# Fond du Lac Band of Lake Superior Chippewa

## Resource Management Division

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September 13, 2021

*Submitted Via Email*

Ms. Jennifer Brundage
Environmental Protection Agency
1301 Constitution Avenue NW
Washington, DC 20460

Re: Notification of Consultation and Coordination on Potential Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights

Dear Ms. Brundage:

The Fond du Lac Band of Lake Superior Chippewa appreciates this opportunity to provide our comments in support of EPA's proposed rulemaking intended to protect tribal reserved rights under the Agency's Clean Water Act authorities. The Band is a federally recognized Indian tribe and one of the six member bands of the Minnesota Chippewa Tribe ("MCT"). The Band retains hunting, fishing, and other usufructuary rights that extend throughout the entire northeastern portion of the state of Minnesota under the 1854 Treaty of LaPointe[1], and through central Minnesota into Wisconsin under the Treaty of St. Peters, 1837 (lands ceded to the federal government). These rights have been reaffirmed by federal courts, including the US Supreme Court.[2] Throughout these ceded territories, all signatory Bands have a legal interest in protecting natural resources, and all federal agencies share in the federal government's trust responsibility to the Bands to maintain and protect those treaty resources.[3]

Hunting, fishing, trapping and gathering remain an important source of subsistence, cultural and religious practices for members of the Fond du Lac Band. Natural resources

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[1] Treaty with the Chippewa, 1854, 10 Stat. 1109, in Charles J. Kappler, ed., *Indian Affairs: Laws and Treaties*, Vol. II (Washington: Government Printing Office, 1904)

[2] Among others, *see*: *Lac Courte Oreilles v. Voigt*, 700 F. 2d 341 (7th Cir. 1983), cert. denied 464 U.S. 805 (1983); *Lac Courte Oreilles v. State of Wisconsin*, 775 F.Supp. 321 (W.D. Wis. 1991); *Fond du Lac v. Carlson*, Case No. 5-92-159 (D. Minn. March 18, 1996) (unpublished opinion); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 119 S.Ct. 1187 (1999); *United States v. State of Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979); *United States v. State of Michigan*, 520 F. Supp. 207 (W.D. Mich. 1981).

[3] *See*, *e.g.*, Exec. Order 13175—Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating "the United States has recognized Indian tribes as domestic dependent nations under its protection . . . .," there is a "trust relationship with Indian tribes," and "[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments."), *available at* http://ceq.hss.doe.gov/nepa/regs/eos/eo13175.html (last visited Feb. 1, 2010).

form the cornerstone of Chippewa tradition. Fish, game, and plants like wild rice are vital to meeting the needs of many Band members for food. Plants and animals are also relied upon to provide medicines and to meet ceremonial and religious needs that define unique aspects of Chippewa culture.

The reservation established for the Fond du Lac Band lies within the territory ceded by the 1854 Treaty, *United States v. Bresette*, 761 F. Supp. 658, 660 (D. Minn. 1991), and has remained the home of the Fond du Lac Band since the time of the Treaty. Because the small reservations established for the Chippewa under the Treaty were not alone sufficient to enable the Chippewa to sustain themselves, the 1854 Treaty also reserved to the Chippewa the right to hunt, fish, and gather on the lands ceded by the Treaty. Article 11 of the 1854 Treaty reserved these rights in the following terms: "And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President."

Further, the exercise of these rights requires access to natural resources that are not contaminated. *See Michigan v. U.S. EPA,* 581 F.3d 524, 525 (7th Cir. 2009). (recognizing that a tribe's "cultural and religious traditions … often require the use of pure natural resources derived from a clean environment."). Treaty rights, environmental health, and tribal culture are all interconnected. Populations with unique connections to the natural environment, such as Indian tribes, experience impacts that are too often overlooked. The EPA recognized this in its *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (1998): "[A]s a result of particular cultural practices, that population may experience disproportionately high and adverse effects. For example, the construction of a new treatment plant that will discharge to a river or stream used by subsistence anglers may affect that portion of the population. Also, potential effects to on-or off-reservation tribal resources (e.g., treaty-protected resources, cultural resources and/or sacred sites) may disproportionately affect the local Native American community and implicate the federal trust responsibility to tribes. *See Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses*, §2.1.1 (footnote omitted) *available at* http://www3.epa.gov/environmentaljustice/resources/policy/ej_guidance_nepa_epa0498.pdf

EPA has long recognized the key role that the federal trust responsibility plays in the Agency's planning and decision-making process. Since 1984, EPA's *Policy for the Administration of Environmental Programs on Indian Reservations*[4] has declared that "EPA recognizes that a trust responsibility derives from the historic relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian law." The policy further states that "[i]n keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations." More recent policy declarations and Agency documents have reiterated this commitment to honoring the trust responsibility. One of the "guiding principles" of EPA's consultation policy is that "EPA recognizes the federal government's trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law." *EPA Policy on Consultation andCoordination with Indian Tribes (2011)*.[5]

[4] Available at http://www3.epa.gov/air/tribal/WETG/wetg2014/indian-policy_1984.pdf.

[5] Available at http://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.

Even more recently, former EPA Administrator Gina McCarthy, in a memo to all EPA employees, expressly noted that "the United States' government-to-government relationship with and trust responsibility to federally recognized Indian tribes reinforces the importance of honoring [tribal] treaty rights. As such, the EPA has an obligation to honor and respect tribal rights and resources protected by treaties. While treaties do not expand the EPA' s authority, the EPA must ensure its actions do not conflict with tribal treaty rights. In addition, EPA programs should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when we have discretion to do so." *Memorandum, Commemorating the 30th Anniversary of EPA's Indian Policy (December 1, 2014)*.[6]

The Band is encouraged to see EPA initiating this proposed rulemaking, as it represents perhaps the most definitive and impactful step the agency has taken to fulfill its trust responsibilities to the tribes. The Band strongly supports EPA's effort to recognize tribal reserved rights and to revise the federal WQS regulations to protect them, in all the ways outlined in EPA's Letter initiating consultation and coordination with Tribal leaders. We would also recommend that EPA expand this effort by interpreting Clean Water Act (CWA) Section 401 in a manner that provides for tribal participation in comments on and objections to discharges within off-reservation state and federal lands both as to ceded territories where tribes exercise their treaty rights to hunt, fish, and gather and where Winters rights depend on the protection of water quality.[7] Finally, the Band suggests that EPA could protect both categories of tribal reserved rights by encouraging tribal co-management of water quality impacting those rights on off-reservation federal lands.

In the enclosure to its Letter, EPA identifies the following revisions that it is considering proposing to its WQS regulations:

- The requirement that states and EPA must not impair tribal reserved rights when establishing, revising, and evaluating WQS.
- The requirement that if reserved rights exist in the geographic area where a given set of WQS will apply, and the rights are related to a certain level of CWA protection that can be defined by available data, upholding those rights requires providing that level of CWA protection.
- Requirements outlining that the scope/definition of these reserved rights and their protection must be informed by consultation with the affected tribe(s).
- Providing options for regulatory approaches that states and EPA can use to ensure tribal reserved rights are protected:
    - Designated uses that explicitly incorporate protection of resources covered by tribal reserved rights.
    - Criteria that protect tribal reserved rights in waters where those rights apply.
    - Assignment of Tier 3 antidegradation protection (i.e., requirement to maintain and protect current and future improved water quality) in waters where tribal reserved rights apply and where current water quality is sufficient to protect those rights.

[6] Available at http://www.epa.gov/sites/production/files/2015-05/documents/indianpolicytreatyrightsmemo2014.pdf.

[7] *Winters v. United States,* 207 U.S. 564 (1908).

The Band supports all of these proposed revisions. however, we would recommend including under the first bullet point that "…states and EPA must not impair tribal reserved rights when establishing, revising, evaluating, *implementing and enforcing* WQS. What we have experienced in the state of Minnesota has been a failure, for decades, to implement and enforce existing approved water quality standards that are intended to protect manoomin, or wild rice, a critically significant cultural and subsistence aquatic resource. This deficiency has extended across implementing those standards in NPDES permits as numeric pollutant limits, monitoring and assessing state waters for this beneficial use, and listing waters as impaired when they fail to meet WQS. Along with other tribes in the state, we are grateful that the EPA Region 5 office recently partially disapproved Minnesota's 2020 impaired waters list and has taken over the listing of waters impaired for wild rice WQS. Also, the Band has designated our most productive wild rice waters as "Outstanding Reservation Resource Waters", with Tier 3 protections under our federally approved WQS. We believe this is an appropriate approach for ensuring that water quality – specifically high quality waters that support tribally important resources – remains sufficient to protect tribal rights to harvest or otherwise access those resources.

Additionally, we would recommend adding under the second bullet point that "…a certain level of CWA protection that can be defined by available data *or data that can be acquired through typical monitoring or relevant environmental information systems (i.e., GIS, LiDAR).*

The Band recognizes that these revisions under consideration could, if enacted, provide a framework for the protection of tribally significant aquatic resources in a manner consistent with what tribes across the nation have long urged the agency to ensure through their CWA authorities. For example, EPA's promulgation of WQS in the states of Washington and Maine specifically for the protection of tribal subsistence fish consumption was welcomed by all tribal nations as clear example of EPA fulfilling its trust responsibility through its CWA oversight authorities, when the states would not establish sufficiently protective standards.

Fond du Lac strongly recommends that EPA also examine how CWA Section 401(d)(2) certifications could best protect tribal reserved rights – both treaty rights and *Winters* rights – in areas outside reservation boundaries. Under this approach, EPA would interpret the scope and implementation of 401(d)(2) broadly to include the protection of "tribal reserved rights." EPA also would make a 401(d)(2) determination on behalf of tribes lacking TAS.

Although a tribe with TAS does have the right to object to a permit under Section 401(a)(2), the permissible scope of tribal objections has not been clearly interpreted by EPA or by the courts. Section 401(a)(2) directs that, once a state or tribe has determined that a "discharge will affect the quality of its waters so as to violate any water quality requirements in such State [or tribe]" and requests a public hearing, the licensing or permitting agency must hold the requested hearing.[8] In addition, Section 401(d) provides that "other appropriate requirement[s]" may be included as conditions in federal permits or licenses, and does not preclude these other appropriate requirements from applying to the downstream states provisions of Section 401(a)(2).[9]

[8] 33 U.S.C § 1341(a)(2) (2012).

[9] *Id*. § 1341(d). The text applies to "[a]ny certification provided under this section," and is not limited to paragraph 401(a)(1). *Id.* Since the preceding paragraphs of Section 401, including paragraphs 401(a)(3), 401(a)(4), and 401(a)(5), explicitly limit their application to a certification obtained pursuant to paragraph (a)(1), the absence of

EPA should interpret Section 401(a)(2) to allow tribal objections to off-reservation discharges that would have an impact on a tribe's use of its reserved rights due to impairment of water quality within the reservation. This interpretation would view tribal reserved rights as "other appropriate requirements," and would support the principle that tribes may propose "conditions and limitations on the activity as a whole."[10] And in doing so it would serve the purpose of Section 401(a)(2), which is to protect the waters of states or tribes affected by discharges originating upstream, and it would be consistent with EPA's fiduciary responsibilities to tribes under executive order and Agency policies. In instances where the affected tribe does not have TAS, EPA should itself determine whether the discharge would affect the quality of tribal waters, after providing notice and consulting with the tribe as to the potential impacts of the permitted activity.

Protecting off-reservation tribal treaty rights would be best served if EPA consulted with the potentially affected treaty tribe(s) as to any threatened impact a permitted activity might have on the tribe's treaty rights. EPA would first notify all tribes with treaty rights in the area in question, regardless of the tribes' TAS status. EPA could then either request a hearing itself (most likely in the case of non-TAS treaty tribes) and represent the tribe's interests before the licensing or permitting agency, after proper consultation and upon request, or allow a treaty tribe (most likely one with TAS) to object to and request a hearing on impacts that would threaten tribal treaty rights.

Finally, when ceded lands are under the control of the federal government, protection of off-reservation treaty rights would be best served if EPA allowed for tribal co-management of water resources in those lands. Direct tribal involvement in the federal government's protection of water quality, rather than merely the potential for tribal consultation, would increase the likelihood that treaty rights to hunt, fish and gather would be protected in the face of proposals for pipelines, mineral extraction, and other industrial development on these federal lands.

The tribe would need to show that the water resources that the tribe seeks to co-manage are, in fact, held by the federal government. The tribe would also need to demonstrate that its members retain reserved rights to hunt, fish or gather on this federal land, and that treaties, statutes, regulations, or other federal authorities establish fiduciary responsibilities to protect tribal reserved rights on the federal land at issue. EPA could require other eligibility criteria as well, such as a requirement that the tribe have qualified for TAS under CWA § 303. And EPA could establish procedures for how tribal input would be considered and incorporated into regulation of the water quality at issue.

In summary, the Band recommends that the proposed rule include the revisions EPA is proposing to the federal WQS regulations, as further discussed in these comments; an expansion of EPA's interpretation of Section 401(a)(2) certification; and an opportunity to participate in co-management with the federal government of certain off-reservation waters. Increasing the scope of tribal participation under the CWA in these ways will further the recognition of tribal interests

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this limitation in Section 401(d) should be interpreted to allow "other appropriate requirements" to be raised and included under paragraph 401(a)(2).

[10] *See PUD No.1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994); see *also S.D. Warren Co. v. Me. Bd. of Envtl. Prot*., 547 U.S. 370, 374 (2006).

and inherent sovereignty in protecting water quality and will allow for better informed management of these precious resources.

Sincerely,

Nancy Schuldt, Water Projects Coordinator
Fond du Lac Environmental Program