



# Fond du Lac Band of Lake Superior Chippewa Resource Management Division

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

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Environmental Analysis and Outcomes Division – Water Assessment Section  
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*Submitted online only*

February 6, 2025

Re: Comments on Triennial Standards Review and Draft WQS Work Plan 2025-2027

Ms. Charles:

The Fond du Lac Band of Lake Superior Chippewa (“Band”) appreciates this opportunity to provide our comments to the Minnesota Pollution Control Agency (“MPCA”) on the Draft Water Quality Standards Work Plan for 2025 to 2027 and triennial standards review. This federally required action under the Clean Water Act (CWA) is an important opportunity for the agency to hear from both the public and the sovereign tribal nations with reserved lands in Minnesota about needs for revisions to or the development of new water quality standards to protect our waters. This particular TSR process is also significant in that it is the first review conducted by MPCA under federal rulemaking finalized in 2024<sup>1</sup> that requires states to specifically consider the use and value of waters for protecting tribal reserved rights, such as those defined in multiple treaties between the federal government and tribal nations, and establish water quality criteria to protect those rights.

The Band is a federally recognized Indian tribe that retains hunting, fishing, and other usufructuary rights that extend throughout the entire northeast portion of the state of Minnesota ceded to the U.S. government under the 1854 Treaty of LaPointe<sup>2</sup> (the “1854 Ceded Territory”). Within the Ceded Territory, all the signatory Bands have a legal interest in protecting natural resources. Further, the Fond du Lac Band retained usufructuary rights under the 1837 Treaty of St. Peters (White Pine Treaty), and the 1837 Ceded Territory stretches across east central Minnesota into

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<sup>1</sup> 40 CFR §131.9, available on-line at [Federal Register :: Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights](#)

<sup>2</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> (last visited March 15, 2016).

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Wisconsin.<sup>3</sup> These rights have been reaffirmed by federal courts, including the US Supreme Court.<sup>4</sup> In this communication, the Fond du Lac Band asserts our treaty reserved rights to harvest aquatic and aquatic-dependent resources in territories ceded to the United States under the Treaties of 1837 and 1854, specifically the portions of the 1837 Ceded Territory located in what is now the State of Minnesota. For the Band to fully exercise these rights, abundant and unpolluted natural resources must be maintained<sup>5</sup>, including waters that meet tribal and state water quality standards. Treaty rights, environmental health, and tribal culture are all interconnected.

The state recognizes a government-to-government relationship with all Minnesota tribes,<sup>6</sup> and both state and federal agencies in Minnesota co-manage 1837 and 1854 Treaty resources with signatory tribes.<sup>7</sup> This relationship is fostered through adequate state consultation with the tribal nations and taking into consideration tribal comments as a vital part of rulemaking changes. Tribal government requests should be accommodated whenever possible to reflect this government-to-government relationship.

Additionally, the Band has federally delegated water quality regulatory authority under §§ 303(c) and 401 of the CWA, with comprehensive water quality standards approved by the US EPA that are applicable to the waters of the reservation. The Band implements our water quality standards to be as protective as possible of the beneficial uses we have designated for our surface water resources, including aquatic life, cultural, recreational, industrial, agricultural, wildlife, ceremonial and subsistence uses, and to maintain their existing high quality. As some waterbodies originate

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<sup>3</sup> See *Minnesota, et al. v. Mille Lacs Band of Chippewa Indians, et al.*, 526 U.S. 172 (1999) (confirming off-reservation usufructuary rights under the 1837 Treaty); see also Great Lakes Fish and Wildlife Commission (“GLIFWC”), *A Guide to Understanding Ojibwe Treaty Rights* (2018), available at <http://www.glifwc.org/publications/pdf/2018TreatyRights.pdf>; MN DNR, *Main Treaties Page*, available at [https://www.dnr.state.mn.us/aboutdnr/laws\\_treaties/index.html](https://www.dnr.state.mn.us/aboutdnr/laws_treaties/index.html).

<sup>4</sup> Among others, see: *Lac Courte Oreilles v. Voigt*, 700 F. 2d 341(7<sup>th</sup> Cir. 1983), cert. denied 464 U.S. 805 (1983); *Lac Courte Oreilles v. State of Wisconsin*, 775 F.Supp. 321 (W.D.Wis. 1991); *Fond du Lac v. Carlson*, Case No. 5-92-159 (D. Minn. March 18, 1996) (unpublished opinion); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 119 S.Ct. 1187 (1999).

<sup>5</sup> See, e.g., *Michigan v. U.S. EPA*, 581 F.3d 524, 525 (7<sup>th</sup> Cir.2009), recognizing that a tribe’s “cultural and religious traditions...often require the use of pure natural resources derived from a clean environment.”

<sup>6</sup> See, e.g., Gov. Walz Exec. Order 19-24, “Affirming the Government-to-Government Relationship between the State of Minnesota and Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation” (Apr. 4, 2019).

<sup>7</sup> Federal agencies have a legal responsibility to maintain all tribal, treaty-reserved natural resources. See, e.g., Memo. on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), affirming Exec. Order 13175—Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating “the United States has recognized Indian tribes as domestic dependent nations under its protection . . . .,” there is a “trust relationship with Indian tribes,” and “[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

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off-reservation and flow downstream through and beyond reservation boundaries, we share jurisdiction with the state on certain reaches (i.e., the St. Louis River).

The unsuppressed use of fish, manoomin (wild rice), and other aquatic and aquatic-dependent beings in Minnesota is impaired and not adequately protected for future generations. The treaties cited above reserved not merely the rights to hunt, fish and gather, but more broadly the right to continue practicing traditional lifeways. These lifeways depend upon the unsuppressed use of these beings for spiritual, cultural, medicinal, subsistence and economic purposes now and for future generations. We offer the following specific recommendations for MPCA to carefully consider during the TSR process and incorporate into your final Water Quality Standards Work Plan for 2025-2027.

#### MN Rules Chapter 7050

- Change the Class 4A beneficial use category of “waters used for the production of wild rice” to Class 2 or appropriate unique subclass within Class 2 (perhaps 2C). The Band and other Minnesota tribes have long advocated for this change<sup>8</sup> as it more clearly and comprehensively protects manoomin as a distinct and inherently valuable species under an aquatic life use classification. This will remove any confusion, real or manufactured, for the public and the regulated community about what this designated use is intended to protect. In addition to linking the scientifically supported protective sulfate criterion currently applicable to wild rice waters to this specific new Class 2 designation, this change will also provide MPCA the flexibility to interpret narrative aquatic life use standards in the implementation and enforcement of state WQS, such as preserving the hydrologic regime this sensitive species requires.

This recommendation is also offered in response to the specific question MPCA posed in the official notice: “Are there any water quality standard revisions, amendments, or additions that are needed to support the agency’s strategic plan goals around environmental justice and climate change resilience?” Newly designated Class 2 protections for wild rice address environmental justice, as tribal communities are disproportionately and adversely affected by the loss of significant wild rice stands across its historic distribution within the state. Further, remaining stands of wild rice continue to be compromised by habitat loss, hydrologic alteration, industrial pollution, nonpoint source pollution, invasive species, and global climate change. More comprehensive protection under WQS can increase resilience under changing climate-driven conditions.

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<sup>8</sup>See, e.g., Fond du Lac Water Projects Coordinator comments to Carol Nankivel dated July 7, 2012, on “MPCA’s Planned Amendments to Rules Governing Water Quality, Minnesota Rules Chapters 7050, 7052, 7053”

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## Priority WQS Groups

- The Band supports both the Use Class 1 (human health standards for sources of drinking water) and the new pH- and temperature-based ammonia standard to protect aquatic life as Priority **Group 1** tasks. In our last TSR, the Band also promulgated a new ammonia aquatic life use standard, likewise referencing EPA's revised criteria document and aligning our WQS with current scientific understanding on the sensitivity of freshwater species to ammonia.
- The Band supports accelerated development of PFOS and PFOA standards to protect aquatic life, and a PFOS fish tissue standard, in your **Group 2** priorities (in technological development). We understand the current rapidly evolving state of research, both within the state and nationally, that is informing not only the best practices and methodologies for sampling and analysis of various media, but also the human health and ecological risk assessments that will lead to protective criteria, and new technologies for treatment that will enable dischargers to attain those criteria.
- The Band urges MPCA to elevate their work plan priorities for several WQS in **Group 3** (tracking and evaluation). The agency should more quickly prioritize the comprehensive analysis for establishing a site-specific wild rice sulfate standard in the Lower Mississippi River, if for no other reason than to avoid more of the frivolous and unsupported SSS applications already submitted by the taconite industry. If MPCA were to complete such an analysis and demonstrate that a higher sulfate concentration is indeed supportive of a thriving and sustainable population of wild rice (what the Band has often referred to as the ecologically relevant endpoint)<sup>9</sup>, that would stand as a demonstration or reference for any other entity proposing an SSS in the future. The agency guidance as it stands now is ripe for misinterpretation and has opened MPCA up to unnecessary litigation.
- We urge MPCA to elevate priority for revising the mercury standard in fish tissue to protect human health. The agency acknowledges that the existing standard is dated, and that climate change may exacerbate known pathways and processes for mercury bioaccumulation in fish. Generally, the state's existing mercury WQS are not protective of subsistence fish consumption. The assumed fish consumption rate of 15 grams/day statewide, or 30 grams/day in the Lake Superior Basin, falls well below EPA's approved subsistence consumption rate of 143 grams/day. Fond du Lac and other Minnesota tribal communities are disproportionately affected by this suppression of fish consumption as an integral part of a traditional and healthy diet based upon treaty-protected resources.
- The Band urgently requests that MPCA elevate development of a specific conductance standard for protection of aquatic life. Specific conductance (often referred to as

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<sup>9</sup> See, e.g., Fond du Lac Water Projects Coordinator comments to Katrina Kessler dated September 1, 2023, re: "Proposed MPCA Framework for developing and evaluating site-specific sulfate standards for the protection of wild rice"

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conductivity) is an accurate, low cost, easily measured water quality parameter that is directly related to salinity, a measure of the combined effect of all ions in water. A similar task (revision to chloride standard and new sulfate standard to protect aquatic life) is listed as a **Group 3** priority. However, when MPCA revised its Class 3 and Class 4 criteria in 2020, the Fond du Lac and Grand Portage Bands strenuously objected to the removal of the specific conductance numeric criteria protective of those use classes, before first promulgating a numeric specific conductance standard that would be protective of aquatic life use<sup>10</sup>. And, with the wild rice beneficial use designated as Class 4A, this weakening of applicable WQS would also directly and adversely affect manoomin in Minnesota waters, and once again, tribal communities who rely on manoomin for cultural and subsistence purposes are disproportionately impacted.

At the time MPCA adopted those WQS revisions, the agency vaguely suggested they might consider promulgating Class 2 specific conductance standards in the future but that they did not have the necessary data. This position was neither reasonable nor supported. In fact, in 2020 EPA Region 5 approved the Band's proposed specific conductance aquatic life use criterion, **which was derived from MPCA's extensive statewide data** following EPA guidance.<sup>11</sup> Since then, EPA Region 5 approved an even more stringent specific conductance standard for the Grand Portage Band, again based upon rigorous scientific support. It is past time to prioritize this WQS revision, and it is deeply disappointing that the agency has not yet focused staff time and resources to do so despite years of tribal comments, requests, and court testimony.

The Band looks forward to further coordination and consultation with MPCA as this TSR process continues.

Sincerely,



Nancy Schuldt, Water Projects Coordinator  
Fond du Lac Environmental Program

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<sup>10</sup> See, e.g., Fond du Lac and Joint Tribal comments to Administrative Law Judge Eric Lipman, Office of Administrative Hearings, dated February 24, 2021

<sup>11</sup> See, e.g., EPA, A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams, Final Report, EPA/600/R-10/023F, March 2011