



Grand Portage Band of Lake Superior Chippewa

83 Stevens Road, PO Box 428
Grand Portage, Minnesota 55605

Minnesota Pollution Control Agency
c/o Kirsten Barta
520 Lafayette Road
Saint Paul, MN 55155

June 14, 2024

RE: Regional General Permit Maintenance General Certification
Cook, Lake, St. Louis, Carlton, Pine, Koochiching, Itasca, Aitkin, Crow Wing Counties, Minnesota
Section 401 Water Quality Certification

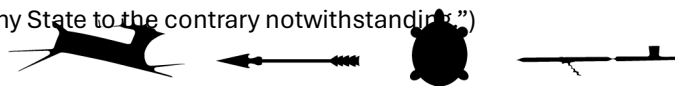
Dear Ms. Barta:

Thank you for the opportunity to review the Minnesota Pollution Control Agency (MPCA) draft 401 certification issued for the US Army Corps of Engineers (US ACE) Regional General Permits for use by the Minnesota Department of Natural Resources (MNDNR) in Cook, Lake, St. Louis, Carlton, Pine, Koochiching, Itasca, Aitkin, and Crow Wing Counties. The homelands of several Tribal Nations lie within the counties listed in the certification. The Leech Lake Reservation is located within Itasca County; the Bois Forte Reservation is located within Koochiching and St. Louis Counties; the Grand Portage Reservation is located within Cook County; the Fond du Lac Reservation is located within St Louis and Carlton Counties; Mille Lacs Reservation is located within Pine, Aitkin, and Crow Wing Counties.

Background

The U.S. Constitution defines treaties as the supreme law of the land, with the same legal force as Federal statutes.¹ Clean Water Act (CWA) Section 511(a)(3) provides that the Act “shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States.” In implementing CWA Section 303(c), EPA has a fiduciary obligation to ensure that its WQS approvals and disapprovals are consistent with treaties, statutes, executive orders, and other sources of federal law reflecting tribal reserved rights. Water is a sacred resource that must be honored and protected, given its interconnections with other sacred resources like wild rice and fish.

¹ U.S. Constitution, Art. VI, cl. 2 (“This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.”)



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Tribes have retained various usufructuary rights in the territories they ceded to the U.S. Government, including the right to harvest natural resources. Usufructuary rights are vested property rights to use, access, or enjoy the fruits of another's property.² As a signatory to the 1854 Treaty of LaPointe³ Grand Portage and other bands ceded more than six million acres to the United States (the "1854 Ceded Territory"); Grand Portage retains usufructuary rights that extend throughout the entire northeast portion of Minnesota. The 1854 Treaty was not a grant of rights *to* the Ojibwe but a grant of rights *from* the Ojibwe *to* non-Indians.⁴ In the Ceded Territory, Tribes serve as co-managers and stewards of those lands and have a legal interest in protecting natural resources.⁵ All federal agencies, including the US EPA and the US ACE, share in the federal government's fiduciary obligation to the Tribes to maintain those treaty resources. Reservations are retained homelands that were not ceded to the US Government.

MN does not have Clean Water Section 404 Authority

EPA *has not* delegated CWA Section 404 authorities to the State of MN. "To assume the Section 404 program, states or tribes need to develop a dredge and fill permit program consistent with the CWA requirements and submit a request to assume the program for EPA approval. Even for states or tribes with an existing dredge and fill regulatory program, this process may necessitate the passage of new laws or modification of existing laws to address all assumable waters or activities covered by Section 404 of the CWA."⁶

The CWA provides that where the US EPA determines that a state is not administering its program in a manner that conforms to the Act, the US EPA must inform the state, request corrective action, and proceed with withdrawing approval of the state program if corrective action is not taken within 90 days of EPA's request. 33 U.S.C. § 1342(c)(3)(2015) ("Whenever the Administrator determines . . . that a State is not administering a program . . . in accordance with

² See *usufruct*, Black's Law Dictionary (11th ed. 2019).

³ Treaty with the Chippewa, Sept. 30, 1854, 10 Stat. 1109.

⁴ See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 184 (1999) (noting "the 1854 Treaty established new hunting and fishing rights in the territory ceded by the Treaty"); *Fond du Lac v. Carlson*, Civ. No. 5-92-159 (D.Minn. March 18, 1996) (unpubl. op.) (holding that Fond du Lac retains usufructuary rights in the 1854 Ceded Territory); *Grand Portage Band of Chippewas, et al. v. State of Minnesota, et al.*, Civ. No. 4-85-1090 (settling suit to enforce 1854 Treaty as to Grand Portage and Bois Forte Bands against state as reflected in Minn. Stat. § 97A.157); *United States v. Bresette*, 761 F. Supp. 658, 661 (D. Minn. 1991) (citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 348 (7th Cir.1983)) (noting "Seventh Circuit has interpreted the 1837, 1842, and the 1854 treaties as reserving full usufructuary rights for the Chippewa on the ceded territories.").

⁵ *Id.*

⁶ US EPA. Statutory and Regulatory Requirements for Assumption under CWA Section 404. [Statutory and Regulatory Requirements for Assumption under CWA Section 404 | US EPA](#)



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requirements of this section, he *shall* so notify the State and, if appropriate corrective action is not taken . . . the Administrator *shall* withdraw approval of such program.”)

Oversight/Jurisdiction

We appreciate the MPCAs additional clarifying language in all 401 certifications for CWA 404 general permits, specifying, *“If your property is located on a federally recognized American Indian reservation, you must obtain a tribal 401 Certification. For Fond du Lac, Grand Portage, Leech Lake, or Red Lake, contact the tribal office directly. For all other reservations in MN, contact US EPA Region 5 at R5wetlands@epa.gov.”* The US EPA and US Army Corps retain Clean Water Act oversight and permitting within Reservation boundaries. EPA has a responsibility to uphold tribal and federal jurisdiction both for Tribes that have Treatment as a Sovereign (TAS) under CWA Section 401 and for Tribes that do not under CWA Section 401(a)(2).

Any state permit issued within a Reservation boundary, especially those relating to reservation waters and regardless of applicant or land status, can and should be considered “matters that have Tribal implications.” Therefore, state agencies are required to provide consultation with Tribes as provided under Minn. Stat. Sec. 10.65. The MNDNR Permitting and Reporting System (MPARS) webpage advertises various features including a *“Single starting point for joint application process when DNR, Board of Water and Soil Resources and U.S. Army Corp of Engineer permits are needed.”* *“Begin the Joint Notification process for multi-agency permitting for work in waters and wetlands.”*⁸ Tribes are not on the list of agencies that will be notified. Both MNDNR and MPCA are required to provide timely notice, consultation, and opportunity to review applications, as well as notice and opportunity to accompany on-site inspections, and cannot simply notify the Tribe after a permit is issued (which is what MPARS does). As a matter of federal law, as a federal delegee, the notification and consultation requirements also apply to permitting off-reservation waters that flow onto the reservation, although there may be some additional analysis to do as to distance, watershed, etc.

Tribal Water Quality Standards are more stringent than the State of MN

Every tribal nation within the boundaries of MN that has water quality standards authority has stricter standards than the State of MN. So, when the State issues a permit within a reservation’s boundary, permit requirements may be insufficient to meet the Tribal water quality standards. For example, both Grand Portage and Fond du Lac Tribes have denied the

⁷ [Water permitting and reporting system \(MPARS\) | Minnesota DNR \(state.mn.us\)](#)

⁸ [Sign in - MPARS \(state.mn.us\)](#)





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application of Regional General Permits for specific waters of the Reservation^{9, 10}, and Leech Lake has denied without prejudice the certification of Regional General Permits within their Reservation boundaries.¹¹ Prior to issuance, it is crucial that MPCA and MNDNR ensure thorough consultation and coordination for every permit issued upstream of or within the boundaries of a Reservation. This step is not just a formality, but a significant process that respects the rights and interests of the Tribal Nations.

We sincerely appreciate MPCAs willingness to include clarifying language in its 401 certifications indicating that if a property is located within a federally recognized American Indian Tribes reservation, a 401 certification must be obtained from the Tribe or US EPA. Grand Portage requests a clause on every MPCA 401 certification of 402 (National Pollutant Discharge System) permits, in addition to 404 (wetlands) general permits, indicating that State certification does not provide coverage within the exterior boundaries of Indian Reservations and that a permit applicant needs to contact the Tribe and/or US EPA.

Sincerely,

April McCormick
Grand Portage Secretary-Treasurer

C. Debra Shore, Administrator, US EPA Region 5

Chad Konickson, Regulatory Branch Chief, US ACE St. Paul District

KerryAnn Weaver, Wetlands Section Supervisor, US EPA Region 5

Sarah Strommen, Commissioner, Minnesota Department of Natural Resources

⁹ Grand Portage Tribe 401 Conditional Certification of US Army Corps of Engineers St. Paul District Regional General Permits. [Grand Portage 401.pdf \(army.mil\)](#)

¹⁰ Fond du Lac Tribe 401 Conditional Certification of US Army Corps of Engineers St. Paul District Regional General Permits. [FDL 401.pdf \(army.mil\)](#)

¹¹ Leech Lake Tribe 401 Certification Denial of US Army Corps of Engineers St. Paul District Regional General Permits. [Leech Lake 401.pdf \(army.mil\)](#)

