Fond du Lac Band of Lake Superior Chippewa

Resource Management Division

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Tamara Cameron
Chief, Regulatory Branch
St. Paul District, Corps of Engineers
180 Fifth Street East, Suite 700
St. Paul, MN 55101-1678

Dear Ms. Cameron:

I received your recent request for information regarding the Fond du Lac Band of Lake Superior Chippewa's federally approved water quality standards, and appreciate the Corps of Engineers' interest in learning more about our standards and their application as they may relate to the proposed NorthMet project. Fond du Lac has advised the Corps and other lead agencies throughout the environmental review process - from initial scoping, through various preliminary drafts of the project Environmental Impact Statement, in our comments on the Draft Environmental Impact Statement, and at numerous technical and consultation meetings – that there would need to be a critical analysis of how the project would comply with the Band's water quality standards. The U.S. Environmental Protection Agency also noted the importance of consideration of the Band's water quality standards in their comments on the Complete Preliminary Draft Environmental Impact Statement (February 5, 2009), and in their comments on the Draft Environmental Impact Statement (February 18, 2010). There is not yet any indication that the project complies with the Band's water quality standards, as that has not been specifically addressed to date in the environmental review process. As you know, NEPA requires this shortcoming to be rectified in the SDEIS and we are committed to assisting you as you prepare the analysis.

First, you ask for "[a]n interpretation as to which FDL standards apply to the St. Louis River within FDL boundaries" and a "description of these standards." To clarify, the USEPA first approved the Band's application for 'Treatment as a State' (known as "TAS") to administer a water quality program for protecting the water resources within the exterior boundaries of the Fond du Lac Reservation in May 1996. The basic requirements for this authorization are described at 40 CFR Section 131.8. This approval delegates certain authorities under the federal Clean Water Act (CWA) to the Band, among them the ability to establish and enforce water quality standards that are protective of the specific designated or beneficial uses for each water body, as the Band defines those uses. After the affirmative TAS decision, Fond du Lac promulgated water quality standards that the tribal governing body (the Reservation Business Committee) approved before submitting them to USEPA Region 5 for review and approval under CWA Section 303(c). Because Fond du Lac's water quality standards were the first tribal standards within the Great Lakes Basin to be reviewed, they were also subject to additional scrutiny at EPA Headquarters and within the Regional Office for consistency with the Great Lakes Initiative or "GLI." I have attached a copy of our approved water

quality standards, but they are also available on the USEPA website at:
http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribes.cfm

At the time that the USEPA approved our water quality standards in December 2001, we were concurrently authorized to exercise authority under CWA Section 401 to certify or deny certification of compliance with our standards for any relevant federal action affecting water quality, such as a Section 404 permit, a federal Section 402 permit, or a license issued under the authority of the Federal Energy Regulatory Commission (FERC). Our water quality standards include all the required elements: designated or beneficial uses for waters of the Reservation, narrative and numeric criteria to support or sustain those uses, and antidegradation provisions.

As you review our ordinance, you will note that all designated uses apply to our 22-mile reach of the St. Louis River with the exception of "Public Water Supply" and "Cultural - wild rice areas." All narrative and numeric criteria associated with the designated uses apply, as well as the antidegradation provisions for high quality waters. You will find some of this information generally in Chapter 1, Section 105, "Antidegradation Policy and Implementation", Chapter 3, "General Standards and Designated Uses", and in the appendices, but other specific information may be found throughout the ordinance.

Our water quality standards have been calculated to assume a higher fish consumption rate by Band members, 60 grams/day, than the general public (17.5 g/day), or even the state of Minnesota's consumption rate for the Lake Superior Basin (30 g/day). We will be reevaluating that consumption rate this year during our triennial review process, and may revise it upwards to be consistent with more current studies on Ojibwe diet and traditional lifeways, studies by the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) identifying a strong seasonal component to Ojibwe fish consumption rates, and in consideration of the mercury in fish studies we have conducted for Reservation waters. The St. Louis River is the most significant on-reservation fishery resource for the Band, both historically and currently.

You also ask "[w]hether the St. Louis River currently meets those standards within FDL boundaries," and if not, what "impact criteria" the Band suggests for assessing the current project, and "the current ambient levels for those particular pollutants." Based upon results of our water quality monitoring program and additional resource investigations, the Reservation's reach of the St. Louis River *is* attaining all of its beneficial uses and meeting applicable water quality standards, with the exception of mercury contamination in fish (our human health chronic standard), which, for Fond du Lac, is the most significant direct impact to evaluate on this project. As for "current ambient levels," while mercury concentrations we have measured in St. Louis River samples are below the GLI Chronic Wildlife Standard of 1.3 ng/l, they exceed Fond du Lac's human health chronic standard of 0.077 ng/l. For this reason, we are concerned about any new or expanded discharges to the St. Louis River upstream of the Reservation that may adversely affect mercury bioaccumulation in fish. In order to fully assess the impact of the proposed project on mercury bioaccumulation downstream, we believe it is crucial to collect as "impact criteria" mercury data in biota (multiple trophic levels) to characterize current conditions in and around the proposed project area, not simply to predict downstream water column mercury concentrations through modeling. There are a number of relevant regional studies and peer-reviewed journal articles that describe sampling strategies and methodologies for lower trophic level taxa such as odonates, crayfish, and prey fish such as yellow perch.

These impact criteria must be evaluated not just as a matter of the Band's water quality standards, but under the CWA. The St. Louis River is already impaired within the meaning of Section 303(d) of the CWA, and if a new proposed project would *cause or contribute to an existing impairment*, it cannot be permitted. Multilateral efforts are being made to address the existing impairment. Fond du Lac has formally concurred with the MPCA regarding the impaired status of the shared reach of the St. Louis River for mercury in fish tissue. MPCA has provided Fond du Lac with their draft Section 303(d) list of impaired waters before the public comment period, and Fond du Lac has responded for the record, for MPCA's submission of the Section 303(d) list to EPA Region 5. Several years ago, EPA Region 5 allocated some of their discretionary Great Lakes Restoration Initiative (GLRI) funds to the St. Louis River regulatory agencies for purposes of developing a TMDL to address toxics in the St. Louis River Area of Concern (AOC), which has multiple legacy toxic contaminants, and to address the mercury in fish impairment applicable to the rest of the river. The federal, state, and tribal partners (MPCA, WDNR, Fond du Lac and EPA Region 5) are currently working with a consultant to develop hydrologic and contaminant transport models for the Total Maximum Daily Load (TMDL) study, and are considering additional data needs to support the TMDL study, including biological sampling of lower trophic levels to augment existing data on game fish species. We expect that any biological data collected for the proposed NorthMet project will be helpful to this effort as well as for predicting downstream impacts as part of the project EIS. In any case, the existing impairment of these waters is a pivotal consideration for the project.

Finally, as preliminary notice to you, Fond du Lac has invested in restoration of the lake sturgeon in the St. Louis River and may adopt additional water quality standards in connection with their protection. A recent development with implications for our water quality standards has been the capture and subsequent radiotelemetry surveys of juvenile lake sturgeon (*Acipenser fulvescens*) in the St. Louis River within Fond du Lac Reservation boundaries. While you may have been aware of a decades-long effort by the Minnesota and Wisconsin Departments of Natural Resources to stock and re-establish lake sturgeon in the lower St. Louis River Estuary, and our tribal fisheries biologist's documentation of the first natural reproduction in the estuary occurring last spring, it has not been as widely known that the Fond du Lac Natural Resources Program had been stocking sturgeon eggs and fry in our reach of the river, beginning in the 1990's. Sturgeon are a culturally important species for the Ojibwe, and were nearly extirpated by overfishing, habitat degradation, damming of free-flowing rivers, and pollution. Given what we know about the habitat and ecological requirements of this species, we are primarily concerned about protecting water quality within the St. Louis River and the on-Reservation tributaries the sturgeon are using. A preliminary literature search and discussions with regional fisheries managers and academic researchers suggests that in addition to temperature and dissolved oxygen, lake sturgeon may be sensitive to industrial pollutants, including increased salinity.

If you have any additional questions about Fond du Lac's water quality standards or regulatory authority as it relates to the proposed NorthMet project, please contact me by phone (218-878-7110) or email.

Sincerely,

Nancy J Schuldt

Nancy Schuldt, Water Projects Coordinator
Fond du Lac Environmental Program

Cc: Karen Diver, Chairwoman, Fond du Lac Reservation
Ann Foss, MPCA
Kevin Pierard, EPA Region 5
Sara Van Norman, Jacobson Buffalo Law Firm