

BAD RIVER BAND OF LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS

CHIEF BLACKBIRD CENTER

P.O. Box 39 • Odanah, Wisconsin 54861

Resolution No. 2-7-18-970

Authorization of Conditional Clean Water Act Section 401 Certification Decision for the Transportation Regional General Permit Issued by the U.S. Army Corps of Engineers

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, welfare and economic security, as well as the economic and political integrity of the Tribe itself; and

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

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

WHEREAS, the Band, after consultation with the Band's Natural Resources Department, finds that conditional certification of the Transportation Regional General Permit is 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 life and wildlife, cultural, and other legitimate uses;

NOW, THEREFORE, BE IT RESOLVED that the Tribal Council hereby approves the 401 certifications with the conditions attached hereto as Exhibit "A" for the Transportation Regional General Permit.

AND BE IT FURTHER RESOLVED that the Tribal Council directs the Natural Resources Department to submit the certification decisions to the U.S. 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 6 members, constituting a quorum, were present at a meeting hereof duly called, noticed, convened, and held on the 7 day of February, 2018; that the foregoing resolution was duly adopted at said meeting by an affirmative vote of 5 members; 0 against; and 0 abstaining, and that the said resolution has not been rescinded or amended.


Rae Ann Maday, Secretary
Bad River Tribal Council

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Clean Water Act Section 401 Certification of the Army Corps of Engineers – St. Paul District’s Transportation Regional General Permit

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 a Transportation Regional General Permit (RGP) applicable within Minnesota, Wisconsin, and the exterior boundaries of Indian Reservations in Minnesota and Wisconsin. This RGP authorizes 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 scope of this RGP and determined that there is reasonable assurance—with the conditions listed below—that the activities associated with Transportation RGP will be consistent with relevant water quality considerations.

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 for Transportation RGP with the following conditions to apply to discharges made under the permit into Waters of the Bad River Reservation:

- 1) This Certification applies only to those activities specifically authorized by this Transportation RGP 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 this RGP 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}
- 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

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- 3) An applicant must notify the Tribe prior to commencing an activity within the exterior boundaries of the Bad River Reservation, which is eligible for coverage under the conditional certified Transportation RGP, regardless of if a pre-construction notification (PCN) is required by the Corps.^{a,b} An applicant must submit a copy of the scope of work, proposed project location, and contact information to the following addresses prior to commencing any physical work :
 - Bad River Tribe’s Natural Resources Department
Attn: Water Resources Specialist
P.O. Box 39
Odanah, WI 54861

 - Bad River Tribe’s Natural Resources Department
Attn: Tribal Historic Preservation Officer (THPO)
P.O. Box 39
Odanah, WI 54861
- 4) Any permittee or person performing activity, which is eligible for coverage under any RGP, shall be responsible for meeting any additional permit requirements imposed by the U.S. EPA necessary to comply with the Tribe’s antidegradation policies if the discharge point is located upstream of waters designated by the Tribe.^a
- 5) Regardless of timelines set by the Corps for Tribal review of projects requiring PCN, the applicant shall not commence any activity under the Transportation RGP until written authorization is received from the Tribe under the Tribe’s Wetland and Watercourse Protection Ordinance, Antidegradation Policy, or other applicable tribal law. The only exception for waiting to receive written approval by the Tribe prior to project implementation if the activity is permitted under Transportation RGP Category 1 or Category 2, and only then if it is an emergency that would result in unacceptable threat to human health or the environment or the severe loss of property. The Tribe must be notified of any activity commenced as an emergency under Categories 1 or 2 within 48 hours, except in wild rice waters as described in condition 6.
- 6) Activities are not eligible for authorization under the Transportation RGP if they are in or within 300 feet of wild rice waters, except for those activities permitted under Category 1, and only then if it is an emergency that would result in unacceptable threat to human health or the environment or the severe loss of property. The Tribe must be notified within 24 hours of any activity commenced as an emergency under Category 1 when the discharge or release causes or contributes to an adverse impact to waters with a wild rice designated use (i.e., wild rice waters).^{d,o} Wild rice waters can be viewed at: <http://www.arcgis.com/apps/View/index.html?appid=6f44c371217e4ee8b5f1c2c705c7c7c5>
- 7) Activities are not eligible for authorization under the Transportation RGP if they are in or within 300 feet of cold water fishery waters, except for those activities permitted under

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Category 1, and only then if it is an emergency that would result in unacceptable threat to human health or the environment or the severe loss of property. The Tribe must be notified within 24 hours of any activity commenced as an emergency under Category 1 when the discharge or release causes or contributes to an adverse impact to waters with a cold water fishery designated use.^{i,q,r}

- 8) The CWA Section 401 certification is denied without prejudice for an activity that results in new or increased discharges or alterations to an Outstanding Tribal Resource Water (OTRW or Tier 3 water) unless the lowering of water quality is short-term and temporary and the activity fulfills the antidegradation decision requirements, including, but not limited to, the activity arising entirely from one of the following:
- a. maintenance/repair of existing roads, bridges, boat landings, culverts, septic systems, or similar structures; construction of buildings, wells, roads, or similar structures;
 - b. response actions undertaken to alleviate a release into the environment of hazardous substances, pollutants, or contaminants which may pose an imminent and substantial danger to public health or welfare; or
 - c. actions undertaken to restore culturally important species and their habitats.^c

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, Potato River, and the portion of Bad River from where it enters the Reservation through the confluence with the White River.^{d,k} OTRWs can be viewed at: <http://www.arcgis.com/apps/View/index.html?appid=6f44c371217e4ee8b5f1c2c705c7c7c5> If an activity has the potential to result in a new or increased discharge or alteration to a OTRW and the activity arises entirely from category (a) or (c), then the permittee must submit the antidegradation demonstration materials described in provision E.4.iv. of the Tribe’s WQS to the address listed below prior to commencing the activity; an antidegradation demonstration template can be found at: <http://badriver-nsn.gov/tribal-operations/natural-resources/antidegradation-demonstration-announcements-forms>. If an activity has the potential to result in a new or increased discharge or alteration to a OTRW and the activity arises entirely from category (b) or (a) if deemed an emergency that would result in unacceptable threat to human health or the environment, then the permittee must submit antidegradation materials within seven (7) days after the unacceptable threat to human health or the environment is addressed. 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

- 9) A permittee proposing to discharge to or alter an Outstanding Resource Water (ORW or Tier 2.5 water) under the Transportation RGP must comply with the antidegradation

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provisions of the Tribe’s WQS. ORWs, or Tier 2.5 waters, include the following: White River, Marengo River, Graveyard Creek, Bear Trap Creek, Wood Creek, Brunswailer River, Tyler Forks River, Bell Creek, Vaughn Creek, and a portion of Bad River from downstream the confluence with the White River to Lake Superior.^{e,k} ORWs can be viewed at:

<http://www.arcgis.com/apps/View/index.html?appid=6f44c371217e4ee8b5f1c2c705c7c7c5>

If an activity is permitted under Transportation RGP Category 1 or Category 2 is deemed an emergency that would result in unacceptable threat to human health or the environment, then the applicant must submit antidegradation materials within seven (7) days after the unacceptable threat to human health or the environment is addressed. The antidegradation demonstration materials described in provision E.4.iii. of the Tribe’s WQS, and included on the antidegradation demonstration template found at: <http://badriver-nsn.gov/tribal-operations/natural-resources/antidegradation-demonstration-announcements-forms>, 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

10) A permittee proposing to discharge to or alter an Exceptional Resource Water (ERW or Tier 2 water) under the Transportation RGP must comply with the antidegradation provisions of the Tribe’s WQS. 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 ERWs can be viewed at:

<http://www.arcgis.com/apps/View/index.html?appid=6f44c371217e4ee8b5f1c2c705c7c7c5>

If an activity is permitted under Transportation RGP Category 1 or Category 2 is deemed an emergency that would result in unacceptable threat to human health or the environment, then the permittee must submit antidegradation materials within seven (7) days after the unacceptable threat to human health or the environment is addressed. The antidegradation demonstration materials described in provision E.4.ii. of the Tribe’s WQS, and included in the antidegradation demonstration template found at: <http://badriver-nsn.gov/tribal-operations/natural-resources/antidegradation-demonstration-announcements-forms>, 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

11) 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

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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.⁸

- 12) All activities which are eligible for coverage under the Transportation RGP 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, including the erosion and sedimentation control, natural buffer, and stabilization requirements. 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 or wetlands@badriver-nsn.gov.
- 13) The THPO must be provided 30 days to comment on the project.^h THPO review is necessary for all projects within the exterior boundaries of the Reservation, regardless of land ownership. For more information regarding the specifics of the cultural resources process, see 36 CFR Part 800. A best practice for an applicant is to consult with the THPO during the planning stages of an undertaking.ⁱ Questions can be directed to the THPO in the Tribe’s Natural Resources Department at (715) 682-7123 or THPO@badriver-nsn.gov.
- 14) Activities eligible for coverage under Transportation RGP Category 1 (Minor Maintenance – Linear Transportation), resulting in greater than 0.5-acres of permanent impact or 1-acre of temporary impact require an individual CWA Section 401 certification. An individual CWA Section 401 certification is also required for this Category, if the activity includes dredging not immediately adjacent to the project (extends farther than 100 ft) or within the boundaries of the structure or fill.^a
- 15) Activities eligible for coverage under Transportation RGP Category 2 (Modification – Linear Transportation) resulting in greater than 1 acre of permanent impact or 2 acres of temporary impacts for the overall project (including all single and complete projects) require an individual CWA Section 401 certification. An individual CWA Section 401 certification is also required for this Category if the activity includes greater than 100 linear feet of impact to a watercourse, including intermittent and ephemeral streams. Impacts to waters of the Tribe must be avoided when practicable and be the minimum necessary, in both extent and duration, to complete the work.^{j,o,p}
- 16) Activities eligible for coverage under Transportation RGP Category 3 (New Construction – Linear Transportation) and Category 4 (New Construction – Non-Linear Transportation Projects) will require an individual CWA Section 401 certification.^a
- 17) Activities eligible for coverage under Transportation RGP Category 5 (Transportation Surveying) resulting in greater than 1/10 acre of impact or greater than 100 linear feet of impact to a watercourse, including intermittent and ephemeral streams, will require an individual CWA Section 401 certification.^a

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- 18) The applicant must implement best management practices (BMPs) on the project site to minimize erosion of slopes adjacent to any part of the overall project. BMPs include, but are not limited to, retaining vegetation, diverting surface water runoff away from the slope, and installing ditch checks.^{j, l, m}

- 19) 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}

- 20) The permittee shall minimize the extent and duration of soil disturbances while undertaking activities authorized by Transportation RGP. 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}

- 21) A permittee must limit the use of herbicides to only non-native invasive plant species control. The applicant must notify the Tribe’s Natural Resources Department if non-native invasive plant species are found within the project or associated right-of-way.^{j, l} Any herbicide application within right-of-ways 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).

- 22) 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}

- 23) 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

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- 24) Activities that result in a pollutant or hazardous waste spill, in addition to meeting general conditions under the RGP, 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 or Brownsfield@badriver-nsn.gov.
- 25) The Bad River Natural Resources Department may require compensatory mitigation under the Bad River Reservation Wetland and Watercourse Protection Ordinance for an activity eligible for coverage under the Transportation RGP. The Bad River Natural Resources Department will utilize Chapter 323 and the Bad River Tribe’s Wetland Mitigation Plan to determine if mitigation is required.
- 26) Discharges and any work as defined under Section 10 in spawning areas during spawning season must be avoided to the maximum extent practicable. The CWA Section 401 Certification is denied for activities that result in the physical destruction (e.g., through excavation, fill, or turbidity) of a spawning area within the exterior boundaries of the Reservation.^{a,g,o,p}
- 27) Fill material (if required) will consist of suitable material that is free of pollutants that would have an adverse effect and, to the extent practicable, 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 RGPs. In addition, the Tribe reserves the right to modify, suspend, or revoke this Certification to carry out its responsibilities during the term of the RGP with respect water quality, including any revisions to the Tribe’s WQS or relevant Tribal law.

Citation 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.

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^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 An applicant should review the applicable provision of the most recent version of the Tribe’s WQS to see the tier classification for a specific waterbody. An applicant 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.

^r Tribes WQS: See provision E.6.ii.g.