

BAD RIVER BAND OF LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS

CHIEF BLACKBIRD CENTER

P.O. Box 39 • Odanah, Wisconsin 54861

Resolution No. 12-09-20-433

Authorization of Conditional Clean Water Act Section 401 Certification of Select Nationwide Permits Issued by the U.S. Army Corps of Engineers and Denial Without Prejudice of Clean Water Act Section 401 Certification of Specific Nationwide Permits

WHEREAS, the Bad River Band of Lake Superior Tribe of Chippewa Indians is a federally recognized Indian tribe with a Constitution enacted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. Sec. 476; and

WHEREAS, Article VI, Section 1(a) of the Constitution authorizes the Tribal Council to negotiate with Federal, State, and local government on behalf of the Band; and

WHEREAS, Article VI, Section 1(n) of the Constitution directs the Tribal Council to encourage and foster the arts, crafts, traditions, culture, wildlife, and natural resources of the Band, which necessarily includes enhancement and protection of the water resources within the boundaries of the Reservation; and

WHEREAS, there is a need for the Tribe to protect the health and welfare of its members, maintain its political integrity and the economic security of the Tribe and its present and future members; and

WHEREAS, the water resources of the Tribe are integral to its members' health and welfare, as well as the economic security and political integrity of the Tribe itself, and

WHEREAS, the Tribe obtained treatment in a manner similar to a state for Clean Water Act Section 303, and 401 program authority from the U.S. Environmental Protection Agency on June 26, 2009;

WHEREAS, the Tribe has taken all steps required under Tribal law and federal law to issue Clean Water Act Section 401 certification decisions of the Nationwide Permit;

WHEREAS, the Tribe, after consultation with the Band's Natural Resource Department, finds that the certification decisions of the Nationwide Permits are necessary to protect (a) the health and welfare of the Band, its members, and others living on its Reservation, and (b) the present and future use of Reservation waters for propagation of fish and aquatic like and wildlife, cultural, and other legitimate uses;

NOW, THEREFORE, BE IT RESOLVED that the Tribal Council hereby approves the 401 Certifications of Nationwide Permits #20 and #37, with the conditions attached hereto as Exhibit "A" of select Nationwide Permits as identified in Exhibit A.

AND BE IT FURTHER RESOLVED that the Tribal Council hereby denies without prejudice the 401 Certifications of select Nationwide Permits as identified in Exhibit A, resulting in the requirement of individual 401 Certifications to be issued by the Tribe before an activity is eligible for coverage under these specific Nationwide Permits.

AND BE IT FURTHER RESOLVED that the Tribal Council directs the Natural Resources Department to submit the certification decisions to the US Army Corps of Engineers.

Certification

I, the undersigned, as Secretary of the Bad River Band of Lake Superior Tribe of Chippewa Indians, an Indian Tribe organized under Section 16 of the Indian Reorganization Act, hereby certify that the Tribal Council is composed of seven members, of whom 7 members, constituting a quorum, were present at a meeting hereof duly called, noticed, convened, and held on the 9th day of December, 2020; that the foregoing resolution was duly adopted at said meeting by an affirmative vote of 6 members; 0 against; and 0 abstaining, and that the said resolution has not been rescinded or amended.

Jay McFee
Jay McFee, Secretary
Bad River Tribal Council

Exhibit A: Clean Water Act Section 401 Certification Decisions of the Army Corps of Engineers' Nationwide Permits

Clean Water Act Section 401 Certification of the Army Corps of Engineers' Nationwide Permits

In compliance with the provisions of the Clean Water Act (CWA), as amended (33 U.S.C. 1251 *et seq.*), the U.S. Army Corps of Engineers (hereafter, the Corps) has posted notice of the issuance of nationwide permits (NWP) applicable within Minnesota and Wisconsin, including within the exterior boundaries of Indian Reservations. These general permits authorize activities under the Army Corps' CWA Section 404 authority and their authority under Section 10 of the Rivers and Harbors Act.

In accordance with Section 401 of the CWA, the Bad River Band of Lake Superior Tribe of Chippewa Indians (hereafter, the Tribe) has examined the application for these general permits and determined that:

- (a) there is reasonable assurance—with the conditions listed below—that the activities associated with NWPs 20 (Response Operations for Oil and Other Hazardous Substances) and 37 (Emergency Watershed Protection and Rehabilitation) will be consistent with relevant water quality considerations;
- (b) There is not reasonable assurance that the activities associated with NWPs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 16, 17, 18, 19, 20, 22, 25, 27, 28, 29, 30, 31, 32, 33, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 51, 52, 53, 54, and E will be consistent with relevant water quality considerations, including tribal laws. Accordingly, the Tribe will deny without prejudice CWA Section 401 certification of these NWPs without prejudice and require individual certifications issued by the Tribe for these NWPs.

The Tribe has determined, however, that certain conditions are necessary to protect (a) the public health and welfare of the Tribe, its members, and others living on its Reservation, and (b) the present and future use of Reservation waters for cultural purposes, propagation of fish and aquatic life and wildlife, and other legitimate uses. Accordingly, the Tribe grants CWA Section 401 certification of NWPs 20 and 37 with the following conditions to apply to discharges made under these permits into Waters of the Bad River Reservation:

- 1) This Certification applies only to those activities specifically authorized by these Nationwide Permits 20 and 37 and, even then, only to the extent that the activity complies with the applicable conditions of this Certification. Water quality certification for any activity that is authorized by these Nationwide Permits but does not comply with the conditions of this Certification is denied without prejudice. This Certification does not obviate the need for the permittee to obtain any other applicable federal or tribal permits, authorizations, or approvals. This Certification is not and shall not be construed as Tribal concurrence under §106 of the National Historic Preservation Act or any other federal or tribal requirement as it pertains to impacts to cultural properties, or historical sites, or properties that may be eligible for listing as such; §106 in any other applicable regulatory requirements must be complied with separately.^{a,b}

*Exhibit A: Clean Water Act Section 401 Certification Decisions of the Army Corps of Engineers'
Nationwide Permits*

- 2) This project shall be implemented in such a manner that is consistent with the Tribe's Water Quality Standards (WQS).^a The Tribe's WQS can be viewed at:
http://badriver-nsn.gov/images/stories/docs/bad%20river%20wqs_final_7-6-11a.pdf

- 3) A permittee must notify the Tribe by US Mail or email of an activity within the exterior boundaries of the Bad River Reservation, which is covered under the conditional certified NWP 20 or 37.^{a,b} A permittee must submit a copy of the scope of work, proposed project location, and contact information to the following addresses within 48 hours of any activity commenced as an emergency under NWP 20 or 37:
 - Bad River Tribe's Natural Resources Department
Attn: Water Regulatory Specialist
P.O. Box 39
Odanah, WI 54861
waterreg@badriver-nsn.gov

 - Bad River Tribe's Natural Resources Department
Attn: Tribal Historic Preservation Officer (THPO)
P.O. Box 39
Odanah, WI 54861
THPO@badriver-nsn.gov

- 4) If an activity permitted under NWP 20 or 37 is deemed an emergency that would result in unacceptable threat to human health or the environment and lowers water quality (or has the potential to lower water quality) in high quality water, then the permittee must submit antidegradation materials within seven (7) days after the unacceptable threat to human health or the environment is addressed. An antidegradation demonstration template can be found at:
<http://badriver-nsn.gov/tribal-operations/natural-resources/antidegradation-demonstration-announcements-forms>.

The antidegradation demonstration materials described in provision E.4.iv. of the Tribe's WQS must be submitted to the following address:

Bad River Tribe's Natural Resources Department
Attn: Water Resources Specialist
P.O. Box 39
Odanah, WI 54861
waterreg@badriver-nsn.gov

High quality waters include waters designated as Outstanding Tribal Resource Water (OTRWs), Outstanding Resource Waters (ORWs), and Exceptional Resource Waters (ERWs) as further described below.

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- OTRWs, or Tier 3 waters, include the following: Kakagon Slough and the lower wetland reaches of its tributaries that support wild rice, Kakagon River, Bad River Slough, Honest John Lake, Bog Lake, a portion of Bad River, from where it enters the Reservation through the confluence with the White River, and Potato River.^{d,k}
 - ORWs, or Tier 2.5 waters, include the following: a portion of Bad River, from downstream the confluence with the White River to Lake Superior, White River, Marengo River, Graveyard Creek, Bear Trap Creek, Wood Creek, Brunsweller River, Tyler Forks River, Bell Creek, and Vaughn Creek.^{e,k}
 - ERWs, or Tier 2 waters, include the following: any surface water within the exterior boundaries of the Reservation that is not specifically classified as an Outstanding Resource Water (Tier 2.5 water) or an Outstanding Tribal Resource Water (Tier 3 water).^{f,k}
 - High quality waters can be viewed at:
<http://www.arcgis.com/apps/View/index.html?appid=6f44c371217e4ee8b5f1c2c705c7c7c5>.
- 5) A discharge to a surface water within the Bad River Reservation boundaries shall not cause or contribute to an exceedance of the turbidity criterion included in the Tribe's WQS, which states: Turbidity shall not exceed 5 NTU over natural background turbidity when the background turbidity is 50 NTU or less, or turbidity shall not increase more than 10% when the background turbidity is more than 50 NTU.⁹
- 6) All activities which are eligible for coverage under any NWP within the exterior boundaries of the Bad River Reservation must comply with the Bad River Reservation Wetland and Watercourse Protection Ordinance, or Chapter 323 of the Bad River Tribal Ordinances. Provision 323.22 describes the process for a Temporary Emergency Permit. Questions regarding Chapter 323 and requests for permit applications can be directed to the Wetlands Specialist in the Tribe's Natural Resources Department at (715) 682-7123, (715) 292-8661, or wetlands@badriver-nsn.gov.
- 7) To maintain compliance with Section 106 of the National Historic Preservation Act, implementation of 36 CFR 800 – Protection of Historic Properties will be adhered. Optimally, the Tribal Historic Preservation Officer (THPO) is to be notified in the planning stages of any ground disturbing project and afforded 30-days to respond. Guidance for Best Practices in Consultation with Indian Tribes can be found at, URL: https://web.archive.org/web/20191220234929/http://www.nathpo.org/PDF/Tribal_Consultation.pdf
- In the event of an Emergency declared by the Bad River Tribal Council on Tribal lands, an alternative in accordance with 36 CFR 800.12, (b), (2) affords the Bad River THPO seven (7) days to comment upon notification of the proposed action. However, if the Advisory

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Council on Historic Preservation (ACHP) and/or THPO objects to the proposed action, implementation of 36 CFR 800.3 through 800.6 must be implemented.

In accordance with 36 CFR 800.12 (d) Immediate rescue and salvage operations conducted to preserve life or property are exempt from Section 106, part 800.12 and THPO notification is not necessary.

Optimally, a Plan of Action (POA) would be developed to address the event of an inadvertent discovery of human remains. However, in the absence of a POA, the Native American Graves Protection Act (NAGPRA) and the Bad River NAGPRA Policy must be adhered within the exterior boundaries of the Bad River Indian Reservation.

Questions concerning this section can be directed to the Bad River THPO in the Tribe's Natural Resources Department at (715) 682-7123 or THPO@badriver-nsn.gov

- 8) A permittee must implement best management practices (BMPs) on the project site to minimize erosion of the Lake Superior shoreline. BMPs include, but are not limited to, retaining vegetation on the bank, diverting surface water runoff (e.g., water from rain gutters) away from the bank, diverting discharges from sumps or grey water away from the bank, and minimizing additional paved areas or impervious surfaces on the property.^{l,m}
- 9) Upon completion of earthwork operations, all exposed slopes, fills, and disturbed areas must be given sufficient protection by appropriate means such as landscaping, or planting and maintaining vegetative cover, to prevent subsequent erosion. If coffer dams are constructed, they shall be maintained so as to prevent erosion into the water. If earthen material is used for coffer dam construction, sheet piling, riprap, or a synthetic cover must be used to prevent dam erosion.^{j,p}
- 10) The permittee shall minimize the extent and duration of soil disturbances while undertaking activities authorized by these Nationwide permits. Temporary and permanent erosion and sedimentation controls must be properly designed, installed, and maintained during construction. Permanent erosion control measures must be maintained throughout the life of the project. Temporary non-biodegradable controls must be promptly removed once soils are stabilized.^{g,j}
- 11) A permittee must limit the use of herbicides to only non-native invasive plant species control. The permittee must notify the Tribe's Natural Resources Department if non-native invasive plant species are found within the property boundaries.^{j,l} Any herbicide application within rights-of-way must comply with the Right-Of-Way Ordinance, or Chapter 421 of the Bad River Tribal Ordinances. No chemical applications of pesticides may occur during or 14 days prior to the anticipated opening of the Tribe's wild rice harvest season in accordance with the Bad River Band Sloughs Protection Ordinance (Chapter 340 of the Bad River Tribal Ordinances).

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- 12) A permittee must submit a series of photographs to the Tribe's Natural Resources Department within one week of completing work on the site. The photographs must be taken from different vantage points and depict all work authorized by this certification.^{a,l}
- 13) The Tribe's Natural Resources Department reserves the right to inspect the project throughout the project life to investigate the project's construction, operation, maintenance, or compliance with the Tribe's WQS.^a
- 14) Activities required for the containment and cleanup of oil and hazardous substances, which are eligible for coverage under the NWP, must comply with the Bad River Band Environmental Response and Remediation Ordinance, or Chapter 380 of the Bad River Tribal Ordinances. Questions regarding Chapter 380 can be directed to the Brownfield Specialist in the Tribe's Natural Resources Department at (715) 682-7123, (715) 685-4440 or Brownfields@badriver-nsn.gov.
- 15) Fill material (if required) will consist of suitable material that is free of pollutants that would have an adverse effect and free of non-native invasive species.^{l,m,n}

Each condition of this Certification cannot be made less stringent without violating the requirements of tribal law.

The Tribe reserves the right to modify this Certification if any changes, modifications or deletions are made to the NWP. In addition, the Tribe reserves the right to modify, suspend, or revoke this Certification to carry out its responsibilities during the term of the NWP with respect water quality, including any revisions to the Tribe's WQS or relevant Tribal law.

Citations and Other Relevant Footnotes:

^a Bad River Band of Lake Superior Tribe of Chippewa Indians Water Quality Standards adopted by Resolution No. 7-6-11-441 (hereafter, Tribe's WQS).

^b 36 C.F.R. § 800.16(l)(2).

^c Tribe's WQS: See provisions E.3.ii. and E.4.iv.

^d Tribe's WQS: See provision E.2.iii.

^e Tribe's WQS: See provision E.2.ii.

^f Tribe's WQS: See provision E.2.i.

^g Tribe's WQS: See provision E.7.iii.

^h 36 C.F.R. § 800.3(c)(4).

ⁱ 36 C.F.R. § 800.3(b).

^j Tribe's WQS: See provision E.6.ii.e.

^k A permittee should review the applicable provision of the most recent version of the Tribe's WQS to see the tier classification for a specific waterbody. A permittee can direct questions to the Tribe's Water Resources Specialist.

^l Tribe's WQS: See provision E.6.i.

^m Tribe's WQS: See provision E.6.ii.a.

ⁿ Tribe's WQS: See provision E.6.ii.h.

^o Tribe's WQS: See provision E.6.ii.c.

^p Tribe's WQS: See provision E.6.ii.d.

^q Tribe's WQS: See provisions F and G.