



MILLE LACS BAND OF OJIBWE DEPARTMENT OF NATURAL RESOURCES



May 17, 2024

Stephanie Lyons, Environmental Specialist 4
Minnesota Pollution Control Agency
525 Lake Ave S, Ste 400
Duluth, MN 55802

E-mail: stephanie.lyons@state.mn.us

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

Dear Ms. Lyons:

The Mille Lacs Band of Ojibwe (the “Band”) a federally recognized Indian Tribe retaining hunting, fishing, and other usufructuary rights that extend throughout east-central Minnesota, northern Wisconsin, and western Upper Peninsula of Michigan, including the portion of Lake Superior in Minnesota, Wisconsin, and western Michigan, under the 1837 Treaty of St. Peters (7 Stat. 536) and the 1842 Treaty of La Pointe (7 Stat. 591). Because the waters discharged by the City of Grand Marais wastewater treatment facility (GMWWTF or the “facility”) would impact our treaty resources protected under our 1842 Treaty, we are providing the Minnesota Pollution Control Agency (“MPCA” or the “State”) with our comments regarding the facility’s draft National Pollutant Discharge Elimination System (“NPDES”) permit due to the facility 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.

Usufructuary rights are vested property rights to use, access, or enjoy the fruits of another's property. The 1842 Treaty was not a grant of rights to the Ojibwe, but a grant of rights from the Ojibwe to non-Indians. In the Ceded Territory, Tribes serve as co-managers and stewards of those lands and have a legal interest in protecting natural resources. All federal

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Comments on draft NPDES permit and variance from mercury water quality standards for the City of Grand Marais wastewater treatment facility.
Mille Lacs Band of Ojibwe

agencies, including US Environmental Protection Agency (“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. Clean Water Act (“CWA”) 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.

Because our Band citizens consume more servings of fish than the general population, the facility’s draft NPDES permit and variance from mercury water quality standards is of great concern. Mercury has been identified in Minnesota Rules Part 7052 (Minn. R. Parts 7052.0300 and 7052.0350) 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. The *Revisions to Minnesota Statewide Mercury Total Maximum Daily Load* (“TMDL”) approved by the EPA for the State on April 3, 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.”

As shown by a Minnesota Department of Health (“MDH”) study *Mercury Levels in Blood from Newborns in the Lake Superior Basin* in 2011, 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. The hydrogeology conditions of northeastern Minnesota and northern Wisconsin readily fosters benthic population to convert mercury into a more toxic methylmercury. 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.

According to the 2021 MDH-issued *Fish Consumption Guidelines for Lake Superior*, pregnant women and children under the age of 15 are restricted to eating one meal per month of *Waase-namegos* (Lake Trout, *Salvelinus namaycush namaycush*), *Bemidewiskawed* (Siscowet

Comments on draft NPDES permit and variance from mercury water quality standards for the City of Grand Marais wastewater treatment facility.
Mille Lacs Band of Ojibwe

Lake Trout, *Salvelinus namaycush siscowet*), and *Mayagi-giigoons* (Rainbow Smelt, *Osmerus mordax*); one meal per week of *Gidagaa-namegos* (Brown Trout, *Salvelinus fontinalis*) and *Gichi-namegos* (Chinook Salmon, *Oncorhynchus tshawytscha*); two meals per week of *Okeyawis* (Lake Herring, *Coregonus artedi*), *Maazhi-namegos* (Coho Salmon, *Oncorhynchus kisutch*), *Adikameg* (Lake Whitefish, *Coregonus clupeaformis*), and *Miigisi-namegos* (Rainbow Trout, *Oncorhynchus mykiss*) from Lake Superior. 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 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.

The EPA ensures the CWA 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 [Water Quality Standards] variance, and the adoption and implementation of a Pollutant Minimization Program.” The GMWWTF variance from mercury water quality standards is set one order of magnitude higher than the greatest pollution reduction achievable using existing technology based upon monitoring results displayed on MPCAs Table 1. Summary of effluent mercury concentrations at SD 003 based on calendar monthly average mercury values from January 2018 through July 2023. The highest achievable value for the reporting period between 2018 and 2023 was 0.983 ng/L. The greatest concentration measured was 6.12 ng/L in July of 2023. Yet, the interim variance is set at 9.8 ng/L, more than 30 percent higher than the highest concentration of mercury measured in the GMWWTF discharge during the same period.

Instead of using the highest achievable value based on monitoring results, the State calculated the 99th percentile of the projected effluent quality daily maximum interim effluent limit using the GMWWTF’s twelve total mercury samples collected between January 2018 through July 2023 from the discharge to capture the “worst-case concentration” rather than the measured and achieved highest attainable value. Using the 99th percentile of the projected effluent quality for mercury effluent limits in the Lake Superior basin does not comply with the Minn. R. Parts 7052.0300 and 7052.0350 or the Great Lakes Initiative Water Quality Standards rules. Yet, none of five lowest reported values measured exceed the 1.3 ng/L wildlife criteria for mercury in the Lake Superior basin.

The State’s adoption of these rules occurred in 1998. It has taken MPCA more than twenty-five years since the adoption of the rules, and more than fifteen years since the state-wide mercury TMDL was approved by EPA to require a mercury pollutant minimization plan for the

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Mille Lacs Band of Ojibwe

GMWWTF. With the health of our Tribal citizens at stake, the Mille Lacs Band of Ojibwe respectfully requests that the variance for the GMWWTF be limited to the highest mercury concentration measured between 2018 and 2023 — 6.12 nanograms per liter. Further we request that a pollutant minimization plan be submitted by MPCA for the GMWWTF at the same time the variance is issued to EPA for approval.

Sincerely,



Kelly Applegate
Commissioner of Natural Resources

cc: Susan Klapel, Executive Director of Natural Resources, Mille Lacs Band of Ojibwe
Debra Shore, Regional Administrator, US Environmental Protection Agency Region 5
Ann McCammon Soltis, Director of Division of Intergovernmental Affairs Director,
Great Lake Indian Fisheries and Wildlife Commission