

# Fond du Lac Band of Lake Superior Chippewa Reservation Business Committee

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## FOR IMMEDIATE RELEASE

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### Minnesota Supreme Court sides with Fond du Lac in Minntac Appeal

#### Fond du Lac Band of Lake Superior Chippewa, MN – February 10<sup>th</sup>, 2021

Today, the Minnesota Supreme Court sided with the Fond du Lac Band of Lake Superior Chippewa in our appeal of the Minnesota Pollution Control Agency (MPCA) 2018 reissuance of the Minntac Tailings Basin NPDES/SDS wastewater discharge permit. This is a victory in our long fight to protect not just wild rice waters but clean drinking water for everyone in our state.

This is the first time a Minnesota tribe has sued the state agency over issuance of a NPDES/SDS permit. The Tailings Basin, part of the U.S. Steel-owned taconite operation in Mountain Iron, Minnesota, has for decades polluted surrounding waters—including the Twin Lakes. These are wild rice waters that lie within the western border of the 1854 Ceded Territory, where the Band retains off-reservation, treaty rights to hunt, fish, and gather.

Since 1973, Minnesota has also had a federally-approved, water quality standard limiting sulfate to 10 mg/L for wild rice waters in order to protect the health of the plant. Monitoring in wild rice waters near Minntac has shown extreme exceedances, ranging up to 40 times beyond this sulfate limit, and the rice stands in these waters are much diminished. Yet the new Minntac permit ignored the 10 mg/L sulfate limit for these waters, among many other defects, and did little to cause Minntac to remediate existing pollution or curb future discharges.

This case has presented unusual challenges and complexity. In late 2019, the Minnesota Court of Appeals granted part of our appeal and reversed part of the permit and sent it back down to the for more work. There were three aspects to this. First, the lower court agreed with the Band that the agency had overlooked evidence showing ongoing, direct surface discharges to the wetlands and streams to the east of the Tailings Basin—waters that feed directly into downstream wild rice lakes.

But on two other issues, the Court of Appeals denied the Band's appeal. The lower court refused to impose limits under the federal Clean Water Act even though the Tailings Basin also discharges pollution directly to groundwater, which then flows right downstream into surface waters—which are subject to federally approved water quality standards. The Court of Appeals also struck

down the permit's sulfate limits for groundwater discharges under state law—just about the only aspect of the permit upon which the MPCA and the Band agreed.

The state Supreme Court, which only accepts five percent of appeals brought before it, took up our appeal of those two issues. While the appeal was pending, the U.S. Supreme Court was also considering *County of Maui v. Hawai'i Wildlife Fund*, a case that would decide conclusively how courts must evaluate cases involving pollution through groundwater to downstream surface waters. The Band, working with the non-profit Minnesota Center for Environmental Advocacy, filed a friend-of-the-court brief with the U.S. Supreme Court arguing that the Clean Water Act does, indeed, apply to this type of pollution. We highlighted for the Court the Minntac case and the importance of protecting downstream wild rice waters. Last summer, the U.S. Supreme Court agreed with us and set forth the rule that certain discharges to groundwater are, indeed, covered by the Clean Water Act where they are the “functional equivalent” of a direct discharge to surface waters.

Now, applying the *Maui* rule, the state Supreme Court has sent the Minntac permit back down for more work, as we had asked. Based upon decades of evidence, the MPCA should now conclude that discharges from the Tailings Basin are, indeed, the “functional equivalent” of direct discharges and must be strictly regulated under the Clean Water Act. Furthermore, the Minnesota Supreme Court has agreed with the Band that “groundwater is a Class 1 water under Minnesota law” and must be protected as a potential source of drinking water. Here, that means that Minntac must curb sulfate levels.

“We are gratified to see the Court’s decision today. This success is hard-won, and it is just one step in our fight to protect our wild rice waters,” said Fond du Lac Chairman Kevin Dupuis. “We will keep pushing the state and others to follow the law and to respect our treaty rights for as long as it takes. Clean water is non-negotiable.”

#### **About Fond du Lac Lake Superior Chippewa**

The Fond du Lac Band (Nagaajiwanaang; where the water stops) is one of six Chippewa Indian Bands that make up the Minnesota Chippewa Tribe. The Fond du Lac Reservation was established by the La Pointe Treaty of 1854.

Archaeologists, however, maintain that ancestors of the present-day Chippewa (Ojibwe) have resided in the Great Lakes areas since 800 A.D. The Band includes 4,200 members.

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