

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Schmidt & Salita, PLLC

Court File No. _____

Case Type: Other Civil

Plaintiff,

v.

COMPLAINT

Minnesota Pollution Control Agency,

Defendant.

Plaintiff Schmidt & Salita, PLLC (Schmidt & Salita), as and for its Complaint against Defendant Minnesota Pollution Control Agency, states and alleges as follows:

INTRODUCTION

1. Water Gremlin Company operated a lead acid battery manufacturing plant in White Bear Township that for over fifteen years emitted levels of Trichloroethylene (“TCE”)—a hazardous air pollutant—into the air that exceeded its state permit and/or state health limits. Over 5,000 Minnesotans live or work at or near the facility and were needlessly exposed to this chemical in the air they breathed. The law firm of Schmidt & Salita, PLLC, which represents over 100 of these people, requested public records about Water Gremlin and the Minnesota Pollution Control Agency’s regulation of the facility over four months ago. The MPCA inexplicably “closed out” its request in mid-May without providing anywhere close to all the responsive public records. Schmidt & Salita’s counsel followed up by requesting a narrowed category of public records from the MPCA in late May, but the MPCA has failed to provide them despite the important public health and public interest concerns attendant to Water Gremlin’s toxic emissions. The MPCA’s failure to provide these records stands in sharp contrast to the response of the Minnesota

Department of Health, which provided the public records requested of it in a much shorter time period. Schmidt & Salita brings this action pursuant to Section 13.08 of the Minnesota Statutes to compel the MPCA's production of the requested public records.

THE PARTIES

2. Plaintiff Schmidt & Salita, PLLC is a professional limited liability company and law firm whose address is 13911 Ridgedale Drive, Suite 325, Minneapolis, MN 55305.

3. Defendant Minnesota Pollution Control Agency ("MPCA") is an executive branch agency of the State of Minnesota.

JURISDICTION AND VENUE

4. Pursuant to Minn. Stat. § 13.08, subd. 3, venue is proper in Hennepin County because it is where Plaintiff has its office, where some or all of the cause of action accrued, and because a state agency may be sued in "any county" in Minnesota in an action under section 13.08.

FACTUAL ALLEGATIONS

Background: Water Gremlin and Trichlorethylene and Other Chemicals.

5. Water Gremlin Company ("Water Gremlin") is a Minnesota corporation that makes fishing sinkers and lead acid battery terminals at its production facility at 4400 Otter Lake Road in White Bear Township, Minnesota.

6. For many years, Water Gremlin used Trichloroethylene ("TCE") as an industrial solvent to clean and coat the lead acid battery terminal posts at its White Bear Township production facility.

7. TCE is a man-made chemical and a volatile organic compound ("VOC") and hazardous air pollutant ("HAP") that easily becomes airborne and spreads through the air.

8. In addition, according to the Minnesota Department of Health ("MDH") publication "*Trichloroethylene ("TCE") and Your Health*," "TCE that has been spilled or dumped

on the ground can pollute soil and groundwater.” According to the same publication, “TCE can evaporate from the polluted soil and groundwater and rise toward the ground surface” through a process called “vapor intrusion.”

9. Elevated TCE levels may increase the risk of certain types of cancers and birth defects, according to a March 1, 2019 press release issued by the MPCA relating to Water Gremlin. According to the United States Environmental Protection Agency, TCE can affect developing fetuses, has been associated with effects in the liver, kidneys, immune system, and central nervous system, and “TCE is carcinogenic to people through all routes of exposure, which include inhalation, dermal (skin), and ingestion.” See <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/fact-sheet-trichloroethylene-tce#q3>.

10. As a result of health concerns related to TCE exposure, the Minnesota Department of Health has developed short-term, acute, sub chronic, chronic, and cancer health-based values (“HBVs”) of 2 micrograms per cubic meter of TCE in air, according to its publication, “*Guidance for Trichloroethylene (TCE) in Air.*” MDH recommends that people not breath a chemical in amounts in excess of an HBV.

11. Federal and state law set emission limits for facilities that use TCE in the manufacturing process. Water Gremlin had a permit from the MPCA that required it to keep its emissions of TCE below certain levels. Jeff Smith, the Director of the Industrial Division at the MPCA, and Sarah Kilgriff, the head of the Land and Air Compliance Section at the MPCA, have led the MPCA’s regulation of Water Gremlin, along with other employees.

12. For years, Water Gremlin emitted significantly more TCE than allowed by its MPCA permit. According to the MPCA, Water Gremlin’s pollution control equipment had not

been functioning in a manner to keep Water Gremlin's TCE emissions to the levels required by its permits from the MPCA for more than *fifteen years*.

13. As a result, people working at or living in neighborhoods near the facility were exposed to TCE at levels above the HBVs established by MDH and above the levels allowed in Water Gremlin's permits from the MPCA.

14. On March 1, 2019 the MPCA entered into a Stipulation Agreement with Water Gremlin relating to the company's violations of its air quality permit due to its TCE emissions. Among other things, the Stipulation Agreement required the company to take certain corrective actions at the production site (including to investigate and report any contamination of the soil and sediment on its property) and to conduct ongoing air monitoring.

15. In its March 1, 2019 press release announcing the settlement, the MPCA stated that Water Gremlin's air emission control equipment was "barely functioning" at times and that "TCA was emitted from the facility at levels that may pose a risk to human health over an area extending up to 1.5 miles from the facility." The Stipulation Agreement states that the air emission control equipment did not operate *at all* at other times.

16. According to the Stipulation Agreement, in 2001 Water Gremlin advised the MPCA that it was replacing its emission control equipment with a new system because the old one was "not working as planned." Stipulation Agreement Part 5(g), p. 2. In 2002, the MPCA issued a new air emissions permit to Water Gremlin that required its new emission control system to control at least 95 percent of TCE emissions. *Id.* (i), p. 3. The equipment had multiple shutdowns and breakdowns from July 2010 to December 2018. *Id.* (o), p. 4. From January 1, 2018 to November 20, 2018, Water Gremlin emitted more than 100 tons of TCE, according to the Stipulation Agreement. *Id.* (u), p. 4. According to the Stipulation Agreement, Water Gremlin's

emissions exceeded the limits of its permit, and the facility under-reported emissions, by an estimated 759 tons, since at least 2002. Stipulation Agreement, Part 6, pps. 7-8. At certain times and places, Water Gremlin's emissions of TCE were 100 times the state HBVs for the chemical.

17. The settlement allowed Water Gremlin to continue to operate using a different solvent, FluoSolvWS, which uses trans 1, 2-Dichloroethylene (DCE) as the main ingredient. MDH has established an HBV for FluoSolv of 3 micrograms per cubic meter.

Schmidt and Salita's Request for Public Records from MPCA.

18. In its March 1, 2019 press release announcing the settlement, the MPCA stated that "the company released the chemical trichlorethylene (TCE) into the air above what was allowed in the permit, resulting in exposure within neighborhoods around the facility to TCE levels above health benchmarks set by the Minnesota Department of Health." In a website posting dated April 25, 2019, MDH stated that Water Gremlin "had been emitting significantly more TCE than allowed by its MPCA permit. As a result, people living in the neighborhoods near the facility were exposed to TCE levels above the MDH air guidance value for TCE."

19. Over 100 people have retained the law firm of Schmidt & Salita to represent them regarding Water Gremlin. These people live(d) or work(ed) at or near the facility and are concerned about the impact of these past emissions on themselves, their families, their health, and their properties. They are also concerned about whether regulatory actions to date have been sufficient to prevent ongoing harms.

20. On April 17, 2019, Schmidt & Salita made a request on behalf of these individuals for public records from the MPCA pursuant to the Minnesota Government Data Practices Act ("MGDPA"). The requested public records involve an important public interest and public health

matter affecting the health, life, families, and property of over 5,000 Minnesotan who live or lived or work or worked at or near Water Gremlin's White Bear Township production facility.

21. Among other things, Schmidt & Salita requested all public records regarding any and all investigations, testing, and sampling of soil, air, or water relating to Water Gremlin; all correspondence with the company; all permits issued to Water Gremlin; and all records sent to other regulators about Water Gremlin.

22. The MPCA thereafter provided a limited number of documents to Schmidt & Salita. On May 17, 2019 the MPCA advised Schmidt & Salita that it was "closing out the requests" as complete. The documents the MPCA provided to Schmidt & Salita did not come close to representing all the requested and responsive public records. The MPCA provided no basis for its withholding of public documents beyond announcing that it was "closing out the requests." It did not cite any legal basis for withholding public records.

23. Schmidt & Salita thereafter retained the law firm of Swanson Hatch, P.A. to assist it in obtaining the requested public records from the MPCA under the MGDPA.

24. On May 28, 2019 Swanson Hatch, P.A.—on behalf of Schmidt & Salita—sent a letter dated May 28, 2019 to the Honorable Laura Bishop, Commissioner of the MPCA, with copies to certain employees believed to be holding public records relating to Water Gremlin. The letter, which was also submitted on the agency's Information Request Form, requested a narrowed group of public records not provided to Schmidt and Salita in response to its original request.

25. The letter underscored that, "This is a matter of grave public health concern and importance to thousands of Minnesotans, especially people whose health may have been jeopardized by Water Gremlin." The letter requested that 11 categories of public documents be produced by June 11, 2019, including records that show exceedances since the Stipulation

Agreement; emails that instructed staff on how to characterize or not characterize the situation at Water Gremlin or the MPCA's response to the problems at Water Gremlin; all emails to and from Industrial Division Director Jeff Smith after January 15, 2019; communications with MDH about Water Gremlin; and emails regarding sampling of sediment, soil, or water to test for lead or TCE levels.

26. The letter concluded by again underscoring that "TCE and lead pose serious health risks to the public. The residents of the White Bear Township area are innocent victims of Water Gremlin's unlawful acts, and they are eager for answers. I look forward to the MPCA's prompt production of these materials by June 11, 2019...."

27. The letter reminded the MPCA that all responsive emails or other documents that were deleted but are contained on the agency's back-up servers, hard drives, or otherwise electronically-stored must be produced pursuant to the MGDPA.

28. The MGDPA prohibits an agency from deleting public records after a request for them is made under the MGDPA. The MGDPA also prohibits an agency from withholding requested emails and other documents that are public records out of a concern they may be embarrassing to the government agency or may cast it in an unflattering light.

29. Sarah Kilgriff is one of the officials at the MPCA in charge of assembling and reviewing the public records responsive to this request and making determinations as to what documents will be provided or withheld. Ms. Kilgriff reports to Industrial Division Manager Jeff Smith, who also has in his possession, custody, and control relevant responsive records.

30. On June 25, 2019, Dale Boettcher in the information management section of the MPCA emailed counsel for Schmidt & Salita and asked whether documents should be provided on a rolling basis or after they were all gathered. The firm replied that same day that documents

should be produced as they were assembled and asked for the timetable when the responses would be completed. On July 8, 2019 counsel for Schmidt & Salita emailed Mr. Boettcher and stated that he had not responded to the firm's June 25, 2019 email, that the agency had not produced documents, and again asked when the public records would be provided pursuant to the May 28, 2019 MGDPA request. Mr. Boettcher did not respond to the email.

31. To date, the agency has not provided documents in response to the May 28, 2019 letter. Most of the records sought were originally requested on April 17, 2019—four months ago.

32. Request No. 5 in the May 28, 2019 letter requested the following documents:

“Lead and Water Sampling. Please provide all emails, memos, or documents from January 15, 2019 to the date of your response with regard to or that discuss or document whether any employee of the Environmental Analysis and Outcomes Division or the Industrial Division has considered, suggested, or undertaken any sampling of the water and/or sediment to test for lead and/or TCE levels at or near the Water Gremlin facility or due to discharges by Water Gremlin. If such sampling has been undertaken, please provide the results of such sampling.”

33. The MPCA has not provided such records or any others to the pursuant to the May 28, 2019 MGDPA requests. Such records clearly exist. For example, on August 15, 2019 the MPCA held a news conference in which it stated that recent tests of the soil, sediment, and waters around the Water Gremlin production plant found industrial solvents in the soil vapors at levels 33 times higher than the state health limits. The MPCA also stated that TCE “hangs around” for a long time in the soil and that TCE, DCE, and lead were found in the nearby holding pond and creek.

34. The MPCA's failure to produce public records stands in stark contrast to MDH. On May 28, 2019 counsel for Schmidt & Salita requested records about Water Gremlin from MDH. MDH produced an initial round of public records on July 3, 2019 and a second round on July 26,

2019, with its response nearly complete. Unlike the MPCA, MDH has provided regular updates and communications on the status of its production.

35. In response to the MGDPA request served on it, MDH has provided to Schmidt & Salita emails and other documents that should have been, but were not, produced by the MPCA to Schmidt & Salita in response to its April 17, 2019 and May 28, 2019 requests.

CLAIM FOR RELIEF

36. Plaintiff restates and realleges the allegations set forth above.

37. Minn. Stat. § 13.03, subd. 1 provides that, “All government data collected, created, received, maintained or disseminated by a government entity shall be public” unless otherwise classified under state or federal law.

38. The responsible authority at the MPCA “shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use” pursuant to Minn. Stat. § 13.03, subd. 1.

39. The responsible authority at the MPCA shall establish procedures consistent with Chapter 13 of the Minnesota Statutes to “insure that requests for government data are received and complied with in an appropriate and prompt manner” under Minn. Stat. § 13.03, subd. 2(a).

40. The MPCA has not provided public records to Schmidt & Salita in an appropriate and prompt manner,” as required by Minnesota law.

41. Among other things, on May 17, 2019 the MPCA advised Schmidt & Salita that it was “closing out the requests” for public records, even though it failed to provide all public records that were requested by the law firm.

42. On May 28, 2019 Schmidt and Salita, through its counsel at Swanson Hatch, P.A., requested a narrowed group of public records that were not provided by the MPCA in response to the April 17, 2019 request made by Schmidt & Salita under the MGDPA. Most of the requested

documents should have been, but were not, produced by the MPCA in response to the April 17, 2019 request of Schmidt & Salita.

43. The MPCA has not provided public documents in response to the request made on behalf of Schmidt & Salita on May 28, 2019, nor has it provided a timetable for when the documents would be provided despite repeated requests by counsel for Plaintiff.

44. Minn. Stat. § 13.03, subd. 3(e) provides that, “The responsible authority of a government entity that maintains public government data in a computer storage medium shall provide to any person making a request under this section a copy of any public data contained in that medium, in electronic form, if the government entity can reasonably make the copy or have a copy made.” Schmidt and Salita made a request to the MPCA that data be provided in this format, but the MPCA has failed to do so.

45. Minn. Stat. § 13.03, subd. 3(f) provides that if the responsible authority of the MPCA determines that requested data is classified to deny the requesting person access, the responsible authority shall inform the requesting person of the determination and shall cite the specific legal basis on which the determination is made. The MPCA has withheld access to public records but has failed to cite the basis on which its withholding was made.

46. Minn. Stat. § 13.08, subd. 4 provides that a person seeking to enforce the person’s rights to access public data under the MGDPA may bring an action in district court to compel compliance with Chapter 13 of the Minnesota Statutes and may recover costs and disbursements, including reasonable attorney’s fees, as determined by the Court. Subdivision 4 of Section 13.08 also authorizes the Court to impose a civil penalty against the government entity that withheld the data.

47. Minn. Stat. § 13.08, subd. 4 provides that the government entity that violates the MGDPA may be enjoined by the district court, which may make any order or judgment as may be necessary to prevent the use or employment by any person of any practice which violates the MGDPA.

WHEREFORE, Plaintiff Schmidt & Salita requests judgment as follows:

1. Pursuant to Minn. Stat. § 13.08, subd. 2 and the common law, temporary and permanent injunctive relief enjoining the MPCA from failing to provide public documents requested by Plaintiff or otherwise violating any provision of the MGDPA as it relates to Plaintiff's requests for public records.

2. Pursuant to Minn. Stat. § 13.08, subd. 4, a court order to compel the MPCA to comply with the MGDPA and provide Schmidt & Salita with access to the requested public records.

3. An award of Plaintiff's reasonable attorneys' fees and costs and disbursements pursuant to Minn. Stat. § 13.08, subd. 4.

4. Other available remedies authorized by Chapter 13 of the Minnesota Statutes and such other and further legal and equitable relief as the court deems just and proper.

August 20, 2019

/s/ Lori Swanson
Lori Swanson
Attorney License No. 0254812
Swanson Hatch, P.A.
431 South Seventh Street
Suite 2545
Minneapolis, MN 55415
(612) 315-3034
lswanson@swansonhatch.com

Counsel for Schmidt & Salita, PLLC

August 20, 2019

/s/ Dean Salita

Dean Salita

Attorney License No. 240643

Schmidt & Salita, PLLC

13911 Ridgedale Drive, Suite 325

Minnetonka, MN 55305

(952) 473-4530

dsalita@mnlaw.team

Counsel for Schmidt & Salita, PLLC

ACKNOWLEDGMENT

Plaintiffs, by and through the undersigned, hereby acknowledge that sanctions may be imposed for a violation of Minn. Stat. 549.211.

August 20, 2019

/s/ Lori Swanson

Lori Swanson

Attorney License No. 0254812

August 20, 2019

/s/ Dean Salita

Dean Salita

Attorney License No. 240643