

Fond du Lac Band of Lake Superior Chippewa



Fond du Lac Band of Lake Superior Chippewa Resource Management Division

Administration; Conservation Enforcement; Environmental; Fisheries
Forestry; Land Information; Natural Resources; Wildlife

Minnesota Pollution Control Agency
c/o Stephanie Lyons
525 Lake Ave S, Ste 400
Duluth, MN 55802

May 20, 2024

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

Dear Ms. Lyons:

The Fond du Lac Band of Lake Superior Chippewa (the “Band”) appreciates this opportunity to submit comments on the draft NPDES permit for the City of Grand Marais wastewater treatment facility (GMWWTF). 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.

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 1854 Treaty of LaPointe¹ (the “Ceded Territory”) and in central Minnesota under the 1837 White Pine Treaty. Usufructuary rights are vested property rights to use, access, or enjoy the fruits of another's property.² As a signatory to the 1854 Treaty of LaPointe³ where Fond du Lac and other bands ceded more than six million acres to the United States (the “1854 Ceded Territory”), the Band 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.⁴ In the Ceded Territory, Tribes serve as co-managers and stewards of

¹ Treaty with the Chippewa, 1854, 10 Stat. 1109, and Treaty with the Chippewa, 1837, 7 Stat. 536, 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> .

² See *usufruct*, Black's Law Dictionary (11th ed. 2019).

³ Treaty with the Chippewa, Sept. 30, 1854, 10 Stat. 1109.

⁴ 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) (unpub. 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

those lands and have a legal interest in protecting natural resources.⁵ 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.⁶ 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.

Mercury has been identified in Minnesota Rules Chapter 7052 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.⁷ The Minnesota Statewide Mercury Total Maximum Daily Load (TMDL) approved by US EPA 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.⁸”

A Minnesota Department of Health Study released in 2011 revealed that 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.⁹ According to MDH fish consumption advisories, 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

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.”).

⁵ *Id.*

⁶ 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.”)

⁷ MN WQS at 7052.0300 and 7052.0350.

⁸ 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>

⁹ 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/)

Whitefish, and Rainbow Trout from Lake Superior.¹⁰ 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. Last year, the Band initiated its first treaty fish harvest on Lake Superior¹¹, after decades of exercising treaty fishing rights on Lake Mille Lacs and other inland waters within the 1837 and 1854 Ceded Territories. Regardless of where Band members choose to fish, they are at risk of health impacts from elevated mercury while also at risk of losing important traditional lifeways and critical intergenerational cultural learning if they do not engage in this subsistence practice.

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](#).^{12”} 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*.¹³ The highest achievable value for the reporting period between 2018 and 2023 was 0.983 nanograms per liter.¹⁴ The greatest concentration measured was 6.12 nanograms per liter in July of 2023.¹⁵ Yet, the interim variance is set at 9.8 nanograms per liter, *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 MPCA 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.¹⁶ Using the 99th percentile of the projected effluent quality for mercury effluent limits in the Lake Superior basin does not comply with the Minnesota 7052 rules or the Great Lakes Initiative Water Quality Standards rules. And specifically relevant to this facility’s

¹⁰ MN Department of Health. 202. Fish Consumption Guidelines for Lake Superior. [Women Who Are or May Become Pregnant \(state.mn.us\)](#)

¹¹ Nagaajiwanaang Dibaajimowinan, October 2023. “Historic Return: FDL Band member return to net on Lake Superior for the first time in 169 years”. [October23.pdf \(revize.com\)](#)

¹² 40 CFR § 131.14 (b)(2)(i)(A)(2).

¹³ 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

¹⁴ *I.d.*

¹⁵ *I.d.*

¹⁶ *I.d.*

discharge history, none of five lowest reported values measured exceed the 1.3 nanograms per liter wildlife criteria for mercury in the Lake Superior basin.¹⁷

MPCA adopted the Lake Superior Basin 7052 rules in 1998. It has taken MPCA more than twenty-five years since 7052 rules adoption and more than fifteen years since the statewide mercury TMDL was approved by US EPA to require a mercury pollutant minimization plan for the GMWWTF. Having followed the NPDES permitting and variance history with the nearby Western Lake Superior Sanitary District and their long term, ongoing studies on mercury reduction technology, we are certain this facility can and should be held to a more protective mercury limit and should be required to more fully examine opportunities for further mercury reductions. Fond du Lac 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 US EPA for approval.

Sincerely,



Nancy Schuldt, Water Projects Coordinator
Fond du Lac Environmental Program

C. Debra Shore, US EPA Region 5 Administrator

¹⁷ I.d.