Fond du Lac Band of Lake Superior Chippewa

Reservation Business Committee

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November 29, 2016

By email to: consultation@bia.gov

The Honorable Lawrence Roberts
Acting Assistant Secretary Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon, Room 3E446
Washington, D.C. 20310-0108

Tracy Toulou, Director
Office of Tribal Justice
U. S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Re: Consultation with Tribes on Federal Infrastructure Decision-making

Dear Assistant Secretary Roberts, Assistant Secretary Darcy and Director Toulou:

On behalf of the Fond du Lac Band of Lake Superior Chippewa, I submit these comments for federal consideration on measures by which federal decision-making on infrastructure projects that affect tribes and tribal interests may be improved. We appreciate the opportunity to consult with you on these important issues. I attended the consultation held on November 15 at Mystic Lake Casino in Minnesota and, at that consultation, I highlighted several of the issues of concern for the Fond du Lac Band and described some measures that the federal government might take to improve decision-making on infrastructure projects. By this letter, we provide additional information about the Band's experiences and expand on ways in which federal decision-making might be improved.

As I explained during the November 15 consultation, I had an opportunity to go to Standing Rock in September and to visit the Sacred Stone Camp. I was very moved by what I saw. Indian tribes nationwide have come together to support each other in a way that is extraordinary and unprecedented. All Tribes are working together to make sure that tribal voices are heard and that tribal rights and interests are protected whenever projects are being developed that put at risk our water, land, natural resources and sacred sites. Fond du Lac is proud to stand with Standing Rock.

Fond du Lac also appreciates the work that this Administration has done to improve government-to-government consultation with Indian tribes. Under President Obama's leadership, this Administration has worked to put in place policies to protect tribal interests. Considerable good work has been done on these policies.

However, several problems persist. One problem is that good policies are not always followed. Agencies or staff may not be aware of them or understand how they are to be applied. A second problem is that even when we have consultation with federal agencies, the final decisions too often do not include protection of tribal interests. Consultation needs to mean more than just checking-off a box. Consultation should result in decisions that include protection of tribal rights and interests consistent with the federal government's trust responsibility to tribes. A third problem is that gaps in the law result in failure to protect the lands, waters and natural resources. This disproportionately harms Indian people, who depend on those resources to meet basic subsistence needs and which are central to our culture and religion. Our experiences illustrate these problems as well as some solutions.

I. Fond du Lac's experiences with federal decision-making on infrastructure and related development projects.

The proposed Sandpiper oil pipeline. One example concerns the proposed Sandpiper oil pipeline. Sandpiper has two components. One is a new crude oil pipeline that would be about 600 miles long. The other is a proposal to replace and possibly expand an existing pipeline, known as Line 3. In 2014, the Army Corps wrote to us to ask if we wanted to consult on Sandpiper. We immediately responded by letter to confirm that, yes, we wanted to consult. In our response, we also asked for information about the project, so that we could prepare for consultation. We never received any information. A year later, we received a phone call from the Corps to ask about where we might want to meet. But nothing else happened. No meeting was set, and there has not been consultation.

What we know about the project is based on what is reported by the press. We saw that this summer the company – Enbridge – announced that it would no longer seek permits for the main Sandpaper pipeline. But there is still a proposal to do work to replace and possibly expand Line 3. Part of Line 3 crosses our Reservation. We are very concerned that the Corps has not begun consultation with us on Line 3, because the Corps may be waiting until the company gets state permits. But at that point, consultation with the Band will be too late. Our concerns about the possible replacement or expansion of this line need to be considered *before* decisions are made about the line, not after.

U.S. Geological Survey's aerial surveys of mineral resources. This spring, the USGS conducted aerial surveys of mineral resources in northern Minnesota, Wisconsin and Michigan. These surveys covered our Reservation as well as the areas outside our Reservation where Fond du Lac and other Chippewa tribes hold Treaty rights to hunt, fish, and gather. When these surveys are done, the data becomes available to mining companies. We are very concerned that

the work the USGS is doing will simply lead to increased pressure for more mining development – all of which would happen without considering the impacts of increased mining on our Reservation, or our reliance on natural resources outside our Reservation.

The USGS did these surveys without any advance notice to the Tribes. We were not consulted. USGS did this work from their Denver office, and that office did not even know the location of our Reservations, much less our Treaty rights. Work is now being done to improve consultation with USGS. But USGS is part of the Department of the Interior and should have known to get information about the Tribes before they started work.

The proposed PolyMet mine. This involves the development and operation of an open-pit copper mine. It would be the first of its kind in Minnesota. The mine would be located on land that is now within the Superior National Forest. For the mine to be developed, the Forest Service would transfer a tract of 6,500 acres of Forest Service lands to the company, in exchange for several scattered tracts of land elsewhere in the state. The mine would operate for 20 years, and would require wastewater treatment for 200 to 500 years after the mine is closed.

This mine would also lie within the territory where we hold Treaty rights to hunt, fish, and gather. The mine's effect on wetlands and water quality puts at risk the fish and wild rice that are so central to our people. In addition, the proposed mine is crossed by two large rivers that flow downstream into the St Louis River – which runs through our Reservation.

The Fond du Lac Band has participated in the environmental review for PolyMet. In that process we provided detailed scientific analysis of the potential impacts of the mine to the environment and identified reasons why further study and additional measures are needed before final decisions can be made regarding the mine.

But we have seen that consultation does not translate into decisions which take into account our concerns. For example, we explained why the mine would put our Treaty rights at risk because of harm to water, fish and wild rice. But the Forest Service, in a draft decision, decided that we won't be harmed because the new lands that the Forest Service will get from the company have roads and boat ramps. We did not ask for more roads or boat ramps. What we need and asked for is clean water – so that wild rice is not destroyed and fish are safe to eat. The Forest Service did not listen to what we said, but claimed to decide for itself what would be good for us.

In our work on PolyMet, we have also seen that the federal agencies do not implement many other important federal policies. For example, the environmental review on PolyMet did not include the kind of analysis of global warming that this Administration has repeatedly urged be done. Tribes are disproportionately hurt by climate change. Accordingly, careful consideration of climate change is essential in reviewing proposed mining projects, especially when they affect tribal rights and interests.

In addition, the PolyMet mine will destroy nearly 1000 acres of high quality, undisturbed wetlands. An additional 7,000 acres of other wetlands not permanently lost would be indirectly damaged. This Administration adopted policies that give priority to avoiding loss of wetlands. Under those policies, if loss of wetlands cannot be avoided, the next priority is to mitigate the loss by developing other wetlands in the same watershed. But none of this will happen if PolyMet is built. Even though the mine will destroy thousands of acres of wetlands, almost all of the proposed mitigation would occur *outside* the St Louis Watershed, and outside the area where our Reservation is located and outside where we hold Treaty rights. Developing wetlands outside this watershed will not mitigate the serious damage to the resources on which we depend.

Hardrock mining in the Minnesota iron range. Our concerns about the proposed PolyMet mine are based on our experience in dealing with the substantial environmental damage already done by hardrock mining in northern Minnesota. Minnesota has a long history of mining. The iron range runs through the area where the Fond du Lac Band holds treaty reserved hunting, fishing and gathering rights, and lies north of our Reservation.

Hardrock mining has created significant, severe and permanent adverse environmental impacts to wetlands, rivers and lakes in Minnesota, and across the United States. Hardrock mining is in fact the most prominent industry represented on the National Priorities List of Superfund sites in the nation. Pollution and habitat destruction from hardrock mining has disproportionately affected Native American lands and people on reservations, trust lands and ceded territories where tribes have treaty-protected hunting, fishing and gathering rights. Federal land use policies that prioritize mining interests above all others on public lands have caused irreversible damage and losses of these subsistence and traditional resources, including foods, medicines, and sacred sites.

As a result of mining, within the territory where the Fond du Lac Band holds treaty-protected rights to hunt, fish and gather, thousands of miles of rivers and lakes are impaired. Mining companies are allowed to operate under expired permits or receive variances and therefore do not comply with water quality standards. As a result, fish carry high levels of mercury, and thousands of acres of wild rice lakes are damaged or destroyed – all of which most directly hurt our tribal members who rely on fish, wild rice and other natural resources for subsistence and for cultural and religious practices.

Many of the problems that we face are the result of 'legacy' mining pollution, done in a time when technology was far less refined, scientific understanding of ecosystem function and the effects of mining wastes were unknown, and regulations were nonexistent. The enactment of the Clean Water Act (CWA) in 1973 was a recognition that human activities – and mining in particular – could be harmful to water resources, and future practices would have to be regulated to better protect our environment. However, after its passage, two new interpretations or implementing policies related to the regulation of mining waste were adopted for the sole benefit of the mining industry contrary to the intent of the CWA. The first of these loopholes allows mine developers to define natural lakes, rivers, streams and wetlands as "waste treatment

systems", thereby exempting them from the CWA. The second loophole, introduced in 2002, redefined the term "fill material" under Section 404 of the CWA to allow for mine tailings and overburden to be placed in our waterways and to exempt such contaminated materials from review under the more protective Section 402 water quality standards.

These two loopholes continue to create the problems that the CWA was intended to prevent. Existing, abandoned, and closed mines continue to pollute tribal lands and resources, while new mines being proposed or developed present new threats. Past experience makes clear that hard rock mines *without exception* degrade and destroy water resources. These two loopholes allow mining companies to continue to directly discharge pollution into our waterways as they have been doing for more than a century.

II. Recommendations

There are steps that the Administration can take to help fix these problems.

Recommendation 1. An Executive Order detailing the requirements for applying the results of tribal consultation to federal decision-making and which requires Free Prior and Informed Consent by Tribes for all projects that cross tribal homelands or affect treaty-retained rights. One step is to make sure that the good policies which this Administration has developed are broadly understood and followed. Such policies also need to be enforceable. Federal agencies have each developed consultation policies, but the basic requirements for proper tribal consultation should be detailed in an Executive Order so they are uniformly understood and applied. We urge the President to issue an Executive Order which provides more detail on what is required for proper tribal consultation, and directs the federal agencies to comply with these consultation policies. Such an Executive Order should state that, where agencies have discretion in decision-making, they must exercise their discretion in ways that protect tribal rights and interests. In addition, the Executive Order should take the approach set out in the United Nations' Declaration on the Rights of Indigenous Peoples (September 13, 2007). A critical element of that Declaration is the requirement that the government obtain the free, prior, and informed consent of tribes before the government takes action on projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilization or exploitation of resources. In the long term, work should be done to adopt these requirements in regulations or statute.

Recommendation 2. Training federal employees. Some of the problems that arise in federal decision-making on projects that affect tribal rights may be reduced or avoided by ensuring that federal employees working on such matters are trained regarding principles of federal Indian law, including the obligations that the United States assumed to tribes under Treaties, statutes, executive orders and regulations. Employees should understand the importance of treaties in the lives of tribes and Indian people, as well as the requirement for tribal consultation. In addition to training about tribes and consultation generally, employees should be trained about the particular tribes in their region.

Recommendation 3. Amend Nationwide Permit 12 to exclude major oil pipelines. Fond du Lac joins with other Tribes in asking that the Corps' Nationwide Permit 12 be revised so that it does not apply to major oil pipelines. We are concerned that Nationwide Permit 12 may be used for some or all of the Sandpiper Line 3, and other potential oil pipelines within the territory where we hold treaty-reserved rights. Nationwide Permit 12 is not a proper vehicle for making decisions on oil pipelines that cross water. Nationwide Permit 12 is intended to streamline the process for Clean Water Act permits for those projects that have a minimal impact on waters – like electric transmission lines and water lines. But pipelines that transport large volumes of crude oil across or under water do not and should not fall within this category. The history of the damage done by oil spills occurring in waterways well establishes that oil pipelines do not have minimal impacts.

The use of Nationwide Permit 12 for oil pipelines poses particular risks for Indian tribes, as the Nationwide Permit process leaves it up to the project applicant to decide, at the outset, whether the proposed pipeline would adversely affect traditional cultural properties of Indian tribes, even though such applicants lack the expertise to identify such properties. And although Nationwide Permit 12 is not to be used if it would adversely affect tribal water or treaty rights, the streamlined process and the authority given to the project applicant to assess how Nationwide Permit 12 applies means that tribal rights are, in fact, overlooked when Nationwide Permit 12 is applied. For all these reasons, oil pipelines should be excluded from Nationwide Permit 12 and should instead be subject to review under individual permits.

Recommendation 4. Review all existing pipeline infrastructure to require compliance with current regulations in order to permit continued operation, and in the case where compliance is not possible, decommission. A large number of major pipelines – including pipelines that cross both our Reservation as well as the territory outside our Reservation where we hold treaty-protected hunting, fishing and gathering rights – were built decades ago. Many of these pre-date all environmental and safety laws that are intended to govern pipelines that transport hazardous liquids. The records collected by the US Department of Transportation's Pipeline Hazardous Materials Safety Administration (PHMSA) shows that most pipeline failures result from weld failures or corrosion – which risks increase as pipelines age. Older pipelines do not have even the most basic safety measures, such as detection equipment and automatic shutoff valves. Older pipelines that transport hazardous liquids (like oil) as well as natural gas need to be brought into compliance with current environmental and safety laws. If pipelines cannot satisfy the current standards, they should be decommissioned.

Recommendation 5. Close the mining loopholes in the policies which implement the Clean Water Act. As discussed above, substantial and on-going degradation of waters and ecosystems result from two interpretations of the Clean Water Act which improperly insulate the mining industry from compliance with that Act. The first is the policy that allows mine developers to define natural lakes, rivers, streams and wetlands as "waste treatment systems," thereby exempting them from the CWA. The second was a 2002 redefinition of the "fill material" under Section 404 of the CWA to allow for contaminated mine tailings and overburden

to be placed in waterways. Both can and should be corrected. The history of each and the need for change are as follows:

Removing the Waste Treatment System "Note." On May 19, 1980, EPA revised its regulations defining waters of the United States providing an exclusion for "waste treatment systems" as follows:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

EPA stated that the intent of the final sentence of the exclusion was to "ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a "waste treatment system," or by discharging wastes into wetlands." This clarification of the waste treatment system (WTS) exclusion was later suspended by EPA without public notice or comment. 45 Fed. Reg. 48620 (July 21, 1980). The Corps adopted the WTS exclusion *without* the explicit manmade waters limitation in 1986. 33 C.F.R. § 328.3(a)(8).

When challenged in the late 1980's by the West Virginia coal mining industry, EPA maintained that "under current EPA regulations, discharges into these instream impoundments continue to be discharges into waters of the U.S., and, therefore NPDES permit limitations must be met prior to treatment in the impoundment, rather than after. EPA then proposed an "alternative approach" in which the Corps would review impoundments of waters pursuant to section 404, and EPA would revise its regulations so that "where such a review has been conducted and section 404 criteria have been met, a 402 permit will only be required for discharges from the instream impoundment, not into it.

In 1992, EPA adopted this alternative approach, specifically for the AJ and Kensington gold mines in Alaska which had proposed impounding wetlands and streams behind earthen dams for purposes of tailings disposal. EPA and the Corps agreed that as long as the Corps approved the construction of the tailings impoundment under section 404, the waters within the impoundment would no longer be considered waters of the United States, and tailings discharges would not require either a section 402 or 404 permit. EPA and the Corps subsequently relied on a similar rationale to authorize tailings disposal for the Fort Knox open pit gold mine near Fairbanks, other Alaska hard rock mines, and ferrous mines in Minnesota's Mesabi Iron Range.

To arbitrarily redefine a natural lake, wetland or river as a "waste treatment system" is shameful; an abomination of the natural order, and a giant step backwards in achieving the nationwide goal of clean water and healthy aquatic ecosystems. The 1992 EPA decision

suspending the requirements of its rule can and should be removed and the provisions of the CWA enforced as they were originally intended, to protect headwater streams, lakes and wetlands from mining pollution.

Revising the Fill Rule. Under the CWA, a person who discharges "fill material" into waters of the United States must obtain a section 404 permit from the Army Corps of Engineers. The discharge of any other pollutants requires a section 402 permit from the EPA or a state that has been delegated authority to issue such permits. In 1982, EPA adopted a zero discharge standard under section 402 for new copper and gold mines using froth-flotation, cyanidation, and similar processes. EPA found that mines operating in the early 1980s were already achieving zero discharge and that it was therefore practicable for new mines to operate without discharging untreated waste into natural waters.

Prior to 2002, EPA and the Corps had different definitions for "fill material." The Corps, which administers section 404, defined fill as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body. *The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.*" 33 C.F.R. § 323.2(e) (2001) (emphasis added). Under this definition, tailings and other mining wastes were not fill material because they were not used for the primary purpose of replacing an aquatic area with dry land. Pollutants discharged into waters primarily as a form of waste disposal were explicitly regulated under the more rigorous section 402 program.

But this changed in 2002 when EPA and the Corps adopted identical definitions of fill material to include discharges that *have the effect* of either replacing any portion of a water body with dry land or changing the bottom elevation of any portion of a water. The regulatory examples included overburden from mining. *See* 33 C.F.R. § 323.2; 40 C.F.R. § 232.2.

The new fill definition was upheld by the Supreme Court decision finding that EPA and the Corps had acted lawfully in authorizing the Kensington mine in southeast Alaska to use Lower Slate Lake as a tailings reservoir in which it could discharge slurry and other wastes. Relying upon the 2002 regulation redefining fill material, the agencies concluded that these discharges should be treated as fill under section 404, rather than waste under section 402, because they would change the bottom elevation of Lower Slate Lake. The decision means that as long as the current definition of fill material is in effect, mine wastes discharged into waters of the U.S. are regulated under section 404 where permits are approved more than 99% of the time instead of under section 402 with its strict pollution standards.

Hardrock mining would be a far less destructive industry if section 402's discharge limitations were strictly applied. Mines produce huge quantities of chemically-treated wastes. Typically, the cheapest places to store these wastes are valleys and other low-lying areas near the mine sites. Of course, these are also the places where the wetlands, rivers, and lakes protected by

the CWA are found. As a result of a change in the definition of fill material, mining companies are currently able to avoid complying with section 402's rigorous pollution limitations and use waters of the U.S. as industrial waste dumps.

We urge EPA and the Corps to revise the fill rule to again exclude waste discharges (any pollutant subject to effluent limitations under section 402). The CWA had protected our natural waters from reactive and contaminated mine waste for nearly 30 years (1973-2002) before this change was made. We urge the Administration to immediately return to the previous, rational definition of "fill material" that explicitly excludes disposal of mine waste.

Recommendation 6. Adopt regulations or statutory provisions to address climate change, to mitigate the disproportionate impacts of climate change on Tribes. Climate change is affecting the natural resources on which our people depend. In the course of the environmental review of the proposed PolyMet mine, the Fond du Lac Band repeatedly requested that the lead agencies develop a comprehensive analysis of the Project's potential impacts on climate change, beyond a greenhouse gas inventory. This Administration has adopted policies that are intended to require such analysis, but as we saw in the environmental review for PolyMet, such policies are not given full or proper effect. That should be corrected.

Although climate change is largely a global phenomenon, there is also no question that federal agencies can still make decisions regarding the potential impacts of their own actions to assess the cumulative effects of their decisions on global warming. Agencies should be evaluating climate change impacts for a broad range of projects requiring federal approvals or permits, such as energy facilities, pipelines, transmission lines, landfills, mines, and transportation projects. Simply quantifying emissions and comparing them to a baseline (as is too often done) is insufficient. Instead, project proponents and agencies reviewing the proposed projects should be required to evaluate the interplay between a project's emissions, emissions attributable to other past and reasonably foreseeable future actions, and the actual environmental impacts attributable to climate change.

One relatively simple response to climate change is prioritizing avoidance of wetland impacts. In addition to the broadly recognized services that wetlands provide, they also store significant amounts of carbon. It has been estimated that wetlands (only about 6% of the world's terrestrial area) contain carbon equal to the total atmospheric carbon store (Intergovernmental Panel on Climate Change, Working Group 11: Impacts, Adaptation and Vulnerability, 5.8.1 (2001)). Much of the carbon stored in wetland soils and vegetation will be released if they are drained, and the release of carbon will exceed sequestration. Including carbon storage in the §404 permit avoidance and minimization sequencing through the 'least damaging practical alternative' evaluation would be a logical step towards reducing the regional carbon footprint. Carbon sequestration services provided by forested wetlands and peat bogs must be considered in the avoidance equation alongside mitigation.

The American Society of Wetland Managers climate change recommendations include: incorporating adaptations to climate change in water projects to add safety factors for floods and erosion; adding ecosystem protection and adjustment goals reflecting anticipated climate changes such as low flow protection for fish and other wildlife; adding protection of wetland carbon stores as an explicit goal of the §404 permitting program; requiring impact reduction and compensation, and; consider the impact of proposed activities on carbon stores in regulatory permitting. Although many of these recommendations are reflected in the policies, guidelines and memoranda developed by this Administration, they need to be made legally enforceable requirements and should be implemented through regulations or statute.

Recommendation 7. Improve implementation of the National Historic Preservation Act (NHPA) Section 106 and withdraw the Army Corps Appendix C. Fond du Lac joins the many other Tribes in asking this Administration to improve the ways in which Section 106 of the National Historic Preservation Act is implemented. One important step is for the Army Corps to eliminate its Appendix C. Appendix C was adopted by the Corps to carry out its responsibilities under section 106 of the NHPA but is inconsistent with the 1992 Amendments to the Act, as well as the regulations adopted by the Advisory Council on Historic Preservation. Another step is to adopt a policy so that federal agencies offer Tribes status as signatories whenever a traditional cultural property or sacred site would be affected by a project – including sites that are located outside tribal lands.

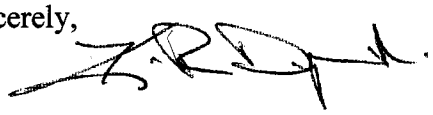
Recommendation 8. Include Tribes on the Permitting Dashboard Steering Committee. The FAST Act ("Fixing America's Surface Transportation Act") which was enacted last December created a process to streamline federal permits for various projects – including those involving transportation facilities, as well as renewable and conventional energy production, electricity transmission, water resource projects, broadband, and pipelines. This is implemented through a Federal Permitting Steering Council. Although the Steering Council has measure to integrate state and local governments which participate in the "purpose and need" infrastructure permitting discussions and funding for participation in federal permitting processes, it fails to provide such measures for Indian tribes. This should be changed to ensure that Tribes are accorded the same rights in the process as other governments. In addition, the Steering Council should include a Tribal Trust Compliance Officer who would be responsible for working with Indian tribes that may be impacted by the proposed project, and ensuring that tribal rights and concerns are properly addressed as the project is reviewed.

Conclusion

Improving the federal decision-making process as it relates to tribal interests is important. It is also sound policy. Timely and proper consideration of tribal interests reduces the risk of disputes and litigation, and results in better designed, developed and implemented projects.

Thank you again for holding these Tribal consultations, and for giving us an opportunity to raise our concerns.

Sincerely,



Kevin Dupuis, Sr., Chairman