercury, which the Band claims is "1,298 times greater than the Band's mercury criterion." The MPCA explains that a "membrane treatment process" of the wastewater treatment system "is the foundation for MPCA's `reasonable potential' analysis" and this treatment system will ensure the discharged water meets the concentration standards for all pollutants, including mercury. But the EPA draft comment letter cited specific concerns about mercury, stating that "the pilot study states that the effectiveness of the treatment system to remove mercury is unknown."[13]

It also is apparent from the EPA draft comment letter that the EPA disagreed with the MPCA about issues arising under the Great Lakes Initiative, which specifies water quality criteria for multiple pollutants in the Great Lakes watershed. *See* Minn. R. 7052.0005-.0380 (2021); 33 U.S.C. § 1268; 40 C.F.R. pt. 132 (2022). Appellants contend, in part, that the MPCA did not conduct a statistical analysis for mercury that was required under the Great Lakes Initiative. According to the MPCA, the Great Lakes Initiative data procedures do not apply here because "the Project is yet-to-be-built" and no data "exist." Citing to Minnesota Rule 7052.0220, subpart 1, the MPCA argues that the procedures apply "only if `facility-specific effluent monitoring data are available.'" But the EPA draft comment letter suggested that a Great Lakes Initiative statistical analysis was possible with the data provided in the application materials.

In light of these apparent conflicts between the MPCA and the EPA on several key issues, we simply do not have an adequate administrative record to resolve the substantive claims of appellants regarding the MPCA permit decision, including the reasonable potential analysis under the CWA and the need for WQBELs, compliance with downstream water quality standards, and the requirements of the Great Lakes Initiative.[14] Without a complete administrative record that includes a reasoned explanation of the MPCA's decision-making, we cannot meaningfully review the MPCA permit decision. There is evidence that the MPCA and the EPA had competing scientific judgments on major issues like the need for WQBELs. Consequently, the inferences that the MPCA asks us to make here go beyond the deference that courts owe to an agency's expertise, and we decline to draw those inferences here. We hold that deference to the MPCA's analysis is not warranted under these circumstances.

Because the arbitrary or capricious decision-making by the MPCA directly frustrates our ability to resolve the substantive claims about the permit decision on the administrative record the MPCA made, we conclude that appellants may have been prejudiced by the arbitrary and capricious permit decision under Minn. Stat. § 14.69(f). In reaching this conclusion, we acknowledge the importance of judicial restraint as well as the separation-of-powers concerns that underlie our review of agency actions. *See, e.g., Reserve Mining,* 256 N.W.2d at 825. At the same time, the Administrative Procedure Act contemplates meaningful judicial review. *See* Minn. Stat. § 14.001. "The `arbitrary and capricious' standard is not meant to

reduce judicial review to a `rubber-stamp' of agency action." *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (citation omitted).

The district court concluded that "[t]he MPCA and its legal counsel knew for years that a legal battle was on the horizon in connection with the NorthMet project." Nonetheless, the MPCA did not adequately document the concerns of the EPA—the federal agency with oversight authority over the NPDES permit—and the administrative record offers little insight into how the MPCA responded to the concerns of the EPA. According to the district court, "the MPCA made decisions motivated by how the public might react." We are aware of the concerns of the EPA now only because of public records requests and the subsequent litigation. "To expect an agency to consider all of the relevant evidence and demonstrate the ability to cogently explain its reasoning is not, as some might claim, an undue burden. It is merely a prudent safeguard against administrative abuse." *In re Application of Minn. Power for Auth. to Increase Rates*, 838 N.W.2d 747, 767 (Minn. 2013) (Anderson, J., dissenting).

In sum, we have an obligation to intervene when "a combination of danger signals" suggests that "the agency has not taken a hard look at the salient problems and has not genuinely engaged in reasoned decision-making." *In re Reichmann Land & Cattle, LLP*, 867 N.W.2d 502, 512 (Minn. 2015) (internal quotation marks omitted) (quoting *Reserve Mining*, 256 N.W.2d at 825). This statement is particularly true here, given the recognition of the MPCA of the "complex and unprecedented environmental and human health questions" at stake in Minnesota's first copper-nickel mine, and the inability for us to assess the appellants' substantive claims based on the limited administrative record the MPCA made as it related to the EPA. It is axiomatic that a petitioner's substantial rights may have been prejudiced by arbitrary or capricious decision-making when that arbitrary or capricious conduct is the very thing frustrating the ability to engage in meaningful review of the substantive challenges to the permit and the agency may have reached a different substantive outcome without the arbitrary or capricious agency action.

D.

Having determined that the MPCA permit decision was arbitrary and capricious and that appellants have made a sufficient showing of prejudice under Minn. Stat. § 14.69, we turn now to the appropriate remedy. We conclude that this matter should be remanded to the MPCA. When, as is the case here, "the record before the agency does not support the agency action, [and] the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course . . . is to remand to the agency for additional investigation or explanation."[15] *Fla. Power & Light Co.,* 470 U.S. at 7 (remanding to agency for failure to make a proper record); *see also* *Reserve Mining Co. v. Minn. Pollution Control Agency,* 267 N.W.2d 720, 723 (Minn. 1978) (explaining that when an agency acts arbitrarily or capriciously, a court has the duty "to remand the matter to the agency to correct its own errors and fashion amended permits within the broad principles prescribed by the reviewing court").

We therefore reverse the court of appeals' decision on these issues and remand to the MPCA to remedy the deficiencies in the administrative record. Appellants ask us to remand to the MPCA to reopen the entire public comment period. But appellants have not demonstrated that their own ability to comment was affected by the deficiencies in the administrative record regarding the EPA. Appellants submitted extensive comments during the public comment period, and the MPCA addressed their comments. Thus, we decline to remand to the MPCA to reopen the entire public comment period.

Instead, our remand is narrowly tailored to remedying the procedural irregularities and resulting deficiencies in the administrative record, which prevent us from resolving the substantive issues that appellants have raised on appeal. These procedural irregularities and deficiencies relate almost exclusively to the EPA. Accordingly, we remand to the MPCA for the limited purpose of giving the EPA an opportunity to provide written comments on the final permit and for the MPCA to respond to any comments submitted by the EPA. We also direct the MPCA to amend the permit if necessary to ensure consistency with the CWA and any need for WQBELs, compliance with state and tribal water quality standards, and to create a record of the reasons for those amendments. If the EPA declines to comment, the MPCA should make a record of how it resolved the concerns raised by EPA during the permitting process.

II.

We now move from surface water issues to groundwater issues. The MCEA argues that the MPCA erred by issuing a permit that does not comply with a Minnesota administrative rule that regulates the discharge of industrial waste to groundwater, Minnesota Rule 7060.0600. The court of appeals rejected that argument, concluding that the permit complies with Rule 7060.0600. *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *17. Because the groundwater issues we consider here are governed by state administrative rules and do not involve the portion of the permit governed by the CWA, the procedural irregularities relating to the EPA addressed above are not relevant to our resolution of these groundwater issues.[16]

Two parts of the facility are implicated by the groundwater rules challenges. First, the permanent stockpile will store Category 1 waste—the waste with the lowest potential for pollution. PolyMet submitted the below image, which models the effect of the Category 1 Waste Rock storage site and containment system on groundwater, as part of its "Rock and Overburden Management Plan."

The permanent stockpile of Category 1 waste rock will sit over a containment system: cutoff walls will surround the 526-acre pile, and a drainage collection system will collect groundwater within the system. The cutoff wall will be attached to the bedrock to limit the amount of water that escapes the system without going through the wastewater treatment system. To reduce or avoid leaching through the cutoff walls, the containment system will include "drawdown" technology to maintain an inward gradient so that potential leaching through the containment system would bring additional water into the system, rather than out of the system. Wastewater collected in this containment system will be sent to a wastewater treatment system (WWTS).

Second, a separate floatation tailings basin will store tailings, which is a waste product from ore processing. PolyMet submitted the below model for the floatation tailings basin (or FTB), which shows its groundwater containment system.

The tailings from the NorthMet project will be mixed with water and pumped as a slurry into an existing taconite tailings basin. The floatation tailings basin will also be used to dispose of seepage from the containment system, treated mine water, water from mining features, and other contaminated water. The existing tailings basin is unlined and is already a source of groundwater and surface water pollution in the area. The basin will remain unlined after construction of the containment system. The tailings basin will cover approximately 1,370 acres and will be surrounded by a cutoff wall like the permanent stockpile. As with the permanent stockpile, a drainage system will collect water within the containment system and convey it to the wastewater treatment system. And because the new containment system will surround existing waste, the system will reduce current pollution *outside* of the system.

When the MPCA considered groundwater pollution from the project, it did not consider pollution to the groundwater *inside* the two containment systems under the permanent stockpile and tailings basin.

The resolution of the groundwater issues requires us to interpret and apply state administrative rules addressing the preservation and protection of groundwater in Minnesota, Minn. R. 7060.0100-.0900 (2021). *See* Minn. R. 7060.0100 ("It is the purpose of this chapter to preserve and protect the underground waters of the state by preventing any new pollution and abating existing pollution."). "When determining the meaning of administrative rules, `we interpret words and sentences in the light of their context and construe rules as a whole.'" *In re Reissuance of NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 577 (Minn. 2021) (quoting *In re Ali*, 938 N.W.2d 835, 838 (Minn. 2020)). When the language of a rule "`is clear and capable of understanding,' we do not defer to an agency's interpretation." *Id.* at 576 (quoting *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 515 (Minn. 2007)).

Groundwater "constitutes a natural resource of immeasurable value which must be protected as nearly as possible in its natural condition." Minn. R. 7060.0200. The Minnesota groundwater rules divide groundwater into two zones: the unsaturated zone—groundwater above the water table—and the saturated zone—groundwater below the water table. Minn. R. 7060.0600, subps. 1-2 (providing prohibitions against certain discharges); Minn. R. 7060.0300, subps. 3, 7 (defining saturated and unsaturated zones). It is undisputed that two features of the NorthMet facility, the permanent stockpile and the tailings basin, will discharge pollutants to groundwater. The MCEA argues that the permit violates the plain language of Rule 7060 by authorizing the discharge of industrial waste to both the unsaturated and saturated zones. The MPCA and PolyMet respond that the permit complies with the groundwater rules because the NorthMet facility will capture and clean up any polluting discharges. We respectively address below the MCEA's arguments that the permit does not comply with the prohibition on discharging industrial waste to the "unsaturated zone" under Rule 7060.0600, subp. 2, or injecting industrial waste to the "saturated zone" under Rule 7060.0600, subp. 1.

A.

The MCEA argues that the permit does not comply with Minnesota Rule 7060.0600, subpart 2, which prohibits the discharge of industrial waste to the "unsaturated zone." The "unsaturated zone" is defined as "the zone between the land surface and the water table." Minn. R. 7060.0300, subp. 7. Rule 7060.0600, subpart 2, provides:

> No sewage, industrial waste, other waste, or other pollutants shall be allowed to be discharged to the unsaturated zone or deposited in such place, manner, or quantity that the effluent or residue therefrom, upon reaching the water table, may actually or potentially preclude or limit the use of *the underground waters* as a potable water supply, nor shall any such discharge or deposit be allowed *which may pollute the underground waters.* All such possible sources of pollutants shall be monitored at the discharger's expense as directed by the agency.

Minn. R. 7060.0600, subp. 2 (emphasis added). In short, under subpart 2, pollution cannot be discharged to the unsaturated zone in a way that may result in pollution to the underground waters. The court of appeals deferred to the MPCA because it concluded that the interpretation by the MPCA that this rule did not apply to the NorthMet project was a reasonable interpretation of its own rules. *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *9.

The MCEA argues that the rule does not allow any industrial waste to enter the unsaturated zone if the discharge might ultimately pollute the underground waters. The MPCA, on the other hand, argues that the discharge of pollutants to the unsaturated zone is permissible if there are "protective safeguards or control measures"—such as the groundwater containment systems planned for both the permanent stockpile and tailings basin—"in place to prevent groundwater pollution." It is undisputed that water within the containment systems will be polluted and the record reflects that the containment systems include groundwater in both the unsaturated and saturated zone.

The core of the disagreement here concerns whether the water within the containment systems is part of "the underground waters" that may not be polluted under Rule 7060.0600, subpart 2.[17] "Underground water" is a defined term that is "synonymous" with "groundwater" and means "the water contained below the surface of the earth in the saturated zone including, without limitation, *all* waters whether under confined, unconfined, or perched conditions." Minn. R. 7060.0300, subp. 6 (emphasis added). The definition of underground water is all encompassing and does not contemplate any exclusions.

In deferring to the MPCA, the court of appeals declined to interpret the meaning of underground water in the context of Minn. R. 7060.0600, subp. 2, instead concluding that "[t]he determination of whether a discharge is prohibited because it will preclude or limit the use of groundwater as a potable water supply or pollute the underground waters requires the [M]PCA's expertise and is entitled to deference from this court." *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *9 (internal quotation marks omitted). But this conclusion by the MPCA fails to address the MPCA's own concession that groundwater within the containment systems will be polluted. Thus, the court of appeals erred by declining to interpret the meaning of underground water in Minn. R. 7060.0600, subp. 2.

We conclude that the prohibition on a "discharge or deposit" that "may pollute the underground waters" under Rule 7060.0600, subpart 2, applies with equal force to groundwater within the planned containment systems at the NorthMet facility as it does to groundwater outside the planned containment system. Nothing in chapter 7060 contemplates an exclusion for the underground waters within a containment system. Because the language of Rule 7060.0600, subpart 2, is unambiguous, we do not defer to the MPCA's interpretation of the rule. *See In re NorthMet Project Permit to Mine Application,* 959 N.W.2d 731, 744 (Minn. 2021) (stating that we do "not defer to agency interpretations of unambiguous language").[18] And because the MPCA has conceded that groundwater within the containment systems will be polluted, we therefore conclude that the permit does not comply with Rule 7060.0600, subpart 2.

The surrounding regulations support the broad prohibition on the discharge of pollutants to the underground waters under Rule 7060.0600, subpart 2. *See U.S. Steel Corp.*, 954 N.W.2d at 577 ("When determining the meaning of administrative rules, `we interpret words and sentences in the light of their context and construe rules as a whole.'" (citation omitted)). The MPCA relies on Minnesota Rule 7060.0600, subpart 3, which calls for "[t]reatment, safeguards, or other control measures" for "pollutants which are to be . . . discharged to the unsaturated zone." The MPCA argues that subpart 3 would be superfluous if we interpret subpart 2 as a complete prohibition on the pollution of groundwater in the unsaturated zone. This argument is unavailing. Subpart 3 requires control measures *before* any waste is discharged to or deposited in the saturated

zone or the unsaturated zone, "to the extent necessary to ensure that the same will not constitute or continue to be a source of pollution of the underground waters or impair the natural quality thereof." Minn. R. 7060.0600, subp. 3. Subpart 3 is harmonizable with subpart 2 if subpart 3 is read to require treatment measures that prevent the pollution prohibited in subpart 2. And subpart 3 does not implicate the meaning of "the underground waters," which is the essence of this dispute.

Subpart 7 of Rule 7060.0600 also buttresses our reading of subpart 2. Subpart 7 explicitly prohibits "[t]he long-term storage underground for later treatment of . . . industrial waste." Other substances may be stored, but only with "safeguards adequate to reasonably assure proper retention against entry into the underground waters." Minn. R. 7060.0600, subp. 7. Thus, subpart 7 does not contemplate the long-term storage of industrial waste—such as the mining waste from the NorthMet project—in an isolated section of the underground waters.

Although we conclude that the current permit does not comply with Rule 7060.0600, subpart 2, the prohibition on discharges does not necessarily preclude the MPCA from issuing a permit for the NorthMet project. The rules contemplate that the MPCA "in its discretion" may allow a variance. Minn. R. 7060.0900. The MPCA may allow a variance in "exceptional circumstances." *Id.* Specifically, the rule allows the MPCA to permit a variance when:

> the agency finds that by reason of exceptional circumstances the strict enforcement of any provision of these standards would cause undue hardship, that disposal of the sewage, industrial waste, or other waste is necessary for the public health, safety, or welfare, or that strict conformity with the standards would be unreasonable, impractical, or not feasible under the circumstances.

Id. PolyMet explains that the containment systems are designed to capture and contain pollutants, which is a goal of the Minnesota groundwater rules. *See* Minn. R. 7060.0100 ("It is the purpose of this chapter to preserve and protect the underground waters of the state by preventing any new pollution and abating existing pollution."). And, as noted earlier, the containment systems will reduce pollution outside of the systems. The MPCA has discretion to allow a variance based "upon such conditions as it may prescribe for prevention, control, or abatement of pollution in harmony with the general purpose of these standards." Minn. R. 7060.0900. Because the MPCA did not consider whether the NorthMet project qualifies for a variance, we reverse the court of appeals and remand the permit to the MPCA for consideration of whether a variance under Rule 7060.0900 is appropriate for the NorthMet project.[19]

B.

The MCEA also argues that the permit does not comply with Rule 7060.0600, subpart 1, which addresses the discharge of industrial waste to the "saturated zone." The "saturated zone" is defined as the "part of the earth's crust in which all the voids, large and small, are ideally filled with water under pressure greater than atmospheric." Minn. R. 7060.0300, subp. 3. Rule 7060.0600, subpart 1, prohibits the discharge of "sewage, industrial waste, or other wastes . . . *directly* into the zone of saturation by such means as injection wells *or other devices used for the purpose of injecting materials into the zone of saturation,*" subject to certain exceptions not relevant here. (Emphasis added.)[20] The parties disagree about whether the containment systems at the NorthMet project will *inject* waste into the saturated zone. The MCEA asserts that "inject" means "[t]o force or drive (a fluid) into something." The MPCA and PolyMet respond that this definition conflates suction and injection. According to respondents, the PolyMet system draws down water like a straw, rather than injecting water like a syringe, and thus the containment systems do not *inject* materials into the saturated zone. The court of appeals again deferred to the MPCA, concluding that the MPCA "reasonably interpreted its own rule to not apply to the NorthMet seepage-capture systems, which are unlike an injection well." *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *9.

In its permit application, PolyMet explained that the water table inside the containment systems will be drawn down. By drawing down the water table, PolyMet aims to maintain an inward gradient, so that any potential leeching through the barrier would be *into* the containment systems rather than *out of* the containment systems. Once water and the pollutants within the containment systems reach the bedrock or cutoff wall, they will travel via a passive system: a perforated drainpipe near the bottom of the trench that is filled with granular drainage material. According to the groundwater modeling of one expert, the drawdown will "influence[]" the rate at which pollution travels from the surface to the saturated zone, but the system does not push or pull water down.

We conclude that the drawdown function of the containment systems is not a device "*for the purpose of* injecting materials into the zone of saturation." Minn. R. 7060.0600, subp. 1 (emphasis added). The purpose of the drawdown is not to insert materials into the saturated zone; instead, the drawdown will maintain a hydraulic gradient within the saturated zone. And the drawdown does not *inject* materials; even accepting the definition provided by the MCEA that "inject" means "[t]o force or drive," the record does not show that the hydraulic gradient will force or drive materials into the saturated zone; rather, the record shows the flow will merely be influenced.[21] Accordingly, we affirm the court of appeals and hold that the drawdown of water using a hydraulic gradient is plainly not an "injection" under Rule 7060.0600, subpart 1.

CONCLUSION

For the foregoing reasons, we affirm in part the decision of the court of appeals, reverse that decision in part, and remand to the MPCA for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded to the Minnesota Pollution Control Agency.

CONCURRENCE

McKEIG, Justice (concurring).

I agree with the outcome and the legal analysis by the majority and join the court's opinion in full. I write separately to emphasize the importance of the Fond du Lac Band's water quality standards, and to highlight the serious disservice that the Minnesota Pollution Control Agency (MPCA) and the Environmental Protection Agency (EPA) did to the Band. The Band's interests were an afterthought here—discounted by those with the responsibility and power to ensure compliance with the Band's standards. Although the court's opinion effectively protects the Band's interest in clean water by remanding the permit for further consideration, I write separately to emphasize the seriousness of the MPCA's failure to create a record.

The Band signed several treaties with the United States government, the last of which was signed in 1854. *See* *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 918 (8th Cir. 1997) (discussing 1854 treaty). The 1854 treaty created reservations for the Band in exchange for title to land historically occupied by the Anishinaabe people (also known as the Ojibwa or Chippewa people). *Id.* at 918-19. This treaty explicitly preserved the Band's usufructuary rights—"[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded . . . ." —which were originally reserved in earlier treaties. Treaty with the Chippewa, July 29, 1837, 7 Stat. 536, Art. 5; *Mille Lacs Band*, 124 F.3d at 919 ("[T]he evidence is overwhelming that neither party intended the 1854 Treaty to disturb usufructuary rights.").

In addition to these treaty rights, the Band has treatment as a state (TAS) approval under the Clean Water Act, and as such, the EPA and the MPCA have a statutory responsibility to the Band. *See* 33 U.S.C § 1377(e). In short, because the Band has TAS status, the Band takes on the same administrative authority as a state would. *See* 33 U.S.C § 1377(e); 40 C.F.R. § 123.31 (2022). This status and the Band's reservation location downstream from the NorthMet project means that the MPCA must ensure compliance with the Band's standards. *Wisconsin v. E.P.A.*, 266 F.3d 741, 748 (7th Cir. 2001) ("Once a tribe is given TAS status, it has the power to require upstream off-reservation dischargers, conducting activities that may be economically valuable to the state (e.g., zinc and copper mining), to make sure that their activities do not result in contamination of the downstream on-reservation waters."). The MPCA cannot legally issue a permit that fails to ensure compliance with the Band's standards. 33 U.S.C. § 1341(a)(2) ("If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.").

More than 20 years ago, the Band set its own water quality standards so that members of the Band could safely exercise their treaty rights and preserve cultural traditions. Given the Band's treaty rights, TAS status under the Clean Water Act, and the Band's role as a "sovereign nation[] with at least some stewardship responsibility over the precise natural resources implicated by" this permit, the MPCA was obligated to treat the Band's environmental standards "with appropriate solicitude." *Cf.* *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1043-44 (D.C. Cir. 2021) (considering the importance of a Native American tribe's interest to an agency's consideration under the National Environmental Policy Act).

If the MPCA approved a permit that violates the Band's water quality standards— which seems possible given the inadequate record before us—then the MPCA failed to treat the Band with appropriate solicitude under the law and approved a permit that threatens the Band's cultural traditions. For the more than 4,000 members of the Fond du Lac Band, natural resource rights are more than just a property right, they are a way of life. *See United States v. Winans,* 198 U.S. 371, 381 (1905) ("The right to resort to the fishing. . . was a part of larger rights possessed by the Indians, . . . which were not much less necessary to the existence of the Indians than the atmosphere they breathed."). Band members rely on their right to hunt, fish, and gather natural resources on the reservation and in the ceded territory for subsistence, cultural, and religious purposes. The Band's reservation lies just 70 miles downstream of the proposed mine, and discharges from the mine will flow directly to the reservation and ceded territory, threatening natural resources that the Band's members depend on.

While I agree with the outcome from the court and join the court's opinion in full, I write separately to emphasize the defective administrative proceeding employed by the MPCA. The EPA raised more than mere concerns with the MPCA's draft permit; the EPA identified specific inadequacies that, if left in the final permit, failed to protect the Band's standards. But the MPCA and the EPA reached an arrangement that ultimately kept any record of these inadequacies secret. The MPCA and the EPA sought to avoid public scrutiny and to hide the risk of illegal water pollution from the public eye. This secrecy is unacceptable.

The court effectively protects the Band's interest in clean water by remanding the permit for further consideration. I write separately to emphasize the seriousness of the MPCA's failure to create a record. By failing to make a record of how the agencies resolved the inadequacies that the EPA identified in the draft permit, the MPCA continued this country's centuries-long history of threatening tribal resources with political disregard of tribal rights.

HUDSON, Justice (concurring).

I join in the majority and in the concurrence of Justice McKeig.

CHUTICH, Justice (concurring).

I join in the majority and in the concurrence of Justice McKeig.

THISSEN, Justice (concurring).

I join in the majority and in the concurrence of Justice McKeig.

MOORE, III, Justice (concurring).

I join in the majority and in the concurrence of Justice McKeig.

[1] After oral argument, respondent filed a notice of name change, requesting to proceed under its new name, NewRange Copper Nickel LLC. Appellants opposed this request, arguing that allowing a name change in ongoing judicial proceedings would be premature until the MPCA has evaluated the impact of PolyMet's new name on its permit decision and issued a permit amendment. We continue to refer to respondent as PolyMet and express no opinion about any permit amendments reflecting the name change.

[2] There is one document in the judicial record regarding the MPCA's request that the EPA not submit written comments during the public comment period: an email message from Assistant Commissioner Lotthammer to EPA staff. Lotthammer deleted the email before she left the MPCA in February 2019. Consequently, this email was not part of the administrative record; the email came to light due to WaterLegacy's FOIA requests.

[3] An MPCA staff attorney took notes while Pierard was reading the draft comment letter and labeled the notes "privileged" on the basis that the notes contained his mental impressions. These notes were not accessible to the MPCA permit team. An MPCA staff member also started taking notes during the call but stopped after a few minutes because she could not keep up. She later recycled the notes.

[4] MCEA also argued the MPCA erred by denying its petition for a contested-case hearing. The court of appeals affirmed on this issue, and that decision is not at issue on appeal here. *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *14-17.

[5] The term "hard look" refers to the arbitrary or capricious standard of review that federal courts use. *See, e.g., Nevada v. Dep't of Energy,* 457 F.3d 78, 93 (D.C. Cir. 2006); *see generally* Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine,* 7 Nev. L.J. 151 (2006) (summarizing the rise of hard look review). Our references to "hard look" review "reflect our understanding that the federal courts have considerable experience implementing a very similar standard of review, and that we therefore find those federal decisions to be persuasive authority in many of our own administrative law cases." *In re Application of Minn. Power for Auth. to Increase Rates for Elec. Serv. in Minn.,*

838 N.W.2d 747, 766 (Minn. 2013) (Anderson, J., dissenting). Although we have not explicitly adopted the federal hard look doctrine, our arbitrary or capricious review standard overlaps with the doctrine. *See, e.g., Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) ("Our role when reviewing agency action is to determine whether the agency has taken a `hard look' at the problems involved, and whether it has `genuinely engaged in reasoned decision-making.'" (quoting *Reserve Mining*, 256 N.W.2d at 825)).

[6] The three procedural irregularities determined by the district court were (1) the MPCA's failure to implement a timely litigation hold; (2) the MPCA's failure to preserve two emails between the MPCA and EPA regarding the agreement that the EPA would not submit written comments during the public comment period; and (3) the MPCA's failure to preserve the partial notes of an MPCA staff member during the April 2018 conference call with the EPA regarding the draft comment letter.

[7] We ultimately remand this case under the arbitrary or capricious standard, which means that we need not decide if any of the MPCA's procedures were "unlawful" under Minn. Stat. § 14.69(c).

[8] In arriving at a narrow definition of "irregularities in procedure" under section 14.68, the district court understandably relied on language in some of our prior decisions. But those prior decisions simply explained that although "it is generally not proper to permit discovery of the mental processes by which an administrative decision is made," we have "allowed persons seeking judicial review of agency decision-making to `make inquiry through discovery to determine whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process.'" *People for Env't Enlightenment & Resp., (PEER), Inc. v. Minn. Env't Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978) (quoting *Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977) (citing *United States v. Morgan*, 313 U.S. 409 (1941))). We did not intend our analysis in these decisions, limiting discovery into the mental processes of agency decision-making, to define the scope of "irregularities in procedure" under section 14.68.

[9] The MPCA cited these same less than 30 pages multiple times in its brief to support its claim of documentation of the EPA's concerns. We recognize it is possible that additional references in the voluminous administrative record exist that document the interactions between the MPCA and EPA. But "[i]t is not the function of the court to conduct an independent search of the record to find support for the agency's decision that is the agency's function, not a reviewing court's." 21 William J. Keppel, *Minn. Prac., Admin. Prac. & Procedure* § 10.06.2 (2d ed.).

[10] In defense of the court of appeals, at least twice, we have omitted the word "may" when articulating the prejudice standard in section 14.69; however, neither decision turned on the issue of prejudice. *See In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001); *Henry v. Minn. Pub. Utils. Comm'n*, 392 N.W.2d 209, 213 (Minn. 1986).

[11] We deny the motions of the MPCA and PolyMet to strike all references to these two documents in appellants' briefs. The MPCA and PolyMet cited Minnesota Rule of Evidence 201(b), which limits judicially noticeable facts to facts that are "not subject to reasonable dispute." We consider the OIG report and the 2022 EPA comment as evidence that the EPA *may* not have agreed with the conditions in the final permit, not as evidence that the conditions in the final permit are insufficient or that the EPA did, in fact, disagree with final permit conditions.

Using public records—such as the OIG report and the 2022 EPA comment—as evidence of potential disagreement between the MPCA and EPA during the permitting process is consistent with our precedent. *See In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 581 n.8 (Minn. 2021). And here, the orderly administration of justice commends it. We are presented with an incomplete record of the concerns of the EPA and no documentation regarding any resolution of those concerns. Respondents ask us to infer from the silence of the EPA that the EPA determined that the permit was consistent with the CWA and complied with state and tribal water quality standards, but these documents show that inference may not be correct. These documents are necessary to illuminate the issues here—specifically, the interaction between the MPCA and EPA. We stress again, however, that we do not take judicial notice of the *substance* of the statements in those documents.

[12] Pending our decision regarding this permit, on June 6, 2023, the U.S. Army Corps of Engineers revoked PolyMet's section 404 Dredge and Fill permit for the NorthMet project—a different permit than the NPDES permit at issue here. The Band filed a letter of supplemental authority of the revocation decision made by the U.S. Army Corps of Engineers arguing that it is relevant to the Band's arguments about the adequacy of the NPDES permit and the motion to strike issue. The MPCA responded arguing that the supplemental authority is not pertinent to the appeal. PolyMet acknowledged the revocation, but likewise argued the decision was not relevant to this appeal. We recognize the revocation of the other permit, but we decline to take judicial notice of the substantive content of that decision.

[13] Because we conclude that the Band has demonstrated that it may have been prejudiced by the MPCA's arbitrary and capricious permit decision, we leave for another day the disputed legal issue of whether the Band's water quality standards need to be met at the point of discharge at the facility, as the Band argues, or only within the boundaries of the Band's reservation, as the MPCA argues.

[14] MCEA raises one issue of state law that the EPA—a federal agency not responsible for implementing Minnesota law—understandably did not address in the draft comment letter: compliance with Minn. Stat. § 115.03 (2022), which addresses the duties of the MPCA. Under the statute, the MPCA has a duty to require:

the achievement of more stringent limitations than otherwise imposed by effluent limitations in order to meet any applicable water quality standard by establishing new effluent limitations, . . . including alternative effluent control strategies for any point source or group of point sources to insure the integrity of water quality classifications, *whenever the agency determines* that discharges of pollutants from such point source or sources, with the application of effluent limitations required to comply with any standard of best available technology, *would interfere with the attainment or maintenance of the water quality classification in a specific portion of the waters of the state.*

Minn. Stat. § 115.03, subd. 1(e)(8) (emphasis added). The MCEA argues that this provision creates a per se requirement for WQBELs under these circumstances. But the MPCA responds that the permit complies with the statute because the permit complies with the federal "reasonable potential" analysis regarding the need for WQBELs. We conclude that the MPCA may demonstrate compliance with the Minnesota statute through the federal reasonable potential analysis. But as discussed above, we decline to defer to the MPCA's reasonable potential analysis, and we cannot resolve the parties' dispute on the administrative record here. Accordingly, we remand this issue to the MPCA along with the other issues that implicate the MPCA's reasonable potential analysis. On remand, the MPCA must create an adequate record of its reasonable potential analysis to show that the permit complies with Minn. Stat. § 115.03, subd. (1)(e)(8).

[15] We have yet to decide what showing is required for the court to remand an agency decision under the requirements of the Minnesota Administrative Procedure Act. *See In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining, Inc., City of Hoyt Lakes, St. Louis Cnty., Minn.*, 955 N.W.2d 258, 268-69 (Minn. 2021) (declining to address whether the court of appeals may remand without explicitly finding a violation of the Minnesota Administrative Procedure Act). Because we conclude that the arbitrary or capricious MPCA action may have prejudiced the substantial rights of appellants, we need not decide that issue here.

[16] The court of appeals reversed and remanded on a different groundwater issue. The court of appeals concluded that the MPCA "erred by not considering whether any discharges to groundwater from the NorthMet project will be the functional equivalent of a discharge to navigable waters and, thus, whether the CWA applies to those discharges." *In re Denial of Contested Case Hearing Requests,* 2022 WL 200338, at *9. Neither the MPCA nor PolyMet challenged that conclusion.

[17] PolyMet apparently concedes that NorthMet will pollute the groundwater within the containment systems because it emphasizes that the containment systems will capture and clean up polluting discharges to ensure compliance with the rules. *See* Minn. Stat. § 115.01, subd. 13 (2022) (defining "pollute the water" as "the discharge of any pollutant into any waters of the state or the contamination of any waters of the state so as to create a nuisance or render such waters unclean, or noxious, or impure so as to be actually or potentially harmful or detrimental or injurious to public health" or other purposes, or "the alteration made or induced by human activity of the chemical, physical, biological, or radiological integrity of waters of the state").

[18] Notably, the MPCA never offered an interpretation of "the underground waters." When the MPCA issued the permit, it found that the permit complies with the Minnesota groundwater rules. But the MPCA never specifically interpreted Rule 7060.0600. And in briefing to our court, the MPCA avoided offering an interpretation that we could infer the MPCA necessarily relied on during the permitting process, instead arguing that it is entitled to deference. *See Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy,* 654 F.3d 496, 513 (4th Cir. 2011) (deferring to an agency's interpretation in litigation when the interpretation was a "necessary presupposition" of the agency action). The MPCA cannot ask for deference without offering a reasonable interpretation to which we can defer.

[19] That the current permit could not issue in the absence of a variance—a variance that has not been granted—shows that, to the extent required, "the substantial rights of the petitioners may have been prejudiced" by this error of law in how the MPCA construed and applied Minn. R. 7060.0600, subp. 2. *See* Minn. Stat. § 14.69(d).

[20] The MPCA raises a perplexing argument: that the MCEA forfeited the argument that the permit violates Rule 7060.0600, subpart 1, because the MCEA did not note the error in its comments during the permitting process. In support of this forfeiture argument, the MPCA cites *Griffin v. State,* a criminal postconviction decision that is irrelevant to this civil dispute. 883 N.W.2d 282, 286 (Minn. 2016). Because the MPCA does not cite any relevant legal authority to support its forfeiture argument, the MPCA has forfeited its forfeiture argument. *See, e.g., Christie v. Est. of Christie*, 911 N.W.2d 833, 837 n.4 (Minn. 2018) (concluding that an argument made without providing any analysis or citation to legal authority was forfeited).

[21] The MCEA cites to *County of Maui* in its argument on this issue and asks us to extend the *County of Maui* analysis here. In *County of Maui,* the Supreme Court interpreted the permit requirement in the CWA for a discharge "from any point source." *See generally County of Maui v. Haw. Wildlife Fund,* 590 U.S. ___, 140 S. Ct. 1462 (2020). The Court held that a discharge of pollutants from a point source to groundwater that conveyed the water to the ocean was the functional equivalent of a discharge to the ocean "from a point source" so a permit was required. *Id.* at 1468. At issue was the meaning of the word "from," which appears nowhere in Minnesota's groundwater rule. The MCEA's reliance on the "functional equivalent" standard adopted by the Supreme Court in *County of Maui* offers helpful context at best because the decision does not apply here. The plain language of the rule here is distinct from the CWA language at issue in *County of Maui.* Here, unlike in *County of Maui,* the rule requires a specific method of discharge: by injection. *See* Minn. R. 7060.0600, subp. 1.

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