

Fond du Lac Band of Lake Superior Chippewa Resource Management Division

1720 Big Lake Road
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Office of Water Protection 401 Water Quality Certification

APPLICANT: USACE St. Paul District

ISSUED: 24 April 2017

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), the Fond du Lac Band of Lake Superior Chippewa Water Quality Certification Standards, Ordinance #01/06 (Adopted by Resolution #1033/06, as amended, of the Fond du Lac Reservation Business Committee on March 28, 2006), 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 2017 Nationwide Permits for certain activities in waters and wetlands in Minnesota and Wisconsin (2017 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 2017 Nationwide Permits where the discharge of dredged or fill material takes place within the external boundaries of the Fond du Lac Reservation.

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.

(Certification continued):

Background: The Fond du Lac Reservation Office of Water Protection (OWP) has examined the request for Certification and the 2017 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 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

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.

(Background continued):

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(e) of the Water Quality Certification Standards 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
1720 Big Lake Road
Cloquet, MN 55720**

2017 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

(Condition #1 continued):

provisions of the Fond du Lac Wetlands Protection and Management Ordinance (WPMO) (Ordinance #03/06).

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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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:

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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.

5) The Office of Water Protection shall be notified at least 48 hours prior to the commencement of work.

(Conditions continued):

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.

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 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, and commercial.

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.

9) To prevent the introduction of invasive species, ALL contractors and sub-contractors MUST high pressure wash ALL equipment (including timber mats) before use on the Fond du Lac Reservation. Notification of the completion of this requirement MUST be provided to the Fond du Lac Office of Water Protection before any equipment is mobilized to the work site. The applicant shall be held responsible for the control of any invasive species introduced as a result of their project conducted under the authorization of any Nationwide Permit.

Notification can be emailed to richardgitar@FDLREZ.com or hard copy sent to:

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10) ALL seed mixes, whether used for temporary stabilization or permanent seeding, shall NOT contain any annual ryegrass (*Lolium* species). Canadian Wild

(Condition #10 continued):

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.

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. If seed mix approval is required under this condition, applicants should contact the following:

Richard Gitar, Water Regulatory Specialist
Phone: 218-878-7122
Email: richardgitar@FDLREZ.com
Address: Fond du Lac Reservation
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Cloquet, MN 55720

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.

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.

14) Adverse impacts to formally listed state or federal threatened, endangered, or special concern species or their critical habitat is prohibited unless the appropriate agency has granted approval.

15) This certification does not authorize impacts to cultural, historical, or archeological features or sites, or properties that may be eligible for such listing.

16) 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.

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(Certification continued):

Authorization of Certification: I, John Smith, acting on behalf of 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 2017 Nationwide Permits (2017 NWP) on the Fond du Lac Reservation.

Signed:  Date: 11-24-17

John Smith
Acting Resource Management Director
Fond du Lac Reservation