

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF ITASCA

NINTH JUDICIAL DISTRICT

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Minnesota Center for Environmental Advocacy,

File No. CV-07-3338

Plaintiff,

v.

Mark Holsten, in his official capacity as  
Commissioner, Minnesota Department of  
Natural Resources,

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
ORDER for JUDGMENT  
and MEMORANDUM**

Defendant,

and

Minnesota Steel Industries, LLC,

Defendant-Intervenor.

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The above-entitled matter came on for hearing before the undersigned Judge of District Court, on July 28, 2008 pursuant to each party's cross-motions for summary judgment. Plaintiff Minnesota Center for Environmental Advocacy was represented by Kevin Reuther, Attorney at Law. Defendant Minnesota Department of Natural Resources was represented by Jill Schlick, Attorney at Law. Defendant-Intervenor Minnesota Steel Industries, LLC was represented by Thaddeus R. Lightfoot, Attorney at Law.

Based on the administrative record, the arguments and memoranda of counsel, and the file and proceedings herein, this Court makes the following:

#### FINDINGS OF FACT

1. Plaintiff, Minnesota Center for Environmental Advocacy ("MCEA"), is a non-profit organization, the goal of which is to develop, communicate and implement environmental change.
2. Defendant Mark Holsten is the commissioner of the Minnesota Department of Natural Resources ("DNR").
3. Defendant-intervenor Minnesota Steel Industries, LLC, ("MSI") has proposed a project consisting of the following: "an open pit taconite mine, adjacent stockpile areas, and the construction of new facilities – a crusher, concentrator, pellet plant, a plant for producing direct reduced iron, and a steel mill consisting of two electric

arc furnaces, two ladle furnaces, two thin slab casters, a hot strip rolling mill, and construction of a new tailings basin" in Itasca County at the site of the former Butler Taconite Mine near Nashwauk, Minnesota.

4. An Environmental Impact Statement ("EIS") must be prepared for all new metallic mining and processing facilities. Minn.R. 4410.4400, Subp. 8. An EIS is "an analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated." Minn.Stat. §116D.04, Subd. 2a.
5. The DNR is the responsible governmental unit ("RGU") tasked with preparing the EIS for metallic mining and processing facilities. Minn.R. 4410.400, Subp. 8. The DNR partnered with the Army Corps of Engineers to prepare a joint state and federal EIS.
6. On all projects where preparation of an EIS is mandatory, it must be preceded by an Environmental Assessment Worksheet. Minn.R. 4410.1000, Subp. 2. An EAW "is designed to rapidly assess the environmental effects which may be associated with a proposed project" and serves primarily to "serve as the basis to begin the scoping process for an EIS." *Id.*
7. The scoping period lasted from July 18, 2005 through August 17, 2005.
8. MCEA did not offer any written comments during the scoping process.
9. A draft EIS was made available for public comment on February 16, 2007.
10. MCEA submitted a comment letter, dated April 2, 2007, on the Draft EIS. (R. 11326-50). MCEA's comment letter addressed each of the issues raised in MCEA's complaint, but the comment letter did not raise the issue of the cumulative impact of this Project and other projects on global climate change.
11. The April 2, 2007 comment letter suggests that "[p]redicted consequences of climate change" be included in the DNR's evaluation of the environmental impacts of the project. (R. 11333). The potential consequences identified by MCEA are: "drought, heavier rain events, increased flooding, more violent storm events, and changes in vegetation and habitat" (*Id.*) (*citing* Union of Concerned Scientists, *Great Lakes Communities and Ecosystems at Risk* (available at <http://www.ucsusa.org/greatlakes>)). The document cited is not a part of the record.

12. The final EIS was made available for public comment in mid-June of 2007. The DNR responded to each of MCEA's comments.
13. At the request of MCEA, a carbon footprint analysis was prepared for inclusion in the FEIS. (R. 11570-591). This analysis estimated that the annual CO2 emissions from the facility would be 3.75 million tons per year.
14. MCEA prepared its own analysis of CO2 emissions. MCEA's expert estimated that the facility's CO2 emissions would be nearly 4.9 million tons per year. The record notes both estimates of expected CO2 emissions.
15. The DNR acknowledges that the facility will contribute greenhouse gases to the atmosphere and that those greenhouse gases will affect the environment. The DNR does, however, claim that it is "not within the state of the art to conduct an analysis of the impacts of MSI-related CO2 emissions on the environment."
16. The FEIS contains an extensive list of suggested mitigation measures including, but not limited to, the following suggestions to reduce GHG emissions: Integration of mining, processing and steel making facilities will reduce energy use and shipping and associated greenhouse gas emissions. Minnesota Steel's use of natural gas rather than coal will further reduce emissions of CO2.
17. MCEA submitted a comment letter, dated July 23, 2007 on the FEIS. (R. 11730-755). The letter did not raise the issue of the potential cumulative impact that this project and other projects could have on global climate change.
18. The FEIS notes: "Although there is general agreement in the scientific community that global climate change is occurring, there is not a consensus on what the specific results of climate change would be on the local climate in the vicinity of the project area. Since the future climate cannot be predicted, the EIS studies, including the cumulative wetland impacts analysis, did not attempt to speculate what the long-term impacts of global climate change would be in the study area. Rather, the analyses focused on reasonably foreseeable events, such as reasonably foreseeable future projects." (R. 11548).
19. The DNR's response to MCEA's suggestion that the EIS include predicted consequences of climate change when evaluating the impact of the Project is that "the MPCA [Minnesota Pollution Control Agency] does not believe that a reliable analytical technique or model exists to accurately determine the effects of the MSI project on climate change. Likewise, there is not a reliable method to accurately project the effects of climate change on the overall modeled environmental impacts for the project given the wide range of possible climate responses." (R. 11698).
20. *MCEA did not propose any analytical techniques or models to determine what effects the MSI project would have on climate change.*

21. The DNR also noted "Given the wide variety of factors that must be taken into account, it is difficult to predict how climate change will ultimately affect Minnesota in general. (Id.) The DNR cited to "the U.S. EPA's Global Warming Web site" for information on how global warming is expected to affect Minnesota's forests, water resources, and precipitation. (R. 11699-700). Identical information is found in a document produced by the MPCA entitled "Global Climate Change and its Impact on Minnesota." (Supp. R. 55-66). The MPCA document also suggests "According to an international scientific body known as the Intergovernmental Panel on Climate Change, the earth's average temperatures will rise between two and 10 degrees Fahrenheit by the year 2100, with northern latitudes like Minnesota at the upper end of the range. (Id. at 56).
22. The record includes a Yearly Water Balance Model (the "Model") prepared by, or on behalf of, MSI in connection with MSI's Water Appropriations Permits and Work in Public Waters Permits. (10828-10882). The model uses historical data from the years 1931-2000. (Id. at 10832) The "drought period of the 1930's was evaluated as an extreme dry condition. The 1964-68 period was the wettest five year period, and was modeled on a recurring basis to evaluate a hypothetical wet period. (Id.) The Model only assessed how much water would be available for the Project and how the Project is anticipated to affect levels of nearby water systems, including creeks, rivers, and lakes.
23. The DNR issued a Record of Decision on August 10, 2007. The record makes numerous findings and in those Findings notes the addition of Appendix O, the Carbon Footprint Analysis, to the FEIS and also notes that comment letters to the FEIS discuss "Increased Levels of Greenhouse Gases" and "Climate Change." (R. 11672-81).
24. Greenhouse gas emissions are not presently regulated. (R. 11332).
25. The DNR does not dispute that the addition of any CO<sub>2</sub> to the environment has an environmental effect. (R. 11698).
26. This project is projected to require 450 MW of electricity per year. (R. 8720).
27. The evidence in the record is that the project will be served by "existing baseload resources" (R. 11706-08).

Based upon the foregoing Findings of Fact, this Court draws the following:

#### CONCLUSIONS OF LAW

1. The decision of the DNR and Army Corps of Engineers to prepare a joint EIS does not mean that the EIS must meet federal standards in order to survive judicial review pursuant to state law. Minn. R. 4410.3900, Subp. 2 is a procedural

rule aimed at promoting efficiency, not a substantive rule designed to impose a greater regulatory burden upon projects.

2. The August 10, 2007 Record of Decision sufficiently incorporates information contained in the Appendices into the FEIS.
3. There is no merit to MCEA's judicial estoppel argument because the Minnesota Supreme Court has expressly declined to recognize the doctrine of judicial estoppels and the task of extending existing law is for the supreme court or legislature. See *State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn.App. 1987).
4. The findings in the FEIS relating to power consumption of the project were not arbitrary and capricious.
5. There is support in the record for the DNR's determination that it is beyond the state of the art to determine whether greenhouse gases emitted in connection with the Project could have significant environmental effects. Whether the cumulative effect of this Project and other Minnesota projects might have a significant affect on global climate change is also beyond the state of the art.
6. It was not arbitrary or capricious for the DNR to conclude that the FEIS adequately identifies alternatives and mitigation measures that could reasonably minimize adverse effects of the project, including greenhouse gas emissions.
7. The DNR rationally discounted predicted effects of global climate change when modeling the environmental impact of the Project because of the inconclusive nature of the predicted effects the project, individually and cumulatively, of global climate change.
8. The DNR's determination that the FEIS is adequate is supported by substantial evidence and was not, therefore, arbitrary and capricious.
9. Because the FEIS is adequate, the issue of whether district courts have authority to enjoin action on any permits or licenses is moot.

Based upon the foregoing Conclusions of Law, this Court makes the following:

#### ORDER FOR JUDGMENT

1. The plaintiff's motion for summary judgment is denied and plaintiff's complaint is hereby dismissed.
2. Defendant DNR's motion for summary judgment is granted and the DNR's determination of the adequacy of the Final Environmental Impact Statement is affirmed.

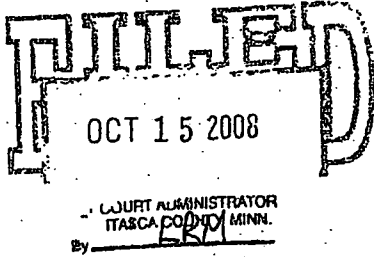
3. Defendants may collect their reasonable costs and disbursements from plaintiff.


Let the attached Memorandum be made a part hereof.

LET JUDGMENT BE ENTERED ACCORDINGLY:

Dated this 15<sup>th</sup> day of October 2008.

BY THE COURT:

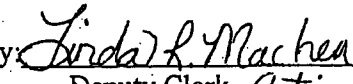


  
Jon A. Maturi  
Judge of District Court

JUDGMENT

I hereby certify that the foregoing Conclusions of Law constitute the Judgment of this Court.

DATED this 15<sup>th</sup> day of October 2008.

By   
Deputy Clerk Acting Court Administrator

## MEMORANDUM

The Minnesota Environmental Policy Act (MEPA) requires that an Environmental Impact Statement (EIS) be prepared for all new metallic mining and processing facilities. Minn.R. 4410.4400, Subp. 8. Minnesota Center for Environmental Advocacy (MCEA) is challenging the adequacy of the EIS that the Department of Natural Resources (DNR), claiming that it is inadequate because it is allegedly deficient in the following areas:

- 1) It fails to address power consumption;
- 2) It fails to address climate change impacts;
- 3) It fails to consider alternatives and mitigation measures to reduce or eliminate greenhouse gas emissions; and
- 4) It fails to account for climate change in modeling of the environmental impacts.

MCEA's objections to the EIS all relate directly to greenhouse gas emissions, specifically carbon dioxide.<sup>1</sup> The DNR and Minnesota Steel Industries (MSI) respond that the EIS does not need to address the issue of carbon dioxide emissions because they're not regulated and the decision of whether to regulate them is a policy question for the legislature. The DNR and MSI argue that even if the EIS is required to address the issue of global climate change, the EIS is adequate because it does sufficiently address each of the issues raised by MCEA.

An EIS will be deemed adequate if it:

- A) Addresses the potentially significant issues and alternatives raised in scoping so that all significant issues for which information can reasonably be obtained have been analyzed in conformance with part 4410.2300, items G and H;
- B) Provides responses to the substantive comments received during the draft EIS review concerning issues raised in scoping; and
- C) was prepared in compliance with the procedures of the act and parts 44100.0200 to 410.6500.

MEPA. Minn.R. 4410.2800, subp. 4. An EIS must include the information required by Minn. R. 4410.2300. An EIS is a tool for decision makers to use, it is not a substantive thing. See Minn.R. 4410.2000, Subp. 1; *MCEA v. MPCA*, 644 N.W.2d 457, 461 (Minn.2002).

A reviewing court may not substitute its judgment for that of the DNR. *Vermont Yankee Nuclear Power Corp., v. Natural Res. Def. Council, Inc.*, 435 US 519, 555, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978); *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 465 (Minn. 2002). This court must uphold the DNR's determination of adequacy unless the determination was arbitrary or capricious. See *Citizens Advocating Responsible Development (CARD,) v. Kandiyohi*

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<sup>1</sup> Even the claim that the EIS fails to address power generation is related to potential increase in greenhouse gas emissions in the generation of the power.

*County Bd. of Commr's*, 713 N.W.2d 817, 832 (Minn. 2006). If the responsible governmental unit takes a hard look at the issues involved and engages in reasoned decision making, then its determination that the EIS is adequate will likely be upheld. *Id.*

Prior to addressing the more substantive issues, the Court will briefly address the issues of judicial estoppel and the issue of compliance with federal standards in a joint state and federal EIS

#### **Judicial Estoppel**

The Minnesota Supreme Court has expressly declined to recognize the doctrine of judicial estoppel. See *State v. Pendleton*, 706 N.W. 2d 500, 507 (Minn. 2005); *Tereault v Palmer*, 413 N.W. 2d 283, 286 (Minn. App. 1987). Even if Minnesota did recognize the doctrine, it would not apply in this case. In order for the doctrine of judicial estoppel to apply three requirements must be met: (1) a party must take a later position that is clearly inconsistent with an earlier position; (2) the facts at issue should be the same in both cases, and (3) the party must have prevailed in its earlier position. *Bauer v. Blackduck Ambulance Association*, 614 N.W. 2d 747, 749-50 (Minn. App. 2000). The facts involved in *Center for biological Diversity v. National Highway Safety Transportation Board*, 508 F. 3d 508 (9<sup>th</sup> Cir. 2007) and this case are sufficiently distinguishable that the doctrine of judicial estoppels would not apply.

#### **Compliance with Federal Standards**

Minn. R. 4410.3900, Subp. 2 allows the State of Minnesota and the federal government to cooperate and issue a joint EIS so long as the federal laws are not in conflict with those of Minnesota. The rule is one of procedure, not substance. The mere joint effort for the purpose of efficiency does not alter the substance of Minnesota law in determining the adequacy of the state portion of the EIS.

#### **I. Failure to Address Power Consumption**

MCEA claims that the FEIS is inadequate because it fails to consider the effects of the 450 megawatts of power that the Project is expected to consume each year. MCEA sets forth a number of reasons why power generation must be considered in preparing the FEIS, including: that the electricity generated for the Project will result in adverse environmental effects that must be analyzed; the generation of electricity for the Project must be analyzed as a direct effect; generation of electricity for the Project must be analyzed as a connected action; and that the FEIS is required to discuss alternatives and mitigation measures that would reduce the Project's demand for power.

The DNR's response is that the FEIS is adequate because no new electricity will be generated for this project. The DNR also argues that even if the Project required the generation of electricity, it does not need to consider the effects of electric generation because electricity generation is not a direct or indirect effect or connected action of the project and that the discussion of alternatives and mitigation measures is adequate.

#### **a. Adverse Environmental Effects**

In arguing that the Project will not require the generation of any additional electricity, the DNR relies upon an e-mail from Marya White in which she answers a number of questions posed by Scott Ek of the DNR about power supply and generation for the project:

- (Q) Is there currently adequate power on the grid to supply MSI 450 megawatts?



(A) This is a general question that has many varied and complex answers, depending on the information sought by the question. As such, I will presume here that because you are seeking this information for an environmental permit, you are asking this question in order to ascertain if serving a 450MW load at the approximate location of Nashwauk MN starting in the Fall of 2008 at the earliest (per my information) would require the construction of further power plants--correct? If so, then available information shows that sufficient (present and proposed) baseload generation should be available to serve a new 450MW load at that approximate location and time, barring any other (presently-unknown) large load additions in that area or limitations on transmission availability.

\* \* \*

(Q) Will the addition of MSI coming "on-line" induce increased use of peaking plants?

(A) No. This load addition should not, itself, prompt the need for any new peaking facilities. The reason for this is because the load profile (which is non-fluctuating power use all of the time--24/7/365) for this load would be served by baseload resources rather than peaking resources. Peaking resources are required to serve residential and other commercial loads which tend to require the largest amount of power for air conditioning during high temperature/humidity peak times.

(Q) What is the available baseload?

(A) This is another general question with many various answers. Here is just one example: Normally, MISO monitors and operates the grid in five-second periods. Available baseload on the grid changes from five-second interval to five-second interval based upon what is being purchased/dispatched and what is available to be purchased/dispatched during that particular five-second interval.

\* \* \*

(R. 11706-08). While Mr. Ek's questions may not have plain language responses, this Court cannot say that it was arbitrary or capricious of the DNR to conclude that the Project's electricity needs will be served by electricity currently being generated.

Ms. White states that the Project's electricity needs will be served by "baseload resources." (R. 11707). The DNR notes that base load power plants "run at or near capacity every day of the year." (R. 11693). While it may seem counterintuitive that power plants would be generating unneeded, excess energy, it is not entirely

inconceivable that there may be enough excess base load capacity in the Mid-Continent Area Power Pool to power the project.

Based upon the record, this Court cannot say that the DNR's finding that adequate power is currently being generated is arbitrary and capricious. Even if excess electrical generation were required to power the Project, the FEIS appropriately addressed the issue.

**b. Indirect Effect**

MCEA argues that generation of electricity needed for the operation of the Project is a direct or indirect effect of the project. Minn.R. 4410.2300(H) requires that "there shall be a thorough but succinct discussion of potentially significant direct or indirect, adverse, or beneficial effects generated" for the project. Indirect effects are those which are "caused by the action and are later in time or farther removed in distance, but still reasonably foreseeable. 40 C.F.R. § 1508.8.

But, as noted above, the record indicates that the Project will be served by electricity currently being generated. Because the Project will not require the generation of additional electricity beyond what is currently being generated, electricity generation is not an indirect effect of the Project.

**c. Connected Action**

The Minnesota Rules define "connected action" as projects that are related in one or more of the following ways:

- A. One project would directly induce the other;
- B. One project is a prerequisite for the other and the prerequisite project is not justified by itself; or
- C. Neither project is justified by itself.

Minn.R. 4410.0200, Subp. 9b. A "project" is defined as "a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly. Minn.R. 4410.0200, Subp. 65. "Governmental action" is defined as "activities including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by governmental units, including the federal government." Minn.R. 4410.0200, Subp. 33.

Because the generation of power at existing plants does not require any "government action," the generation of power for this plant would not be a "connected action" and no consideration of the effect of the generation is required.

**d. Discussions of Energy Requirements and Conservation Potential of Alternatives and Mitigation Measures**

In arguing that the consideration of project alternatives and mitigation measures must include a discussion of their energy requirements, MCEA relies upon a federal regulation, 40 C.F.R. § 1502.16(e). While Minnesota courts may certainly look to NEPA for guidance for help in interpreting MEPA, it is not necessary to resort to federal law on this issue because MEPA does not include a requirement that an EIS include discussions of energy requirements and conservation potential or alternatives and mitigation measures. MEPA merely requires that the EIS include a "thorough but succinct discussion of "potentially significant direct or indirect, adverse, or beneficial effects generated" for all project alternatives. Minn.R. 4410.2300 (G). MEPA's requirement

that an EIS discuss mitigation measures is limited to the effects of the project, it does not require that mitigation measures address the potential effects of a project's energy requirements. Minn.R. 4410.2300 (I).

Nevertheless, the FEIS does address alternatives and mitigation measures that relate to the issue of electricity generation. The FEIS discusses various project alternatives, including a no action alternative. (R.8420-30). The FEIS reports that there would be no effect from the no action alternative. (R. 8420). The FEIS also includes summaries of the evaluations of each of the other alternatives considered and cites to the technical memoranda addressing each of those alternatives for information regarding the effects of each of the alternatives. (R. 8421-24). The FEIS lists the relevant technical memoranda and indicates that copies of each are available by contacting the project manager. (R.11841-2). The discussion of alternatives and mitigation measures in the FEIS notes that integrated nature of the project itself will result in an "estimated 30 percent less" energy use than a non-integrated facility and explains how the energy conservation will be achieved. (R. 8425).

There is substantial evidence that the DNR considered alternatives and mitigation measures, including the energy efficiencies gained by integrating this facility and the various mitigation measures suggested. Therefore the DNR's determination of adequacy was not arbitrary and capricious as it relates to the issue of Project's energy use issues.

## II. Failure to Address Climate Change Impacts

MCEA argues that the FEIS fails to address the cumulative impacts of this project on global climate change. "Cumulative impact" is defined as:

the impact on the environment that results from incremental effects of the project in addition to other past, present, and reasonably foreseeable future projects regardless of what person undertakes the other projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

Minn.R. 4410.0200, Subp. 11. "Environment" as defined by the Rules, is "the area that may be affected by a proposed project." Minn. R. 4410.0200, Subp. 23. "Project" is defined "governmental actions that cause physical manipulation of the environment, directly or indirectly." Minn. R. 4410.0200, Subp. 65. "Governmental action" as projects wholly or partially conducted, permitted, assisted financed, regulated, approved by governmental units including the federal government. Minn. R. 4410.0200, Subp. 33. A "governmental unit" is any state agency or any governmental unit "in the state." Minn. R. 4410.0200, Subp. 34.

Based upon the definitions of the relevant terms, a cumulative impact analysis need only address how this Project and other existing or planned state or federal projects in Minnesota would impact the area around this Project and such an analysis need only be conducted if the impact of those projects would be significant. Thus, the initial question becomes: Whether this project and other projects in Minnesota have a significant cumulative impact on global climate change?

There is no support in the record for finding that the cumulative effect of this and other related projects would have a significant effect on global climate change. Because the cause and effects of global climate change are both global in scope any measurement

of the impact of a project, or group of projects, must be measured globally as well. On a global scale, the cumulative impact upon global climate change of this Project and other projects within the state appears to be relatively insignificant. This project, and other projects in Minnesota, will add a relatively insignificant amount of CO<sub>2</sub> to the atmosphere in comparison to all other sources of CO<sub>2</sub> emissions all over the Earth.

Even if there were a means of measuring the cumulative impact upon global warming, there is no basis in the record for this Court to disagree with the agency's determination that it is beyond the state of the art to determine what the cumulative impact of those projects would be.<sup>2</sup> As noted in the FEIS, global climate change is an issue that should be addressed holistically, and not on a case-by-case basis.

The FEIS in the present case takes a reasonable approach towards the issue of CO<sub>2</sub> emissions by acknowledging that this project will emit between 3.75 and 4.9 million tons of CO<sub>2</sub> into the atmosphere each year and acknowledging the general effects that global climate change is expected to have on the environment. (R. 11697, 11699-700). This information is sufficient to raise the issue of global climate change in the minds of decision-makers and provide relevant information about the Project's greenhouse gas emissions. In light of the above, the failure of the FEIS to address the cumulative impact of global climate change was not arbitrary or capricious.

### III. Failure to Consider Alternatives and Mitigation Measures to Reduce or Eliminate Greenhouse Gas Emissions

MCEA also argues that the FEIS is inadequate because the discussion of project alternatives and suggested mitigation measures fails to specifically address alternatives or measures aimed at reducing or eliminating greenhouse gas emissions.

Every EIS is required to address alternatives to a proposed project as well as any adverse or beneficial effects of the alternatives as well as identify mitigation measures which could eliminate or minimize adverse effects of the project. Minn. R. 4410.2300(G), (H), (I). "Mitigation" means any of the following:

- A. Avoiding impacts altogether by not undertaking a certain project or parts of a project;
- B. Minimizing impacts by limiting the degree of magnitude of a project;
- C. Rectifying impacts by repairing, rehabilitating, or restoring the affected environment;
- D. Reducing or eliminating impacts over time by preservation and maintenance operations during the life of the project;
- E. compensating for impacts by replacing or providing substitute resources or environments;
- F. reducing or avoiding impacts by implementation of pollution prevention measures.

Minn. R. 4410.0200, Subp. 51.

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<sup>2</sup> The DNR largely deferred to the MPCA on the issue of global climate change, apparently because the MPCA has technical experience regarding issues related to greenhouse gas emissions. Trial courts are to defer to agency decisions and should not substitute their own judgment in place of the technical expertise of the agency. *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 463 (Minn. 2002).

Although the FEIS does not specifically examine any project alternatives aimed at reducing greenhouse gas emissions or suggest mitigation measures specifically to reduce greenhouse gas emissions, the DNR's determination that the FEIS was adequate is not arbitrary and capricious because the entire project is an alternative that reduces the adverse effects to the environment and the project contains numerous mitigation measures, both planned and suggested, which reduce greenhouse gas emissions.

There are two greenhouse gas emissions inventories included in the record, one prepared on behalf of MSI and one prepared on behalf of MCEA. (R. 11570-91, 11607-22). The MSI inventory anticipates that the Project will result in the emission of 3.75 million tons of CO<sub>2</sub> per year while the MCEA inventory predicts that the Project will result in the emission of nearly 4.9 million tons of CO<sub>2</sub> per year. But the record demonstrates that regardless of which estimate is used, the Project is a more desirable alternative than traditional steel production because the integrated nature of the Project significantly mitigates any harm by significantly reducing greenhouse gas emissions as compared with traditional steel production. Production of a comparable amount of steel by traditional means would emit approximately 6.44 million tons of CO<sub>2</sub> per year. (R. 11570-71). Thus, it is clear from the record that the entire Project is an alternative that will emit a substantially smaller percentage of greenhouse gases into the atmosphere than even a no action alternative which would result in the demand for the proposed steel production at MSI being met by traditional steel production resulting in the emission of greater amounts of greenhouse gasses.

In addition to the more efficient design and operation of the project, the FEIS includes numerous other mitigation measures, both implemented and suggested and some of those would have the effect of reducing greenhouse gas emissions. (R. 8425-29).

This project was proposed because of the global demand for steel. It is basic economics that if the Project were not completed another project would be undertaken to meet the demand for more steel. *See Mid States Coalition for Progress v. Surface Transp. Board*, 345 F.3d 520 (8<sup>th</sup> Cir. 2003)(applying supply and demand model in rejecting agency argument that making cheaper and better coal available would not affect demand). It seems likely that the alternative to this Project would be an increase in traditional steel production within the U.S., which the record indicates significantly is less efficient and contributes more greenhouse gasses to the atmosphere than the Project, or an increase in steel production outside the United States, perhaps in a country like India or China, where the steel could be made less expensively due, in part, to a lack of environmental regulation. While it is certainly possible that more could be required of MSI in terms of reducing greenhouse gas emissions, the Project, as MCEA seems to acknowledge, is a substantial improvement over traditional steel making and the FEIS discusses major alternatives and suggests multiple mitigation measures in sufficient detail to support the DNR's finding of adequacy.

#### **IV. Failure to Account for Climate Change when Modeling Environmental Impact**

MCEA argues that the FEIS is deficient because the DNR failed to account for the effects of global climate change when modeling the environmental impact of the Project. In support of this argument, MCEA cites to documents in the record which suggest that average temperatures will likely rise by as much as 10 degrees Fahrenheit during this

century, which will lead to increased evaporation and a reduction in lake levels, but that there will also be increased rainfall.

The DNR's response is that it did not take global climate change into account when modeling the effects of the project because "there is not a reliable method to accurately project the effects of climate change on the overall modeled environmental impacts for the project, given the wide range of possible climate responses." (R. 11698).<sup>3</sup>

Both parties cite *National Resources Defense Council v. Kempthorne*, 506 F. Supp.2d 322, (E.D.Cal. 2007), in their respective arguments on the issue of modeling and although the case involves the Endangered Species Act (ESA), there is a strong parallel between the biological opinion required pursuant to the ESA and the EIS required in the present case.

*National Resources Defense Council* was brought as a challenge to a biological opinion which concluded that a massive water diversion project would jeopardize the existence of, or adversely modify the habitat of, the Delta smelt. *Id.* at 328. One of the issues addressed in the lengthy opinion involves evidence of global climate change. *Id.* at 367-70. The National Resources Defense Council and others offered evidence that global climate change is occurring, that average temperatures are expected to increase by as much as "several degrees Celsius over the next 100 years", and that the area inhabited by Delta smelt could be expected to experience more flooding. *Id.* at 367-68. The agency(s) did not deny failing to specifically address how predicted global climate change might affect the Delta Smelt, arguing that evidence of global climate change was too inconclusive regarding climate change to meaningfully address the effects of climate change. *Id.* at 369. The Court held that the agency(s) "acted arbitrarily and capriciously by failing to address the issue of climate change in the [biological opinion]. This absence of *any* discussion in the [biological opinion] of how to deal with any climate change is a failure to analyze a potentially 'important aspect of the problem.'" *Id.* at 370 (emphasis in original).

In support of MCEA's position is the court's acknowledgement that the "precise magnitude" of the changes caused by global climate change remain uncertain, but that "judgments about the likely range of impacts can and have been made." *Id.* at 369. The decision goes on to suggest that a "meaningful discussion" of the issue would have been sufficient. *Id.*

Supporting DNR's position is the court's statement that the agency's failure to address the global climate change studies left the court unable to determine whether the information presented in the studies was rationally discounted because of its *inconclusive nature* or whether it was arbitrarily ignored by the agency. *Id.* (emphasis added).

Unlike the agencies in *National Resources Defense Council*, the DNR in this case did not completely ignore evidence about the predicted effects of global climate change. The DNR acknowledged the reality of global climate change, but chose not to use any predicted effects in its modeling because it determined that the predicted effects are too speculative. For example, the record contains information suggesting that global climate change may result in Minnesota's average temperatures rising as much as 10 degrees Fahrenheit during this century. (Supp. R. 56). One problem with attempting to use such a general estimate in modeling the effects of climate change is that this project is only expected to exist for 27 years (including 2 years of construction, 20 years of operation,

<sup>3</sup> MSI's position is consistent with DNR's position and argument.

and 5 years for closure). (R. 8415). It would be purely speculative to attempt to apply a general estimate of what conditions may be like nearly 100 years from now to a project that is expected to last only a fraction of that time.

While the DNR's response to MCEA's concerns about global climate change may not have been ideal, this Court cannot say that the DNR's decision to exclude the predicted effects of global climate change in its modeling was arbitrary or capricious or otherwise insufficiently addressed the issue. Information contained in the FEIS also minimally satisfied Minn. R. 4410.2500. The DNR acknowledged that although the evidence in the record clearly shows that global climate change is a reality, the predicted effects of global climate change are indefinite and encompass a broad range of potential outcomes. (R. 11698). The DNR explained that more precise information would be necessary to model the effects of global climate change on the Project area. (Id.) The DNR included a brief summary of evidence on global climate change. (R. 11699-700). And the DNR included in the record modeling showing the effect that drought-like conditions would have on water systems in the surrounding area. (R. 10828-10882).

#### V. Conclusion

The parties are in agreement that Global climate change is a "serious problem," that the addition of any carbon dioxide to the environment has an environmental effect, and that the Project will add between 3.75 million and 4.9 million tons of carbon dioxide to the atmosphere every year. The bottom line is that this project is being proposed in order to meet the global demand for steel and without this project the steel will be produced somewhere else likely utilizing less efficient methods (particularly if mined and milled outside of the United States) that would be more damaging to the environment. The ore will be mined, the power will be generated, and the steel will be milled.

This Project offers a more efficient alternative to traditional steel-making that produces fewer greenhouse gas emissions. The record demonstrates that the DNR took a hard look at the issues involved and engaged in reasoned decision making when it determined that the FEIS was adequate. Estimates about the effects of global climate change are vague both in terms of the extent of the effects and when they will occur. An attempt to predict this Project's effect on global climate change, or the cumulative effect of this Project and others, based upon the record would necessarily be speculative and, therefore arbitrary. The record establishes that the DNR adequately addressed the issue of global climate change based upon the available information.

This case does demonstrate some glaring gaps between the current status of the law and the scientifically established connection between greenhouse gas emissions caused by human activity and global climate change. Among those are the fact that most, if not all, greenhouse gases are unregulated. Another is that while all parties to this action acknowledge the adverse effects of greenhouse gases on the environment through global climate change, MEPA, as currently drafted, is geared to analysis and modeling of state, regional or local effects on the environment. This works when the issue is something like how much water will the project use and what effect that usage would have on the local resources, or when the issue is what, if any, effect will the project have on the Canadian Lynx population.

MEPA, as now written, does not seem to be up to the task of analyzing how greenhouse gas emissions from projects like MSI should be accounted for on the local, regional, state, national and even global scale. Minn. Stat. Chap. 216H sets out broad

goals for the reduction of greenhouse gas emissions in Minnesota and for the development of a plan to meet those goals. It does not regulate greenhouse gas emissions, nor does it provide a mechanism for project-by-project analysis or regulation.

Given the lack of regulation of greenhouse gases and the limits in the MEPA procedures, this Court cannot say that the Final Environmental Impact Study analysis of the greenhouse emissions and the potential effect on climate change, was arbitrary or capricious or that it failed to adequately consider alternatives and/or mitigation measures. Under the current status of the law, the FEIS was adequate.

J.A.M.