



# Grand Portage Band of Lake Superior Chippewa

## RESERVATION TRIBAL COUNCIL

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Minnesota Pollution Control Agency

c/o Stephanie Lyons

525 Lake Ave S, Ste 400

Duluth, MN 55802

May 17, 2024

Re: Draft NPDES permit and variance from mercury water quality standards for the City of Grand Marais wastewater treatment facility, permit MN0020010.

Dear Ms. Lyons:

The Grand Portage Band of Chippewa (the “Band”) hereby submits these comments in connection with draft NPDES permit for the City of Grand Marais wastewater treatment facility (GMWWTF) permit MN0020010. The facility is designed to treat 990,000 gallons per day discharging into Lake Superior and has applied for a variance from Minnesota mercury water quality standard due to the cost of treatment. The variance requires the facility to work towards minimizing mercury sources, investigate mercury removal technologies, and comply with attainable limits for mercury.

### **Introduction**

The Band is a federally recognized Indian tribe retaining hunting, fishing, and other usufructuary rights that extend throughout the entire northeast portion of the state of Minnesota under the

Grand Portage cmts re GMWWTF MN0020010 variance

1854 Treaty of LaPointe<sup>1</sup> (the “Ceded Territory”). Usufructuary rights are vested property rights to use, access, or enjoy the fruits of another's property.<sup>2</sup> As a signatory to the 1854 Treaty of LaPointe<sup>3</sup> where Grand Portage and other bands ceded more than six million acres to the United States (the “1854 Ceded Territory”), Grand Portage retains usufructuary rights that extend throughout the entire northeast portion of the state of Minnesota. The 1854 Treaty was not a grant of rights *to* the Ojibwe, but a grant of rights *from* the Ojibwe to non-Indians.<sup>4</sup> In the Ceded Territory, Tribes serve as co-managers and stewards of those lands and have a legal interest in protecting natural resources.<sup>5</sup> All federal agencies, including US EPA, share in the federal government’s fiduciary obligation to the Tribes to maintain those treaty resources.

The U.S. Constitution defines treaties as the supreme law of the land, with the same legal force as Federal statutes.<sup>6</sup> Clean Water Act Section 511(a)(3) provides that the Act “shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States.” In implementing CWA Section 303(c), EPA has a fiduciary obligation to ensure that its water quality standards approvals and disapprovals are consistent with treaties, statutes, executive orders, and other sources of federal law reflecting tribal reserved rights.

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<sup>1</sup> 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> .

<sup>2</sup> *See usufruct*, Black’s Law Dictionary (11<sup>th</sup> ed. 2019).

<sup>3</sup> Treaty with the Chippewa, Sept. 30, 1854, 10 Stat. 1109.

<sup>4</sup> *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 184 (1999) (noting “the 1854 Treaty established new hunting and fishing rights in the territory ceded by the Treaty”); *Fond du Lac v. Carlson*, Civ. No. 5-92-159 (D.Minn. March 18, 1996) (unpubl. op.) (holding that Fond du Lac retains usufructuary rights in the 1854 Ceded Territory); *Grand Portage Band of Chippewas, et al. v. State of Minnesota, et al.*, Civ. No. 4-85-1090 (settling suit to enforce 1854 Treaty as to Grand Portage and Bois Forte Bands against state as reflected in Minn. Stat. § 97A.157); *United States v. Bresette*, 761 F. Supp. 658, 661 (D. Minn. 1991) (citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 348 (7th Cir.1983)) (noting “Seventh Circuit has interpreted the 1837, 1842, and the 1854 treaties as reserving full usufructuary rights for the Chippewa on the ceded territories.”).

<sup>5</sup> *Id.*

<sup>6</sup> U.S. Constitution, Art. VI, cl. 2 (“This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.”)

**Mercury is a Bioaccumulative Substance of Immediate Concern Known to be Impairing  
Treaty-reserved Fish Harvests in Lake Superior**

Mercury has been identified in Minnesota 7052 rules as a bioaccumulative chemical of concern (BCC) and a bioaccumulative substance of immediate concern (BSIC). Within the Lake Superior basin, Minnesota water quality standards prohibit any new or expanded point source discharges of bioaccumulative substances of immediate concern including mercury.<sup>7</sup> The mercury Total Maximum Daily Load approved by US EPA for the State of MN in 2008 provides that “The approved TMDLs address water bodies not meeting the aquatic consumption designated use due to an exceedance of numeric water column water quality standards or elevated levels of total mercury per kilogram of fish, or parts per million, fish tissue mercury concentration. The target for both the northeast and southwest regional TMDLs is 0.2 milligrams of total mercury per kilogram of fish, or parts per million (mg/kg or ppm), fish tissue mercury concentration, which is a surrogate for the numeric water column water quality standards: 1.3 nanograms per liter (ng/L) for the Lake Superior Basin, and 6.9 ng/L for the rest of the State.”<sup>8</sup>

As shown by a Minnesota Department of Health Study, one in ten babies born in the Lake Superior Basin in Minnesota has unsafe blood mercury concentrations. The babies born in the summer had higher levels of mercury suggesting that increased consumption of locally caught fish is an important source of pregnant women's mercury exposure in this region.<sup>9</sup> Methylmercury is known to causes severe developmental problems in children and fetuses and neurological damage in adults. There can be no compensation for permanent nervous system damage to babies born with unsafe blood mercury concentrations.

Access to fish that can be safely consumed from Lake Superior is an essential component of treaty resource harvest rights. The number of meals that fish can be safely eaten from Lake

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<sup>7</sup> MN WQS at 7052.0300 and 7052.0350.

<sup>8</sup> MPCA. TMDL Decision Document for Revisions to Minnesota Statewide Mercury Total Maximum Daily Load. <https://www.pca.state.mn.us/sites/default/files/tmdl-mercury-dd.pdf>

<sup>9</sup> Minnesota Department of Health, Pat McCann, Mercury Levels in Blood from Newborns in the Lake Superior Basin (Nov. 30, 2011), [Mercury in Newborns in the Lake Superior Basin - MN Dept. of Health \(state.mn.us\)](http://www.health.state.mn.us/mercury/newborns/)

Grand Portage cmts re GMWWTF MN0020010 variance

Superior is far below subsistence levels and demonstrates that the health and welfare of tribal members who rely upon these resources for sustenance and cultural practices are disproportionately put at higher risk when existing regulatory structures do not recognize protected tribal reserved rights. According to the MDH pregnant women and children under the age of 15 are restricted to eating *one meal per month* of Lake Trout, Siscowet Lake Trout, and Smelt; *one meal per week* of Brown trout and Chinook Salmon; *two meals per week* of Lake Herring, Coho Salmon, Lake Whitefish, and Rainbow Trout from Lake Superior.<sup>10</sup>

### **The Highest Attainable Interim Criterion Establishes Mercury Variances**

The Clean Water Act requires States and Tribes to “set the concentration of a variance using the highest attainable interim criterion; or the interim effluent condition that reflects the greatest pollutant reduction achievable; or if no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the *greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance*, and the adoption and implementation of a Pollutant Minimization Program.<sup>11</sup>”

The greatest pollutant reduction achievable for the reporting period between 2018 and 2023 was 0.983 nanograms per liter.<sup>12</sup> The highest concentration measured was 6.12 nanograms per liter in July of 2023.<sup>13</sup> None of the five lowest reported average values measured between 2018 and 2023 exceed the 1.3 nanograms per liter wildlife criteria for mercury in the Lake Superior basin<sup>14</sup>, yet the MPCA calculated the 99<sup>th</sup> percentile of the *projected effluent quality* daily maximum interim effluent limit to capture the “worst-case concentration” of 9.8 nanograms per

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<sup>10</sup> MN Department of Health. 202. Fish Consumption Guidelines for Lake Superior. [Women Who Are or May Become Pregnant \(state.mn.us\)](https://www.state.mn.us/health/women-who-are-or-may-become-pregnant)

<sup>11</sup> 40 CFR § 131.14 (b)(2)(i)(A)(2).

<sup>12</sup> *I.d.*

<sup>13</sup> *I.d.*

<sup>14</sup> *I.d.*

Grand Portage cmts re GMWWTF MN0020010 variance

liter<sup>15</sup>. This will result in an improper expanded discharge of a BSIC.

### **Water Quality Necessary to Protect Existing Uses Must be Maintained**

7052.0300 ANTIDegradation STANDARDS. Subp. 2. of Minnesota rules for the maintenance of existing water quality states that “Existing water uses under parts 7050.0250 to 7050.0335 and the level of water quality necessary to protect existing uses must be maintained and protected. Where designated uses of the water body are impaired, there must be no lowering of the water quality with respect to the GLI pollutants causing the impairment.” Mercury is causing water quality impairments for human health (fish consumption) and wildlife designated uses (Loons and Otters) in Lake Superior. Contrary to MPCA’s statement that the existing water quality conditions will be protected while holding the Permittee accountable to making future mercury reductions<sup>16</sup>, this limit does not reflect what is currently achievable and allows for backsliding instead of maintaining existing water quality.

Allowing the GMWWTF to discharge mercury without a Pollutant Minimization Plan for more two decades since the criterion was established in Minnesota water quality standards; and providing a variance that is an order of magnitude higher than the lowest concentration of mercury measured in the previous five years, and higher than any concentration measured in the discharge, does not support the protection of high quality waters, wildlife, or subsistence fishing in Lake Superior.

This is particularly concerning because Grand Portage, a community of approximately 500 people, was required by US EPA to develop a pollutant minimization plan prior to receiving a variance from mercury water quality standards in 2011, more than a decade before MPCA required similar actions for small community wastewater discharges within the state (Grand

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<sup>15</sup> MPCA. Water Quality Program Facility-specific preliminary determination Water quality standard variance for mercury City of Grand Marais Grand Marais Wastewater Treatment Plant (WWTF) MN0020010 / AI 414, pg. 6

<sup>16</sup> *I.d.* pg. 7.

Grand Portage cmts re GMWWTF MN0020010 variance

Marais has a population of approximately 1,300 people). The Grand Portage variance was set at 4.7 nanograms per liter, the highest concentration of mercury measured in the discharge based on the five previous years of monitoring and lower than the ambient mercury concentration of the Lake Superior Bay where the discharge occurs. Since then, and with much effort, the variance concentration has been lowered to 2.4 nanograms per liter in 2021. Allowing an expanded discharge of mercury by our closest U.S. neighbor stalls the possibility of safe subsistence fish consumption.

**Set Variance to Highest Attained Level and Require Mercury Pollutant Minimization Plan**

It has been more than twenty-five years since the Minnesota Lake Superior Basin water quality standards rules were adopted and more than fifteen years since the statewide mercury TMDL was approved by US EPA that direct the MPCA to require a mercury pollutant minimization plan for the GMWWTF. Grand Portage respectfully requests that the variance for the GMWWTF be limited to the highest average mercury concentration measured between 2018 and 2023 of 6.12 nanograms per liter. Further we request that a pollutant minimization plan be submitted by the MPCA for the GMWWTF at the same time the variance is provided to US EPA for review.

Thank you for your consideration of our comments.

Sincerely,

April McCormick

Grand Portage Secretary-Treasurer

C. Debra Shore, Administrator, US EPA Region 5

Melanie Nowin, MN Tribal Liaison, US EPA Region 5

