



Minnesota Center for Environmental Advocacy

The legal and scientific voice protecting and defending Minnesota's environment

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BY ELECTRONIC AND U.S. MAIL

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**Re: Minnesota Steel Industries Final Environmental Impact Statement
Comments of Minnesota Center for Environmental Advocacy**

Dear Messrs. Ek and Ahlness:

We write on behalf of the Minnesota Center for Environmental Advocacy ("MCEA") with comments on the Final Environmental Impact Statement ("FEIS") for Minnesota Steel Industries' ("MSI") proposed mining and steel making project ("Project"). MCEA is a Minnesota nonprofit environmental organization whose mission is to use law, science, and research to preserve and protect Minnesota's natural resources, wildlife, and the health of its people. MCEA has state-wide membership. The mining Project involves environmental impacts in many of the areas of MCEA's work, including water quality, natural resources, public health, and energy. Thank you for the opportunity to offer comments on the FEIS for the Project.

MCEA appreciates the Minnesota Department of Natural Resources' ("DNR's") and the U.S. Army Corps of Engineers' ("USACE's") (collectively "the RGU's") responses to the comments of MCEA and others on the Draft EIS and the additional information included in the FEIS. Nonetheless, MCEA maintains many of the objections we stated in our April 2, 2007, comments, including but not limited to our objection to the Minnesota Pollution Control Agency's ("PCA's") conclusion that the dewatering and augmentation discharges may be allowed without a National Pollution Discharge Elimination System ("NPDES") permit. We note that the U.S. Environmental Protection Agency ("EPA") stated similar concerns. Because of resource and time limitations, however, we have limited our comments on the FEIS. We outline below the omissions and insufficiencies that, in particular, make the FEIS inadequate.

I. AVAILABILITY OF MATERIALS FOR PUBLIC PARTICIPATION.

MCEA does not agree with the DNR and USACE that the way in which technical documents have been made available to the public for this project meets the spirit or intent of the environmental review laws. DNR and USACE have provided no reasonable justification for failing to put the incorporated references on the internet so that the public could have access to them. As members of the public who are experienced in reviewing EISes, we submit that, in fact, the failure to post the technical documents "imped[ed] governmental and public review of the project." Minn. R. 4410.2400. The treatment of technical documents, so obviously the core of the review here, also fails to comply with 40 C.F.R. 1502.21 which provides that "[n]o material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment." This is particularly the case with regard to this FEIS because the project is very large with many components, and the FEIS itself generally presents conclusory statements and cites to the technical documents for support. We find it disheartening that, rather than listening to this feedback, state and federal regulators seek to justify the lack of transparency in this process by simply asserting that the minimum regulatory requirements have been met. Response to Comments, IG-07.01. In light of the fact that state and federal regulators could have quite easily established a web page and made the supporting materials available to the public (or required MSI to do so), the decision not to make the documents publicly available on the internet was not "reasonable." The DNR and USACE's approach to information access in this instance has impeded public participation and does not satisfy the spirit or intent of state and federal regulations.

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Moreover, the DNR's and USACE's response stating that "all project documents" are reviewable pursuant to the Minnesota Data Practices Act is misleading given MCEA's experience with regard to MSI's carbon analysis. As you will recall, MCEA made a specific request pursuant to the Data Practices Act for all documents related to the carbon study, including any drafts, underlying calculations, spreadsheets, notes, etc. Rather than gathering the responsive documents from MSI and its consultants, DNR denied MCEA's data practices request, asserting that the information was not government data because it was not in DNR's possession. See May 11, 2007, Letter to MCEA from Scott Ek. Clearly, DNR had the authority, and the obligation to assemble the information MCEA had requested. See Minn. R. 4410.0400, subp. 3 ("the proposer of the project . . . shall supply any data reasonably requested by the RGU . . .") State agencies "shall make and preserve all records necessary to a full and accurate knowledge of their official duties." Minn. Stat. § 15.17. Federal law similarly requires that the agency independently verify the accuracy of the information in the context of the National Environmental Policy Act ("NEPA") process. See e.g., *Utahns for Better Transp. v. Department of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) ("NEPA require[s] that the agency verify the accuracy of information supplied by an applicant") (citing 40 C.F.R. § 1506.5(a)). While an agency can allow the NEPA document to be prepared by the applicant, the agency

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(1) must independently evaluate the information and is responsible for its accuracy, and (2) make its own evaluation of the environmental issues and take responsibility for the scope and content of the document. 40 C.F.R. 1506.5; *see also, Sierra Club v Corp of Engineers*, 701 F.2d 1011, 1038 (2nd Cir 1983) (USACE may not delegate EIS responsibility to a state/local agency with different interests/objectives).

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The MSI-produced carbon analysis has been made part of the FEIS which, MCEA assumes, means that the state and federal agencies responsible for the EIS have adopted it. MCEA fails to see how the documents it requested would not be "necessary to a full and accurate knowledge" in deciding to adopt the MSI carbon analysis. *See* Minn. R. 4410.0400, subp. 2 ("RGU's shall be responsible for verifying the accuracy of environmental documents")

Minnesota's environmental review rules state as their purpose: to aid in providing an understanding of the impact a proposed project will have on the environment "through the preparation and public review of environmental documents." Minn. R. 4410.0300, subp. 3. The federal NEPA regulations state that "public scrutiny [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). The inadequate access to the underlying documents in this case means that the agencies have failed in their duties under federal and state environmental review laws.

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II. THE FEIS FAILS TO ADDRESS ENVIRONMENTAL CONSEQUENCES FROM MSI'S POWER CONSUMPTION.

The FEIS does not adequately address the environmental impacts of the 450 megawatts of electricity MSI says it needs to operate. Indeed, the FEIS inexplicably fails to provide any analysis at all about the power needed for this project. In response to MCEA's earlier comment on this issue, regulators have quoted a statement from the draft EIS that "any new power production facilities would not be a direct result of the Proposed Project and would be built (or not built) independently of the decision on the feasibility of the Proposed Project." IG-70.35. The statement is non-responsive.

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There are at least three problems with this approach. First, the statement that no new facilities or generation will be needed to meet MSI's electricity needs is contrary to MSI's public statements and conduct. Second, it is based on a misapprehension of power consumption —, regardless of whether a new facility is built to supply MSI with electricity, the fact is that it will consume huge amounts of electricity and the generation of that electricity creates environmental impacts. Those impacts, along with alternatives and mitigation options, must be evaluated in the FEIS. And third, it reflects a misunderstanding of the legal obligation to assemble in one EIS all environmental consequences of a project, including information from any connected action, all indirect as well as direct effects, and also the cumulative impacts of the project and other past, present or reasonably foreseeable future actions. Electricity generation is a connected

action, it is arguably a direct and unquestionably an indirect effect of the project, and it is a plainly foreseeable additional impact that must be considered in the FEIS's review of cumulative effects.

A. The Assumption That MSI Will Not Require New Electricity Generation Is Factually Unsupported.

The contention that any new power plant would be built or not built without regard to the MSI project appears to be calculated specifically to avoid detailing the environmental consequences of MSI's enormous electricity consumption. It is not clear whether this statement is based on a representation by MSI or on the belief of state and federal regulators. In any case, the statement is contradicted by MSI's public statements and conduct during the 2007 Legislative session. MSI objected to legislation that would have prevented the building of new power plants or the importation of electricity from new plants. During a hearing of the Minnesota House of Representatives Environment and Natural Resources Committee, MSI's representative responded to a question on how the legislation would affect the MSI project, stating:

MSI will require a great deal of electric energy . . . and that is going to require . . . new power coming into the state or new power in the state of Minnesota to be generated . . . [MSI] is probably the largest construction project in the state of Minnesota that's ever been done . . . it's going to require a good deal of energy and that energy has to come from somewhere.

Testimony of Jim Girard, March 6, 2007, available at http://www.house.leg.state.mn.us/audio/archivescomm.asp?comm=9000&ls_year=85.

MSI sought and received an exemption in the legislation from the prohibition on electricity from new power plants. The exemption specifically allows for new power plants if they are providing power to the MSI project:

Subd. 5. Exception for new steel production facility. The prohibitions in subdivision 3 do not apply to increases in statewide power sector carbon dioxide emissions from a new steel production project located in a taconite relief area that has filed an application for an air quality permit from the Pollution Control Agency prior to January 1, 2007.

Laws of Minn 2007, Ch. 136, Art 5, Sect. 3.

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Obviously, if MSI intended to receive its power from existing generation, it would have had no reason to object to the legislative prohibition on new facilities or to seek an exception for its electricity consumption. The assumption in the FEIS is plainly contradicted by MSI's public statements and its conduct and is evidence that the agencies have failed in their duty to fully examine and verify or correct statements in the FEIS.

The notion that no new power will need to be generated to supply MSI with electricity is also contradicted by public statements and planning documents submitted by Minnesota Power, the utility from which MSI will have to buy its power.¹ For example, in the Minnesota Public Utilities Commission's ("PUC's") May 19, 2006, Order accepting Minnesota Power's resource plan, the PUC states that Minnesota Power's "need for baseload power has unexpectedly grown, with forecasts showing a need for an additional 200 megawatts by 2010 or 2011." This new need is due mainly to expanded operations by several of the Company's large industrial customers." May 19, 2006 Order, Docket No. E-015/RP-04-865, p. 4 (available at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=3085521>). Thus, Minnesota Power was projecting the need for more baseload for its existing industrial customers. This does not account for the additional 450 megawatts MSI, a new customer, will consume.

Likewise, utility representatives would object to the FEIS claim that the Mid-Continent Area Power Pool (MAPP) has sufficient capacity to absorb a 450 megawatt increase in consumption without new generation. According to the Central Minnesota Municipal Power Association, Minnesota will have a net capacity deficit by 2020 of 2,725 megawatts, even factoring in the renewable energy objective and optimistic projections for energy efficiency savings. See Exhibit A, March 14, 2007, flyer (attached). Projections provided by the utilities to state legislators show a more than 1,000 megawatt deficit below reserve margins of capacity by 2013. See Exhibit B, MAPP Reserve Margins graph (attached).² Debra Bergen, representing Missouri River Energy Services, stated that an additional 5,000–7,000 megawatts of baseload capacity will be needed by 2020 to "keep the lights on" based on projected need. February 22, 2007, Minnesota Senate Energy, Utilities, Technology and Communications Committee Hearing, http://www.senate.leg.state.mn.us/media/media_list.php?ls=85&archive_year=2007&category=committee&type=audio#header (Bergen test. at 1:02). Many utility representatives testified about the Midwest Independent System Operator's maximum generation alert on February 5, 2007, when a cold

¹ Apparently the City of Nashwauk may provide power to part of the facility. While Nashwauk may be an independent provider, MCEA's understanding is that Nashwauk also would get any power it sells to MSI from Minnesota Power.

² Exhibits A and B were presented at the March 14, 2007, hearing of the Minnesota House of Representatives Energy, Finance, and Policy Division.

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snap resulted in a loss of normal reserve capacity and Xcel Energy briefly cut electricity to some industrial and commercial customers. *Id.*; see also, U.S. Department of Energy, Energy Assurance Daily, Feb. 8, 2007, available at <http://www.oe.netl.doe.gov/docs/eads/ead020807b.pdf>. Thus, the idea that MSI will have its 450 megawatts of electricity consumption met by existing capacity is in direct conflict with representations made by utilities with regard to the projected availability of grid capacity. The statement relied on in the FEIS is contradicted by MSI's own conduct during the legislative session and contrary to all utility-provided assessments of capacity and future baseload need.

B. MSI's Power Consumption Requires The Generation Of Electricity Regardless Of Whether Its Needs Fall Within Existing Capacity.

Second, regardless of whether any "new power production facilities" are built because of MSI's electricity demand or whether it is met with existing "capacity," the fact remains that MSI's electricity consumption will require electricity generation. "Capacity" refers to the ability to generate, not actual generation. In other words, even if there is "capacity" for an additional 450 megawatts to be generated, it will actually have to be generated to meet MSI's demanded consumption. It is axiomatic that the consumption of electricity requires the generation of electricity. As a result of that generation, environmental impacts will occur.

Moreover, the consumption of electricity by MSI will mean that electricity will be generated for MSI that would not otherwise be generated. The FEIS treats electricity as if it were like other consumer goods – a widget is produced in the hope it will be purchased and used; if excess widgets are already produced (e.g., excess "capacity") and a customer comes along to purchase them, one could argue that the initial production of the widgets was not dependent on the customer's purchase. Electricity is not like a widget. Electricity cannot be produced and then put on a shelf for later purchase. Rather, electricity is generated to meet demand. Thus, if MSI is consuming up to 450 megawatts of electricity, it is causing an equivalent amount to be generated. This is true whether the generation is accomplished by existing facilities or requires new facilities. It is also true even if one imagined MSI's consumption falling within existing generation levels. For example, if a 450 megawatt user closed or 450 megawatts were saved through conservation, the result would not be that those 450 megawatts get generated and put on a shelf, the result would be that 450 fewer megawatts would be generated (and concomitant pollutants avoided). In order for MSI to operate, 450 megawatts of electricity will have to be generated that would otherwise not be needed. The environmental impacts of that electricity generation must be accounted for and analyzed in the FEIS.

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C. State And Federal Regulations Require That The FEIS Address The Environmental Impacts Of Electricity Generated For MSI.

State and federal regulations require that the environmental impacts of generating electricity for consumption by MSI be addressed in the FEIS. NEPA requires consideration of “any adverse environmental effects which cannot be avoided should the proposal be implemented.” 42 U.S.C. § 4332(C)(ii). The consumption of 450 megawatts of electricity requires the generation of 450 megawatts of electricity, and that generation has the potential for significant adverse environmental effects. State and federal regulations also make clear that the FEIS must consider the electricity generated for MSI’s use because it is a connected action, an indirect (if not direct) effect of the Project, and a reasonably foreseeable result of the Project that will compound its cumulative impacts.

Generation of electricity for MSI is a connected action that must be addressed in the FEIS. A connected action includes any action that “cannot or will not proceed unless other actions are taken previously or simultaneously.” 40 C.F.R. § 1508.25(a)(ii). Under Minnesota Rules, connected actions include any projects where one induces the other or where one project is a “prerequisite for the other.” Minn. R. 4410.0200, subp 9b(A) and (B). MSI cannot make steel without the generation of electricity – the project “will not proceed unless other actions [i.e., electricity generation] are taken previously or simultaneously.” The generation of electricity is plainly a “prerequisite” to MSI’s proposed project.

The FEIS must also consider both direct and indirect effects of the proposed action. Indirect effects include those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8. Electricity generation for consumption by MSI has the potential to produce significant air pollutants. This pollution is a reasonably foreseeable consequence of MSI’s proposed project and, therefore, must be addressed in the FEIS. *See, Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (remanding EIS to federal agency to evaluate air quality degradation, a foreseeable indirect effect of rail line expansion that would increase demand for coal for power generation).

The environmental effects of generating electricity for MSI must also be addressed because federal and state law require consideration of the cumulative impact of the proposed action and “other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions.” 40 C.F.R. § 1508.07; Minn. R. 4410.0200, subp. 11. Even if electricity was not considered a “connected action” and even if the air pollution resulting from the generation of electricity were not deemed an “indirect effect” of the project, the environmental effects of generating electricity for MSI would still

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have to be considered in the cumulative impact analysis. Because the FEIS fails to account for the environmental effects of MSI's power consumption, it is legally deficient and inadequate.³

The failure to include environmental effects of electricity use in the FEIS has led to absurd assertions. For example, in the section entitled "Mitigation Opportunities for Air Emissions" (4.7.3, pp 4-150-51), the FEIS lists "offsets associated with the use of green energy" as a mitigation for MSI's industrial air emissions. The idea that MSI would get credits to "offset" its industrial emissions by purchasing green energy is ludicrous and shows how the failure to include the full impact of MSI's project, including its energy use, has made this FEIS wholly inadequate. Rather than getting "offsets," MSI must account for all of the air emissions associated with its needed 450 megawatts of power. If MSI chooses green sources for its power (which MCEA would support), there will be fewer pollutants. Adding fewer pollutants is not the same as reducing the amount of pollution overall or not generating the pollutant in the first instance. Simply purchasing less polluting power is not an "offset" since that power, absent the new project, would never have been generated. MSI may seek to reduce the amount of pollutants it emits and the environmental effects of its project by purchasing "green" power. But such a reduction would not be an "offset." This error highlights the importance of including MSI's power consumption in the FEIS's analysis of environmental effects so that a true picture of the Project's full impact is provided to regulators and the public.

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D. The Environmental Consequences Of Generating 450 Megawatts Of Electricity Could Be Enormous And Alternative Sources Must Be Evaluated In The FEIS.

Four hundred fifty megawatts is a very large amount of power, with significant environmental effects. For example, the three Taconite Harbor plants Minnesota Power is using to meet increased industrial demand total 225 megawatts. The Big Stone II power plant, the subject of extensive review, will generate 600 megawatts. <http://www.oah.state.mn.us/cases/BigStone/index.html>.

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³ It would be instructive for the RGU's in this case to review the decision in *Mid States Coalition for Progress* cited above. There, the 8th Circuit Court of Appeals reviewed the final EIS for DM&E's proposed upgrade to existing rail lines and building of new rails to reach the Wyoming Power River Basin coal reserves. The EIS did not address emissions from the burning of additional coal, a likely effect of developing the rail line. Minnesotans for an Energy-Efficient Economy and Sierra Club argued that the RGU's failure to include the environmental effects of burning more coal was error and the 8th Circuit agreed. Although DM&E asserted that the extent of increased coal burning was "speculative" and therefore not required to be evaluated in the EIS, the court reasoned that "when the nature of the effect is reasonably foreseeable but its extent is not, we think that the agency may not simply ignore the effect." *Mid-States Coalition*, 345 F.3d at 549. With MSI, no speculation is required with regard to nature or extent of the effect. MSI has said it requires 450 megawatts of electricity and the agencies clearly have the know-how to evaluate the environmental consequences of generating electricity.

The environmental impacts of generating 450 megawatts of electricity are obviously significant. In addition, they vary widely depending on the fuel used. *See, e.g.,* Exhibit C, Minnesota Power, Your Electricity, Your Choice brochure (attached). For example, if MSI gets its electricity from a coal-fired plant, its carbon dioxide emissions will be 3.5 times higher than if it gets its electricity from a natural gas plant. *Id.* Carbon dioxide emissions from hydro, solar, or wind sources would be zero. There are equally large variations with regard to other pollutants as well, such as nitrogen oxides, sulfur dioxide, particulate matter, and mercury. *Id.*

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The FEIS does not identify the amount of electricity MSI will actually use (in megawatt hours). This is a shortcoming of the FEIS that obviously must be corrected in order to evaluate the environmental effects associated with MSI's electricity consumption. Rick Heede, an expert in greenhouse gas emissions and mitigations hired by MCEA to evaluate MSI's greenhouse gas emissions, estimated 3,460 megawatt hours per year based on conversations with PCA staff. *See* Exhibit D, Heede, *Greenhouse Gas Emissions Inventory* (attached).

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With regard to greenhouse gases (measured in CO₂ – equivalents, "CO₂-eq"), Mr. Heede concluded that the electricity for MSI's operations alone would contribute 2.41 million tons of CO₂-eq per year to the atmosphere.⁴ *Id.* Based on Mr. Heede's calculations, greenhouse gas emissions from electricity consumption alone make up 49% of the project's overall greenhouse gas emissions. If, in fact, MSI's electricity comes from coal, the CO₂-eq emissions would total 3.7 million tons per year. If the electricity comes from a natural gas plant, the CO₂-eq emissions would total 1.1 million tons. This figure could be further reduced by possible co-generation at the MSI facility. Hydro, wind, and solar sources have no CO₂-eq emissions.⁵ This type of analysis must be developed in the FEIS for all of the criteria pollutants – the FEIS must document the emissions associated with MSI's power consumption, analyze the environmental effects of these additional emissions, and evaluate alternatives and strategies for mitigation.

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With regard to mercury emissions, a particular concern in Northern Minnesota, MSI's power use has the potential to contribute significantly to an already identified pollution problem. If coal supplies MSI's power, it will contribute 223

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⁴ The greenhouse gas emissions coefficient for this calculation is based on an average of Minnesota Power's generation sources.

⁵ These calculations are provided to exemplify the significant environmental effects, and the significance of the variation between effects based on different power sources. They are simple calculations of estimated MWh electricity use taken from the Heede report multiplied by air emission factors published by Minnesota Power in Exhibit C. These calculations are not intended to substitute for the analysis required in the FEIS.

pounds of additional mercury to the atmosphere per year.⁶ The emission of 223 pounds of additional mercury is in direct conflict with Minnesota's approved mercury Total Maximum Daily Load ("TMDL") which contemplates that the energy sector will move from the 1,834 pounds emitted in 2000 to an initial target of 675 pounds. See Minnesota Mercury TMDL, p. 46, available at <http://www.pca.state.mn.us/publications/wq-iw4-01b.pdf>. Ultimately the energy sector needs to emit a total of only 313 pounds of mercury per year under the plan. *Id.* Fuel sources other than coal emit far less mercury or none at all. Clearly, MSI's power use will have significant environmental consequences and must be addressed in the FEIS. Cf., *Port of Astoria, OR v. Hodel*, 595 F.2d 467, 479 (9th Cir. 1979) (requiring EIS on environmental consequences of power contract with industrial user).

Because the FEIS failed to include emissions from power consumption, the emission inventories and subsequent modeling are deficient. For example, the modeled impacts to Class II and Class I areas presented in sections 4.7.2.2.1 and 4.7.2.2.2 do not account for additional air emissions from the generation of electricity for MSI. Portions of the Human Health Risk Assessment suffer from the same deficiency, particularly with regard to mercury. Without an enforceable commitment that MSI's power will come from sources that do not have air emissions, the RGU's cannot ignore the effect of these known pollutants in the FEIS. See, *Mid States Coalition for Progress*, 345 F.3d at 550 ("For the most part, [the RGU] has completely ignored the effects of increased coal consumption . . . We believe that it would be irresponsible . . . to approve a project of this scope without first examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption.")

The failure to analyze environmental consequences of power generation also means the RGU's failed to consider alternatives and options for mitigating those effects. The U.S. Supreme Court has noted the important role mitigation strategies play in environmental review:

To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences. The requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from the language of the Act and, more expressly, from CEQ's implementing regulations. Implicit in NEPA's demand that an agency prepare a detailed statement on "any adverse environmental effects which cannot be avoided should the proposal be implemented," 42 U.S.C. § 4332(C)(ii), is an understanding that the EIS will discuss the extent to

⁶ Calculated as described in footnote 3.

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which adverse effects can be avoided. More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the "action-forcing" function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects. . . Recognizing the importance of such a discussion in guaranteeing that the agency has taken a "hard look" at the environmental consequences of proposed federal action, CEQ regulations require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b) (1987), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c).

Roberston v. Methow Valley Citizens Council, 490 U.S. 332, 351-52 (1989) (internal citations and footnotes omitted). Here, without any discussion of the environmental consequences of MSI's electricity consumption and without any of the alternatives and mitigation measures available, the RGUs, other agencies involved in permitting, and the public cannot evaluate the severity of the adverse effects or the reasonableness of alternatives.

In sum, the absence of any analysis related to MSI's electricity consumption leaves a gaping hole in the environmental review for this project. There is no justification for this error. Generation of electricity for use by the project will have enormous environmental effects. A range of alternatives and mitigation strategies could and should be studied in an effort to ameliorate the effects of this electricity consumption. The FEIS is inadequate without further evaluation in this regard and will not withstand a legal challenge. MCEA requests that the FEIS be withdrawn and that the RGUs develop an analysis of the environmental impacts of MSI's power consumption that is thorough and detailed and includes analyses of alternatives and mitigation strategies.

III. THE FEIS FAILS TO ACCOUNT FOR OR EVALUATE ENVIRONMENTAL EFFECTS OF AIR EMISSIONS FROM MOBILE SOURCES.

Mobile industrial sources of air pollutants will be a significant environmental effect from the MSI project, especially the mine operation, and the FEIS is inadequate in its complete failure to disclose and analyze the mobile sources and their impact to Northern Minnesota. Two primary pollutants of concern are particulate emissions ("PM") and nitrogen oxides ("NOx"). NOx are a significant concern for Minnesota's Class I areas, Voyageur's National Park and the Boundary Waters Canoe Area Wilderness ("BWCA"). PM is a significant health and visibility concern. There is ample documentation and evidence, even from a simple internet search, regarding the large contributions of industrial mobile sources to PM pollution and NOx (and it appears that in urban areas,

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ozone is a concern.) Numerous EPA documents discuss the contributions by industrial engines, including specifically mining, and the need for their control. *See, e.g.*, <http://www.epa.gov/nonroad/nrstudy.pdf> and <http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/pdf/04-11293.pdf>. Similarly, studies are available that discuss in detail the contributions of mobile industrial sources to PM pollution and attendant health concerns, and NOx pollution. http://www.environmentaldefense.org/documents/2738_DieselDivide.pdf. Moreover, this information should already be in the process of being assembled as it will be a necessary component of MSI's air permit.

NOx is a significant contributor to haze pollution. Northern Minnesota's Class I regions receive the most stringent protections of air quality under the Clean Air Act ("CAA"), with no deterioration allowed. 42 U.S.C. § 7475. Unfortunately, due to sources of air pollution in Minnesota and the surrounding region (in particular, the mining industry), air quality in the Class I areas has significantly declined. <http://www.pca.state.mn.us/air/regionalhaze.html>. Northern Minnesota's mining industry has been identified by PCA as the primary contributor to the haze pollution in the Class I protected national park and wilderness areas. *Id.* Minnesota is required to be part of a regional effort to return Voyageurs and the BWCA to meeting Class I requirements for haze – to essentially recreate natural conditions. PCA is working on a plan to meet those requirements. *Id.* The plan calls for certain percentage *reductions* in current Minnesota haze-producing emissions by 2018 in order to stay on the path to required reductions by 2064. Currently, PCA's estimates show that even with expected reductions in existing sources, the 2018 targets for Voyageurs and BWCA will not be met. Therefore, additional reductions must be sought and obtained. Given the current expectations about the inability to address the threat to some of our most valuable state resources, it is inexcusable that the FEIS fails to even mention the contribution of industrial mobile sources at MSI to the haze pollution in the BWCA and Voyageurs. The FEIS fails to even acknowledge that such a problem exists. Despite plentiful and easily-accessible information regarding this significant source of pollutants and their impacts on human health and the environment, the FEIS is devoid of any information or discussion of mobile sources of air pollution at the mine or other components of MSI's operation and is therefore inadequate.

IV. THE FEIS FAILS TO ADDRESS THE ENVIRONMENTAL EFFECTS OF MSI'S CONTRIBUTION TO INCREASED LEVELS OF GREENHOUSE GASES.

The FEIS does not adequately address or take into account climate change, nor have the RGUs sufficiently responded to MCEA's earlier comments raising this issue.

The FEIS contains no information about the environmental effects of continued increases in greenhouse gas emissions, despite the significance of this environmental effect and the significance of MSI's contribution to greenhouse gas emissions. Rick Heede estimates that total emissions from the project will be 4.9 million tons CO₂-eq per year, and this

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amount, based mainly on MSI-supplied figures, does not include many emission sources that would be included in a comprehensive cradle-to-grave analysis of the project. *See*, Exhibit D, Heede Report (attached). It also excludes additional greenhouse gas effects attributable to the project because of its elimination of carbon sinks (through destruction of wetlands, for example). Thus, the 4.9 million is a relatively conservative number.

Four point nine million tons of CO₂-eq per year is a significant increase in the amount of greenhouse gases in Minnesota. For example, between the years 2000 and 2004 the total increase in greenhouse gas emissions from all sources in the state was 2.3 million, less than half the estimated emissions for MSI alone. *See*, Exhibit E, Ciborowski, *Greenhouse Gas Inventory*, (attached). MSI, a single industrial project, represents more than two times the amount of increase from all sectors over that four-year period. MSI alone would cause a 200% increase in the rate at which state greenhouse gas emissions are going up, assuming all other emissions remained constant. Similarly, current greenhouse gas emissions from Minnesota's industrial sector total approximately 18 million tons per year. *Id.* MSI's emissions alone would increase the industrial emissions by 25%. It is clear that the MSI project would cause a substantial increase in the state's greenhouse gas emissions.

Moreover, the MSI project is proposed at a time when the State has a goal to achieve substantial reductions in greenhouse gas emissions. 2007 Laws of Minn. Ch. 136, Art. 5, Sec. 2, subd. 1 ("It is the goal of the state to reduce statewide greenhouse gas emissions across all sectors producing those emissions to a level at least 15 percent below 2005 levels by 2015, to a level at least 30 percent below 2005 levels by 2025, and to a level at least 80 percent below 2005 levels by 2050"). The decision on whether or how to permit MSI's project obviously has important public policy implications. MSI proposes to double the rate of increase in emissions when state law requires planning for steep reductions. Clearly, the RGUs must evaluate the project's greenhouse gas emissions, the environmental consequences of continued increases in emissions, and alternatives and mitigation strategies.

Environmental review laws require "a detailed statement" on the environmental consequences of a proposed action. 42 U.S.C. § 4332(C); Minn.Stat. § 116D.04, subd. 2a. Further, the level of significance of the environmental impact must dictate the attention paid to the issue in the FEIS. 40 C.F.R. § 1502.2(b) ("Impacts shall be discussed in proportion to their significance"). In the response to comments, the RGUs state that "PCA acknowledges the significance of global warming as a serious environmental problem" RTC IG-07.16. Based on the state's acknowledgement that global warming is a significant and serious environmental problem, it has an

⁷ It is unclear why DNR and USACE, in responding to MCEA's comments, state what the PCA believes with regard to global warming. *See* 40 C.F.R. § 1503.4(a) (the agency preparing the FEIS has the obligation to respond to comments).

obligation to treat it as such in the FEIS. As stated in MCEA's initial comments, it is beyond dispute that climate change presents the largest single threat to environmental resources, with consequences affecting water, air, land, and all living things, including humans. It violates basic environmental review principles that climate change effects from this project, a proposal that will contribute significant amounts of greenhouse gases, increasing the rate and scale of impending climate changes, are not addressed in this FEIS. Information on climate change impacts on the environment is readily available and, in many instances, already in the government agencies' possession. *See*, Links and Resources at Minnesota Climate Change Advisory Group, Climate Change Impacts, <http://www.mnclimatechange.us/background-impacts.cfm>.; *see also*, Global Climate Change and its Impact on Minnesota, <http://www.pca.state.mn.us/hot/globalwarming.html#gastrends>. Climate change and its concomitant environmental effects is a consequence of greenhouse gas emissions. MSI is a major source of emissions and these environmental effects must be addressed in the FEIS.

The Response to Comments also states that, while agreeing that climate change is a serious and significant environmental problem, the PCA "believes that it must be addressed holistically and not just by an individual facility." *Id.*, fn. 7 above. MCEA agrees that significant environmental problems such as climate change must "be addressed holistically." Mercury and sulfur dioxide emissions, for example, have created serious and significant environmental problems that state-wide, national, and international efforts are underway to address. Likewise, water quality impairments are environmental problems that involve many actors and rarely are caused or addressed "just by an individual facility." Yet, PCA certainly would not suggest that the environmental effects of mercury and sulfur dioxide emissions and the discharge of pollutants to water resources need not be disclosed and analyzed in a FEIS. PCA's reasoning – apparently adopted here by DNR and USACE – makes no sense and does not justify the complete lack of discussion of climate change effects in this FEIS. The FEIS must provide a detailed analysis of the environmental consequences of the proposed project. The fact that MSI is not the sole source of global warming pollutants does not exempt DNR and USACE from analyzing the environmental effects of climate change, an impact that MSI's pollution clearly will contribute to.

The RGU's response to MCEA also states that "it should be noted to the commenter that currently there are no regulations governing CO2 or greenhouse gas emissions." MCEA suggests the RGUs study Article 5 of Minnesota's Next Generation Energy Act of 2007, entitled "Global Climate Change; Greenhouse Gas Emissions." Laws of Minn. 2007, Ch. 136, Art. 5. Minnesota Legislators and Governor Pawlenty would likely express surprise that state and federal regulators believe Minnesota has no laws related to greenhouse gas emissions. According to the Governor, Minnesota's 2007 legislation is directly targeted at "tackling greenhouse gas emissions." *See*, Office of Governor, Press Release, May 25,

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2007, available at http://www.governor.state.mn.us/mediacenter/pressreleases/PROD008146.html?BV_SessionID=@@@@1113723098.1184172964@@@@&BV_EngineID=ccceaddlgdilkkfjkcenndffidgon.0. The RGUs may also wish to review the United States Supreme Court decision in *Massachusetts v. U.S. Environmental Protection Agency*, ___ U.S. ___, 127 S.Ct. 1438, 1447-48 (2007) in which Justice Stevens provides a history dating to the late 1970's, when "the Federal Government began devoting serious attention to the possibility that carbon dioxide emissions associated with human activity could provoke climate change" and rejected EPA's argument that greenhouse gases are not "air pollutants" as defined in the Clean Air Act. 549 U.S. at ___, 127 S.Ct. at ___. Justice Roberts, in his dissent, appears to disagree with the RGU's assertion that there are currently no laws concerning greenhouse gases as well. He says "[Global warming] may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change." *Id.* at _____.

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Moreover, the notion that a pollutant must be "regulated" before it can be considered in an EIS is simply wrong. Nothing in NEPA or the Minnesota Environmental Policy Act places such a constraint on the scope of environmental review. *See*, 42 U.S.C. § 4332(C)(i) (requiring a detailed statement of the "environmental impact of, the proposed action"); Minn. Stat. § 116D.04, subd. 2a (requiring a statement that "analyzes [the proposed action's] significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of the action could be mitigated.") According to the plain language of the federal and state statutes, if an action has an environmental effect, that effect must be analyzed in a detailed EIS, and alternatives and mitigation strategies must be explored, regardless of whether the cause of the environmental impacts is subject to current regulation. *See*, e.g., *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997, 1028-29 (S.D. Cal. 2003) (rejecting argument that CO₂ and ammonia need not be considered in environmental review because they are not pollutants identified in federal or state law).

The FEIS includes in an appendix the "carbon footprint" analysis MSI did of its greenhouse gas emissions. While this document provides a baseline inventory for some of the project's greenhouse gas emissions, it provides no analysis of the environmental effects of those emissions. State and federal environmental review laws make clear that environmental review must be analytic, not encyclopedic. Minn. Stat. § 116D.04, subd. 2a; 40 C.F.R. § 1502.2(a). In addition, it does not appear that the RGUs made any attempt to evaluate the MSI-submitted inventory, which grossly underestimates the actual greenhouse gas emissions from project. Compare Exhibit D with EIS App. O. There is no independent review or analysis by the DNR or USACE contained in the FEIS. Nor does it appear that DNR or USACE reviewed the PCA's evaluation of MSI's carbon

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footprint, since it is not referenced or included in the FEIS. It is clear that the RGUs – the agencies ultimately responsible for preparing and independently evaluating the FEIS, 40 C.F.R. § 1506.5(c) – gave little, if any, attention to the greenhouse gas emissions from the project or the environmental impacts of climate change.

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Finally, because the RGUs have not considered any of the environmental effects of climate change to which MSI's emission will contribute, they also have not evaluated alternatives or strategies that could mitigate emissions and subsequent effects. State and federal law require such inquiries and analysis in an EIS: Minn. Stat. § 116D.04, subd. 2a; 40 C.F.R. § 1500.2(e).

The FEIS is inadequate without a thorough analysis of the environmental effects caused by continued increases in greenhouse gas emissions, and it will not withstand a legal challenge. Therefore, MCEA requests that the FEIS be withdrawn and that the RGUs develop an analysis of the environmental impacts of MSI's greenhouse gas emissions that is thorough and detailed and includes analyses of alternatives and mitigation strategies

V. THE FEIS FAILS TO TAKE INTO ACCOUNT THE LIKELY EFFECTS OF CLIMATE CHANGE WHEN MODELING ENVIRONMENTAL IMPACTS.

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MCEA's earlier comments noted that the predicted consequences of climate change should be factored into models that evaluate many of the project's environmental impacts. Known likely consequences will particularly affect water resources, and as a large water user, the environmental consequences of this project will likely be amplified by climate change. If it is presumed, based on changes occurring in the climate, that heavier convective events coupled with more frequent drought periods are more likely in the future than they were in the past, it is not appropriate to evaluate MSI's water plan based on a model that was calibrated using historical climate records.

The RGU's response to MCEA's earlier comment in this regard is not sufficient. The RGU's state "[c]limate change is not accounted for in the data used for the modeling described above. This modeling is done using an existing data set that has undergone review and quality assurance measures and it can not be readily modified to address various projected scenarios due to climate change." RTC IG-07.17.⁸ Certainly, state and federal regulators are not taking the position that an existing model, because it exists, is the preferred and only model for evaluating environmental effects. If assumptions built into the existing model are no longer valid, the modeled results are no longer valid. Clearly, if circumstances change that would require a model to be updated, it is the responsibility of regulators to develop an updated model that can be similarly reviewed

⁸ There appears to be an error in the numbering of comments and responses. The issue raised here is labeled "18" on MCEA's comment letter, but the response labeled IG-07.18 is not relevant to this issue. MCEA therefore assumes the response in IG-07.17 was the intended response. Note also that responses IG-07.16 and IG-07.18 are identical.

for quality assurance. The RGU's response does not explain why climate change was not accounted for in the modeling data, how predicted changes in the climate may corrupt or alter modeled impacts, how long it would take or how complex it would be to modify existing data sets to include projected climate change, whether they are working on developing updated models, and if not, why not, nor did the RGUs cite to any authority. The response is insufficient. *See* 40 C.F.R. § 1503.4 (requiring an explanation "why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response").

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VI. WETLANDS

Generally, the RGUs' responses to MCEA comments on the wetlands portion of the EIS and the largely unchanged FEIS are inadequate. Many of the responses to comments are simply nonresponsive or appear to be addressing a topic other than that commented on. Therefore, MCEA restates and incorporates its comments on wetlands herein relative to the inadequacy of the FEIS. A few additional items bear emphasis.

The discussion in the FEIS and the response to comments regarding the location of the plant site is entirely inadequate. The only additional information provided is that the old Butler plant site is not discussed among alternatives because it is located on an ore body leased by MSI. Presumably, the entire project area is the "ore body leased by MSI," so this statement means nothing and changes nothing relative to MCEA's original comments on this point. Moreover, location of the ore body at the old Butler plant site is not relevant to consideration and analysis of the different environmental effects from using that site as opposed to the preferred location. Again, the old Butler site will clearly impact many fewer high and moderate quality wetland and may obviate the need for some extended infrastructure such as pipelines. Environmental review requires those differences in environmental effects to be disclosed and analyzed regardless of whether the alternative is the "preferred" alternative.⁹ The so-called alternatives in the FEIS are not really alternatives at all, but simply different building configurations. This is entirely inadequate under the case law and regulations cited in MCEA's original comments. The technical documents and the appendices cited to support the RGUs' arguments regarding adequacy go only to physical and engineering requirements of the plan, not alternative environmental effects analysis. MCEA does not object to a discussion of why a site such as the old Butler plant site may not be preferred, but that does not completely relieve MSI or the RGUs of the obligation to consider and analyze it from an environmental perspective. The FEIS is completely inadequate in this regard.

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⁹ The RGUs claim the Butler site alternative and its environmental effects relative to the preferred alternative do not have to be explored because the Butler site alternative "would not meet the underlying goal of the project." This statement is entirely unsupported in the record. It appears that it would meet the engineering requirements and given the fact of an existing plant site, the presumption is it would meet the requirements.

In regard to indirect wetland impacts, the FEIS still fails to analyze in any detail what those are and how they will occur. The response to comments, item IG-07.26 appears to say that effectively 100% of the wetlands over the entire MSI project area will be eliminated and/or significantly downgraded either directly or indirectly. If this is in fact the case, the FEIS must clearly make such a statement. The FEIS must identify which wetlands are affected by the MSI project, the nature of the wetlands affected, how they are affected, what the wetland will look like or be changed to as a result of the effect and how that effect might be avoided or minimized. The response to comments provides that the only way to decrease the impact is to decrease the project footprint. Exactly. That is what alternatives analysis is supposed to provide. Stating the obvious is not a substitute for complying with the law and providing real analysis. The FEIS is entirely inadequate in this regard.

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As noted in MCEA's original comments, the cumulative impacts analysis for wetlands is inadequate under that law as it is constrained to the project site. That is not cumulative impacts analysis, but simply the required project analysis. The responses to comments essentially admit this and indicate that the scoping document provided that cumulative impacts analysis of wetlands outside the project area would be eliminated and therefore the FEIS is adequate. A scoping document does not and cannot allow the RGUs and the project proposer to circumvent clear legal requirements to provide cumulative impacts analysis of wetlands in a geographically and ecologically relevant area expanding beyond the project boundaries. See, citations in MCEA's original comment letter. Again, an obvious choice is analysis of cumulative wetland impacts within the Mississippi headwaters.

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The FEIS is inadequate in its complete disregard for the cumulative effects of the project on wetlands in combination with impacts from global warming. The responses to comments claim that this particular issue is ignored because the potential future effects from global warming are too uncertain. First, even if that is the case, the law requires an explanation of the lack of information and how the FEIS analysis could be affected should that information be known. That is, the public and other decision-makers need to understand that the analysis of wetland impacts may be limited by the lack of certainty on global warming impacts and that the effects could therefore be much more significant. See, 40 C.F.R. § 1506.22 which provides that in the case of incomplete or unavailable information, if the information can be obtained without exorbitant cost, the agency must obtain it and include it in the EIS. If the information cannot be obtained and/or the cost is exorbitant, then the agency shall include a statement that the information is lacking, a statement of the relevance of the information to evaluating impacts on the environment, a summary of existing credible scientific evidence which is relevant to evaluating impacts, and the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. Obviously, as set forth in detail above, there is significant and readily available information within the scientific community about potential impacts from global warming. The Intergovernmental Panel

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on Climate Change has extensive documentation and summaries of the potential impacts of global warming in the middle of the continent. Or, for example, just last year, researchers published a paper demonstrating that wetlands in the Dakotas will be hard hit and that species dependent on those wetlands will then become more dependent on wetlands in parts of Minnesota. See, Johnson, W. Carter, B.V. Millett, T. Gilmanov, R.A. Voldseth, G.R. Guntenspergen, D.E. Naugle, Vulnerability of Northern Prairie Wetlands to Climate Change, *BioScience* 55:863-872 (2005). Clearly, the FEIS fails to comply with the requirements set forth in federal law regarding incomplete or unavailable information regarding the impacts of global warming coupled with the impacts of the project on wetlands.

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VII. LYNX

A. Formal Consultation With The U.S. Fish & Wildlife Service Is Required.

The FEIS and record documents it cites fail to address the lynx-related concerns lodged by MCEA. The FEIS omits and fails to consider significant information necessary for a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the Project. The FEIS fails to collect and consider together for reasoned analysis important and relevant information that is scattered in encyclopedic fashion throughout the FEIS and record documents. As with omission of significant information, the FEIS' failure to consider together in a reasoned fashion rationally-related information scattered in various documents precludes the reasonably thorough discussion required by NEPA of the significant aspects of the Project-specific and cumulative probable environmental consequences. The FEIS violates NEPA. The Project will adversely affect lynx in Minnesota, and thus the Project must be withdrawn or the USACE must engage in formal consultation with the U.S. Fish & Wildlife Service (USFWS).

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B. The FEIS Omits Critical Facts And Information.

The FEIS omits discussion of the significance of the Project Area falling within a USFWS-mapped "core area" of lynx habitat. The FEIS fails to reveal or discuss the importance of habitat linkages to the movement of lynx within and between core areas and secondary areas, and the overall persistence of lynx at the southern edge of their range. There is no estimate of the size of Minnesota's lynx population, nor is any effort made to measure the size and therefore importance of the share of Minnesota's total known lynx mortality that is road-related. Again, federal regulation requires that even uncertain information be provided and shared with a discussion by the agency of how the uncertainty may affect the analysis.

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1. **The FEIS omits all mention of the 2005 final Lynx Recovery Outline, and fails to discuss the significance the Project Area's status as "core area" lynx habitat, and other relevant information.**

The FEIS gives an incomplete and inaccurate impression of the importance of the Project Area, leading the reviewing public to infer that habitat there is not of any special importance to lynx. In the section describing the Project's affected environment, the FEIS states: "[t]he project area ... is within the species range. However, no Critical Habitat for lynx has been designated by the USFWS within or near the proposed Minnesota Steel project area." FEIS, at 6-16. First, the lynx Critical Habitat designation mentioned is apparently one of at least eight decisions recently described by the USFWS Director as having been inappropriately tampered with by development-minded political appointees in the present administration. These decisions, are likely to be reversed and resolved in a way that affords more protection to the federally-listed species at issue, according to Mr. H. Dale Hall, the USFWS Director.¹⁰ Second, the FEIS and all other record documents omit any mention of the *Final Lynx Recovery Outline* (the "Recovery Outline"), prepared by the USFWS in September, 2005, and which "serves as an interim strategy to guide recovery efforts and inform the critical habitat designation process for the contiguous United States population of the Canada lynx until a draft recovery plan has been completed." See, Exhibit F, Recovery Outline, at 1. The Recovery Outline is significant because it depicts much of northeastern Minnesota (encompassing the Project Area) as being "core area" habitat for lynx. *Id.* at 21.

"Core areas" represent the most important lynx habitat, the areas deemed by USFWS as being most necessary to ensure the survival of lynx in the Lower 48 states. As the Recovery Outline explains: "[f]ocusing lynx conservation efforts on these core areas will ensure the continued persistence of lynx in the contiguous United States by addressing fundamental principles of conservation biology." *Id.* at 4. According to the Recovery Outline, "[t]he areas with the strongest long-term evidence of the persistence of lynx populations within the contiguous United States,

¹⁰ "H. Dale Hall, the director of the [USFWS] said he had asked the agency's regional managers to submit for review cases in which Ms. MacDonald might have inappropriately bent the process to fit her political agenda. Mr. Hall winnowed the list to eight instances in which he said he expected that her actions would be reversed. 'We wouldn't be doing them if we didn't suspect the decisions would be different,' Mr. Hall said in a telephone conference with journalists. 'It's a blemish on the scientific integrity of the [USFWS] and the Department of the Interior.' The species that could receive additional protection are ... and the Canada lynx." The New York Times, Friday, July 21, 2007, "U.S. Agency May Reverse 8 Decisions on Wildlife." By John M. Broder. (see: <http://www.nytimes.com/2007/07/21/washington/21interior.html?ex=1185595200&en=baef56996220d665&ei=5099&partner=TOPIXNEWS>)

are defined as 'core areas.' Core areas have both persistent verified records of lynx occurrence over time and recent evidence of reproduction." *Id.* at pp. 3-4.

The 2007 Lynx Assessment Report, prepared by MSI, (the "Assessment Report"), mentions "core area" in three locations, yet fails to explain the term, or that it is defined and has special significance for lynx. In turn, this hampers the ability of the public to understand the significance of core habitat and what it means to lynx protection and recovery. This is the case even if the public were to engage in a careful reading of the FEIS and all the documents to which the FEIS refers, because neither the FEIS nor its cited documents so much as hint at the Recovery Outline's existence. The three sentences mentioning "core area" are found in the executive summary on page i ("The mine project site is in the core area used by lynx in Minnesota."); the introduction to the study purpose section on page 1-1 ("The project is in the core area used by lynx in Minnesota."); and in section 3.4.2., which describes observations of lynx in the vicinity of the study area since 2000 ("Based on sightings of lynx since 2000, the proposed mine project site is on the western edge of the core area used by lynx in Minnesota (Figure 5)."). Contrary to informing the reader of the special significance of "core area" habitat, Figure 5 contains no mention or delineation of the lynx "core area," though it does depict lynx Critical Habitat. The citation to Figure 5, which mainly displays lynx sightings, merely adds to the impression that core area is merely a colloquialism bearing no special significance. This tactic in the FEIS is "hiding the important information in plain sight" and should not be condoned by the agencies.¹¹ The fact that the mapped "core area" for lynx in the Great Lakes encompasses the Project Area is of real importance, the significance of which is obscured by the FEIS' silence on the matter, and by the 2007 Lynx Assessment Report's uninformative recitations of the term, unadorned as they are by explanation, analysis, or reference to the seminal federal document. The FEIS' omission skews the description of the Project's affected environment and precludes the "reasonably thorough discussion" required by NEPA of the significant aspects of the Project's

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¹¹ The Assessment Report is also cloudy in its statements about lynx habitat, in that it identifies suitable lynx habitat in the area, but then also contains numerous instances where descriptions of lynx habitat in the area tend toward the negative. For example, "We observed habitat that was marginally suitable for lynx in all townships of the study area" (2007 Lynx Assessment Report at Executive Summary); cf. "We observed habitat that was at least marginally suitable for lynx in all townships of the study area, except where lands had been disturbed by historic or ongoing mining operations, and where agricultural, community, or residential development had occurred" (*Id.* at 5-3)). This calls into serious question the usefulness of the document and calls into question whether the agencies have adequately met their obligations to ensure that the FEIS is accurate and constitutes the requisite hard look.

Report states its conclusion that lynx will not be much affected by the Project-specific effects on wildlife corridors (“Thus, the proposed project may increase the distance lynx must travel by about a mile from current travel distances for lynx to access habitats to the north or south of the project area” – 2007 Lynx Assessment Report at 7-10), this cannot be reconciled with contrary information available but scattered elsewhere in the FEIS and other documents. Most importantly, there is no discussion or recognition of the Wildlife Corridor CEA’s conclusion regarding the “significant” nature of the loss of Corridor #3 and diminishment of Corridor #4, much less the cumulative effects on habitat connectivity of actions up and down the Mesabi Range. Moreover, the FEIS and 2007 Lynx Assessment Report limit their consideration of the movement – and dispersal-limiting effects to lynx that are within six miles of the Project, omitting any consideration of effects to lynx elsewhere. In short, there is no reasonably thorough discussion of the significant aspects to the environmental consequences of the Project, specifically, impeding lynx movement from areas north of the Mesabi Range to “secondary area” habitat located south and east of Duluth in Minnesota and northwestern Wisconsin, and thereby potentially removing a recognized “contribut[ion] to lynx persistence” in the “core area” of northeastern Minnesota.

In sum, the FEIS omits mention of LCAS discussion and guidance on linkages; that mining is recognized as an activity that threatens linkages; that lynx population stability depends on dispersal rates that are reduced by damage to or loss of linkages; and that population persistence in Northeastern Minnesota may be harmed by actions that impair movement of lynx from north of the Mesabi Range to areas farther south. These omissions prevent a reasonably thorough discussion of the significant aspects of the Project’s probable environmental consequences. The omissions prevent a proper understanding of the Wildlife Corridor CEA’s conclusions regarding wildlife corridors through the Mesabi Range as a result of the Projects’ and all cumulative effects.

3. The FEIS does not provide an estimate of lynx population size and omits important information relating to mortality in Minnesota.

In gauging the risks to a population’s persistence, important data or estimates that must be factored in include the effective population size and mortality rate. The FEIS and its related documents never discuss an estimate of lynx population size. It should be possible, with sufficient caveats, to make logical high and low estimates of the lynx population. Personal communication, Ron Moen, 7/11/2007. Discussion in the FEIS

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probable environmental effects. *Oregon Natural Resources-Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997).

2. The FEIS omits information on the importance of wildlife linkages to lynx dispersal and persistence at the southern edge of lynx range.

The FEIS cites the Lynx Conservation Assessment and Strategy (LCAS) just once, noting that it, “guides management activities that could affect both denning and foraging habitat for lynx.” *Id.* at 6-17. This description is misleading. It portrays the scope of LCAS guidance far too narrowly by omitting any mention of LCAS guidance on management activities that could affect linkages - habitat areas that enable or improve the success and rate of lynx movements and dispersal across barriers that divide blocks of suitable habitat. The LCAS emphasizes the importance of linkages, and its guidance urges that linkages should be protected and improved.

In addressing “Risk Factors Affecting Movement,” the LCAS states: “[k]ey linkage areas are especially important in the southern portions of lynx range.” LCAS at 5-3. The FEIS and 2007 Lynx Assessment Report fail to make any mention of this fact, even though Minnesota and northwestern Wisconsin comprise a large part of the southernmost lynx range in the Great Lakes region. Lynx Recovery Outline at 21; 2007, Lynx Assessment Report at 1-1. The LCAS also states: “Mineral prospecting and extracting activities may affect important lynx habitats or linkage areas. As programmatic plans are updated or revised, such areas should be evaluated to determine if withdrawal from mineral leasing is warranted.” LCAS at 5-2. This reference to linkages is, likewise, omitted from the FEIS.

The importance of habitat connectivity and the corridors and linkages between patches of habitat is not a mystery. As the LCAS explains, “[c]onnected forested habitats allow lynx, and other large and medium size carnivores, to easily move long distances in search of food, cover and mates.” LCAS at 7-14 (Conservation Measures to Address Movement and Dispersal). Both the LCAS and the FEIS cite McKelvey et al. (2000a) and that research’s conclusion that, “fragmented forest cover types, high vagility of lynx, and linkages in population dynamics suggest that lynx in the contiguous United States are arranged as metapopulations.” LCAS at 4-18; 2007 Lynx Assessment Report at 3-6. The LCAS continues in the next sentence to describe the McKelvey (et al., 2000a) findings whereas the 2007 Lynx Assessment Report does not. The 2007 Lynx Assessment Report and FEIS omit this important conclusion. “Metapopulation stability depends on not only habitat quality but also dispersal rates

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between habitat islands.” LCAS at 4-18; *cf.* 2007 Lynx Assessment Report at 3-6.

That population persistence may be threatened by decreases in the relative ease of lynx movement and dispersal is not surprising. The Mesabi Range is a long linear barrier to wildlife presenting an inability to connect blocks of suitable habitat on either side. Decreasing those corridors and lowering their quality with projects like MSI, means the barrier is that much more effective at separating suitable habitat blocks and reducing their connectivity. It also means a lower the lynx dispersal rate from habitat on one side of the barrier to habitat on the other. Lynx may have to travel farther and/or pass through more inhospitable habitat that carries higher risks of mortality, in order to disperse through or around the Mesabi Range. Impeding dispersal harms lynx by reducing the likelihood of lynx persistence in Northeastern Minnesota because their peripatetic movements may lead them to attempt to cross and re-cross the Mesabi Range, leading to higher mortality rates.¹²

It is illogical and untenable to conclude that the effects of further reductions in habitat connectivity north and south of the Mesabi Range could be insignificant. Obviously, if the entire history of mining activity along the Mesabi Range was being proposed as a single new project today, the total mining/industrial footprint would have a significant effect on lynx movement and dispersal, and would significantly adversely affect the lynx population in Minnesota.¹³ It appears that significance is being improperly gauged in the FEIS.

The danger is even more important for lynx in East-Central Minnesota and Northwestern Wisconsin, which are classified in the Recovery Outline as “secondary area” habitat. Recovery Outline at 21. According to the Recovery Outline, the USFWS hypothesizes that, “secondary areas may contribute to lynx persistence by providing habitat to support lynx during dispersal movements or other periods, allowing animals to then return to ‘core areas.’” *Id.* at 4. The importance of dispersal of lynx from “core area” habitat in Minnesota to and back from “secondary area” habitat in Minnesota and Northwestern Wisconsin is omitted from the FEIS and MSI 2007 Lynx Assessment Report. While the 2007 Lynx Assessment

¹² The MSI 2007 Lynx Assessment Report describes travel distances of 60 miles as being “characteristic” of lynx, with dispersal distances of several hundred miles (up to 380 miles recorded) not unusual. *Id.* at 3-3.

¹³ “[The Mesabi Range] presents itself regionally as a long linear barrier to regional travel from northwestern to southeastern sections of the Arrowhead. The minerals formation is approximately 100 miles in length.” Wildlife Corridor CEA at 4. “The mine features provide a variety of impediments to travel and thus feasible travel between habitats northwest and southeast of the formation is restricted to travel corridors shown in Figure 1.” *Id.* at 6.

and 2007 Lynx Assessment Report¹⁴ regarding anticipated road-related lynx mortality is cursory, conclusory in nature, not supported with explanation or analysis specific to roads, and does not address the cumulative impacts from road and traffic changes in the Project Area, along the Mesabi Range, or in Northeastern Minnesota.

The FEIS and its attached documents do not mention or discuss implications of lynx road and rail mortality data collected during the attempted lynx reintroduction in the Adirondacks.¹ In addition, while minimum lynx road and rail mortality data collected in Minnesota are recited in abbreviated form,¹⁵ the share of total known lynx mortality that those six lynx road-related deaths represent is omitted from the FEIS and 2007 Lynx Assessment Report. Omission of minimum known road-related mortality in relation to total known mortality prevents a reasonably thorough discussion of the relative importance of roads. Without lynx population size estimates, it is not possible to evaluate how Project-related and cumulative road and traffic rates may affect lynx population persistence.

The FEIS' lack of treatment of cumulative road effects including road-related mortality does not constitute the quantified, detailed, analytical evaluation that characterizes the "hard look" required by NEPA. *Neighbors of Cuddy Mt. v. United States Forest Serv.*, 137 F.3d 1372, 1379-1380 (9th Cir., 1998) ("To 'consider' cumulative effects, some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the [action agency's] decisions, can be assured that the [action agency] provided the hard look that it is required to provide. [...] General statements about "possible" effects and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided.").

The FEIS fails in its task of providing a full, rational, analytical look at the Project's affects on lynx. The FEIS does not respond to evidence showing that the Project will adversely affect the lynx. The Project will adversely affect the lynx in Minnesota, and the USACE must either withdraw the Project or initiate formal consultation with the USFWS.

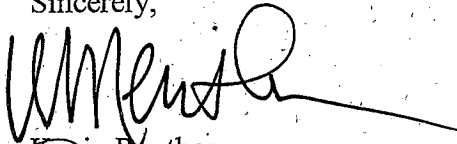
¹⁴ "Roads will be constructed although their impact on lynx should be minor, given the other habitat loss and disturbance associated with the project and limited number of lynx found near the proposed mine project site." 2007 Lynx Assessment Report at 7-8.

¹⁵ "Of the 435 verified, potential, and unverified lynx observations in the Minnesota DNR (2007) database for 2000 to 2006, there are five records of lynx being killed by a vehicle, and one record of a lynx being killed by a train...." (2007 Lynx Assessment Report at 7-7).

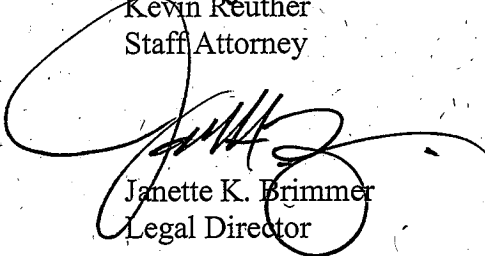
VIII. CONCLUSION

For all of the reasons above as well as reasons stated in MCEA's April 2, 2007, comment letter, MCEA contends that the Minnesota Steel FEIS is inadequate. MCEA requests that all cited documents and sources in this letter as well as all documents and sources cited in its April 2 letter be made part of the official record for the RGUs' decision. Thank you for the opportunity to comment on this FEIS. Please let us know if you have any questions.

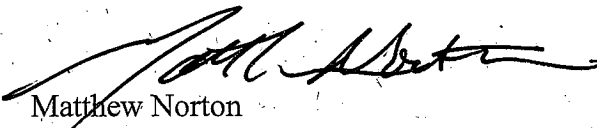
Sincerely,



Kevin Reuther
Staff Attorney



Janette K. Brimmer
Legal Director



Matthew Norton
Forestry Advocate

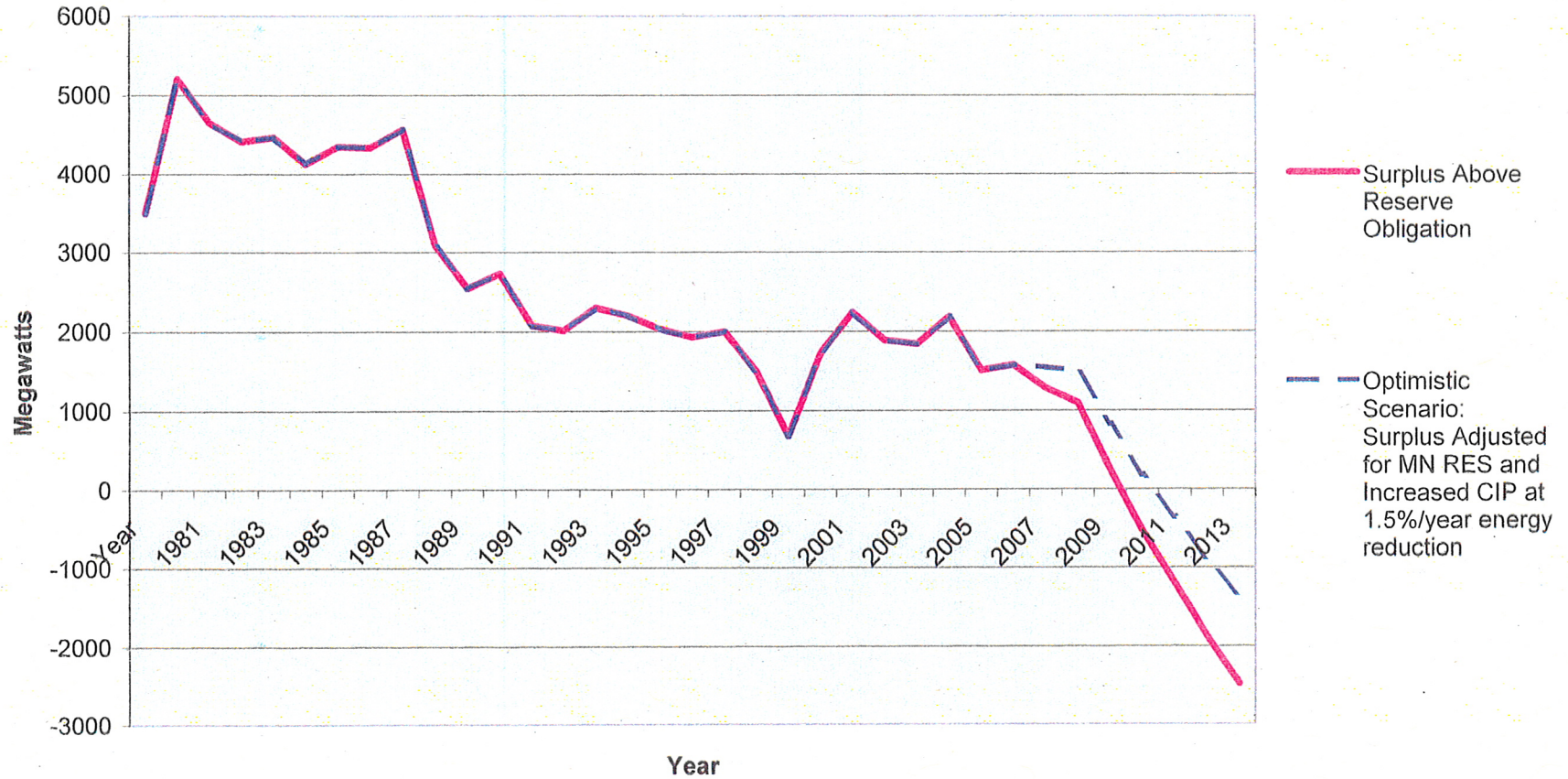
Enclosures

Minnesota Department of Energy
2007

**Minnesota Electric Demand Growth and Resources
Cumulative Impact on Capacity Needs, 2007 to 2020**

	<u>Megawatts</u>
Growth in MN Generation Requirements, 2007 to 2020:	4,550
New Renewable Energy Standard (RES) Impact	(900)
Optimistic Scenario: Additional Conservation assuming 1.5% energy/year	<u>(925)</u>
Net Capacity deficit in 2020	2,725

CHART 2
MAPP-U.S. Reserve Margins without Big Stone Unit II¹
1980-2005 Actuals
2006-2014 Projected



1. Source of base surplus data: Mid-Continent Area Power Pool (MAPP).
 Projected figures from MAPP Load & Capability (L&C) Report, July 12, 2005.
 Results from 2006 L&C report are similar.

WHAT CAN YOU DO?

You can participate in Minnesota Power's energy conservation programs listed below.

Minnesota Power's Residential Conservation Programs

- ❖ Purchase wind power. Support the growth of renewable energy in Minnesota Power's generation supply. ([WindSense Program](#))
- ❖ Install a geothermal heat pump. Tap a renewable resource—the constant temperature in the earth—for energy-efficient and environment-friendly heating and cooling. Receive a rebate and an installer/dealer incentive. Visit [www.mnpower.com/hvac](#). ([Geothermal Heat Pump Program](#))
- ❖ Receive a FREE energy-saving SmartPak (energy-efficient showerhead, faucet aerator, and pipewrap) when purchasing an electric water heater, or if you have an existing electric water heater. These products can help save you energy, water, and money. Visit [www.mnpower.com/foundmoney](#). ([SmartPak Program](#))
- ❖ Request an in-home electric use analysis. Get the most from your energy dollar by learning more about energy use in your home. Qualify for water-saving showerheads, faucet aerators, pipe wrap, water heater blankets, blower door analysis, caulking assistance, and weather stripping. If you qualify as a low-income customer, you may be eligible for replacement of electric water heaters and refrigerators at little or no cost. ([Energy Partners Program](#))
- ❖ Install a grid tie solar electric system and receive a rebate through Minnesota Power's SolarSense Program. The electricity generated from a solar electric system helps conserve our natural resources while preserving the environment. Visit [www.mnrenewables.org](#). ([SolarSense Rebate Program](#))
- ❖ Build your home to meet energy-efficient performance standards. Lower energy costs, improve building durability, and increase market value. You may also qualify for a rebate. Visit [www.mnpower.com/foundmoney](#). ([Triple E New Construction Program](#))
- ❖ Purchase ENERGY STAR® appliances or lighting at participating ENERGY STAR retailers and you may

qualify for rebates. Visit [www.mnpower.com/foundmoney](#). ([ENERGY STAR Program](#))

- ❖ Purchase a high-efficiency furnace with an electronically commutated motor (ECM) and you may qualify for a rebate. Visit [www.mnpower.com/hvac](#). ([HVAC Program](#))
- ❖ Properly install a new central air conditioner or tune up your existing air conditioner and you may qualify for a rebate. Visit [www.mnpower.com/hvac](#). ([HVAC Program](#))

Minnesota Power's Commercial/Industrial Conservation Programs

- ❖ Purchase wind power. Support the growth of renewable energy in Minnesota Power's generation supply. ([WindSense Program](#))
- ❖ Request an energy analysis or design assistance on your existing or new building and learn how to get the most out of your energy dollar. Visit [www.mnpower.com/powergrant](#). ([Energy Analysis Program](#))
- ❖ Install high-efficiency lighting and motors and qualify for a rebate. Visit [www.mnpower.com/powergrant](#). ([PowerGrant Rebate Program](#))
- ❖ Install innovative technologies and/or replace existing equipment with high-efficiency electric products and qualify for a rebate or grant based on energy savings and technological innovation. Visit [www.mnpower.com/powergrant](#). ([PowerGrant Program](#))

WHERE CAN YOU LEARN MORE?

The Minnesota Public Utilities Commission requires electric utilities to provide customers with information on the costs, reliability, and air emissions related to the fuels used to generate electricity.

For more information, call Minnesota Power at 218-722-2625 or 1-800-228-4966, or visit [www.mnpower.com](#).

You may also contact the Minnesota Department of Commerce at 1-800-657-3710 or [www.commerce.state.mn.us](#) for more ideas on saving energy, or the Minnesota Pollution Control Agency at 651-297-2274 or 1-800-646-6247, or [www.pca.state.mn.us/programs/electricity.html](#) for more information on air emissions.

