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RE: Mesabi Nugget, LLC and Steel Dynamics Inc.  
Proposed Variance NPDES/SDS permit MN0067687

Dear Ms. Holst, Mr. Pfeifer:

I represent WaterLegacy, a Minnesota non-profit formed to protect Minnesota's water resources and the communities that rely on them. This letter follows up our phone discussion last week regarding proposed variance to NPDES/SDS Permit MN0067687 for the Mesabi Nugget project.

WaterLegacy has taken the position in comments to the Minnesota Pollution Control Agency ("MPCA") and the United States Environmental Protection Agency ("USEPA") that the proposed Mesabi Nugget variance meets neither the Minnesota nor the federal requirements for a variance. These comments are attached. We request that the USEPA deny the proposed Mesabi Nugget variance, which would not require compliance with Minnesota water quality standards until 2021. Based on the initial variance approved by the MPCA and USEPA in 2005, this proposed variance would effectively grant applicants at least a 16-year variance from their obligation to treat discharge to surface waters.

1. The Proposed Variance Does Not Meet Minnesota Rule Requirements

Minnesota Rules require an applicant seeking a variance on the grounds that compliance would pose an undue economic burden to provide the following verified financial information:

[F]inancial statements prepared or approved by a certified public accountant, or other person acceptable to the agency, which shall fairly set forth the status of the business, plant, system, or facility for each of the three financial years immediately preceding the year of the application, and an analysis of the effect of such financial status if the variance is not granted (if the business, plant, system, or facility has not been in operation for this period, then the financial statements and analysis must be based on the most complete data available). Minn. R. 7000.7000, Subp. 2(E)

The MPCA's decisional documents reflect that the Mesabi Nugget variance was proposed based on financial hardship as well as technological considerations on the grounds that "by reason of

exceptional circumstances the strict enforcement of any provisions with the standards would cause the discharger undue hardship” pursuant to Minn. R. 7050.0190, subp. 1.<sup>1</sup> The primary discussion at the MPCA Citizens’ Board hearing and the primary basis on which the Board approved the variance for submittal to the USEPA focused on the economic burden of requiring compliance with water quality standards.

The MPCA did not require Mesabi Nugget to provide the financial analysis required by Minn. R. 7000.7000, Subp. 2(E). The Agency simply accepted various assertions made by the applicant, as excerpted below:

36. *Mesabi Nugget has provided* a brief evaluation of how the projected cost for immediate installation of treatment (assuming that all the design uncertainties were resolved), *could affect* the cost of iron nugget production and how that *could affect* market competitiveness. *The company concluded* that with the current worldwide competition in iron supply, even a relatively small percentage increase in operating costs would present the company with a significant competitive disadvantage during all economic cycles and particularly so during downturns in iron nugget/pig iron pricing such as occurred in 2009.

37. *Mesabi Nugget has indicated* that it is currently operating at a loss. *The company states* that while short term losses are not entirely unexpected with a first commercial development of a new technology, the current and future projected losses are considerably larger than the company expected, are not sustainable, and will jeopardize the future of this facility, and the ITMk3 technology overall, if costs cannot be controlled in the near future. *Mesabi Nugget has determined* that the addition of an annualized cost of \$4.3 million for the immediate installation of an additional RO wastewater treatment system capable of meeting final effluent limitations for the variance parameters would add unsustainable losses for the foreseeable future such that the entire \$300 million project would be jeopardized.

38. *Mesabi Nugget has estimated* that closure of the existing facility would result in the permanent lay-off of 111 people from the facility and up to an additional 200 contractors and suppliers according to studies on impacts of layoffs to other industries. In addition, *Mesabi Nugget states* that closure of the Large Scale Demonstration Plant *would likely result* in the abandonment of the Mesabi Mining project (iron ore concentrate from the proposed mining project would no longer be needed for the LSDP) resulting in the future loss of an estimated 240 additional jobs. (emphasis added).<sup>2</sup>

As WaterLegacy noted in our comments, Mesabi Nugget’s claimed 5 percent impact on prices from water quality treatment was based on pig iron prices below publicly available prices. Adjusting arithmetic for actual prices would reduce the cost ratio to 3.2 percent. Mesabi Nugget also claimed layoffs from closure (111 employees) in excess of its actual employment (70 persons). The MPCA Citizens’ Board hearing provided additional evidence undermining claims of economic hardship. A recent Steel Dynamics, Inc. filing with the U.S. Securities and Exchange Commission stated that compliance with current environmental laws and regulations would not have an adverse effect on the company’s financial condition. By failing to require verified financial statements, the MPCA may have based its variance on unreliable information.

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<sup>1</sup> MPCA Issue Statement, *Mesabi Nugget Delaware, LLC - Request for Approval of Findings of Fact, Conclusions of Law, and Order and Authorization to Grant a Variance and to Reissue National Pollutant Discharge Elimination System/State Disposal System Permit MN0067687, October 23, 2012, p. 8.*

<sup>2</sup> MPCA’s Findings of Fact, Conclusions of Law and Order, *Mesabi Nugget Delaware, LLC - Request for Approval of Findings of Fact, Conclusions of Law, and Order and Authorization to Grant a Variance and to Reissue National Pollutant Discharge Elimination System/State Disposal System Permit MN0067687, October 23, 2012.*

## 2. The Proposed Variance Does Not Meet the Requirements of Federal Regulations.

Under the Clean Water Act, a variance may only be granted if the requirements of federal regulations in 40 C.F.R. §131.10(g) are met. The only conceivable basis for the proposed Mesabi Nugget variance would be a demonstration that “Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.” 40 C.F.R. §131.10(g)(6).

The United States Environmental Protection Agency (“USEPA”) Economic Guidance for Water Quality Standards explains how “substantial and widespread economic and social impacts” must be analyzed in the case of a private sector facility, as excerpted below:

In order to perform the economic tests, the cost of the pollution control needed to comply with the Water Quality Standards must be calculated and converted to an annualized cost. . . Both the capital and O&M cost estimates should be provided by the discharger requesting relief. To assess whether the costs represent the most cost effective means of meeting the water quality standards, they should be compared to costs at comparable entities that meet the same standards. (3-3)

Four general categories of financial tests are presented in the following sections. . .

**Primary Measure**

Profit -- how much will profits decline due to pollution control expenditures?

**Secondary Measures**

Liquidity -- how easily can an entity pay its short-term bills?

Solvency -- how easily can an entity pay its fixed and long-term bills?

Leverage -- how much money can the entity borrow? (3-4)

Profit and solvency ratios are calculated both with and without the additional compliance costs (taking into consideration the entity's ability, if any, to increase its prices to cover part or all of the costs). Comparing these ratios to each other and to industry benchmarks provides a measure of the impact on the entity. (3-4)

For all of the tests, it is important to look beyond the individual test results and evaluate the total situation of the entity. . . The results should be compared with the ratios for other entities in the same industry or activity. In addition, the ratios and tests should be calculated for several years of operations. This will allow long-term trends to be differentiated from short-term conditions. (3-4)

The structure, size, and financial health of the parent firm should also be considered. An important factor, which may not be reflected in the preceding measures, is the value of an applicant's product or operations to its parent firm. . . The results of these tests and other relevant factors, can be used to make a judgment as to the likely actions of the applicant (e.g. shut down entirely, close one or more product/service lines, shift to other products/services, not proceed with an expansion, continue operations at current levels) faced with the pollution control investment. (3-4)

It is EPA policy, however, that applications based on economic considerations must be accompanied by data that demonstrate the impacts. (3-5)

In most cases, interpreting the results requires comparisons with typical values for the industry. (3-5)

At a minimum, however, the analysis must define the affected community (the geographic area where project costs pass through to the local economy), consider the baseline economic health of the community, and finally evaluate how the proposed project will affect the socioeconomic well-being of the community. (4-1)<sup>3</sup>

The record for the proposed Mesabi Nugget variance does not meet minimum financial tests required by federal regulations and USEPA guidance. In contrast with the Exhibits in USEPA Economic Guidance cited, no audited financial data has been required for Mesabi Nugget.

Fundamentally, there is no showing in this record that a pollution control investment of reverse osmosis would result in an adverse financial condition that would shut down the Mesabi Nugget plant. The MPCA's Findings stating that "immediate installation" of reverse osmosis would jeopardize the project are taken verbatim from a report of Barr Engineering,<sup>4</sup> not from an audited financial analysis. Representatives of Steel Dynamics, Inc., who spoke for Mesabi Nugget at the October 23, 2012 MPCA Citizens' Board hearing, did not testify that failure to grant the variance would result in shutting down the Mesabi plant.

3. The Structure, Size and Financial Health of Steel Dynamics, Inc. Has Not Been Appropriately Considered.

The USEPA Economic Guidance excerpted above states the structure, size and financial health of a parent firm must be considered to evaluate the likelihood of "substantial and widespread economic and social impact" pursuant to 40 C.F.R. §131.10(g)(6). This analysis is particularly salient since Steel Dynamics, Inc. is not only the majority owner and joint venturer in the Mesabi Nugget project, but is directly involved with environmental compliance or non-compliance with water quality standards and the particular variance at issue. Pertinent facts include the following:

- Mesabi Nugget is a joint venture between Steel Dynamics (81 percent) and Kobe Steel (19 percent).<sup>5</sup>
- The Mesabi Nugget web site reflects the dominance of Steel Dynamics in its business. Its PowerPoint entitled "Welcome to Mesabi Nugget," promotes at "An American Business Success Story." This success story is that of Steel Dynamics, Inc., citing Steel Dynamics' net sales of \$6.3 billion in 2010, its 6,000 employees worldwide and its NASDAQ listing of STLD.<sup>6</sup>
- The most recent prior NPDES/SDS Permit MN0067687 for the Mesabi Nugget facility, the February 24, 2011 permit modification, included the following Permittees: Mesabi Nugget Delaware, LLC and Steel Dynamics, Inc.
- The Application for the current NPDES/SDS Permit MN0067687 and Proposed Variance dated June 2010 was prepared by Barr Engineering for the following permittees: Steel Dynamics, Inc. and Mesabi Nugget, LLC.
- Persons speaking at the MPCA Board meeting on October 23, 2012 in favor of the proposed permit and variance identified themselves as representatives of Steel Dynamics,

<sup>3</sup> All excerpts from USEPA, *Interim Economic Guidance for Water Quality Standards*, E PA-823-B-95-002, March 1995. See also <http://water.epa.gov/scitech/swguidance/standards/economics/table41.cfm> last visited Nov. 1, 2012.

<sup>4</sup> Finding is taken from a report of Barr Engineering. (Barr Report for Mesabi Nugget Delaware LLC, "Additional Information Submittal Mesabi Nugget NPDES Permit MN0067687", March 2012) referenced in the MPCA Statement of Basis, p. 20, fn. 2, Attachment 5 to MPCA Findings of Fact, *supra*.

<sup>5</sup> Mesabi Nugget web site at <http://www.mesabinuggetmn.com/ourcompany.php>, last visited Nov. 1, 2012.

<sup>6</sup> *Id.* Download available as of Nov. 1, 2012, see PowerPoint slide 2.

Inc. Steel Dynamics appears to have been actively involved at every stage of the environmental permitting and variance proceedings.

Applicable law connects Steel Dynamics Inc. to the obligation for compliance with water quality standards at Mesabi Nugget and, thus, to the proposed variance. Where a parent corporation operates a facility in a joint venture with a subsidiary, the most basic scenario for parent liability is met. *United States v. Bestfoods*, 524 U.S. 51, 71 (1998). See also *In the Matter of Hibbing Taconite Co.*, 431 N.W. 2d 885, 892 (Minn. Ct. App. 1988).

Involvement in environmental compliance designs and environmental compliance permits also establishes direct obligations and direct liability for a parent corporation. *BP Amoco Chem. Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 990-91 (D. Del. 2001); *Kayser-Roth Corp.* 103 F. Supp. 2d 74, 81-82 (D. RI 2000). See also *United States Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 215 F. Supp. 2d 239 (D. Me. 2002).

Steel Dynamics' 10-Q Quarterly Report filed with the SEC on June 30, 2012 suggests that environmental compliance would not have any material adverse effect:

***Environmental and Other Contingencies.*** We have incurred, and in the future will continue to incur, capital expenditures and operating expenses for matters relating to environmental control, remediation, monitoring, and compliance. We believe, apart from our dependence on environmental construction and operating permits for our existing and proposed manufacturing facilities, that *compliance with current environmental laws and regulations is not likely to have a materially adverse effect on our financial condition, results of operations or liquidity*; however, environmental laws and regulations have changed rapidly in recent years, and we may become subject to more stringent environmental laws and regulations in the future, such as the impact of United States government or various governmental agencies introducing regulatory changes in response to the potential of climate change.<sup>7</sup>

Appropriate analysis of the structure, size and financial health of Steel Dynamics as well as requiring verified financial statements pursuant to MPCA rules and specific financial tests described in USEPA guidance would confirm that the proposed Mesabi Nugget variance cannot be justified under either Minnesota rules or federal regulations.

WaterLegacy requests that the Mesabi Nugget variance be denied and that the USEPA reject for this and other mining industry permits Minnesota's use of extended (or indeterminate) compliance deadlines as a *de facto* moratorium on compliance with water quality standards.

Respectfully submitted,



Paula Goodman Maccabee  
Counsel for WaterLegacy

Enclosures

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<sup>7</sup> U.S. Securities and Exchange Commission, Form 10-Q for Steel Dynamics, Inc. June 30, 2012 <http://quote.morningstar.com/stock-filing/Quarterly-Report/2012/6/30/t.aspx?t=XNAS:STLD&ft=10-Q&d=7bf0f7696f470d1b5eb5db238e4298f0> at p. 24 (emphasis added), last visited Nov. 1, 2012.