



Minnesota Conservation Federation

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April 8, 2021

Commissioner Laura Bishop
Minnesota Pollution Control Agency
Via Electronic Mail (under Email cover today)

Dear Commissioner Bishop,

The undersigned organizations and individuals (an ad hoc coalition) request an immediate reconsideration of MPCA policies and practices with regard to the MPCA's regulatory role in dredge spoil disposal in the waters of the Duluth Superior Harbor and Lake Superior. This review is requested to be completed before any further approvals for or discharges of dredge spoils in or near the harbor or the lake.¹

We request an on-line virtual meeting with our coalition's representatives be set up with you and your staff as soon as possible to discuss the serious pollution and human health concerns we raise in this letter.

On March 1st of 2019 the Minnesota Pollution Control Agency (MPCA) granted the U.S. Army Corps of Engineers Detroit District (USACE) a certificate of compliance under authority of Section 401 of the Clean Water Act (CWA). This was in response to the USACE's March 5, 2018, request for a 401 Water Quality Certification to discharge, over the following five years, approximately 1,000,000 cubic yards of hydraulically dredged sediments and associated transport water from the Duluth-Superior federal navigational channel to the Lake Superior side of Minnesota Point in Duluth, Minnesota.

This discharge of spoils was intended to offset loss of shoreline being eroded from Minnesota Point, the largest fresh water barrier island of its kind in the world, a unique and fragile ecosystem. Much if not all of these erosional losses are attributable to the Corps harbor entry breakwater structures blocking the natural flow (long shore drift) of the lake shore's cobble and coarse sediments from reaching Minnesota Point from both the north and south shores of Lake Superior.

Harbor sediments have proven to be highly inappropriate for this beach restoration for a variety of reasons. Harbor sediments are much too fine grained to withstand erosive forces of the lake's storm driven waves for more than a few short months. These fine

¹ Approvals of spoils discharged to any properly designed confined on-land disposal facility notwithstanding.

grained sediments are well known to be contaminated with all manner of pollutants from past abuses of the harbor for disposal of municipal and industrial wastes. The harbor has a long history of repeated leaks and spills of toxic chemicals and petroleum.

Spoils deposited on both ends of Minnesota point in 2019 and 2020 were also found to contain legacy refuse in the form of old metal beverage cans that were shredded by dredging operations. Discharging such refuse into the nation's waters violates provisions of the Rivers and Harbors Act of 1899, the oldest environmental law in the nation.

These can shards have been emerging on the beach as waves wash away the finer sediments and have presented a serious and on-going health hazard to recreational beach users. At our coalition's insistence, the Corps has recently posted signs warning the public of the hazards while they devise methods to clean up the beach.

Just this past month, and also upon our coalition's advice, Duluth city officials and Park Point residents have applied to the Corps for more appropriate and sustainable relief of beach erosion through provisions of Section 111 of the Rivers and Harbors Act. This provision of the Act is specifically intended to repair damages to public or private property attributable to Corps navigation facilities. Beach replenishment under this provision would not be reliant on harbor sediments as a source of restoration materials.

For the years 2019 and 2020 the Corps did not apply for and the MPCA did not issue the requisite State Disposal System (SDS) permits in accordance with the 1977 Amendments to the Clean Water Act Section 404 (t). We also assert that the Corps Section 401 Certification application for these waste discharges was not complete and that the MPCA did not conduct the proper review of this application under MPCA's antidegradation and applicable state water quality standards. And we believe the permitting process did not give proper consideration of spoil disposal alternatives as required by both the antidegradation rules and the Minnesota Environmental Policy Act (MEPA).

It was clearly the intent of Congress (per December 17, 1977 Congressional record) that in passing the original CWA in 1972 this type of open water disposal of dredge spoils was to have ended. This amendment also makes it clear that Corps of Engineers dredging must be performed in compliance with the same water quality standards and permitting requirements with which any other waste discharged to the nation's waters would be required to comply. The applicability of this provision to Corps dredging in Minnesota could not be clearer as it was Minnesota's Congressional delegation that insisted this clarifying language be added to the CWA.

It is also clear from this same record that lawmakers were well aware of the adverse impacts of primary pollutants associated with dredge spoil such as turbidity and total suspended solids. Thus Congress moved to stop dredge spoil disposal from degrading the nation's waters. Congress intended the Corps dredging to comply with state standards addressing these and other pollutants commonly found in dredge spoils. Congress also acknowledged that compliance with state water quality standards would require funding

and instructed the Corps to seek the funds necessary to comply with these state water quality standards.

Beyond these Congressional directives, in a 1978 District Court Settlement with the Minnesota Conservation Federation² the Corps was specifically ordered to make a good faith effort to locate and maintain an inventory of suitable on land disposal facilities and to make on-land beneficial uses of dredge spoil collected in such facilities. These beneficial uses were clearly intended to preserve treatment and storage capacity of the disposal facilities

Today, in spite of these Congressional directives and court orders the Corps finds itself very deficient in the on-land confined treatment capacity necessary to comply with these water quality standards for Duluth harbor dredging.

Furthermore, Minn. Statutes 115.01 Subd. 9 specifically defines sewage, industrial wastes and other wastes to include dredge spoil. This statute defines disposal systems to mean the system for disposing of sewage, industrial wastes and other wastes and requires any person operating or installing such disposal systems to submit information and applications to the MPCA as required in Mn Statutes 115.04. This means that it is illegal for any person to operate any such disposal system without a written MPCA permit under Minn Statutes 115.07.

In a 1985 MPCA letter (see attached copy) to the Corps of Engineers St. Paul District the MPCA communicated all of these requirements and more for the Corps future record. The letter goes on to add that any form of open water discharge of untreated dredge spoils including so-called beach nourishment is prohibited by these laws without having first applied for and having been granted a variance from these requirements. A public hearing and possibly more extensive environmental review under provisions of MEPA were described as possibly being necessary before granting such variances.

Members of our ad hoc Coalition presented this letter to your staff during a February 18th 2021 virtual meeting and requested a review of its contents. We sought your agency's guidance in affirming the application of law and rule applied to dredging as outlined in this letter. If your staff agreed that these requirements were still valid we requested an explanation as to why the MPCA was no longer holding the Corps responsible for meeting these procedural and substantive requirements. On the contrary, if your staff believed any of the provisions of this letter were no longer operative or applicable we requested information on the process by which these deviations from past policy were made.

To date, we have not received a reply. Our requested meeting is intended to address these open questions.

The chemical, physical and biological (ecological) integrity of Lake Superior, as with the downstream chain of other Great Lakes is under increasing anthropogenic stressors

² The Minnesota Conservation Federation is a party in this Coalition and co-signer of this letter

manifest by increasing frequency and severity of algal blooms, fish consumption advisories, fish population declines, diminishing species diversity, invasion by exotic species, and ever warmer waters.³

Because this portion of Lake Superior is also classified as a Restricted Outstanding Resource Value Water (ORVW), it receives additional protections under the antidegradation standards pertaining to the specific qualities for which the waters were originally designated ORVWs. As you know, Lake Superior is a CWA 303(d)-listed impaired water, meaning it does not currently meet the applicable state water quality standards for PCBs and mercury in fish tissue.

The dredging is also within the St. Louis River Area of Concern (SLRAOC), one of forty three locations throughout the Great Lakes area where certain beneficial uses are listed as impaired as described in the Great Lakes Water Quality Agreement (GLWQA - 1987).

Under the GLWQA the governments of Canada and the United States have committed to restore and maintain the physical, biological and chemical integrity of the waters of the Great Lakes. The Lakewide Action and Management Plan (LAMP) is a binational action plan for restoring and protecting the ecosystem. The LAMP⁴ developed nine lakewide objectives seeking to protect the physical, biological and chemical integrity of Lake Superior. One chemical-related objective is to achieve zero release (from within the Lake Superior basin) of nine persistent bioaccumulative toxic substances including mercury, PCBs, dioxin, hexachlorobenzene, octachlorostyrene and four pesticides (dieldrin, chlordane, DDT, and toxaphene).

As a member of the Great Lakes Agreement the MPCA is also committed to work toward the zero release objectives for these chemicals. Several of these nine toxic substances including mercury, dioxin and PCB's are found in harbor sediments and are likely to have been discharged into Lake Superior with dredge spoil runoff. .

As with other threatened ecosystems around the globe the causes for these lake impairments are nearly always the same; over extraction, watershed land use conversion, man-made chemicals, invasive species and climate change. The vital ecosystem services delivered by Lake Superior for humans such as climate moderation, flood reduction, food (fish) provision, drinking water supply, aesthetics, recreation, spiritual sustenance and others are all at stake if these stressors are not significantly reduced or eliminated.

³ <https://www.mprnews.org/story/2016/01/14/climate-cast-lake-superior-warming>;
<https://www.mprnews.org/story/2019/11/18/signs-of-trouble-ahead-for-lake-superiors-historic-lake-herring-fishery>; <https://www.mprnews.org/story/2015/12/03/lake-superior-herring>;
<https://www.greatlakesnow.org/2020/11/saving-great-lakes-national-geographic-december-issue-struggles/>

⁴ https://www.epa.gov/sites/production/files/2016-10/documents/lake_superior_lamp_2015-2019.pdf

We think you will agree that it is not a stretch to assert that continuation of uncontained disposal of dredge spoils has potential to exacerbate each and every one of these causes of impairment and can increase ecological stresses on Lake Superior.

Sediment sampling alone, as has been done in the past, cannot be used to certify water quality standards will be met. End-of-the-pipe effluent monitoring must be required for future permits as is the case for all other waste discharges to protect water quality, vital ecosystems and human health. And numerical water quality standards alone are often found insufficient to gauge the adverse ecological impacts to a water resource from a proposed discharge. MPCA's new antidegradation rules fortify Judge Miles Lord's order in the 1978 Minnesota Conservation Federation case in this specific regard. Both the rules and the judge's order each specify that lake ecology and ecosystem service impacts must be thoroughly evaluated before any further degradation of Lake Superior can be allowed.

In light of the myriad adverse impacts already reported from 2019 and 2020 dredge spoil discharged to Lake Superior for questionable benefit to Minnesota Point we request the MPCA reconsider its decisions. Citizen reports of large turbidity plumes, small algae blooms, petroleum odors, oil slicks and large quantities of refuse in the form of shredded cans and bottles is more than adequate reason to suspend further open water disposal for the 2021 season.

We regret that the MPCA has chosen to permit such actions and did not impose end-of-the-pipe or in-lake water quality monitoring to demonstrate compliance as is required of every other permitted discharger. Even after citizen complaints of turbidity, petroleum-like odors, oil sheens and discolored sediments were lodged with your agency no substantive investigations were conducted nor was instrument monitoring (rather than visual observation) required. The MPCA's Section 401 Certification BMP approval letter imposed turbidity monitoring requirements in the event such complaints were received. But your staff has since informed complainants that requiring such compliance monitoring was a mistake on the agency's part. We find this quite troubling and without satisfactory explanation from MPCA staff.

We also have serious reservations for the adequacy of the health risk assessment conducted by the Corps as a requirement of the MPCA's certification. We support the MPCA's premise that health risks are an issue when humans may be exposed to untreated dredge spoils and we applaud the MPCA's concerns. However, we have found what appear to be serious flaws and shortcomings in the design, implementation and interpretation of this assessment. These concerns are quite technical in nature but we will provide an overview of these matters for you when we meet. Resolution of these issues may involve a follow up discussion with your technical staff.

We have much to discuss and many problems to resolve. Your prompt attention to these matters would be very much appreciated and we look forward to meeting with you in the very near future.

Please have your staff contact Brad Gausman, Executive Director of the Minnesota Conservation Federation to make arrangements for this meeting. Mr. Gausman is prepared to host the virtual meeting on the platform the Federation maintains. You can contact Exec Dir. Brad Gausman by email at brad@mncf.org or by phone at: 651-690-3077.

Regards,

The Undersigned Organizations and Individuals:

The Minnesota Conservation Federation, Brad Gausman, Executive Director
The Save Lake Superior Association, Lori Andresen, President
Clean Water Action, Deanna White Minnesota State Director;
The National Wildlife Federation, Great Lakes Office, Jason Dinsmore, Director
of Conservation Partnerships;
The North Shore Surfrider Foundation, Bob Pokorney, President
Grant Merritt, Former Executive Director, Minnesota Pollution Control Agency
Willis Mattison, Former Regional Director, Minnesota Pollution Control Agency

Attachment: MPCA's 1985 Letter to USCOE

Cc (electronic):

The Honorable Governor Tim Walz, % Alexis Donath
Ann Hotz, MPCA
Melissa Kuskie, MPCA
Kevin Malloy, MPCA
Jean Coleman, MPCA
Roz Randorf, Councilor, City of Duluth
Jim Filby Williams, City of Duluth
Dawn Buck, Park Point Community Club
Paul Treuer, Park Point Community Club
Melissa Bosman, USCOE, Detroit District
Lt. Co. Katalenich, District Engineer, USCOE Detroit District
Nicholas. J. Zager, P.E., Planning Office, USCOE Detroit District