Fond du Lac Band of Lake Superior Chippewa

Reservation Business Committee

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October 31, 2018

By Email

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Commissioner, Minnesota Department of Natural Resources
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Re: Fond du Lac Band's request for notice of and opportunity to respond to the pending CWA §401 Certification and Permits Required for Operation of the Proposed NorthMet Mine to ensure compliances with Fond du Lac Band's downstream water quality standards

Chief Konickson, Regional Administrator Stepp, Acting Director Holst, Commissioner Stine and Commissioner Landwehr:

The Fond du Lac Band of Lake Superior Chippewa (the "Band") submits this letter to notify the U.S. Army Corps of Engineers, the U.S. Environmental

Protection Agency, as well as the Minnesota Pollution Control Agency and the Minnesota Department of Natural Resources, that no final decisions to approve permits for the proposed NorthMet Mine ("the Project" or "PolyMet") should be made unless such permits contain conditions so that the Project will also comply with the Fond du Lac Band's water quality standards as required by § 401(a)(2) of the Clean Water Act, 33 U.S.C. §1341(a)(2). As extensively discussed in the Band's prior comments submitted in the course of the development of the environmental impact statement for this Project—and more recently on the draft permits—and as confirmed by objective scientific studies and analysis, the proposed Project will adversely affect the quality of the Band's jurisdictional waters downstream of the Project, so as to likely violate the Band's water quality standards ("WQS").

The Band formally requests that, as required by § 401(a)(2) of the Clean Water Act, the Band be given notice of, and the right to review, the State's proposed CWA § 401(a)(1) certification, along with the terms and conditions of proposed state and federal permits, and have an opportunity to comment on, raise objections, or urge additional measures as necessary to ensure the Project will satisfy the Band's WQS. Such measures include, as warranted and as provided by CWA § 401(a)(2), seeking a public hearing in this matter to provide for the development of appropriate permit conditions to ensure compliance with our water quality requirements.[1]

Further, should the State make decisions approving permits and certifying that the Project will not violate State WQS without including conditions that also ensure compliance with the Band's WQS, the Band reserves its right to request mediation with the State over the unreasonable effects resulting from conflicts between the Minnesota and Tribal WQS for the St. Louis River. 40 C.F.R. § 131.7.

In support, the Band states as follows:

The Band is a federally recognized Indian tribe and a member band of the Minnesota Chippewa Tribe. The Band holds and occupies the Fond du Lac Reservation, established as the Band's permanent home by the Treaty of LaPointe with the United States, Sept. 30, 1854, 10 Stat. 1109. The Reservation lies in the St. Louis River basin, directly downstream from the Project. The Band provides governmental services to Band members and other qualifying persons. Among the Band's government functions is protection of the environment. With

[1] MPCA advised the Band via email on October 25, 2018 that MPCA has transmitted revised draft air quality and water quality permits for the proposed Project to the EPA for EPA review. MPCA stated that these revised drafts are not final permits and that there will be no opportunity for the Band or anyone else to comment on them. MPCA further stated its position that the State's "401certification is not required to be provided to EPA for a final review prior to MPCA making a decision on the certification." MPCA's position on these issues, however, does not affect the obligations of MPCA, the Corps, and EPA to ensure that the Band is given notice of and an opportunity to comment on the State's 401 certification and to seek a hearing or mediation if the proposed state and federal permits fail to include conditions that ensure the Project will also meet the Band's WQS.

regard to water quality, the Band has Treatment as a State status under the federal Clean Water Act[2] for our Reservation waters. That is vital to the Band's members, who rely on the Reservation's resources for subsistence, cultural, and religious purposes. To protect that interest, the Band has issued WQS for waters within the Fond du Lac Reservation, pursuant to its delegated authority to regulate water quality under the CWA.[3] The Band's responsibilities under the CWA to protect tribal waters include the inherent right to exercise our authority under § 401 to object to a proposed upstream discharge that would violate our water quality standards.

The federal and state agencies involved in reviewing the proposed Project recognized the Band's interest when they agreed to include the Band as a cooperating agency on the Project during the environmental review process. In addition, EPA and the Corps recognized the need to address the Band's downstream water quality standards in connection with decisions on permitting for the proposed Project.[4]

The Band's water quality staff has determined that the proposed Project will negatively impact the water quality of the St. Louis River where it enters the Fond du Lac Reservation such that it would result in a violation of the Band's WQS. That determination, and the basis for it, have been set out in our prior correspondence, comments, and objections submitted in the course of the environmental review and development of draft permits for this Project. The best available scientific evidence indicates that the Project's discharges into surface water, wetlands, and ground water that is hydrologically connected to surface water in the St. Louis River Basin will result in contaminants flowing into the Reservation via the St. Louis River.

As a result of mining in the Mesabi Range, the reach of the St. Louis River downstream from the Range and within the Fond du Lac Reservation is already impaired and fails to meet the Band's WQS. The CWA precludes the State, the Corps and EPA from issuing permits or certifications that would allow discharges that would contribute to the impairment of these waters on the Fond du Lac Reservation. For that reason, any permits authorizing the Project must include requirements that will protect the Band's downstream waters and ensure compliance with the Band's WQS.

As a downstream water quality authority with a long-term comprehensive water quality monitoring program in place, the Band knows that existing mines upstream of the Reservation are polluting reservation waters today. Our findings are entirely consistent with scientific studies done, and conclusions reached, by the State.[5] That research, as further confirmed by other

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[2] *See* 33 U.S.C. § 1377(e); 40 CFR § 131.8 (Requirements for Indian Tribes to administer a water quality standards program); *see also* Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30,183 (May 16, 2016).
[3] *See* 33 U.S.C. § 1377(e).
[4] *See* U.S. EPA comments on the Complete Preliminary Draft Environmental Impact Statement (February 5, 2009); U.S. EPA comments on the Draft Environmental Impact Statement (February 18, 2010). *See also* Letter from Tamara Cameron, Army Corps of Engineers,) to the Fond du Lac Band (Feb. 17, 2012).
[5] *See, e.g.*, Michael Berndt & Travis Bavin, Minn. Dep't of Natural Res., On the Cycling of Sulfur and Mercury in the St. Louis River Watershed, Northeastern Minnesota: An Environmental and Natural Trust

objective scientific studies, shows that discharges from abandoned and active mine sites in the Iron Range are still having an effect in the downstream St. Louis River basin to this day. This includes discharges and accumulations of numerous constituents of concern, among which are selenium, bromide, and sulfate, which are negatively affecting the environment in the Reservation, thereby impacting Band members' rights to fish and gather wild rice. All of this is of deep concern to the Band. We particularly draw your attention to the effects of sulfate discharges, which are a significant issue raised by the Project. Sulfate is being carried downstream from currently operating mines, abandoned mine pits, and tailings basins in the Mesabi Range all the way to the Reservation and into Lake Superior. The natural process by which this sulfate is reduced to sulfide plays an important role in converting naturally occurring mercury in water and river sediments to methylmercury (MeHg). MeHg is a toxic form of mercury that bioaccumulates in fish. Thus, the presence of sulfate, carried downstream from mining activity by rain events and other natural hydrological processes, results in elevated levels of toxic MeHg in the fish in the St. Louis River within the Reservation.

Our members rely on those fish for subsistence and cultural purposes. Consistent with Ojibwe diet and traditional lifeways, fish consumption by Band members is considerably higher than the consumption levels for the non-Native population. The Band's WQS are set specifically to protect Band members in light of this considerably higher fish consumption level. As we have explained, mercury concentrations in the St. Louis River exceeded the Band's human health chronic standard. This already intolerable situation cannot be allowed to worsen.

The same natural processes that cause existing mining in the Iron Range to affect the St. Louis River on the Reservation will apply to the discharges from the Project into the St. Louis River basin. The scientific evidence indicates that the anticipated sulfate and mercury discharges from the Project into surface water, wetlands, and ground water that is hydrologically connected to surface water will further impair the St. Louis River on the Reservation, in violation of § 303(d) of the CWA, and to the detriment of the health and safety of the Band's members and the Reservation's resources.

The Band has repeatedly raised these issues with the MPCA and MNDNR, as well as the Army Corps and EPA. This has been done in the Band's substantive written comments to MNDNR on the draft permit to mine, draft water appropriation permits, and draft dam safety permit; to the MPCA on the draft NPDES/SDS permit, draft air permit, and draft §401 certification; and to the Corps, Forest Service, and EPA in our comments on the Final EIS, as well as in our recent request for a supplemental EIS.

Fund Final Report (Aug. 15, 2012) (unpublished Final Report); Michael Berndt & Travis Bavin, Minn. Dep't of Natural Res., Sulfate and Mercury Chemistry of the St. Louis River in Northeastern Minnesota: A Report to the Minerals Coordinating Committee (Dec. 15, 2009); *see also* John Baeten, et al., *A Spatial Evaluation of Historic Iron Mining Impacts on Current Impaired Waters in Lake Superior's Mesabi Range* (2017); John Baeten, et al., *A Geospatial Approach to Uncovering the Hidden Waste Footprint of Lake Superior's Mesabi Iron Range*, 3Extractive Indus. & Society 1031 (2016).

For example, in our comments on the 2009 draft EIS, the Band noted its concern about the Project's "potential for further degradation of our most important on-reservation fishery, the St. Louis River. Any additional releases of mercury, or loadings of sulfate that enhance downstream methylation of mercury and bioaccumulation in fish, is an unacceptable violation of our water quality standards authority." In the supplemental draft EIS ("SDEIS"), the co-lead agencies took the position that the Project would result in a net *decrease* in mercury loadings to the St. Louis River. However, as the Band explained in detailed comments on the SDEIS, submitted on February 3, 2010, and again in detailed comments on the Final EIS, submitted on December 18, 2015, that view was fundamentally flawed. The conclusion was not supported by data, failed to evaluate other scientifically documented factors that affect mercury methylation, avoided addressing these issues by modeling, and instead relied on incomplete mercury mass balance and general literature studies—some of which were misinterpreted—among other flaws.[6]

The flaws are compounded by other deficiencies. As the Band summarized in its comments and objections to MPCA's draft § 401 certification for the Project, there are ample reasons to expect that the Project will violate tribal WQS—for instance, MPCA has not required a sufficient water quality monitoring system at the Project site, and PolyMet has failed to provide a sufficient analysis of the Project's mercury sources to nearby water resources and wetlands that would rebut the Band's evidence of likely violations. Although these issues could be properly evaluated through correctly developed and applied models and monitoring, to date, none of that has been done. The objective scientific evidence shows that the Project will affect the Band's downstream water quality. The conclusions reached in the final EIS are flawed, and draft permits, to date, fail to take sufficient measure to ensure that the Project avoids adverse impacts to the Band's waters.

Under the CWA, permits authorizing the Project must not contribute to the impairment of waters that currently fail to meet the Band's WQS. Those permits must protect the Band's downstream water quality by providing sufficient treatment, containment, or mitigation of discharges from the Project. We reiterate what we have said in our numerous comments on these permits about why the permits as currently proposed fail to meet these requirements, and how they should be amended to meet the requirements of the CWA.

Moreover, under CWA § 401(a)(2), the Fond du Lac Band is entitled to notice of the State's proposed CWA § 401 certification in connection with the proposed permits for this Project, so that the Band can evaluate the proposed discharge and notify the State, Corps, and EPA of any objections and request a public hearing on the proposal. 33 U.S.C. § 1341(a)(2). Even if EPA is unable, or not presently willing, to reach a conclusion on whether the Project will affect the Band's downstream waters, the Band should nevertheless be provided notice of the

[6] The Band's position was well-supported by an analysis done Dr. Brian Branfireun, an internationally recognized expert in the fields of watershed hydrology, biogeochemistry and the environmental cycling of mercury, who prepared a report regarding the mercury issues raised by this proposed Project. Branfireun, B., Expert Review of the NorthMet Mining Project and Land Exchange Final Environmental Impact Statement (December 2, 2015), prepared for P. Maccabee, Counsel/Advocacy Director for WaterLegacy.

401 certification to allow the Band to address this matter – as EPA has done with regard to other CWA § 401(a)(2) notices to downstream states in connection with other projects.[7] The Band's responsibilities under the CWA to protect tribal waters include the inherent right to exercise authority under § 401 to object to a proposed upstream discharge that would violate our WQS, and so the Band will make such an objection and demand a hearing if the Administrator fails to notify us of its determination.

Further, should the State make decisions approving permits and certifying that the Project will not violate State WQS without including conditions that also ensure compliance with the Band's WQS, the Band reserves its right to request mediation with the State over the unreasonable effects resulting from conflicts between the Minnesota and Tribal WQS for the St. Louis River. 40 C.F.R. § 131.7. The Band has already attempted to resolve this conflict through extensive comments and communication to MPCA, MDNR, the Corps, and EPA. Under federal regulations, the next proper step to address these unreasonable results is mediation.

The Band will continue to be involved in the permitting and certification process for the Project. We intend to take any other legal actions necessary to ensure that any permits for the Project protect the Band's downstream water quality, and its members and resources.

We would welcome any further opportunities to discuss fully our concerns and recommendations for protecting Reservation waters from the adverse effects of the Project, and how the proposed permits can be modified to protect Reservation waters and the health and welfare of the Band's members.

Sincerely,

Kevin R. Dupuis, Sr.
Chairman

[7] *See, e.g.*, EPA Region 5 Notifications dated March 15, 2018 to Indiana, Kentucky and Illinois Pursuant to CWA 401(a)(2) regarding 404 permit application for Mountaineer Natural Gas Liquids Storage, LLC's Powhatan Project in Monroe County Ohio (Noticed that EPA provided this notice although EPA had "made no determination" on whether the project would violate the WQS of the downstream state).