

# Fond du Lac Band of Lake Superior Chippewa

## Resource Management Division

MILE POST 7 WEST RIDGE RAILROAD RELOCATION, DAM EXTENSIONS, AND STREAM MITIGATION PROJECT EAW  
RECORD OF DECISION - ATTACHMENT A  
FINDING OF FACT 13.c - COMMENT LETTER - FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

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Bill Johnson  
Environmental Review Unit  
Ecological and Water Resources Division  
MN Department of Natural Resources  
500 Lafayette Road N  
St. Paul, MN 55155-4025

May 17, 2023

Re: Mile Post 7 West Ridge Railroad Relocation, Dam Extensions, and Stream Mitigation Project – Environmental Assessment Worksheet

Dear Mr. Johnson:

Thank you for the opportunity to provide comments on the Mile Post 7 West Ridge Railroad Relocation, Dam Extensions, and Stream Mitigation Project Environmental Assessment Worksheet (EAW).

The Fond du Lac Band of Lake Superior Chippewa is a federally recognized Indian tribe, as well as a member band of the Minnesota Chippewa Tribe “(MCT)”. Along with other MCT Bands, the Band retains hunting, fishing, and other usufructuary rights that extend throughout the entire northeast portion of the state of Minnesota under the 1854 Treaty of LaPointe<sup>1</sup> (the “Ceded Territory”), which encompasses in the area of the Project. In the Ceded Territory, the Band has 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.<sup>2</sup> In order to fully exercise these guaranteed treaty rights, abundant unpolluted natural resources must be available. Accordingly, water that meets tribal and state water quality standards is required to ensure the full exercise of treaty 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> (last visited March, 2014).

<sup>2</sup> 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)

Because of their unique government-to-government relationship with the Minnesota tribes, state<sup>3</sup> and federal agencies<sup>4</sup> have a legal responsibility to maintain treaty-reserved natural resources. The Minnesota Pollution Control Agency (MPCA) and the Minnesota Department of Natural Resources (MDNR) are required to consider the input gathered from tribal consultation in their decision-making processes, with the goal of achieving mutually beneficial solutions.<sup>5</sup>

The Fond du Lac Band has in recent years communicated concerns about environmental impacts to natural and cultural resources as a result of the expansion of the Mile Post 7 tailings basin and these proposed related actions. Tribal environmental concerns are amplified by the lack of adequate environmental review for this major undertaking. State and federal permitting agencies today are relying upon analyses of environmental impacts from Environmental Impact Statements that were conducted in 1976 (DNR) and 1977 (USACE), with far less rigor and much reduced scope than is typical best practices for today. These analyses neither contemplated nor studied impacts from any expansion of the Mile Post 7 tailings basin beyond the boundary of today's railroad track. Therefore, this substantial expansion of the tailings basin to the west by more than 800 acres, and rise in final elevation of the dams by fifty feet is a major new project requiring government action that was neither planned nor evaluated in any EIS. It is not a "phased action; it requires a new EIS.

In fact, while researching this facility's permitting history, tribes learned that the final EIS approved by DNR on June 2, 1976 found the Mile Post 7 tailings basin alternative would have disqualifying adverse environmental impacts, and did not support constructing the Mile Post 7 tailings basin at that location, let alone its expansion 44 years later. Additionally, the 1977 EIS performed by the USACE did not contemplate or analyze increasing the tailings height to 1365 feet above mean sea level (MSL), or the expansion of the tailings basin west of the railroad track constructed at Mile Post 7.

In the mid 1970's, Cleveland Cliffs (Reserve Mining) was *ordered* to build a tailings basin in order to stop direct discharge of their tailings into Lake Superior. At that time, the primary water quality constituent of concern was asbestos-like or amphibole fibers in the tailings

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<sup>3</sup> See, e.g., 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."

<sup>4</sup> 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.").

<sup>5</sup> See, e.g., 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."

being discharged into the lake in proximity to public drinking water intakes. Despite the findings of the EIS, the Mile Post 7 tailings basin was constructed in the Beaver River watershed, and is currently permitted under an MPCA industrial discharge (NPDES/State Disposal System or SDS) permit that expired in 2008 but has been extended administratively. The Beaver River, a designated trout stream, is listed on the MPCA's CWA §303(d) list, with impairments including fish communities, mercury, temperature and pH.

The Minnesota Pollution Control Agency (MPCA) has extensively surveyed this watershed as part of its statewide Watershed Restoration and Protection Strategies (WRAPS) process, and confirmed healthy coldwater biological communities, both fish and macroinvertebrates, in upstream reaches of the Beaver River, including native brook trout. But more downstream reaches near the Mile Post 7 tailings basin have been assessed as impaired for aquatic life use and mercury. The loss of these sensitive species in the stream reaches near the tailings basin are indicative of degradation from previous mine processing disturbances.

Water quality monitoring data presented in the draft CWA 401 certification document for this project also demonstrates that currently there are clear exceedences of MN water quality standards for fluoride and mercury, and highly elevated specific conductance. A Stressor Identification Report and a Total Maximum Daily Load (TMDL) study on the Beaver River have been completed by the MPCA. The Stressor Identification Report indicates that turbidity, altered hydrology and poor habitat are clearly affecting fish communities, and suggests elevated ionic strength (specific conductance), pH and loss of connectivity are likely contributors to this impairment. All of these stressors can be clearly tied to the physical disturbance of the existing tailings basin and the polluted seepage emerging through dam walls and connected groundwater. Expanding the Mile Post 7 tailings basin will exacerbate these impairments, even though the CWA requires the MPCA to restore impaired waters.

#### 5.4 Beaver River Watershed Stressor Identification Summary

Stressor identification results for the Beaver River fish impairment are presented in Table 20. Refer to the section number listed in the right column of the table to review the evidence used to diagnose or eliminate the various stressors that were evaluated for this impairment.

Table 20. Summary of stressor identification results for the Beaver River fish IBI impairment

Candidate cause	Result	Section
Elevated water temperature	•	5.3.1
Low dissolved oxygen	X	5.3.2
Elevated ionic strength (Specific conductivity)	○	5.3.3
pH	○	5.3.4
Poor habitat	•	5.3.5
Loss of connectivity	○	5.3.6
Elevated total suspended solids/Turbidity	•	5.3.7
Altered hydrology	○	5.3.8

Key: • = confirmed stressor ○ = potential stressor X = eliminated candidate cause

Our concerns for the proposed Mile Post 7 tailings basin expansion also include the serious and foreseeable risks of upstream dam failure, which would lead to discharge of highly polluted tailings and slurry water to Lake Superior, less than 3 miles downstream via the Beaver River. These human health and ecological risks have never been analyzed in an EIS. In fact, the Mile Post 7 tailings dam was originally designed to be built using the downstream construction method, but after permitting, the DNR approved upstream method construction for subsequent dam raises. This method of construction is inherently less safe; in fact, it has been banned in many countries around the world after high profile catastrophic tailings dam failures in Brazil and British Columbia.

The Mile Post 7 tailings dam was constructed using upstream methods called “modified centerline or offset-upstream” processes where the dam is constructed out of coarse tailings piled on top of the uncompacted fine tailings. Placing coarse tailings on top of uncompacted fine tailings causes a high level of vulnerability for catastrophic failure caused by seismic or static liquefaction. The 1976 Final EIS only considered the potential impacts of tailings dam failure from relatively safer downstream construction methods without an analysis of catastrophic failure resulting from less stable upstream construction methods. DNR considers Mile Post 7 dams to be High Hazard or Class I dams.<sup>6</sup> MN Rules consider Class I dams as high hazards because “*failure, mis-operation, or other occurrences or conditions would probably result in...any loss of life or serious hazard, or damage to health, main highways, high-value industrial or commercial properties, major public utilities, or serious direct or indirect, economic loss to the public.*”<sup>7</sup> Yet there has not been a full evaluation of the vastly increased probability of dam failure due to Northshore’s use of upstream and offset upstream raises to substantially increase dam height since MN DNR’s approval of these methods in 1997.<sup>8</sup>

The Minnesota DNR apparently determined that supplemental analyses were not required for this significant expansion to the Mile Post 7 tailings basin, because the decades-old EIS had already considered impacts to surface and groundwater and determined that “...Based upon MPCA’s understanding of the seepage collection system, and that there is unused pumping capacity available, the agency does not expect seepage-related impacts to deviate significantly from that assessed in the 1977 EIS...any seepage impacts to the water quality of the Beaver River are projected to remain negligible, again within consideration of the issues in the 1977 EIS.” The DNR simply assumed there would be no water quality impacts beyond what was evaluated in the earlier EIS, as “The facility remains subject to NPDES/SDS permit provisions, thus any impacts are subject to ongoing regulatory control.” (DNR 2017 SEIS

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<sup>6</sup> DNR 2022 ROD ¶197.

<sup>7</sup> Minn. R. 6115.0340, subp. A.

<sup>8</sup> DNR 2017 ER Memo at pdf pg.14

Memo). Considering the long-expired NPDES/SDS permit, which itself lacks water quality-based effluent limits necessary to protect downstream waters, and the clear evidence of existing water quality impairments in downstream waters, tribes do not share the DNR's confidence in "ongoing regulatory control".

The DNR memo also summarily dismissed any dam safety concerns, concluding "...the proposed adjustments to the final crests for Dams 1, 2, and 5 are not unusual for tailings basins, and as long as the design meets current dam safety standards, the progression should not result in impacts different from what was examined in the 1977 EIS. The Dam Safety Permit will likely have to be amended, but no new analyses beyond those normally required for the permit application are anticipated. The potentially significant adverse impacts associated with dam safety are not affected by the proposed action." (DNR 2017 SEIS memo)

The potential environmental effects of the Mile Post 7 project cannot be determined without a modern dam-safety analysis that assesses the potential area that would be covered by a tailings flood resulting from catastrophic dam failure; the depth and velocity of a tailings flood; anticipated residential and non-residential human health and infrastructure impacts; impacts on terrestrial and aquatic wildlife and their habitats; downstream water quality impacts; and worst-case scenario impacts.

The habitat restoration plans for the stream portions that will be covered by new tailings (and have already been covered by tailings) is only one element of what is actually needed to mitigate the project impacts to aquatic resources. The tailings basin extension will change the head pressure and create seepage in new locations. Water quality impairments must also be addressed through completing and implementing Total Maximum Daily Loads (TMDLs) for existing impairments, identification and permitting of all new seepage or discharge points, and ensuring that those permits include adequate waste load allocations, and wastewater treatment requirements to meet all MN water quality standards. Until these issues are addressed in permitting, this project must not move forward. The MPCA and MN DNR are well aware that only a portion of total seepage is captured through the use of barriers and ditching as documented at through aerial overflights and assessments of downstream waters at all taconite tailings basins in MN.

Liquefaction of tailings causing catastrophic dam failure is also of great concern for this project. Progressing from 1950's mine waste management technology to modern dry-stack technology would reduce the impacts to water quality, require a smaller on-land footprint, and provide a more stable tailings pile heap. Finally, the additional losses to Treaty Reserved Resources within the footprint of this tailings basin expansion are cumulative and must be assessed from that perspective. The MN DNR and MPCA have an obligation to minimize the footprint of the tailings basin and ensure that the expansion does not cause or contribute

to excursions from MN water quality standards resulting from seepage or dam failure. The state has that obligation to the tribes because of their unique government-to-government relationship with the Minnesota tribes.<sup>9</sup> The Minnesota Pollution Control Agency (MPCA) and the Minnesota Department of Natural Resources (MDNR) are required to consider the input gathered from tribal consultation in their decision-making processes, with the goal of achieving mutually beneficial solutions.

In summary, tribal concerns for adverse environmental impacts from these proposed projects to mitigate expansion of the Mile Post 7 tailings basin are based upon the lack of sufficient analysis of predictable impacts, and clear evidence of existing adverse water quality impacts from the tailings basin that are not being controlled through the regulatory framework of permitting. The proposed expansion would also incorporate a coal ash landfill within the dams; there has been no evaluation or analysis of water quality impacts associated with having additional highly toxic waste contained behind leaky coarse tailings dams, built higher than originally planned and by a demonstrably unsafe construction method.

Fond du Lac requests a compulsory Environmental Impact Statement (EIS) be prepared to assess the significant and cumulative impacts of the proposed project. Further, MDNR must require Cliffs to provide sufficient financial assurance to protect reserved Tribal resources, the surrounding community, the environment, and taxpayers from tailings dam failure and tailings basin pollution. We request that DNR require that the Mile Post 7 tailings basin be subject to formal permitting in compliance with dam safety statutes and rules in Minnesota Statutes Chapter 103G and Minnesota Rules Chapter 6115, and with permit to mine statutes and rules in Minnesota Statutes Chapter 93 and Minnesota Rules 6115.

Sincerely,

A handwritten signature in blue ink that reads "Nancy Schuldt". The signature is written in a cursive, flowing style.

Nancy Schuldt, Water Projects Coordinator

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<sup>9</sup> See, e.g., 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."