

D. Management and Protection of Water Resources of the Reservation

The water quality standards and water quality certification programs to be administered by the KBIC will assist in managing and protecting water resources within the borders of the L'Anse Reservation, as well as those waters on lands constituting the KBIC's "informal reservation" discussed below. The Tribe is presently developing water quality standards for EPA review and approval.

The boundaries of the L'Anse Reservation for which the KBIC is seeking authority to administer the water quality standards and water quality certification programs were set in the 1854 Treaty with the Chippewa:

"For the L'Anse and Vieux De Sort bands, all unsold lands in the following townships in the State of Michigan: Township fifty-one north range thirty-three west; township fifty-one north range thirty-two west; the east half of township fifty north range thirty-three west; the west half of township fifty north range thirty-two west, and all of the township fifty-one north range thirty-one west, lying west Huron Bay."¹

The legal description of the L'Anse Reservation is as follows:

"Township-fifty-one north range thirty-three west; township fifty-one north range thirty-two west; the east half of township fifty north range thirty-three west; the west half of township fifty north range thirty-two west, and all of township fifty-one north range thirty-one west, lying west of Huron Bay."²

The boundaries of the Townships, also being the formal Reservation boundaries, were originally surveyed between the years of 1845-1850, and have since been updated. The most recent survey work was completed during the 1980s. Surveys in the 1980s were performed to reestablish corners and boundaries established in the 1840s, make any necessary corrections, and establish corners that were not previously established.

The Reservation boundaries encompass approximately 59,071 acres of land, of which 20,427 acres (approximately 35%) is tribal land.³ In its May 21, 2013 submission, the Tribe also submitted maps at Appendices B and P that depict the reservation areas for which the Tribe is seeking authority to administer its water quality program. The map in Appendix B shows a square protrusion of land in Township 50 North, Range 33 West, Section 9 as being part of the Reservation. As memorialized in Appendix OO submitted herewith, that land is held in Trust for the Tribe. As such, this land constitutes informal reservation lands over which the Tribe intends to assert jurisdiction.

¹ See Appendix A (at Art. 2) to KBIC's original TAS application dated May 21, 2013.

² See Appendix B (letter from Jason A. Ayres, dated May 15, 2000) to KBIC's original TAS application dated May 21, 2013.

³ These figures have been updated from those provided at pg. 9 of the KBIC's May 21, 2013 submission.

The surface waters for which the Tribe proposes to establish water quality standards are those surface waters that occur on the reservation areas described in maps submitted to EPA in May of 2013, and which are further described and depicted in the following, additional materials provided with this submission: Draft (dated February 28, 2017) Keweenaw Bay Indian Community Tribal Surface Water Quality Regulations (Appendix PP); and additional maps identifying waters within the L'Anse Reservation's exterior boundaries. These include the following named waters (and their tributaries) that occur within those areas: Bella Lake Creek; Bishop Lake; Camp Creek; Dakota Creek; Daults Creek; Dead Man's Creek; Denomie Creek; Gomanche Creek (and its tributaries); Kallio Creek; Kelsey Creek; Laughs / Laws / Lost Lake; Linden Creek; Little Carp River; Little Silver Creek; Meadow Creek; Mud Lakes and Sloughs; Page Creek; Pekkala Creek; Pequaming Sloughs and Wetland; Pinery Lakes; Robillard Creek; Sand Point Sloughs; Silver River (and its tributaries); Third Lake (including its inlet creek); Unlabeled #1 Creek into Huron Bay; Unlabeled # 2 Creek into Huron Bay; and Unlabeled # 3 Creek into Huron Bay.⁴

E. Tribal Legal Counsel Statement

A statement by the Tribe's legal counsel providing references to the documents that established the Tribe's reservation lands, and describing the basis of the Tribe's assertion of authority, was provided with the KBIC's May 2013 TAS submission to EPA. That statement, at page 10, expressly states that the KBIC has delegated authority from Congress to regulate water quality.

The Tribe cited a number of bases for its authority in the application submitted in May 2013. Here, KBIC wishes to make clear that the basis for its assertion of authority at this juncture is the express congressional delegation of authority to eligible Indian tribes to administer regulatory programs over their reservation contained in section 518 of the Clean Water Act. This authority is described in the EPA's final interpretive rule, Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30183 (May 16, 2016).

There are no limitations or impediments to the Tribe's authority or ability to effectuate the delegation from Congress as described in the preceding two paragraphs. In addition, the following demonstrate the Tribe's exercise of authority in general over the reservation: the Constitution and Bylaws of the Keweenaw Bay Indian Community⁵; the existence of a tribal government⁶; and the KBIC Tribal Code.⁷

⁴ The map in Appendix RR depicting water bodies and drainage basins specifically identify Unlabeled #1 Creek into Huron Bay; Unlabeled # 2 Creek into Huron Bay; and Unlabeled # 3 Creek into Huron Bay.

⁵ See Appendix D to the KBIC's original TAS application dated May 21, 2013.

⁶ See Appendix F to the KBIC's original TAS application dated May 21, 2013.

⁷ See Appendices E and G to the KBIC's original TAS application dated May 21, 2013. Since 2013, the KBIC has added titles to its Tribal Code, including titles concerning environmental matters such as waste management and control of hazardous substances. See Appendices QQ and SS.

F. Tribal Capability

The KBIC is capable of administering effective water quality standards and water quality certification programs. Information concerning the KBIC's capabilities in this regard was provided in the KBIC's TAS submission dated May 21, 2013. See Section V (Tribal Capacity) at pgs. 48–54. The overall organization of the Tribe's government and experience in managing programs, such as environmental or public health programs, is described in the following places within the KBIC's previous TAS submission dated May 21, 2013: Section V.A. (Management Experience); and Appendix F (KBIC Government Structure and Committees/Boards/Task Force Groups). In addition, since the time of the KBIC's May 21, 2013 submission, it has put in place and administers a Hazardous Substances Control Program and a Solid Waste Management Program.

As indicated in the KBIC's May 2013 submission, the responsibilities to establish, review, implement and revise water quality standards will be undertaken by KBIC's Natural Resources Department. Existing Water Program staff, consisting of the Water Resource Specialist(s) and the Water Resource Technician(s), will administer the 401 certification program. Experienced staff trained to administer the water quality standards and certification programs are already on board in both the KBIC's Natural Resource Department and its Water Program. Information pertaining to program and staff capabilities was also provided as part of the KBIC's May 2013 submission.

II. Response to Michigan Department of Environmental Quality's January 27, 2014 Comments

A. MDEQ's Comments Regarding Appendix P (Third and Fourth Paragraphs of DEQ's Letter [located at pgs. 1-2])

As an initial matter, the information in Appendix P concerns KBIC's Proposed Designated Uses and *Draft* Water Quality Standards. Because these are not final water quality standards for EPA approval, Michigan's comments concerning the information in Appendix P are premature. Please note that KBIC is in the process of developing water quality standards and finalizing the list of affected waters (and associated designated uses) to which these standards apply. In short, the Tribe is seeking regulatory authority over all waters within the exterior boundaries of the L'Anse Reservation. See *Wisconsin v. EPA*, 266 F.3d 741, 747 (7th Cir. 2001) ("The Clean Water Act ... explicitly gives authority over waters within the borders of the reservation to the tribe."). The Tribe also seeks to assert regulatory authority over the "informal reservation" land identified in Appendix OO, which is located in Township 50 North, Range 33 West, Section 9.

Toward that end, in addition to the materials provided in Appendix P to the KBIC's May 21, 2013 submission, the Tribe is providing Appendices PP and RR, which include additional information concerning waters traversing the border of the L'Anse reservation that are affected by KBIC's surface water quality standards.

B. MDEQ's Comment Regarding Land in Township 50 North, Range 33 West, Section 9 (Fifth Paragraph of DEQ's Letter [located at pg. 2])

Michigan comments that "Appendix B of the application ... appears to include off-reservation land in Township 50 North, Range 33 West, Section 9." Reviewing Appendix B, it appears Michigan's comment pertains to a square protrusion of land depicted in the first map within Appendix B. As memorialized in Appendix OO, the land to which Michigan's comment appears to pertain is held in Trust for the Tribe. As such, this land constitutes informal reservation lands over which the Tribe intends to assert jurisdiction.

C. MDEQ's Comment Regarding Page 12, Footnote 1 of KBIC's Original Submission (Sixth Paragraph of MDEQ's Letter [located at pg. 2])

In response to matters raised by the Michigan Department of Environmental Quality's January 27, 2014 correspondence concerning page 12, footnote 1 of the KBIC's original submission (dated May 21, 2013), the Tribe hereby formally revises its application to clarify that the provisions for these water quality standards are intended to apply to all surface waters within the exterior boundaries of the L'Anse Reservation. 33 U.S.C. § 1377(h)(1). The exterior boundaries were set in the 1854 Treaty with the Chippewas and were also judicially defined in *Keweenaw Bay Indian Cmty. v. Michigan*, 784 F. Supp. 418 (W.D. Mich. 1991); the State of Michigan was a party in that case and is aware of the exterior boundaries defined by the United States District Court for the Western District of Michigan.⁸ Consistent with the United States District Court for the Western District of Michigan's ruling concerning title to and jurisdiction over the beds and waters of Keweenaw Bay in that case for the purpose of this Application, **the KBIC does not seek to assert regulatory jurisdiction over the beds or waters of the Keweenaw Bay.**⁹

D. MDEQ's Comment Regarding Technical Capability to Effectively Regulate Water Quality (Eighth Paragraph of DEQ's Letter [located at pgs. 2-3])

The KBIC respectfully disagrees with Michigan's contention that the KBIC "does not have the technical capability to effectively regulate water quality." However, because the KBIC understands that no response to this comment is necessary at this time, no further response is given.

E. MDEQ's Comment Regarding Regulatory Authority Over Non-Tribal Entities and Resources Within the Reservation (Ninth Paragraph of DEQ's letter [located at pg. 3])

With regard to the first full paragraph on pg. 3 of Michigan's letter concerning "non-Tribal entities and resources," the KBIC respectfully disagrees with Michigan's position on this subject.

⁸ These exterior boundaries have since been specifically recognized by Michigan appellate courts. See *Moses v. Dep't of Corr.*, 274 Mich. App. 481, 501, 736 N.W.2d 269, 281 (2007).

⁹ The Tribe specifically reserves its right in a future Application to broaden the scope of its regulatory jurisdiction at a later time.

However, because EPA's new streamlined rule obviates a need for a response to this comment, no further response is provided at this time.