# Fond du Lac Band of Lake Superior Chippewa
## Reservation Business Committee

1720 Big Lake Rd.
Cloquet, MN 55720
Phone (218) 879-4593
Fax (218) 879-4146

Chairman
Kevin R. Dupuis, Sr.

Secretary/Treasurer
Ferdinand Martineau, Jr.

Dist. I Representative
Vanessa L. Northrup

Dist. II Representative
Bruce M. Savage

Dist. III Representative
Roger M. Smith, Sr.

Executive Director,
Tribal Programs
Miyah M. Danielson

Constance Cummins, Forest Supervisor
Superior National Forest
8901 Grand Avenue PL
Duluth, MN 55808

Chris Korleski, Director
EPA Region 5 Water Division
77 W. Jackson Blvd.
Chicago, IL 60604

Col. Sam Calkins, St. Paul District Commander
U.S. Army Corps of Engineers, St. Paul District Regulatory Branch
180 5th St. East
St. Paul, MN 55101

September 12, 2017

Dear Ms. Cummins, Mr. Korleski, and Col. Calkins:

The Fond du Lac Band of Lake Superior Chippewa appreciates the opportunity we had on August 8 to meet with staff from each of your agencies to discuss, among other issues, the status of wild rice restoration on Sandy and Little Sandy Lakes as a condition of US Steel Minntac's Section 404 (CWA) Permit No. 2011-00832-JCB. In previous consultation between the US Army Corps of Engineers and tribal leaders from the Fond du Lac, Grand Portage, and Bois Forte Bands, the tribes requested that the Corps condition that wetland permit to require US Steel to restore wild rice in the two lakes, often referred to as the "Twin Lakes". These had been significant lakes for manoomin harvest by band members in the 1854 Ceded Territory until recent decades, when sulfate pollution and hydrologic loading depleted the natural stands nearly to extinction. Only a few remnant stalks have been seen in annual surveys conducted by the 1854 Treaty Authority since 2010.

In the actual USACE permit language, the tribal request for *restoration* of wild rice was translated to a requirement to develop a "Restoration Opportunities Plan" that would evaluate and identify implementation alternatives for re-establishing wild rice in the Twin Lakes. In our recent meeting, the USACE reiterated their position that they cannot order attainment of permit conditions under their regulatory authorities. The Bands questioned that position, and the EPA staff present at the meeting suggested that they did not interpret the regulations as preventing the Corps from requiring attainment of permit conditions.



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Fond du Lac and the other 1854 CT Bands have long expressed our frustration at the apparent lack of regulatory enforcement on taconite facilities in Minnesota, and in particular the US Steel-Minntac operations. We have persistently sought fair and reasonable enforcement of existing water and wetland regulations by state and federal agencies, but continue to see unfair and in some cases, illegitimate lack of regulatory oversight of this industry. For instance, the MPCA indicated to the Corps that the Minntac tailings basin was 'in compliance' with their NPDES permit (issued in 1987; expired in 1992; administratively continued) when the 2012 USACE wetland permit was issued. USACE considers the State to be the arbiter of whether a site is meeting Clean Water Act (CWA) standards, through determinations under the State's Section 401 certification authority, even though the Bands provided substantial data (from MPCA-required monitoring reports) documenting that existing tailings basin discharges were greatly exceeding Minnesota water quality standards, including the sulfate standard for wild rice. The Bands believe that USACE regulations require a proposed permitted activity must comply with *water quality standards*, as opposed to being in compliance with a permit. Clearly, poorly written, antiquated permits with no enforceable pollutant limits will not protect aquatic resources, and that, quite simply, is what the Band expects responsible state and federal regulators to do.

Additionally, the Bands had expressed our concerns for the 'piecemealing' of several consecutive Minntac Section 404 permits issued in rapid succession by the Corps for major wetland destruction (hundreds of acres), which ignored the cumulative effects of both new and existing wetland impacts and water quality violations over decades on important treaty-protected resources. But the Corps chose to only consider the *incremental* impact of the single mine expansion for this 2011 Section 404 permit, and the *incremental* impact of the additional loading associated with this pit expansion, not historical or cumulative impacts. Again, the result is a failure to protect treaty resources – and in the case of the Fond du Lac Band, continued degradation of water quality in the St. Louis River, including the portion under tribal regulatory authority.

In reviewing progress reports from US Steel and their consultants on the "Twin Lakes Wild Rice Restoration Opportunities Plan", the Bands frankly find US Steel's focus on beaver activity as the primary cause for wild rice loss disingenuous. There are presently some nominal wild rice stands as a result of the limited seeding that has been done, but these are minimal and potentially decreasing. Research conducted over the past seven years by the Bands and the state, in conjunction with University of Minnesota research scientists, into the effects of excess sulfate loading on wild rice growth and reproduction indicate these will be short-lived stands because of long-term effects of elevated sulfate concentrations. However, this ongoing line of experimental research has also demonstrated that wild rice populations **can rebound if sulfate loading is halted.** The Bands believe this is compelling evidence that wild rice *can* be restored to the Twin Lakes if US Steel is required to treat their wastewater for excess sulfate, and actually meet water quality standards.

The Bands have also recognized that hydraulic loading of the downstream wetlands is a concern for wild rice restoration; the Twin Lakes' mean annual depth has increased over the years since the tailings basin has been constructed, and millions of gallons per day of water 'seeping' out through discharge weirs. Not only has that impacted wild rice in the Twin Lakes, but there has also been a massive conversion of wetland type at the toe of the tailings basin, from black spruce/tamarack dominated peat bogs to cattail monocultures. This profound wetland disturbance has already occurred at this and other similarly-constructed Minnesota Iron Range tailings basins, but neither US Steel nor any other taconite operations has been held accountable for these easily predictable indirect wetland impacts, either in permitting or mitigation.

As the Bands and agencies concluded our technical discussions about US Steel-Minntac at the August 8 meeting, we summarized the outstanding issues that need to be resolved. Primarily, the relationship between the USACE wetland permit and the MPCA Section 401 certification is a concern. Regardless of whether or not US Steel is in compliance with the outdated tailings basin NPDES permit requirements – deficient as they may be – it is clear that Minnesota water quality standards have not been attained. The USACE Record of Decision (ROD) for the Section 404 permit may reference attainment of downstream water quality standards, and the fact that US Steel is out of compliance with the Clean Water Act (CWA) may mean the USACE permit does not meet certification standards. The USACE will review and consider if a cease and desist is an option and what that might look like. The Bands also requested that the USACE review and consider their enforcement capability for conditions they applied to the Section 404 permit, specifically the restoration of wild rice in the Twin Lakes.

Finally, the Bands and the Corps agreed that the Section 106 (National Historic Preservation Act) consultation process should be resumed and concluded (through a Programmatic Agreement) for this permitted action. The Twin Lakes is an established heritage site (historic property) because of its historic use by tribal members as a wild rice resource. A site inspection with the 1854 Treaty Authority, Bois Forte and the Superior National Forest archaeologist found pottery shards – perhaps from late woodland period - along the shore. Earlier actions taken through the Section 106 consultation process had established an area of potential effect, and tribal member testimony on access and use had been documented, but further steps to define and resolve adverse effects should commence immediately.

The Bands ultimately posed a question to all three federal agencies participating in this meeting: How will the responsible federal agencies ensure that wild rice is restored in the Twin Lakes? We suggested that there should be active collaboration among the agencies

(USFS, EPA, and USACE) to examine the regulatory record for this facility with a clear understanding of each agency's own permitting, oversight and enforcement responsibilities. The commonality in this challenging regulatory/enforcement state of affairs lies in the fact that all three agencies share trust responsibility with the Bands to achieve a sustainable wild rice stand and meet federal responsibility to protect tribal interests.

In closing, the Fond du Lac Band requests of agency leadership that the USACE, the EPA and the USFS engage with one another in a strategy meeting, perhaps under the 'umbrella' of a revived Section 106 consultation process, to determine the manner in which the federal agencies can collaborate to restore wild rice the Twin Lakes. The Band and our tribal partners in the 1854 Ceded Territory are anxious to see this important treaty resource made whole, and stand ready to work with the agencies to make progress towards this goal.

Sincerely,

Kevin R. Dupuis, Sr.
Chairman, Fond du Lac Reservation Business Committee

Cc: Kenton Spading, USACE
Ralph Augustin, USACE
Jill Bathke, USACE
Desiree Morningstar, USACE
Marty Rye, USFS
Krista McKim, USEPA
Wendy Melgin, USEPA