

**STATE OF MINNESOTA
MINNESOTA POLLUTION CONTROL AGENCY**

IN THE MATTER OF A REQUEST
FOR A CONTESTED CASE HEARING
ON THE PROPOSED ISSUANCE OF
AIR EMISSION PERMIT NO. 13700063-004
FOR UNITED STATES STEEL CORPORATION – KEETAC,
KEEWATIN, MINNESOTA

WATERLEGACY PROPOSED
FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

CONFIDENTIAL DRAFT

Petitioner WaterLegacy submits proposed Findings of Fact, Conclusions of Law and Order below as amendments to the Findings of Fact, Conclusions of Law and Order submitted by Agency staff on September 2, 2011. Where amendments to Findings are proposed, underlining and strike-outs reflect the differences. Where it is requested that paragraphs be retained without change or deleted, that recommendation is provided. At the conclusion of this document, WaterLegacy also proposes a resolution pertaining to this matter.

DESCRIPTION OF THE PROJECT

Paragraphs 1-9, no changes proposed.

REGULATORY CONTEXT

Paragraphs 10-31, no changes proposed.

MERCURY EMISSIONS

Fish Tissue Mercury Concentration Standard

32. In 2008, the MPCA promulgated a 0.2 mg/kg mercury fish tissue standard in its numeric water quality standards in Minn. R. ch. 7050. In accordance with the federal Clean Water Act, the MPCA developed Minnesota’s Statewide Mercury Total Maximum Daily Load (TMDL) which was approved by EPA in March, 2007. The TMDL sets a goal of 93 percent reduction in human-caused annual mercury air emissions from 1990 levels and a 24 pounds per year (lb/yr.) water discharge goal. The 93 percent reduction goal translates to a goal of 789 lb/yr. of mercury air emissions. The TMDL set a target for fish tissue concentration of mercury based on human consumption and the TMDL and Implementation Plan translated the target to reduction goals and strategies for existing, new and expanded mercury sources to protect public health. The Implementation Plan provided that new or modified sources increasing mercury by more than 3 pounds per year should provide the agency with assurances that equivalent reductions can be secured for the entire potential to emit.

Paragraphs 33-34, no changes proposed.

35. MPCA rules provide that an air emissions permit may only be issued if its conditions comply with applicable requirements and the requirements of parts 7007.0100 to 7007.1850. Minn. R. 7007.1000, subp. E. The MPCA rules require that air emission permits shall include requirements needed to ensure compliance with all applicable requirements. Minn. R. 7007.0800, subp. 2. “Applicable requirement” is defined at Minn. R. 7007.0100, subp. 7 and does not include the mercury TMDL, the Implementation Plan or the Strategy Framework. Minn. R. 7007.0800, subp. 2 also states that any permit “shall also include any condition the agency determines to be necessary to protect human health and the environment.”

36. The MPCA finds that the Mercury TMDL, Implementation Plan and Strategy Framework establish goals and strategies, ~~not air quality mandates or applicable requirements for air quality permits.~~ The MPCA further finds that the Mercury TMDL, Implementation Plan and Strategy Framework establish conditions necessary to protect human health and the environment pursuant to Minn. R. 7007.0800, Subp. 2.

Paragraph 37, no proposed change.

38. The permit also requires U. S. Steel to install and operate either activated carbon injection (ACI) or an equivalent alternative on the Phase III line within 365 days of startup, to control mercury emissions. The MPCA expects at least 80 percent reduction in mercury emissions from ACI or its alternative. An 80 percent reduction in mercury emissions from the Phase III line translates to approximately 21 lb/yr. The proposed permit sets no new or stepped down mercury limit applicable upon the installation of such mercury control equipment.

Paragraph 40, no proposed changes.

41. The SOC requires U. S. Steel Corp. to identify and conduct short-term trial of mercury control technologies on one of its existing taconite production lines and a long-term trial if the short-term trial is feasible based on an evaluation developed by the regulated party and approved by the MPCA. In addition to the Keetac facility, U. S. Steel Corp. owns and operates the Minntac facility near Mountain Iron, Minnesota. The existing production lines at Minntac are available for control technology trials.

42. If the research and trials successfully identify a viable mercury technology, the SOC requires U. S. Steel Corp. to submit a permit application(s) and schedule for installation of the technology on its operating taconite indurating furnace lines at Minntac and Keetac. The SOC also provides that if, by June 30, 2016, U. S. Steel Corp. and the MPCA agree that research and trials have not identified mercury technologies for installation, U.S. Steel Corp.'s obligations will be fulfilled by cooperating with the Mercury-Emissions-Reduction Research and Implementation Council established pursuant to the Mercury TMDL Implementation Plan. There is no requirement for a permit amendment or notice to the public or the Citizens Board before the MPCA can make such a determination that no viable mercury technology is available to offset or reduce mercury emissions.

43. The intent of the SOC is to obligate that U. S. Steel Corp. to make mercury emission reductions earlier than is targeted in the mercury TMDL, Implementation Plan and Framework Strategy.

Paragraph 44-45, no proposed changes

46. Operation of the Keetac Phase III modification will result in an increase in mercury emissions from the Keetac facility in the short term. The intent of the SOC is to obligate U. S. Steel Corp. to early mercury emission reductions so that overall cumulative mercury emissions will be the same or lower for the years 2008 to 2025 as they would have been without the Phase III expansion modification.

Paragraph 47-48, no proposed change

49. The MPCA finds that U. S. Steel Corp.'s commitments to early and equivalent reductions in the Keetac modification permit and the SOC could further the goals and strategies of the mercury TMDL, Implementation Plan and Strategy Framework. However, absent a stepped down emissions limit in the draft permit and, given the potential uncertainties in the research and trials described in the SOC, a factual issue has been presented as to the level of mercury emissions that will result from the Keetac expansion and whether the mercury emissions increase from this expansion is consistent with Minnesota's mercury TMDL, Implementation Plan and Strategy Framework and with the protection of human health and the environment. The permit and SOC obligate U. S. Steel Corp. to take specific steps to achieve reductions in mercury emissions earlier than the Implementation Plan suggests and to ensure equivalent reductions for the increase in mercury emissions from operation of the Phase III line. The MPCA finds that these obligations advance progress toward achievement of the goals of the mercury TMDL.

Paragraph 50, propose deletion.

PUBLIC NOTICE OF THE PERMIT

51. Minn. R. 7007.0050 to 7007.1850 apply to the issuance of air emission permits and describe the process the MPCA must follow in reviewing an application for a permit. Minn. R. 7007.0850 to 7007.0950 contain procedural requirements for public notice and comment, review by other states, and review and objection by EPA, which apply to this proposed permit. Subpart 1 of Minn. R. 7007.0850 requires the MPCA Commissioner to prepare a TSD setting forth the legal and factual basis for the proposed draft permit conditions. Subpart 2 requires the MPCA to give public notice of the preliminary determination to issue a permit, including information on how copies of relevant documents can be obtained, the activities involved in the permit action, the emission changes involved in any permit amendment, the comment procedures, any scheduled meetings or hearings, and hearing request procedures. Minn. R. 7007.0900 requires the MPCA to provide notice to affected states. Minn. R. 7007.0950 specifies the procedures for EPA review.

52. On June 2, 2011, pursuant to Minn. R. 7007.0850, subp. 2, the MPCA Commissioner issued a public notice of the preliminary decision to issue the permit. The notice was published as required by MPCA's rules, and included the information required. The notice of the preliminary determination to issue the permit provided for a comment period ending July 1, 2011. In accordance with Minn. R. 7007.0850, subp. 1 and 2 (2003), a draft permit and technical support document were eventually made available to the public, but the multi-pollutant SOC was not made available. The public notice provided no specific information regarding the proposed changes in mercury emissions and did not use the word mercury, despite the level of public interest in the health consequences of mercury contamination of fish.

Paragraph 53, no proposed changes.

54. The MPCA staff held a public information meeting for this proposed facility modification in Hibbing, Minnesota on June 16, 2011. The public information meeting was publicized and held in accordance with Minn. R. 7007.0850, subp. 2, which references Minn. R. 7001.0110, subp. 3 and with Minn. R. 7001.0120. Public information regarding the facility modification did not mention any increase in mercury emissions.

55. Minn. R. 7007.0950 specifies the procedures for EPA review of permits proposed for issuance by the MPCA. On June 1, 2011, the MPCA submitted the draft permit to EPA for its review, but did not submit the SOC to the EPA. EPA submitted comments on the permit during the public comment period.

Paragraph 56, no proposed changes.

PUBLIC COMMENTS

57. During the comment period, the MPCA received a total of 12 written comments from citizens or other government entities. After the comment period, the MPCA received more than 400 comments from citizens asking that the MPCA prevent increased mercury air emissions from the Keetac mine expansion.

Paragraphs 59-60, propose deletion.

EVALUATION OF THE REQUEST FOR A CONTESTED CASE HEARING

Paragraphs 61-67, no proposed changes.

68. Regarding item A in Finding 61, there is ~~no~~ a material issue of fact in dispute. The permit sets a limit for mercury from the expansion of 75.5 pounds per year as the comment notes. Attachment 7.b. to the TSD (available during the public notice period) provides a graphical depiction of how mercury emissions may increase for several years before decreasing as controls are implemented. There is a material issue of fact in dispute as to whether the projections in Attachment 7.b. of the TSD are accurate given the absence of any step down in permitted mercury emissions at any time after issuance of the permit.

69. The MPCA finds that WaterLegacy has ~~not~~ met Criterion A. of Minn. R. 7000.1900, subp. 1.

The petition for a contested case hearing on item A in Finding 61 is denied

70. Item B in Finding 61 questions the degree to which increased mercury emissions from the Keetac facility modification will be offset and in what timeframe. Attachment 7.b. to the TSD for the permit describes the timeframe as well as the amount of change in annual mercury emission.

71. ~~WaterLegacy's does not appear to challenge to the accuracy or adequacy of that description based on the text of the SOC raises a related material issue of fact as to the uncertainty of any projected mercury offsets. To the extent that the issue does not challenge either the time frame or the change in annual mercury emissions provided in the TSD, there is no material issue of fact in dispute and the petition fails to meet criterion A. of Minn. R. 7000.1900, subp. 1.~~

Paragraph 72- 73, propose deletion.

Paragraph 74, no proposed changes.

Paragraph 75, propose deletion.

76. ~~To the extent that~~ WaterLegacy's petition for a contested case hearing does not challenges the goals established in the mercury TMDL, the Implementation Plan or the Strategy Framework, ~~the petition is both untimely and beyond the scope of this permitting proceeding and is denied.~~

Paragraph 77-79, propose deletion.

80. Further, the mercury requirements of the SOC were originally established in an August 2010 agreement related to the Keetac expansion. The requirements were incorporated, ~~without change,~~ into the SOC that was finalized in June 2011 in connection with the Keetac air permit now before the Board. The engineering evaluation in the SOC was referenced in the draft permit as well as the TSD. ~~Any Board meeting at which the Board would have considered the August 2010 agreement or the SOC could have been considered is past.~~ The MPCA finds that a petition for a contested case hearing on the mercury requirements of the SOC is ~~are~~ untimely under Minn. R. 7000.1800, subp. 1.

Paragraph 81-82, propose deletion.

83. Item A in Finding 62 contends that the Keetac Draft/Proposed Permit is inconsistent with the mercury TMDL in that it provides for mercury increases and only speculative and untested mercury reductions.

84. There is no material issue of fact in dispute that the Keetac modification permit allows a mercury increase from operation of Phase III. ~~WaterLegacy's petition for a contested case hearing on that fact is denied.~~ There is a material issue in dispute as to the level of mercury increase permitted and whether this mercury increase is consistent with the mercury TMDL, Implementation Plan and Strategy Framework and protection of human health and the environment.

85. WaterLegacy ~~appears to~~ also questions whether the uncertain degree of mercury reductions to be realized through the requirements of the SOC renders the Keetac modification permit inconsistent with the mercury TMDL and therefore requires the MPCA modify or deny the permit.

86. As more fully described in the Findings 32 through 36, the mercury TMDL, the Implementation Plan and the Strategy Framework provide mechanisms to achieve the mercury fish tissue concentration standard in Minn. R. ch. 7050. ~~The TMDL does not establish applicable requirements, but goals. The TMDL is not a rule to which the MPCA must adhere when issuing permits.~~

87. As described in Finding 35 and 36, ~~the Implementation Plan and Strategy Framework, not to~~

~~mention the new and modified source guidelines, are not applicable regulatory requirements. Nevertheless, the MPCA has chosen, as a matter of policy, to include certain mercury control requirements in the permit, which will further the goals of the mercury TMDL. permit conditions must be sufficient to protect human health and the environment.~~

88. WaterLegacy's primary concern appears to be that the Keetac modification permit allows an increase in mercury emissions even though no mercury control technology for the taconite industry currently exists. These are undisputed facts.

89. WaterLegacy does not challenge the fact that the mercury TMDL, the Implementation Plan and the Strategy Framework articulate goals. It does not challenge the fact that the SOC requires U. S. Steel Corp. to undertake mercury control research and trials. ~~It does not challenge the fact that the SOC requires U. S. Steel Corp. to provide a contingency plan for equivalent reductions, although it complains that the SOC does not specify the equivalent reductions.~~ Based on the permit record and information in the Keetac Expansion Final EIS, WaterLegacy challenges whether the proposed Keetac mercury increase, with or without the SOC is consistent with the TMDL, Implementation Plan and Strategy Framework and the protection of human health and the environment.

90. ~~Additionally, although Minn. R. 7000.1900, subp. 1.B. allows a petitioner to identify witnesses it may call at a hearing and to summarize their testimony, to identify publications or references it might introduce at a hearing in order to clarify and sharpen an allegation of a factual dispute, WaterLegacy does not make any such offering. Citizens may present issues at hearing through exhibits and cross-examination even if they do not call expert witnesses.~~

Paragraph 91, propose deletion.

92. WaterLegacy's petition for a contested case hearing on whether the permit is consistent with the mercury TMDL ~~does not presents~~ a material issue of fact and a contested case would allow the introduction of information that would aid the board in making its final decision in this matter. is denied.

93. Next, WaterLegacy questions whether the permit is inconsistent with the mercury TMDL in that offsets to the mercury emission increases from Phase III operation are not certain, specific, timely or enforceable.

94. The TMDL and Implementation Plan ~~do not require offsets, but~~ recognize that some increases in mercury will occur from new and modified sources. The MPCA staff provided guidance, which calls for 1:1 equivalent reductions in mercury emissions for such sources.

Paragraph 95-96, proposed deletion.

95. WaterLegacy disputes that appears to recognize that offsets to the Phase III increase are provided for as required. ~~However, they are required by the SOC, which requires U. S. Steel Corp. to reduce mercury emissions earlier than the target date in the TMDL and to submit a contingency plan to completely offset the increases in mercury emissions from the operation of Phase III from startup to January 1, 2025, should early emission reductions not be possible.~~

96. Although not stated as such, it appears that WaterLegacy disputes whether the SOC is enforceable and whether the offset requirement is certain, specific and timely ~~(by "timely" we will assume that WaterLegacy means "contemporaneous").~~

97. Similar to WaterLegacy's complaint that the Keetac modification permit is not consistent with the mercury TMDL, WaterLegacy disputes whether the SOC will actually require offsets such that the proposed mercury increase in the Phase III permit would be consistent with the mercury TMDL, Implementation Plan and Strategy Framework. the MPCA is unable to identify any fact that is actually in dispute. There is no dispute that equivalent reductions are not provided for in the permit itself and that the SOC allows equivalent reductions through early

reductions from existing U. S. Steel Corp. facilities or through the contingency plan, which is uncertain in that it does not specify the source of the equivalent reductions. There is no dispute that the equivalent reductions are not contemporaneous with the mercury emission increases.

Paragraphs 98-100, propose deletion

101. Finally, WaterLegacy asks for a contested case hearing on whether the SOC undermines compliance with NPDES/SDS permits and water quality standards that is inconsistent with the MPCA's delegated duties under the Clean Water Act.

102. This issue is not concerned with the Keetac air emissions permit. It raises issues concerning U. S. Steel Corp's NPDES/SDS water permit and the SOC, neither of which are presently before the MPCA. It does not raise any issue that is material to the proposed air emission permit. As such, it fails to meet criterion A. of Minn. R. 7000.1900, subp. 1. The issue of whether the SOC undermines compliance with water quality standards is being addressed by the EPA in connection with U.S. Steel Corp's NPDES/SDS permits.

Paragraphs 103-104, propose deletion.

~~FINAL DETERMINATION ON ISSUANCE~~ STANDARDS FOR REVIEW OF THE PERMIT
Paragraph 105, no proposed change.

CONCLUSIONS OF LAW

Paragraphs 106-108, no proposed changes.

109. A limited contested case proceeding is needed to determine whether the conditions under which the MPCA is authorized to issue this Permit set forth in Minn. R. 7007.1000 have been met, and whether or not conditions for the denial of the permit are present and whether proper operation of the project in accordance with the conditions of the permit issued by this order will achieve compliance with applicable state and federal air pollution control statutes and rules and the conditions of the permit.

110. The request for a contested case hearing with the scope described herein should be **granted. denied.**

ORDER

The Minnesota Pollution Control Agency ~~denies the request for a contest case hearing of~~ WaterLegacy refers this matter to the Office of Administrative Hearings for a contested case proceeding, including a public hearing as to the following issues: the level of additional mercury emissions that would result from the Keetac expansion; the level, timing and likelihood of any mercury reductions offsets from the Schedule of Compliance with U.S. Steel Corp.; and whether such increased mercury emissions from the Keetac expansion are consistent with Minnesota's mercury TMDL, Implementation and Strategy Framework and protection of human health and the environment, either considering or excluding the provisions of the June 11, 2011 Schedule of Compliance with the United States Steel Corporation.

This Order shall become effective immediately.

IT IS SO ORDERED

Commissioner Paul W. Aasen
Chair, Citizens' Board
Minnesota Pollution Control Agency

Date

SUGGESTED RESOLUTION
Granting a Contested Case Hearing

BE IT RESOLVED, that the Minnesota Pollution Control Agency (MPCA) grants the request of WaterLegacy for a contested case hearing on the Air Emission Facility Permit for the United States Steel Corporation, Minnesota Ore Operations - Keetac Project No. 13700063-004 (Keetac Air Permit) on the following issues:

- the level of additional mercury emissions that would result from the Keetac expansion under the Keetac Air Permit;
- the level, timing and likelihood of any mercury reductions offsets from the June 11, 2011 Schedule of Compliance with U.S. Steel Corp. (SOC);
- whether increased mercury emissions under the Keetac Air Permit are consistent with Minnesota's mercury TMDL, Implementation Plan and Strategy Framework and protection of human health and the environment, either considering or excluding the provisions of the SOC; and
- whether denial of the Keetac Air Permit, additional permit limits, conditions and/or monitoring requirements are needed to ensure consistency with the TMD, Implementation Plan and Strategy Framework and protection of human health and the environment.

BE IT FURTHER RESOLVED, that the MPCA approves and adopts the preceding Findings of Fact, Conclusions of Law, and Order in support of its grant of a request for a contested case hearing with the above scope.

BE IT FURTHER RESOLVED, that the Commissioner is authorized to execute the Findings of Fact, Conclusions of Law, and Order on behalf of the MPCA.