



Grand Portage Reservation Water Quality
PO Box 428
Grand Portage, MN 55605

Sent via email only:

environmentalrev.dnr@state.mn.us

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 18, 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). Grand Portage requests a compulsory Environmental Impact Statement (EIS) to assess the significant and cumulative impacts of the proposed project. Further, Minnesota Department of Natural Resources (MDNR) must require Cliffs to have enough financial assurance set aside to protect reserved Tribal resources, the surrounding community, the environment, and taxpayers from tailings dam failure and tailings basin pollution. Mile Post 7 has been allowed to operate for 40 years without permits that require compliance with current statutes and rules. Therefore, the MDNR must now compel Cliffs to apply for new permits that comply with dam safety statutes and state water quality standards.

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Grand Portage is a federally recognized Tribe that has retained hunting, fishing, and other usufructuary rights in the lands and waters that were ceded to the United States. Usufructuary rights were retained to ensure hunting, fishing, and gathering for subsistence, economic, cultural, medicinal, and spiritual needs could continue into perpetuity. “*Reserved property rights, explained by the Supreme Court in 1905 in United States v. Winans, 198 U.S. 371, are not ‘a grant of rights to the Indians, but a grant of rights from them’.* In *Winters v. United States, 207 U.S. 564 (1908)*, the Supreme Court applied this principle in a water rights case. These two cases are the basis of the “reserved rights doctrine”, that recognizes tribes retain those rights of a sovereign government not expressly extinguished by a federal treaty or statute.”¹ In order to fully exercise these guaranteed treaty rights, abundant unpolluted natural resources must be available. Consequently, water that meets tribal and state water quality standards is required to ensure the full exercise of treaty rights.

Because of their unique government-to-government relationship with the Minnesota tribes, state² and federal agencies³ are legally responsible for maintaining treaty-reserved natural resources. The Minnesota Pollution Control Agency (MPCA) and the MDNR are required to consider the input gathered from tribal consultation in their decision-making processes, with the goal of achieving mutually beneficial solutions.⁴

I. Dam Safety Remains a Concern at Mile Post 7

On July 28, 1993, a 27-acre coal ash heap containing approximately 770,000 cubic yards experienced a catastrophic failure and sent a massive amount of mercury-laden waste across Highway 61, the only direct route connecting communities along the North Shore of Lake Superior, picking up a semi-truck on the way and depositing the contaminated slurry into the Beaver River and Lake Superior. Coal ash contains toxic chemicals, including mercury, that increase the risk of cancers, damage the lungs and heart, cause stomach ailments, and contribute to premature death. The land cleanup cost the company \$11 million. Water resources have not been fully restored.

¹ The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope, Pevar, Stephan L., 2009.

² 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.”

³ 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.”).

⁴ 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.”

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Prior to the collapse, in 1991, Cliffs predecessor LTV applied to the MPCA for a permit to resume depositing ash on the heap. After a site investigation, MPCA determined that the coal ash heap was polluting Lake Superior from stormwater run-off and seepage and issued a “no discharge” requirement, ordering LTV to stop the release of water from the ash pile. LTV had several options for compliance, including dry storage with a cover over the ash pile. LTV chose and received approval from MPCA to construct a containment and recirculation system, similar to a tailings basin, consisting of a large pond on the downhill side of the ash heap to collect surface runoff and leachate water. Water was pumped from the pond to the top tier of the ash heap, sprayed back onto the heap, and dispersed by evaporation of water through the vegetation covering the ash pile. Excess water from a coal stockpile was also dumped into the pond or directly onto the ash heap. After a moderately strong storm event, the ash heap became saturated and liquefied, causing the collapse.

After the collapse, the coal ash disposal pond was relocated inland next to the current Mile Post 7 tailings basin, where it remains today. The coal ash landfill and the existing West Ridge Railroad are not authorized in the 1977 Master Permit or the 1985 Permit to Mine.

The Mile Post 7 tailings dam was supposed to be constructed using downstream methods analyzed in the 1976 EIS. Upstream construction methods, called “modified centerline or offset-upstream,” are 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. Modified centerline or offset-upstream construction methods were proposed by LTV and approved by the MDNR in 1997.

The analysis based on downstream construction methods and alternative sites were assessed along with the current Mile Post 7 location in 1976. The EIS provides “*Dams of the same design and construction at each of the alternative sites would have a greater safety factor than at Mile Post 7.*”⁵ Even so, one of the EIS conclusions provides that a “*1,000-foot breach in the 13,000 foot south dam at Mile Post 7 would produce a 28 foot high wall of water moving down the Beaver River valley at more than 20 miles per hour to Lake Superior*”⁶ *destroying, impairing and polluting significant waters resources,*⁷ *thereby thwarting “the entire purpose of on land disposal by emptying stored tailings into Lake Superior. The threat to Lake Superior would not end when operations cease, but would persist indefinitely.”*⁸ The 1976 EIS has no analysis of catastrophic failure resulting from less stable upstream construction methods.

⁵ MDNR and MPCA. Reserve Mining Company, On-Land Tailings Disposal Findings, Conclusions and Recommendations. June, 1976. Pg. 42, conclusion 9.

⁶ MDNR and MPCA. Reserve Mining Company, On-Land Tailings Disposal Findings, Conclusions and Recommendations. June, 1976. Pg. 41, Conclusion 4 [140233.pdf \(mn.gov\)](#)

⁷ Id. Pg. 42, Conclusion 6.

⁸ Id. Pg. 41, Conclusion 5.

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The MDNR considers Mile Post 7 dams to be High Hazard or Class I dams.⁹ MN rules describe Class I dams as high hazards because “*failure, mis-operation, or other occurrences or conditions would probably result in...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.*”¹⁰ Yet, there has not been a full evaluation of the vastly increased probability of tailings dam failure due to Northshore’s use of upstream and offset upstream raises to increase dam height since MDNR approved these methods in 1997.¹¹ Grand Portage and Fond du Lac, along with GLFIWC and the 1854 Treaty Authority staff requested dam safety inspection documents from the MDNR almost two years ago to assess permitting needs for this project and other proposed mine and tailings basin expansions. After a year and a half, we received most of the documents, although they were heavily redacted. The redactions included all identified seepage locations and their discharge rates and any information regarding potential dam failure or identification of vulnerabilities that could cause a dam breach.

The MDNR required Tribal governmental representatives to use Data Practices Act requests to receive these documents. Then when we asked about the massive redactions, the MDNR stated that “*When this request was first made, DNR sought legal advice from our General Counsel. As a state agency, DNR is subject to the Data Practices Act (DPA). The data you requested is considered nonpublic under the DPA, which is the reason DNR must redact certain data before we provide it to you.*”¹² This appears to be circular logic to deny another governmental agency access to information that must be considered before issuing National Pollution Discharge and Elimination Permits (NPDES permits), dam safety permitting, financial assurance, and insurance. Tribes are governmental agencies that co-regulate activities that can impact reserved resources within the 1854 Ceded Territory, and we do not represent the public; therefore, these redactions should not have occurred.

The proposed expansion of the tailings basin will create new seepage discharges that could impact the stability of the current coal ash pond. Cliffs have the option to use updated technology to dry-stack the tailings. However, just as in 1991, a choice has been made to extend the pond size and store the waste as a slurry. Dry storage should be required to decrease the surface area needed for new tailings, reduce polluted water entering the surrounding streams and Lake Superior, and reduce the risk of catastrophic dam failure.

Further, 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.

⁹ MDNR 2022 ROD paragraph 197.

¹⁰ Minn. R. 6115.0340, subp. A.

¹¹ MDNR 2017 ER Memo at pdf pg.14

¹² Email from Katie Smith, MDNR, to Nancy Schuldt, Fond du Lac Band of Lake Superior Chippewa. May 12, 2023.

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Minn. R. 6115.0410, subp. 2, requires a new dam safety permit for dam enlargement, Minn. R. 6115.0410, subp. 2, and transfer of dam ownership requires a permit. Minn. R. 6115.0370. Chapter 6115, a dam safety application and permit approval, must contain provisions that comply with Minn. R. 6115.0410, including the following:

- a) The application must describe the type, size, height, and storage capacity of the dam extending through the life of the impoundment. *Id.*, subp. 2.
- b) The preliminary report for the permit must include all other elements related to the total dam project specifically including railroads. *Id.*, subp 3.
- c) The final design report must include a dam-break analysis, information on waste materials and disposal practices, stability analysis and design details for dams, impoundments and other features. *Id.*, subp. 6.
- d) The permit can only be approved on findings of dam stability “under all conditions . . . based on current, prudent engineering practice” and dam hazards and on “[c]ompliance with prudent, current environmental practice throughout its existence.” *Id.*, subp. 8(D), (F).

II. Cumulative Environmental Impacts to Tribally Reserved Resources Must be Assessed

In spite of acknowledging that this project will diminish areas available to exercise usufructuary rights within the 1854 Ceded Territory, the EAW states that the State Agencies didn’t consider cumulative environmental effects for project-related changes to cover-types and habitats that would contribute to reductions in areas available to Band members to exercise treaty rights.¹³ However, the only EIS conducted for the Miles Post 7 tailings basin (in 1976) did evaluate some of the project’s cumulative impacts. *“Existing timber resources at the Mile Post 7 site would be harvested. The potential for timber production within the disposal area, which is relatively high, would be eliminated. The site would not return to anything similar to its present vegetated condition for several hundred years.”*¹⁴ *“Fishery resources within the disposal area will be destroyed, including 9.7 miles of trout streams. Streams downstream from the disposal area would be adversely affected by erosion at construction areas, including stream diversion dikes and channels, roadways, railroads and pipelines, causing turbidity and sedimentation which would adversely affect the fishery resource. Loss of a portion of the watershed could result in reduction in flow and rise in temperature to critical levels adversely affecting the fishery*

¹³ MDNR. Mile Post 7 West Ridge Railroad Relocation, Dam extensions, and Stream Mitigation Project-Environmental Assessment Worksheet

¹⁴ MDNR and MPCA. Reserve Mining Company, On-Land Tailings Disposal Findings, Conclusions and Recommendations. June, 1976. Pg. 23, at 76. [140233.pdf \(mn.gov\)](#)

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resource downstream from the site, including the anadromous fishery of the lower portion of the Beaver River. Windblown dust, nutrients related to revegetation efforts, seepage and accidental spillage could adversely affect the fishery resource in the vicinity of the site.¹⁵” “Construction and operation of the tailings disposal system at Mile Post 7 would cause pollution, impairment, and destruction of the air, water, land and other natural resources located within the state.¹⁶”

Instead of considering the project's cumulative effects, the term “idled forest lands” is used extensively within this document to obfuscate the loss to Tribes and the surrounding communities. Unless too polluted to do so, forest lands support plants, insects, birds, amphibians, and four-legged animals and are therefore never “idled.” In fact, these forest lands that are planned to become part of the tailings pond and deposition areas are providing ecosystem services at no cost, including filtering pollutants coming from the tailings basin before the contamination can enter Lake Superior on the west and south sides, and the Superior National Forest on the north side. Thus, using the term “idled” is inaccurate when the forest lands are providing needed ecosystem services that mitigate some of the impacts to the local environment. Grand Portage requests the MDNR require an Environmental Impact Statement to assess cumulative project impacts on treaty-reserved natural resources.

III. Water Quality Must be Restored to Comply with MN Rules

“The Tailings Basin Features area watershed draining to the Beaver River is comprised of 11.0 acres, which drains through an unnamed waterway approximately 1.1 mi. before reaching the Beaver River. The Tailings Basin Features area watershed draining to Little Thirty-nine Creek is comprised of 4.4 acres, which drains via sheet flow through a 25-acre wetland complex before reaching Little Thirty-nine Creek. The Tailings Basin Features area watershed draining to the East Branch Beaver River is comprised of 32.9 acres, which drains through a ditch system and unnamed creek before reaching the East Branch Beaver River approximately 1.2 mi. downstream.”¹⁷

All discharges to streams originating within the acreage of the tailings basin must receive NPDES permits to comply with the Clean Water Act.¹⁸ The seepage information documented from the MDNR’s own tailings dam inspections must be provided to and used by the MPCA to ensure all discharges are identified, have an NPDES permit, and that the water has been adequately treated to meet MN Water Quality Standards (WQS) to protect remaining segments of these streams and Lake Superior. Although the EAW notes the impaired streams, it does not mention the existing mercury and PCB impairments in Lake Superior waters, even though the Beaver River drains into Lake Superior. The EAW does not include information on how MPCA addresses the impairment issues through permitting, including Total Maximum Daily Loads (TMDL), Waste Load Allocations (WLA), and wastewater treatment requirements. Instead, the

¹⁵ Id. Pg. 24 at 78.

¹⁶ Id. Pg. 24 at 79.

¹⁷ MDNR. Mile Post 7 West Ridge Railroad Relocation, Dam extensions, and Stream Mitigation Project-Environmental Assessment Worksheet

¹⁸ County of Maui v. Hawaii Wildlife Fund, No. 18-260, 590 U.S._ (2020).

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EAW only provides that: “*Big and Little 39 Creeks are impaired based on fish bioassessments, water column mercury, pH and turbidity; White Rock Creek is impaired for both mercury and PCBs in fish tissue and is infested with White Perch, Viral Hemorrhagic Septicemia, and Round Goby.*”¹⁹ Water quality restoration must be required in addition to habitat mitigation.

IV. Potential Adverse Environmental Consequences Mandate Preparation of an EIS

The losses to Treaty Reserved Resources are cumulative and have occurred since the Treaty signing and must be assessed from that perspective. The MDNR and MPCA have an obligation to minimize the footprint of the tailings basin and ensure that the expansion does not cause or contribute to the spread of invasive species or excursions from MN water quality standards resulting from seepage or dam failure. Due to the potential adverse environmental consequences of this project the MDNR is required to prepare an EIS under MN rules that evaluates *all cumulative impacts* of the proposed new construction of the railroad, extension, and an increase in the height of tailings dams using modified upstream construction methods, and the expansion and change to acreage and location of the wet slurry tailings basin, including the impacts on all water resources. The potential for and the impacts of a dam breach or catastrophic failure on treaty-reserved natural resources, the surrounding communities, nearby streams, and Lake Superior must also be assessed. The EIS must also evaluate and assess all of the Mile Post 7 tailings dam features, including the coal ash pond and other structures and construction methods that have not previously undergone full environmental review.

Sincerely,

Margaret Watkins

Margaret Watkins
Grand Portage Water Quality Specialist

¹⁹ MDNR. Mile Post 7 West Ridge Railroad Relocation, Dam extensions, and Stream Mitigation Project-Environmental Assessment Worksheet