GRAND PORTAGE BAND OF CHIPPEWA
ENVIRONMENTAL DEPARTMENT
P.O. Box 428, Grand Portage, MN55605

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Erik Smith (erik.smith@state.mn.us)
Industrial Division
Minnesota Pollution Control Agency
520 Lafayette Road N
Saint Paul, MN 55155

RE: U.S. Steel Minntac Application for a Variance from Water Quality Standards For Industrial Wastewater NPDES/SDS Permit MN0057207

Dear Mr. Smith,

The Grand Portage Band appreciates this opportunity to comment on U.S. Steel Minntac's proposed variance from Minnesota's Water Quality Standards for their NPDES/SDS Permit MN0057207. The Band is a federally recognized Indian tribe and occupies a reservation in northeastern Minnesota pursuant to a treaty with the United States – the Treaty of LaPointe[1] ("1854 Treaty"). Along with other tribes under the 1854 Treaty, the Band retains hunting, fishing and other usufructuary rights on lands ceded by the Chippewa to the United States across the Great Lakes region, an area that extends over 5 million acres of northeastern Minnesota ('the Ceded Territory"). In the Ceded Territory, all the signatory Tribes have a legal interest in protecting natural resources.

A NPDES permit is required for all of the discharges from the Minntac tailings basin to surface waters in the Dark River and Sand River watersheds through hydrologically connected groundwater. U.S. Steel documented in its application that discharge to groundwater from the Minntac tailings basin has polluted hydrologically connected surface waters in the Dark River and Sand River watersheds; stating that some of the tailings basin water enters the surficial aquifer beneath the basin and flows as groundwater from the basin to the west and east. This deep seepage has resulted in elevated solutes in groundwater and the downstream surface waters in the Dark River and the Sand River watersheds.[2] U.S. Steel confesses in its application that the "quantity of materials being discharged to surface waters" has been calculated using the "discharge rate of surface seepage from SD001 and the rate of seepage to groundwater from the tailings basin."[3] U.S. Steel then approximates the contributions of tailings basin groundwater seepage to violations of water quality at surface water monitoring stations stating, "the current

[1] Treaty with the Chippewa, 1854, 10 Stat. 1109, in Charles J. Kappler, ed., *Indian Affairs: Laws and Treaties*, Vol. II (Washington: Government Printing Office, 1904), available on-line at http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0648.htm
[2] Groundwater Variance Application, pp. 3, 13
[3] *Id.*, p. 17.

estimate of total seepage that is not captured and returned to the basin is 3,210 gpm, with 1,450 gpm seeping to the east to the Sand River watershed and 1,760 gpm seeping to the west to the Dark River watershed. Note that this does not include the 700 gpm of seepage that is captured by the existing SCRS."[4]

U.S. Steel's application also documents the surface water pollution concentrations affected by Minntac tailings basin discharge for specific conductivity and sulfate. In the upper Dark River (SW003), average specific conductance from 2011 through 2016 was 1,798 µS/cm and average sulfate 597 mg/L. Average sulfate concentrations from 2011 to 2016 in the Sand River were 149 mg/L, and specific conductance averaged 619 µS/cm.[5] Monitoring data from the 1854 Treaty Authority recorded average sulfate concentrations of 207- 460 mg/L at the inlet to Little Sandy Lake, the wild rice water monitoring station that is closest to the Minntac tailings basin.[6]

The proposed variance would remove effluent limits for specific conductance, total dissolved solids, bicarbonates, sulfate, and hardness, and replace effluent limits with only monitoring.[7] This proposal violates the Clean Water Act "reasonable potential to exceed" requirements found at 40 CFR §122.44(d)(1): if a known or projected concentration exceeds the applicable numeric water quality criterion for a specific pollutant, there is reasonable potential that the discharge may be causing or contributing to an excursion above the applicable water quality standards and the permit writer *must develop a Water Quality Based Effluent Limit*.

40 CFR § 122.46 (a) states that the duration of NPDES permits shall be effective for a fixed term not to exceed 5 years. In spite of major NPDES permit modifications and multiple schedules of compliance, MPCA has not provided a new permit to Minntac since their permit expired in 1992. And, since 1987 when the existing NPDES permit was issued, MPCA has issued multiple Schedules of Compliance for the same suite of pollutants listed in this variance request for Minntac's tailings basin discharge.

Variances are intended to be time-limited designated use and criterion. Further, compliance schedules are only allowed for recently adopted standards. The U.S. Steel request is for a suite of conventional pollutants that are ineligible for a variance under the Clean Water Act because the statutory deadline of July 1, 1977, for compliance of applicable water quality standards has long since passed.[8] The EPA NPDES Permit Writer's Manual states, "*after July 1, 1977, permits may not contain compliance schedules for effluent limitations based on water quality standards adopted before July 1, 1977.*"[9]

The Clean Water Act defines a "schedule of compliance" as including "an enforceable sequence of actions . . . leading to compliance with an effluent limitation . . . ." 33 U.S.C. § 1362(17). Yet, more than twenty-five years have passed and Minntac is still being allowed to contravene

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[4] *Id.* pp. 18, 20.
[5] Surface Water Variance Application, p. 14
[6] 1854 Treaty Authority Sandy Lake and Little Sandy Lake Monitoring (2010-2016), Technical Report 16-06, December 2016.
[7] Surface Water Variance Application, pp. 2-3, 20.
[8] 33 U.S.C. §1311(b)(1)(C).
[9] EPA, NPDES Permit Writers Manual, Sept. 2010, Ch. 9, p. 9-9, available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm_chapt_09.pdf

both Minnesota's water quality standards and the federal Clean Water Act. Postponing compliance with surface water quality standards until at least 2038[10] provides an effective variance from water quality standards for fifty-years.

U.S. Steel has asserted that attainment of surface water quality standards is economically infeasible under Chapter 7000 of Minnesota Rules,[11] and that attaining criterion to support the existing designated uses is not feasible under 40 CFR § 131.10(g) due to low flow and human-caused conditions.[12]

40 CFR § 131.10(g) states that designated use may be removed, or subcategories of a use established, only if there is a demonstration that attaining the designated use is not feasible because:

1. naturally occurring pollutant concentrations prevent the attainment of the use;
2. natural, ephemeral, intermittent, or low- flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met;
3. human-caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place;
4. dams, diversions, or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use;
5. physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to [chemical] water quality, preclude attainment of aquatic life protection uses; or
6. controls more stringent than those required by sections 301(b)(1)(A) and (B) and 306 of the Act would result in substantial and widespread economic and social impact."

Both Minnesota and federal rules require a discharger to demonstrate that attaining the water quality standard is not feasible.[13] U.S. Steel has failed to meet the requirements to demonstrate that either low flow or human-caused conditions make attaining Minnesota surface water quality standards infeasible. Simply asserting that low-flow conditions in the Dark River and Sand River make industrial or agricultural water appropriations permits unlikely[14] does not meet the requirements to demonstrate that attaining water quality standards is infeasible.[15] Similarly, using property boundaries[16] to demonstrate that human-caused conditions prevent attainment of

[10] *Id.*, p. 5.
[11] *Id.*, pp. 20, 11, seeking relief under Minn. R. 7000.7000, Subp. E.
[12] Surface Water Variance Application., pp. 11, 20, citing sub-paragraphs of 40 C.F.R. §131.10(g).
[13] 40 CFR §131.13. MPCA, Guidance for Water Quality Standard Variances, Jan. 2013, p. 1 available at https://www.pca.state.mn.us/sites/default/files/wq-wwprm2-10a.pdf
[14] Surface Water Variance App., pp. 23, 24, 25, 35.
[15] 40 C.F.R. §131.10(g)(2); Minn. R. 7050.0190, Subp. 4, Item A (2).
[16] Surface Water Variance Application, pp. 25, 36, 37, 38.

water quality standards for industrial or agricultural irrigation uses[17] does not meet State or federal requirements.

In Minnesota rules, a permittee must demonstrate to the agency that receiving a variance would not remove an existing use,[18] *and* demonstrate to the agency that attaining the water quality standard is not feasible. The definition of existing use is "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."[19] In fact, U.S. Steel funded the 1854 Treaty Authority to monitor wild rice downstream of tailings basin in the Sand River watershed. These annual studies have demonstrated that unless U.S. Steel is required to abide by Minnesota rules, the wild rice existing use will be removed.[20] Assessments of the quality of fish and/or benthic macroinvertebrate communities in the Dark River or Sand River watersheds have not been provided. Therefore, U.S. Steel cannot demonstrate aquatic life existing uses are not impaired or pollution-intolerant species have not been extirpated.[21]

U.S. Steel has not met the state or federal rule requirements to demonstrate that compliance with water quality standards would "result in substantial and widespread negative economic and social impacts."[22] Because U.S. Steel is a publically traded company it is subject to the Security and Exchange Commission ("SEC") public reporting requirements. In its 2016 annual report to the SEC U.S. Steel recorded net sales of more than $10 billion and a total liquidity of approximately $2.9 billion.[23] In order to focus on U.S. Steel's stockholder" *value creation strategy*" to "*earn the right to grow, and drive and sustain profitable growth*"[24] it appears that the company is not planning to spend millions of dollars on pollution control treatment systems because disregarding both state and federal environmental laws for twenty-five years has been shown to be a profitable business model. This means that unless fines are levied that make it unprofitable for U.S. Steel to continue to contravene the Clean Water Act and Minnesota's water quality standards, this exploitation will persist.

As a matter of law, U.S. Steel has not demonstrated that compliance with water quality standards is infeasible, or that existing uses would not be removed in the surface waters surrounding the tailings basin. U.S. Steel's 2016 10-K Annual Report filed with SEC demonstrates that *compliance with water quality standards* ***will not*** *result in substantial and widespread negative economic and social impacts.* Therefore, U.S. Steel's variance request must be denied.

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[17] 40 C.F.R. §131.10(g)(3); Minn. R. 7050.0190, Subp. 4, Item A (3).
[18] Minn. R. 7050.0190, Subp. 1, Item C. See also 40 C.F.R. §131.10(g) and (h)(1) and 40 C.F.R. §131.3.
[19] 40 C.F.R. §131.3. Minn. R. 7050.0190; *see* Minn. R. 7050.0210, Subp. 6c; Minn. R. 7001.1080, Subp. 2, Item B (2).
[20] 1854 Treaty Authority, Sandy Lake and Little Sandy Lake Monitoring (2010-2016), Technical Report 16-06, December 2016.
[21] No fisheries or macroinvertebrate surveys are provided for surface water locations SW003, SW005, SW006, SW007 or SW008.
[22] Minn. R. 7050.0190, Subp. 4(6); 40 C.F.R. §131.10(6).
[23] U.S. Steel, Form 10-K Annual Report to the U.S. Securities and Exchange Commission for the fiscal year ended Dec. 31, 2016, pp. 25, 59, available at https://www.ussteel.com/sites/default/files/annual_reports/USS%20Form%2010-K%20-%202016.pdf
[24] *Id.* p. 4

As a matter of law, MPCA must issue a NPDES permit that has limits for all pollutants demonstrated to exceed water quality standards for all outfalls where groundwater is known to have hydrologic connections to surface waters. And, as a matter of law, the NPDES permit must not contain a variance or schedule of compliance for conventional pollutants. Instead, a Consent Decree that includes stipulations making it unprofitable for U.S. Steel to continue to contravene both state and federal rules must be issued.

Sincerely,

Margaret Watkins

Margaret Watkins
Water Quality Specialist