

DECISION DOCUMENT:

**APPROVAL OF THE LAC DU FLAMBEAU BAND OF LAKE SUPERIOR
CHIPPEWA'S APPLICATION FOR TREATMENT IN THE SAME MANNER AS
A STATE FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

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I. Introduction and Administrative Record

A. Introduction

Section 303(c) of the Clean Water Act (CWA) requires the States to develop, review and revise (as appropriate) water quality standards for surface waters of the United States. At a minimum, such standards must include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. 40 C.F.R. § 131.6. In addition, Section 401 of the CWA provides that States may grant or deny "certification" for Federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the State's determination regarding whether the proposed activity will comply with, among other things, water quality standards it has adopted under Section 303. If a State denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license.

Section 518(e) of the CWA authorizes the United States Environmental Protection Agency (EPA or the Agency) to treat an eligible tribe in the same manner as a state (TAS) for certain CWA programs, including Sections 303 and 401. EPA regulations establish the process by which EPA implements that authority and determines whether to approve a tribal application for TAS for purposes of administering Sections 303 and 401 of the CWA. See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 13814 (March 23, 1994) (codified at 40 C.F.R. Part 131).

This Decision Document provides the basis and supporting information for EPA's decision to approve the Application from the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe", "Band" or "LdF") for TAS for Section 303(c) and Section 401 of the CWA, pursuant to Section 518(e) of the CWA and 40 C.F.R. Part 131. CWA Section 518(e)(2) authorizes EPA to treat a tribe as a state for water resources "within the borders of an Indian reservation." This approval applies to all surface waters identified by the Band that lie within the exterior borders of the Lac du Flambeau Indian Reservation.

B. Administrative Record

The following documents comprise a portion of the administrative record for this decision. Appendix I contains a complete index to the administrative record for this decision.

1. Application and Supporting Materials

The Band's Application for TAS for purposes of the water quality standards and certification programs under Sections 303 and 401 of the CWA includes the following letters and related documents from the Band and its Counsel:

10/12/05 Letter from Larry Wawronowicz, Deputy Administrator of Natural Resources for the Lac du Flambeau Band of Lake Superior.

Chippewa Indians to Jo Lynn Traub, Water Division Director, U.S. EPA Region 5, enclosing CWA Section 303 and 401 "Eligibility Application."

11/29/05 Letter from Larry Wawronowicz, Deputy Administrator of Natural Resources for the Lac du Flambeau Band of Lake Superior Chippewa Indians to Jo Lynn Traub, Water Division Director, U.S. EPA Region 5, providing a revised watershed and wetland map.

5/31/06 Letter from William R. Perry, Douglas B. L. Endreson, and Vanessa L. Ray-Hodge, Law Offices of Sonosky, Chambers, Sachse, Endreson & Perry, LLP, representing LdF Band to Jo Lynn Traub, Water Division Director, U.S. EPA Region 5, providing supplemental information in support of the Band's Application.

6/27/06 Letter from Douglas B. L. Endreson, and Vanessa L. Ray-Hodge, Law Offices of Sonosky, Chambers, Sachse, Endreson & Perry, LLP, representing LdF Band to Jo Lynn Traub, Water Division Director, U.S. EPA Region 5, providing additional responses to comments on the Application.

4/3/07 Letter from Larry Wawronowicz, Deputy Administrator of Natural Resources for the Lac du Flambeau Band of Lake Superior Chippewa Indians to Jo Lynn Traub, Water Division Director, U.S. EPA Region 5, providing supplemental information in support of the Band's Application.

2. Letters and Related Documents from EPA

12/1/05 Letter from Thomas V. Skinner, Regional Administrator, Region 5, to Honorable Jim Doyle, Governor, State of Wisconsin, providing notification of the LdF Application and comment period. Letter cc'd to Wisconsin Department of Natural Resources (WDNR), Wisconsin Attorney General's Office, Lac du Flambeau Band, Vilas County Board, Iron County Board, and Oneida County Board.

12/13/05 Press Release by EPA Region 5 announcing availability of the LdF Application for review and comment. Public review copies available at Minocqua Public Library, LdF Environmental Office, and EPA Region 5 Office. Ad placed in the local paper on 12/20/05 and 12/23/05.

12/20/05 Letter from Dan Cozza, EPA Region 5, to recipients of 12/1/05 letter and local library providing revised watershed and wetland map from LdF.

1/19/06 Letter from Thomas V. Skinner, Regional Administrator, Region 5 to Victoria A. Doud, President, Lac du Flambeau Band, announcing a 30-day extension to the comment period.

1/19/06 Letter from Thomas V. Skinner, Regional Administrator, Region 5, to Scott Hassett, Secretary, WDNR, announcing a 30-day extension to the comment period.

2/2/06 Letter from Thomas V. Skinner, Regional Administrator, Region 5 to Victoria A. Doud, President, Lac du Flambeau Band, announcing scheduling of public informational session.

2/2/06 Letter from Thomas V. Skinner, Regional Administrator, Region 5 to Scott Hassett, Secretary, WDNR, announcing scheduling of public informational session.

6/15/07 Letter from Mary A. Gade, Regional Administrator, Region 5, to Honorable Jim Doyle, Governor, State of Wisconsin, providing notification of the release and comment period regarding EPA's Proposed Findings of Fact. Letter cc'd to WDNR, Wisconsin Attorney General's Office, Lac du Flambeau Band, Vilas County Board, Iron County Board, and Oneida County Board.

3. Governmental Entity Comments Regarding Tribal Authority

On December 1, 2005, former EPA Region 5 Regional Administrator Thomas Skinner sent a letter notifying appropriate governmental entities¹ of the substance and basis of the Band's assertion of authority in its Application as provided at 40 C.F.R. §131.8(c)(2). Notice went to the governor of Wisconsin. Consistent with Agency practice, EPA also provided an opportunity for local governments and the public to review and comment on the Application. EPA extended the comment period to February 21, 2006. A public informational session was held on February 15, 2006. Advertisements announcing the comment period and the public informational session were placed in the local newspaper.

Notice of the availability of the LdF Application for comment was sent to the following recipients:

The Honorable Jim Doyle, Governor
State of Wisconsin
Madison, WI 53702

Mr. Scott Hassett, Secretary
Wisconsin Department of Natural
Resources
P.O. Box 7921
Madison, WI 53707

¹ EPA defines the term "appropriate governmental entities" as "States, tribes, and other Federal entities located contiguous to the reservation of the tribe which is applying for treatment as a State." 56 Fed. Reg. 64876, 64884 (Dec. 12, 1991). The term does not include local governments such as cities and counties.
Id.

Wisconsin Department of Justice
Attn: Attorney General's Office
P.O. Box 7857
Madison, WI 53707

President Victoria A. Doud
Lac du Flambeau Band of Lake
Superior Chippewa Indians
P.O. Box 67
Lac du Flambeau, WI 54538

Vilas County Courthouse
Attn: County Clerk
330 Court Street
Eagle River, WI 54521

Oneida County Courthouse
Attn: County Clerk
One Oneida Avenue
Rhineland, WI 54501

Iron County Courthouse
Office of the County Clerk
300 Taconite Street
Hurley, WI 54534

Minocqua Public Library
Attn: Reference Librarian
415 Menominee Street
Minocqua, WI 54548

EPA received comments in support of the LdF Application from the Bad River Band of Lake Superior Chippewa, the Oneida Nation and several individual and public entities.

Comments on the Band's Application were received from Scott Hassett, Secretary of the Wisconsin Department of Natural Resources by letter dated February 21, 2006. In addition, the State of Wisconsin transmitted comments from the public. All the comments received on the Application are listed in the Administrative Record (See Administrative Record Index in Appendix I). EPA's consolidated responses to the comments on the Application and the Proposed Findings of Fact, described below, are contained in Appendix III.

Consistent with its practice, EPA prepared Proposed Findings of Fact and, on June 15, 2007, circulated them for comment to the State of Wisconsin. EPA also informed local governments and the public. Comments on the Proposed Findings of Fact were received from Scott Hassett, Secretary of WDNR in a letter dated August 7, 2007. The WDNR also transmitted comments from the public in a letter dated August 3, 2007. All the comments received on the Proposed Findings of Fact are listed in the Administrative Record (see Administrative Record Index in Appendix I). EPA's consolidated responses to the comments on the Proposed Findings of Fact are contained in Appendix III. EPA has finalized the Proposed Findings of Fact based on comments received and the Final Findings of Fact is contained in Appendix II.

4. Capability Review

In approving the Band's application under Section 106 of the CWA, the EPA determined that the Band is federally-recognized and possesses a government exercising substantial duties and powers. LdF was approved for CWA Section 106 grant eligibility on May 29, 1990. In addition, based upon the Band's successful implementation of other environmental programs and the review of this Application's

supporting documentation, the Agency has determined that the Band satisfies the capability requirement. (See memo attached as Appendix IV dated December 11, 2007 by Dan Cozza, EPA Region 5, Water Division Tribal Program Manager).

5. Statutory and Regulatory Provisions

a. Section 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e), authorizes EPA to treat an eligible Indian tribe in the same manner as a state if it meets specified eligibility criteria.

b. "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations" 56 Fed. Reg 64876 (codified at 40 C.F.R. Part 131.8), establish the requirements for a tribe to obtain TAS approval.

6. Policy Statements

Including, but not limited to:

a. EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 11, 1984, as reaffirmed most recently by EPA Administrator Jonnson on September 26, 2005.

b. EPA Memorandum entitled "EPA/State/Tribal Relations," by EPA Administrator Reilly, July 10, 1991.

c. Memorandum entitled "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," by Robert Perciasepe and Jonathan Cannon, March 19, 1998.

d. Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs, dated January 23, 2008.

II. Requirements for TAS Approval

Under CWA Section 518(e) and EPA's implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve a tribe's TAS application for water quality standards under Section 303(c) and certification under Section 401. These are: (1) the Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation; (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources that are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

EPA's regulation at 40 C.F.R. § 131.8(b) identifies what must be included in an application by an Indian tribe for TAS to administer a water quality standards program. EPA separately reviews tribal water quality standards under 40 C.F.R. § 131.21, and TAS approval under 40 C.F.R. § 131.8 does not constitute an approval of such standards. But approval of a tribe for TAS for purposes of water quality standards does authorize that tribe to issue certifications under Section 401 of the CWA, once the Tribe's water quality standards are federally approved, see 40 C.F.R. § 131.4(c), and provided that the tribe designates a "certifying agency" as defined in 40 C.F.R. § 121.1(e).

A. Federal Recognition

Under section 518 of the CWA and its implementing regulations, EPA can approve a TAS application only from an "Indian tribe" that meets the definitions set forth in CWA Section 518(h) and 40 C.F.R. § 131.3(k), and (l). See 40 C.F.R. § 131.8(a)(1). The term "Indian tribe" is defined as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian Reservation." CWA § 518(h)(2), 40 C.F.R. § 131.3(l). The term "Federal Indian Reservation" means "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." CWA § 518(h)(1), 40 C.F.R. § 131.3(k).

The Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin is included on the Secretary of the Interior's list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." 72 Fed. Reg. 13647, 13649 (March 22, 2007). Furthermore, as discussed below, the Band is exercising governmental authority over a reservation within the meaning of the CWA. Thus, EPA has determined that the Tribe meets the requirements of 40 C.F.R. § 131.8(a)(1) & (b)(1).

B. Substantial Governmental Duties and Powers

To show that it has a governing body currently carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that the Tribe submit a descriptive statement that should: (i) describe the form of the tribal Government; (ii) describe the types of governmental functions currently performed by the tribal governing body; and (iii) identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

The Band's Application relies on EPA's previous approval of the Band's TAS application for the CWA Section 106, noting that when EPA approved that application, it found the Band had adequately described the form of tribal government, the governmental functions the government performs, and the source of tribal authority to carry out those functions. A tribe that has previously shown that it meets the "governmental functions" requirement for purposes of another EPA program generally need not make that showing again. See 59 Fed. Reg. 64339, 64340 (December 14, 1994)(regulation simplifying TAS process). The Band's

Application includes updated governmental information that shows that the Band continues to carry out the requisite governmental functions. The Band's application includes, in Attachment H, a summary of the Tribal Administrative Structure, highlighting that the Band operates under a Constitution and Bylaws (Attachment F of the Application) and that the Band has followed this structure since 1936. Attachment I of the Application provides an organizational chart of the Band's Department of Natural Resources that will be responsible for implementing the water quality standards program and Attachment J outlines the Band's proposed CWA 401 Certification process. Attachment B of the Application provides the Statement by the Band's Legal Counsel outlining the Band's authority to be able to carry out the programs under the Clean Water Act. In addition, Attachments AV and AW (Supplemental Information dated May 31, 2006) highlight a past Memorandum of Agreement with the WDNR (1997) and Funding Agreements with the Bureau of Indian Affairs (2005 and 2006) for water programs, showing that the Band has the experience to maintain water resource programs.

EPA has determined that the Band's submissions in its Application and supplemental information, including the prior CWA Section 106 TAS approval in 1990, adequately demonstrates that the Band's governing body is currently carrying out substantial governmental duties and powers over a defined area and that nothing has happened in the interim to change that determination. Thus the Band meets the requirements in 40 C.F.R. § 131.8(a)(2) & (b)(2).

C. Jurisdiction Over "Waters Within the Borders" of the Lac du Flambeau Band of Lake Superior Chippewa Indian Reservation

Under 40 C.F.R. § 131.8(b)(3), the Band is required to submit a statement of authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the Tribe asserts authority over surface water quality; (ii) a statement by the Tribe's legal counsel (or equivalent official) that describes the basis for the Tribe's assertion of authority, which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the Tribe's assertion of authority; and (iii) an identification of the surface waters for which the Tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

1. Map or Legal Description

The Band has submitted maps and a legal description of the Reservation, which consists of approximately 86,630 acres of land in northern Wisconsin. The Band's Application (at Attachment O) and the Findings of Fact (Appendix II) provide a legal description of the Reservation. Maps are included as Attachment A of the Application. In sum, in its application, the Band asserts jurisdiction over all waters within the formal Reservation.

EPA has determined that the Band has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing a map and legal description of the area over which the Band asserts authority to regulate surface water quality.