

Fond du Lac Band of Lake Superior Chippewa Resource Management Division

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Office of Water Protection 401 Water Quality Certification

APPLICANT: USACE St. Paul District

ISSUED: 18 December 2020

Administration
Conservation Enforcement
Environmental
Fisheries
Forestry
Land Information
Natural Resources
Wildlife

Pursuant to § 401 of the Clean Water Act (33 U.S.C. 1341), the Fond du Lac Band of Lake Superior Chippewa is required to certify whether the activity described below will violate applicable water quality standards. Accordingly, the Fond du Lac Reservation Office of Water Protection requires reasonable assurance that the activity will not violate provisions of the Fond du Lac Band of Lake Superior Chippewa Water Quality Standards of the Fond du Lac Reservation, Ordinance #12/98 (Adopted by Resolution #1403/98 of the Fond du Lac Reservation Business Committee on December 10, 1998; Amended by Resolution #1286/01 of the Fond du Lac Reservation Business Committee on September 11, 2001 and by Resolution #1321/20 of the Fond du Lac Reservation Business Committee on July 8, 2020), the Fond du Lac Band of Lake Superior Chippewa Water Quality Certification, Ordinance #01/06 (Adopted by Resolution #1033/06 of the Fond du Lac Reservation Business Committee on March 28, 2006; Amended by Resolution #1513/20 of the Fond du Lac Reservation Business Committee on December 16, 2020), or of § § 301, 302, 303, 306, or 307 of the Clean Water Act.

A request for Clean Water Act (CWA) § 401 Water Quality Certification has been received from the United States Army Corps of Engineers – St. Paul District for the 2020 Nationwide Permits for certain activities in waters and wetlands in Minnesota and Wisconsin (2020 NWP). Fond du Lac's Water Quality Standards may be found at: <http://www.fdlrez.com/government/ords/12-98ord.pdf>

Applicant: **Regulatory Branch**
St. Paul District, Corps of Engineers
180 Fifth Street East, Suite 700
St. Paul, Minnesota 55101-1678

Authorized Work: The authorized work consists of only those activities (and only to the extent of the impact limitations) specified in the 2020 Nationwide Permits where the discharge of dredged or fill material takes place within the external boundaries of the Fond du Lac Reservation.

(Certification continued):

Location(s): Construction activities authorized under these Nationwide Permits may occur anywhere permissible by the Nationwide Permits and this Certification within the exterior boundaries of the Fond du Lac Reservation.

Background: The Fond du Lac Reservation Office of Water Protection (OWP) has examined the request for Certification and the 2020 Nationwide Permits (including both General and Regional Conditions) and based upon our evaluation of the supplied information that is relevant to Water Quality Certification considerations, we certify that there is reasonable assurance that activities associated with the Nationwide Permits will be conducted in a manner that will not violate the Fond du Lac Band of Lake Superior Chippewa Water Quality Standards of the Fond du Lac Reservation Ordinance #12/98, as amended.

The §401 certification process ensures that Fond du Lac has the opportunity to establish conditions or even deny certification in order to protect our reservation water resources. The conditions that Fond du Lac believe are necessary to assure compliance with applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307, and with appropriate requirements of tribal law (specifically, Fond du Lac Ordinance #12/98, as amended) are related to our interpretation of our narrative water quality standards and our antidegradation policies. The condition regarding turbidity (no more than 10% increase over ambient or background turbidity) defines the water quality based effluent limitation (WQBEL) and monitoring/reporting requirements necessary to assure that any applicant for this Federal permit will be in compliance with our water quality standards. Monitoring and reporting requirements allow Fond du Lac, USEPA, and USACE to confirm that the certification conditions intended to protect the existing high quality of our reservation waters are effective and being implemented. They can trigger adaptive management practices at a site, and can help inform the development of more robust certification conditions in the future. Monitoring and reporting activities help permittees to actually see and understand the impact, or avert an impact, on water quality resulting from their permitted actions. Over the five (5) years period of EPA's Construction General Permit (CGP 2012) had been in effect with the Fond du Lac turbidity limit and monitoring requirement, we have only encountered one incident of exceedance of this permit condition. This exceedance led to immediate corrective action that may not have otherwise been required without this specific condition in place.

Fond du Lac considers all waters of the reservation to be Tier 2 (higher quality, on a pollutant by pollutant basis, than the minimum quality necessary to maintain designated uses), and our primary wild rice lakes are Tier 3 or "Outstanding Reservation Resource

(Background continued):

Value” waters. It is entirely consistent with EPA guidance on antidegradation review¹, for instance, to define a significance threshold above which the effects on water quality require findings of necessity and social and economic importance to support any decision about the lowering of water quality in high quality waters. The significance threshold of 10% has been independently defined and approved by EPA through multiple processes that have included environmental groups, industry representatives, scientific experts, and public input, including Water Quality Guidance for the Great Lakes, and other states as well.

Fond du Lac believes that the turbidity-related condition cannot be made any less stringent without violating the requirements of tribal law. Section 301(h) of our water quality standards specifies “settleable and suspended solids (turbidity) should not reduce the depth of the compensation point for photosynthetic activity by more than 10% from the seasonally established norm for aquatic life”. Our comprehensive water quality monitoring data collected over the last eighteen years provides a defensible basis for defining ambient conditions and protecting the existing high quality and biological integrity in our surface waters.

Certification: Certification is **DENIED** to any new discharge to Outstanding Reservation Resource Waters (ORRW) as described in § 105 b. 3. of the Fond du Lac Water Quality Standards (Ordinance #12/98, as amended). Although additional waters may be designated in the future, currently Perch Lake, Rice Portage Lake, Miller Lake, Deadfish Lake, and Jaskari Lake are designated as ORRWs. New dischargers wishing to discharge to an ORRW must obtain a separate Water Quality Certification of such discharges. As per § 201(h) of the Water Quality Certification Ordinance #01/06 this Water Quality Certification is granted as **CERTIFICATION WITH CONDITIONS** for all other waters/wetlands within the Fond du Lac Reservation and therefore the following conditions apply:

1) A copy of the Pre-Construction Notification (PCN) MUST be sent to the Fond du Lac Office of Water Protection at the same time it is sent to the St. Paul District, Corps of Engineers. The PCN must include all applicable drawings, plans, and specifications for the project. The Fond du Lac Office of Water Protection must be invited to participate in any meetings between the St. Paul District, the Local Government Unit, Technical Evaluation Panel and the applicant. The PCN can be submitted electronically to richardgitar@FDLREZ.com or by hardcopy sent to:

**Fond du Lac Reservation
Office of Water Protection**

¹ Memorandum from Ephraim S. King, Director, EPA Office of Science and Technology, to Water Management Division Directors, Regions 1-10, “Tier 2 Antidegradation Reviews and Significance Thresholds”, August 10, 2005.

(Condition #1 continued):

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2020 Nationwide Permits applicants are encouraged to work with the FdL Office of Water Protection (OWP) in the development of their projects since most of such projects will require a Wetland Activity Permit or Exemption Certificate under provisions of the Fond du Lac Wetlands Protection and Management Ordinance (WPMO) (Ordinance #03/06). [This condition helps the Office of Water Protection stay informed of the project as it progresses and gives information to evaluate whether the project requires a Wetland Activity Permit under the provisions of the Fond du Lac Wetlands Protection and Management Ordinance. FDL Water Quality Certification Ordinance, Section 204 (a) (3)].

2) If the project will entail a discharge to any watercourse or open water body, the turbidity limit shall NOT exceed 10% of natural background within any receiving water(s) as determined by Office of Water Protection staff. For such discharges, turbidity sampling must take place within 24 hours of a ½-inch or greater rainfall event. The results of the sampling must be reported to the Office of Water Protection within 7 days of the sample collection. All sample reporting must include the date and time, location (GPS: UTM/Zone 15), and NTU. 2017 Nationwide Permits applicants are encouraged to work with the Office of Water Protection in determining the most appropriate location(s) for sampling.

Water sample data reporting should be submitted electronically to richardgitar@FDLREZ.com or by hard copy sent to:

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[This condition helps both the Office of Water Protection and the project proponent in knowing whether or not their erosion control efforts are effective. FDL Water Quality Certification Ordinance, Section 204 (b) (1)].

3) Receiving waters with open water must be sampled for turbidity prior to any authorized discharge as determined by Office of Water Protection staff. This requirement only applies to receiving waters in which no ambient turbidity data exists.

Water sample data reporting should be submitted electronically to richardgitar@FDLREZ.com or by hard copy sent to:

(Condition #3 continued):

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[This condition allows the Office of Water Protection to Obtain a baseline turbidity sample in which to compare to other samples. FDL Water Quality Certification Ordinance, Section 204 (b) (2)].

4) The work shall be accomplished in conformance with the accepted plans, specifications, data, permit application materials (including the PCN), and other information submitted in support of the project application and the limitations, requirements and conditions set forth herein. [This condition keeps the project proponent from changing the scope and extent of the project without requiring a new certification. FDL Water Quality Certification Ordinance, Section 204 (a) (4)].

5) The Office of Water Protection shall be notified at least 48 hours prior to the commencement of work. [This condition allows the Office of Water Protection to know when a project will begin. FDL Water Quality Certification Ordinance, Section 204 (a) (5)].

6) Impacts to waters of the Fond du Lac Reservation other than those specifically addressed in the plans, application materials, and this certification are prohibited. All lakes, streams, springs, and wetlands for which impacts are not authorized shall be fully protected prior to, during and after construction until the area is stabilized. [This condition limits the discharge to only the waters that were identified at the time of the application and subsequent certification. FDL Water Quality Certification Ordinance, Section 204 (a) (6)].

7) All work shall be carried out in such a manner as will prevent violations of water quality criteria as stated in the Water Quality Standards of the Fond du Lac Reservation, Ordinance 12/98, as amended. This includes, but is not limited to, the prevention of any discharge that causes a condition in which visible solids, bottom deposits, or turbidity impairs the usefulness of water of the Fond du Lac Reservation for any of the uses designated in the Water Quality Standards of the Fond du Lac Reservation. These uses include public water supply, wildlife, aquatic life, warm water fisheries, cold water fisheries, subsistence fishing (netting), primary contact recreation, secondary contact recreation, cultural, wild rice areas, aesthetic waters, agriculture, navigation, commercial and wetlands. It also includes the designated uses of wetlands including, but not limited to, baseflow discharge, cultural opportunities, flood flow attenuation, groundwater recharge, indigenous floral and faunal diversity and abundance, nutrient cycling, organic carbon

(Condition #7 continued):

export/cycling, protection of downstream water quality, recreation, resilience against climactic effects, sediment/shoreline stabilization, surface water storage, wild rice, and water dependent wildlife. [In addition to listing the designated uses of waters of the Fond du Lac Reservation, this condition also limits the project proponent to discharges that will not violate our Water Quality Standards. FDL Water Quality Certification Ordinance, Section 204 (a) (7)].

8) Appropriate steps shall be taken to ensure that petroleum products or other chemical pollutants are prevented from entering waters of the Fond du Lac Reservation. All spills must be reported to the appropriate emergency management Agency (National Response Center AND the State Duty Officer), and measures shall be taken immediately to prevent the pollution of waters of the Fond du Lac Reservation, including groundwater. The Fond du Lac Office of Water Protection must also be notified immediately of any spill regardless of size. [This condition helps protect water quality and also reminds project proponents of their responsibility in reporting spill events. FDL Water Quality Certification Ordinance, Section 204 (b) (3)].

9) To prevent the introduction of invasive species, all contractors and subcontractors MUST disclose information stating prior equipment location(s) and all known invasive species potentially being transported from said location(s). All equipment MUST undergo a high-pressure wash (including timber mats) before entering the Fond du Lac Reservation. Personal equipment, such as work boots, gloves, vests, etc. must be clean of debris, dirt, and plant and animal material before entering the Fond du Lac Reservation. Equipment being transported from known infested areas MUST undergo a high pressure wash as soon as possible after leaving the infested site and again BEFORE entering the Fond du Lac Reservation to avoid transport of invasive species into areas surrounding the Reservation. Upon arrival, all contractor and sub-contractor equipment will be inspected by appointed Fond du Lac staff (or an independent inspector designated by the project proponent). If equipment is deemed unsatisfactory, the equipment must undergo a high pressure water until the equipment is cleared by the inspector, until such time, minimal travel will be allowed through the Reservation. The project proponent shall be held responsible for the control of any invasive species introduced as a result of their project. [This condition requires the project proponent to prevent the inadvertent introduction of invasive species by taking an active role in cleaning all vehicles, equipment, and equipment mats before entering the Reservation. This condition has been placed in certifications since 2012, due to the introduction of Wild Parsnip in 2011 from a pipeline contractor. It is much easier to prevent the introduction of an invasive species that it is to eradicate it once it has been introduced. Many invasive plant species form monocultures, preventing native plants from growing. This situation often leads to cases of erosion, which in turn effect water quality. FDL Water Quality Certification Ordinance, Section 204 (g) (1)].

(Conditions continued):

10) ALL seed mixes, whether used for temporary stabilization or permanent seeding, shall NOT contain any annual ryegrass (*Lolium* species). Canadian Wild Rye (*Elymus* species) or Oats (*Avena* species) may be used as a replacement in upland seed mixes. Upland seed mixes approved by the Minnesota Department of Transportation (MnDOT) may be used without Office of Water Protection approval provided they do NOT contain annual ryegrass. Seed mixes 21-111 (Oats Cover Crop) and 21-112 (Winter Wheat Cover Crop) are approved for use on the Fond du Lac Reservation. [This condition prevents the use of annual ryegrass on the Reservation. Annual ryegrass is allelopathic, which means it produces biochemical in its roots that inhibit the growth of other native plants. If used in seed mixes, annual ryegrass could contribute to erosion, especially on slopes. However, this condition also specifies substitute grasses that germinate almost as fast as annual ryegrass for use as a cover crop to help prevent erosion. FDL Water Quality Certification Ordinance, Section 204 (f) (1)].

11) Seed mixes used in wetlands MUST be approved by Office of Water Protection staff prior to use. Wetland seed mixes approved by the Minnesota Board of Water and Soil Resources (BWSR) may be used without Office of Water Protection approval if they do NOT contain annual ryegrass. Seed mixes 34-171 (Wetland Rehabilitation), 34-181 (Emergent Wetland), 34-361 (Riparian Northeast) and 34-371 (Wet Meadow Northeast) are approved and recommended for use on the Fond du Lac Reservation. The use of mulch is NOT allowed in wetlands. [This condition requires the seed mixes used in wetland be approved by the Office of Water Protection. The BWSR seed mixes list have already been reviewed by Office of Water Protection staff and are pre-approved. Mulch is not allowed in wetlands because it often reduces germination of wetland plants and also does not break down the same as in upland situations. FDL Water Quality Certification Ordinance, Section 204 (f) (2)].

12) ALL erosion and sediment control Best Management Practices (BMPs) shall be properly installed, maintained, inspected for effectiveness, replaced if not effective, and removed once the area has been properly stabilized or re-vegetated. [This condition places the burden on the project proponent to ensure that their BMPs are functioning properly to prevent erosion and sedimentation, thus preventing degradation of water quality. FDL Water Quality Certification Ordinance, Section 204 (c) (1)].

13) For temporary impacts, all appropriate steps shall be taken to ensure proper restoration of the site, including the separation, storage and replacement of soil horizons, removal of all rutting from maintenance operations, removal of all equipment, materials and construction BMPs, and returning the site to the original contours as much as possible. [This condition reminds project proponents that propose temporary impacts of their responsibilities in restoring the site so the impacts are truly temporary in nature. FDL Water Quality Certification Ordinance, Section 204 (c) (2)].

(Conditions continued):

14) It is the responsibility of the applicant to convey all terms and conditions of this certification to all appropriate staff, workers, contractors and sub-contractors. [This condition requires the project proponent to inform everyone under their control of the condition of this certification so that all can aid in compliance of those conditions. FDL Water Quality Certification Ordinance, Section 204 (a) (8)].

Authorization of Certification: I, Reginald DeFoe, do grant Clean Water Act § 401 Water Quality Certification With Conditions to the U. S. Army Corps of Engineers – St. Paul District for the 2020 Nationwide Permits (2020 NWP) on the Fond du Lac Reservation.

Signed: _____



Date: _____

12/18/20

Reginald DeFoe
Resource Management Director
Fond du Lac Reservation