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FOND DU LAC BAND OF LAKE SUPERIOR
CHIPPEWA ENVIRONMENTAL PROGRAM
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Erik Smith
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, MN
55155-4194

December 19, 2014

Re: Pre-public notice for US Steel Minntac tailings basin water permit reissuance for NPDES MN0057207

Dear Mr. Smith:

Thank you for the opportunity to review and comment on the pre-public notice draft of the US Steel Minntac tailings basin water permit reissuance for NPDES MN0057207 and NPDES Permit Fact Sheet. We would like to suggest that the Public Notice contain your email address in addition to your physical address.

Statement of Interest

Both Grand Portage and Fond du Lac Bands are federally recognized Indian tribes, as two of the member bands of the Minnesota Chippewa Tribe "(MCT"). Along with other MCT

Bands, the Bands retain hunting, fishing, and other usufructuary rights that extend throughout the entire northeast portion of the state of Minnesota under the 1854 Treaty of LaPointe[1] (the "Ceded Territory"), which encompasses in the area of the Project. In the Ceded Territory, the Bands have a legal interest in protecting natural resources and all federal agencies share in the federal government's trust responsibility to the Bands to maintain those treaty resources.[2]

Moreover, the Bands both have Treatment-in-the-same-manner-As-a-State ("TAS") status under the Clean Water Act for purposes of administering Water Quality Standards, and are downstream regulators. To the extent that there is a dispute between the state and the Bands regarding the applicable water quality standards, the Bands can seek recourse to the EPA to act as mediator between the two agencies before issuance of any CWA permit.

Statement of Action

I. Definition and Authorization of Discharge

The "fact sheet" and draft permit inconsistently indicate that the only discharge that needs coverage under the Clean Water Act, and the only discharge that MPCA is authorizing, is to the Dark River. On page 9 of the draft permit, the only surface discharge station is listed as SD-001, with the "type of station" described as "effluent to surface water". Although it has been demonstrated that the barrier and pump-back system installed along the eastern side of the tailings basin has reduced the discharge to the Sand River and Twin Lakes by 40-60%, *the discharge has not been eliminated.* If in fact MPCA believes that the only tailings basin discharge is to the Dark River, then the permit should *only authorize a discharge to the Dark River*. The convoluted description of discharge to the Sand River, and permit limits for the Sand River and the Twin Lakes, indicate that the real purpose is to offer "permit-as-a-shield" protection to the company without providing adequate protection for the receiving waters in the form of a water-quality based effluent limits (WQBELs) or a total maximum daily load (TMDL). The Fact Sheet and permit must be re-written before Public Notice to accurately describe the tailings basin discharges MPCA is authorizing. If MPCA is not authorizing a tailings basin discharge to the Sand River, it must be clearly articulated in the permit.

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[1] 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, 2014).

[2] *See, e.g.*, 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 http://ceq.hss.doe.gov/nepa/regs/eos/eo13175.html (last visited March, 2014)

Monitoring data that has been collected by US Steel at the discharge (SD-002) and monitoring locations in the Sand River and the Twin Lakes demonstrate that hardness, total dissolved solids, specific conductance and sulfate exceed MN WQS by an order or more in magnitude. Therefore, if MPCA is in fact authorizing a discharge to the Sand River, then WQBELs must be established in addition to interim and final permit limits, and an actual date for interim and final compliance with MN WQS must be included in the permit for this discharge.

The extensive discussion surrounding MPCA's three distinct definitions for 'discharge' found in the Fact Sheet is disturbing. It appears to ignore the obvious condition of adjacent surface waters, which expose the reality that elevated concentrations of pollutants in the tailings basin are still being transported to the Twin Lakes, four years post-construction of the seepage collection and return system (SCRS) along the eastern berm of the basin. The 1854 Treaty Authority, under an agreement between the Bois Forte Band and US Steel, has been monitoring multiple locations in Little Sandy and Sandy Lakes downstream of the tailings basin[3], where harvestable stands of wild rice have been destroyed since the basin was constructed. While the Fact sheet acknowledges this data collection effort, it fails to reveal to the public that the applicable sulfate criterion (10 mg/L) continues to be grossly exceeded. After an initial drop in sulfate concentrations (2010-2012), the mean sulfate concentration at the monitoring station closest to the tailings basin rose in 2013:

Year	Mean Sulfate (mg/L)	Range Sulfate (mg/L)
2010	483	360-661
2011	357	208-561
2012	207	137-275
2013	355	215-650

While 2014 data are pending, it is apparent that the SCRS installation alone will never be sufficient for the basin discharge to meet WQS.

EPA Region 5 has provided substantial comments and recommendations to the MPCA and the US Army Corps of Engineers over the past several years as multiple expansions, mine pit extensions, and progressions of the Minntac facility have been newly permitted while enforcement of the expired NPDES permit for the tailings basin has remained grossly inadequate for protecting downstream water resources. In comments on the Environmental Impact Assessment for the East Pit Extension submitted to the Army Corps[4], EPA Region 5 clarified their interpretation of the CWA applicability to "discharges of pollutants from a point source to surface water that occur via directly connected ground water." EPA acknowledged that "the need

[3] *Sandy Lake and Little Sandy Lake Monitoring (2010-2013)*, 1854 Treaty Authority report, 2014
[4] Peter Swenson to Tamara Cameron, May 15, 2013

for a NPDES permit is highly dependent on the facts surrounding each situation"[5], and noted that US Steel "may have installed the seep collection and return system as an approach to eliminate the surface discharge." The agency expressed concern that "such systems may not capture all of the flow to surface waters, thus resulting in continued discharges to surface waters."

EPA Region 5 clearly informed the Corps that "Section 301 of the CWA prohibits point source discharges to surface waters, either directly or via directly connected ground water, unless the discharge is in compliance with an NPDES permit". Finally, the agency states that:

> "To the extent that US Steel may only be converting the path through which pollutants are discharged to surface water or reducing the volume of the discharge, EPA expects that the discharges will continue to be subject to NPDES requirements. If a permit is terminated (or a discharger decides not to seek renewal of a permit) without permanent elimination of the entire discharge, the discharger would risk being found in violation of the CWA for discharge without a permit".

II. Designated Uses and Applicable Criteria for Protecting Uses

Under the federal Clean Water Act (CWA), impaired waters are defined as "lakes, river or stream segments with monitored violations of one or more numeric and/or narrative water-quality standards". Although both the draft permit and fact sheet discuss the reasonable potential for a discharge to cause or contribute to an excursion from water quality standards (WQS)[6], the analysis is only applied to the Dark River, and only for WQS applicable to Class 3 and 4 (Industrial and Agricultural Uses). Neither the Fact Sheet nor the draft NPDES permit clearly state the applicable Class 2 (Aquatic Life Use) and trout stream (Class 2A) limits for the Dark River watershed. The Fact Sheet does not reveal the known occurrence of wild rice in the Dark River, although multiple state agency and university field crews have documented its presence over the past several years. The 10 mg/L sulfate criterion for protection of wild rice should also be applicable to this waterbody.

Discharge monitoring reports over a long period of record point to manganese as another constituent of concern for likelihood of exceedence of Minnesota's drinking water standard. The MPCA should identify interim and final limits for manganese as well as sulfate to comply with current Health Risk Levels (HRLs).

III. Definition of Schedule of Compliance/Compliance Schedule

Both the permit and fact sheet must provide a consistent definition of "Schedules of Compliance" or "Compliance Schedules". US EPA delegated the authority to MPCA to administer the NPDES program. Therefore, MPCA rules regarding the NPDES program must be

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[5] 66 *Fed. Reg.* at 3,015; 63 *Fed. Reg.* at 7,881.
[6] 40 CFR § 122.44(d)(1)

at least as stringent as the Clean Water Act. Within the CWA there is only one definition of a Schedule of Compliance, or Compliance Schedule, regardless of the order in which the words are used. Therefore, the purported "state" definition of a Compliance Schedule appears to be used to obfuscate the law, and confuse the public. Please find below the CWA rules regarding Schedules of Compliance:

40 C.F.R. § 122.47. Schedules of compliance.
(a) *General (applicable to State programs, see § 123.25).* The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations.

(1) *Time for compliance.* Any schedules of compliance under this section shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.

(2) The first NPDES permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before recommencement of discharge.

(3) *Interim dates.* Except as provided in paragraph (b)(1)(ii) of this section, if a permit establishes a schedule of compliance which exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement.

(i) **The time between interim dates shall not exceed 1 year,** except that in the case of a schedule for compliance with standards for sewage sludge use and disposal, the time between interim dates shall not exceed six months.

(ii) If the time necessary for completion of any interim requirement (such as the construction of a control facility) is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

(4) *Reporting.* The permit shall be written to require that no later than 14 days following each interim date and the final date of compliance, the permittee shall notify the Director in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports if paragraph (a)(3)(ii) is applicable.

IV. Compliance Schedule Exceeds One Year and Does Not Contain Interim or Final Compliance Date

The Fact Sheet must be revised on page 6 to state: "Beginning in **1987**, the Agency and the Permittee have entered into agreements to conduct studies and perform remedial measures to reduce concentrations of sulfate and other pollutants in the tailings basin and surrounding waters", rather than stating "Beginning in 2001 or earlier" in an attempt to obscure the actual timeline that the company has been granted to "conduct studies and perform remedial measures". It may also bear mentioning in the Facility History that the tailings basin was origirally

permitted as a "closed system". In fact, the first condition for the March 31, 1972 "Permit for Construction and Operation of Disposal System" states: "No effluent shall be discharged from the system to surface waters of the State.[7]" It is not clear from our review of archived documents related to the US Steel Minntac facility when, and why, the tailings basin was first permitted to allow substantial volumes of polluted effluent to be discharged into the surrounding surface and ground waters. It is clear, however, that the state regulatory agencies have long been aware of the risk posed to downstream wild rice resources, and that US Steel has been enabled to avoid enforcement of applicable WQS for decades by simply being required to 'study' their discharge flows and pollutant concentrations[8].

Chapter 2 (Compliance Schedule) of the draft permit provides at least three more years to study the existing water quality problems and determine potential treatment methods. Since the issuance of the very first NPDES permit for Minntac's tailings basin in 1987, the company has been required through multiple, successive Compliance Schedules to repeatedly study and determine the sources of sulfate and hardness. However, *none of the Compliance Schedules issued during the previous 27 years have required compliance with MN WQS, or have contained a date when compliance must be attained.* The Schedule of Compliance in this permit must require the company to select and install treatment technologies within one year of permit reissuance. And, the Compliance Schedule must contain a specific date when interim and final WQS will be attained.

Summary of Statement of Action

1) The draft permit and fact sheet must plainly describe the discharge(s) MPCA is authorizing under this NPDES permit. And, 40 CFR § 122.44, "the reasonable potential for a discharge to cause or contribute to an excursion of WQS" must be applied to all of the surface waters where MPCA authorizes discharges.

2) The draft permit and fact sheet must clearly identify all applicable designated uses and applicable criteria for surface waters in the Sand and Dark River watershed, and the applicable criteria for ground water affected by tailings basin discharge.

3) Both the draft permit and fact sheet must use a consistent definition of "Compliance Schedules" and "Schedules of Compliance" that when used in an NPDES permit is at least as stringent the CWA requirements.

4) The fact sheet must be revised to clearly articulate the length of time that Minntac has already been provided to conduct studies and perform remedial actions. The Compliance

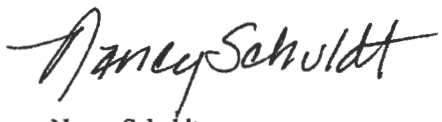
[7] Permit WPC 7248, dated March 31, 1972.

[8] See, eg.: Jess Richards letter to Kevin Pierard re: Response to Comments on Draft Schedule of Compliance US Steel Minntac (Nov. 28, 2007); Minnesota DNR Status Report: *Sulfate Sampling in Waters Receiving Seepage from the USX Tailings Basin*, (1 March 1988); Minnesota DNR Final Report: *Sulfate Release from the USX Tailings Basin and Quantification of Sulfate Sources* (August 1991).

Schedule must require the selection and installation of wastewater treatment within one year of permit reissuance, and include dates when interim and final effluent limits will be achieved.

Sincerely,

Margaret Watkins
Grand Portage Water Quality Specialist



Nancy Schuldt
Fond du Lac Water Programs Coordinator

Cc. Rebecca Flood, MPCA
Kevin Pierard, Tinka Hyde - U.S. EPA
Tamara Cameron, Tim Smith - U.S. Army Corps of Engineers
Brenda Halter - U.S. Forest Service
Jennifer Engstrom - MNDNR