

# 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: 13 February 2018

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 Regional General Permit – Transportation in the States of Minnesota and Wisconsin and Federally-Recognized Indian American Indian Reservations 2017-02361. 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:** Category 1: Minor Maintenance – Linear Transportation: Regulated activities required for crossings of waters of the United States associated with minor repairs, rehabilitation, or replacement of a previously authorized currently serviceable linear transportation project, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated in the original permit or the most recently authorized modification. Regulated activities associated with tributary channelization, slope widening, road widening, new lanes, trails, railways, and runways, or new storm water ponds are NOT authorized by this category. Category 2: Modification – Linear Transportation: Regulated activities required for crossings of waters of the

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(Authorized Work continued):

United States associated with the expansion, modification, improvement or minor realignments of an existing transportation project (e.g., roads, highways, attached frontage roads, railways, trails, airport runways, and taxiways), including the temporary structures, fills, and work, including mats, necessary for those activities. **Category 3: New Construction – Linear Transportation:** Regulated activities required for crossings of waters of the United States associated with the construction of a linear transportation project (e.g., roads, highways, railways, trails, airport runways, and taxiways). Examples of eligible activities include: discharges for the construction of: (1) new roads or major realignments of existing roadways; (2) new railroad spurs or tracks; (3) new or detached frontage roads; (4) new airport runways; (5) new or detached trails; (6) associated linear infrastructure for those new construction projects, and (7) temporary structures, fills, and work, including the use of temporary mats, necessary for activities 1-6. **Category 4: Non-Linear Transportation Projects:** Regulated activities required for the construction, expansion, or maintenance of non-linear features associated with transportation projects, including the use of temporary discharges necessary to conduct those activities. Such projects may include: vehicle maintenance or storage buildings, weigh stations, rest-stops, parking lots, train stations, aircraft hangers, and associated infrastructure, including storm water management facilities. **Category 5: Transportation Surveying:** Regulated temporary activities required for surveying activities necessary for transportation projects, such as core sampling, exploratory-type bore holes, exploratory trenching, soil surveys, sediment sampling, sample plots or transects for wetland delineations, historic resources surveys, and temporary access roads necessary to perform those activities.

**Location(s):** Construction activities authorized under this Regional General Permit may occur anywhere permissible by the Permit 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, the Public Notice, and the Transportation Regional General Permit, and based upon our evaluation of the supplied information that is relevant to Water Quality Certification considerations, **at this time we DO NOT CERTIFY** that there is reasonable assurance that activities associated with the Regional General Permit 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

(Background continued):

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 review<sup>1</sup>, 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.

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<sup>1</sup> 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.

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(Certification continued):

**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 **DENIED WITHOUT PREJUDICE** for all other waters/wetlands within the Fond du Lac Reservation for the following reasons:

- 1) Aquatic resources are extremely important to the Fond du Lac Band of Lake Superior Chippewa and are quite extensive, comprising approximately 47% of the area within the external boundaries of the Fond du Lac Reservation.
- 2) Although the locations of these aquatic resources are known and mapped, the locations of potential transportation projects are not known. Therefore, the potential impacts to the aquatic resources cannot be quantified unless the actual project scope and location is known.
- 3) While a set of generic conditions may be adequate to protect water quality, until a specific transportation project is proposed, it is difficult to determine what site-specific conditions may be appropriate to truly protect the water quality and aquatic resources that Fond du Lac Band Members depend upon.

Fond du Lac has chosen to Deny Without Prejudice this 401 Water Quality Certification as to not create any undue burden on the applicant or the Corps of Engineers. It will allow the applicant to use the Transportation Regional General Permit, yet allow Fond du Lac the opportunity to review the applicant's project and develop a set of conditions to an individual 401 Water Quality Certification that is project-specific.

**Authorization of Certification:** I, Reginald DeFoe, do Deny Without Prejudice Clean Water Act § 401 Water Quality Certification to the U. S. Army Corps of Engineers – St. Paul District for the 2017 Transportation Regional General Permit on the Fond du Lac Reservation.

Signed:  Date: 02/13/16

Reginald DeFoe  
Resource Management Director  
Fond du Lac Reservation