



Michael S. Regan, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Submitted via brundage.jennifer@epa.gov

RE: Lac du Flambeau Band of Lake Superior Chippewa Indians Comments in regards to Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights

Dear Administrator Regan,

Thank you for supporting the federal government's obligation and responsibility to Tribes by consulting with the Lac du Flambeau Band of Lake Superior Chippewa Indians (LdF Tribe) in regards to the Environmental Protection Agency (EPA) potential revisions to the federal water quality standards (WQS) regulations to protect tribal reserved rights.

Lac du Flambeau Band of Lake Superior Chippewa Indians is a federally-recognized Indian Tribe, centered within the Lac du Flambeau Reservation located in Vilas, Oneida and Iron Counties in Northern Wisconsin. The LdF Tribe also retains interest in ceded lands in Wisconsin, Michigan and Minnesota; these lands were ceded to the United States government in the Treaties of 1837, 1842 and 1854.

Waaswagoning, or Place of the Torch, was settled in 1745 by an Anishinaabe (Ojibwe) Tribal leader named Kiishkiman. Later named Lac du Flambeau by French fur-traders, the main village sits at the northern point of Flambeau Lake. Kiishkiman moved the band into this area after overpowering the Dakota, Sac, and Fox tribes. While there was one main village, Waaswagoning, small villages were established throughout the area. At Waaswagoning the Ojibwe were still living a semi-nomadic life, moving seasonally to gather where the wild harvest was most abundant throughout treaty ceded lands, but returning to the village throughout the year.

Currently, there are 4075 enrolled Anishinaabe members of the Lac du Flambeau Tribe with numerous descendants. Tribal members meet their subsistence, economic, medicinal and spiritual needs by the treaty reserved rights of hunting, fishing and gathering. In order to be able to continue to hunt, fish and gather, there needs to be clean, healthy and abundant natural resources, especially water resources, available. The Federal Government is obligated to fulfill the treaty rights by providing clean, healthy natural resources to meet the needs and requirements of the Tribes.

Lac du Flambeau Band of Lake Superior Chippewa Indians

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Water is as fundamental as blood in your veins, we cannot survive without it. The Tribe cannot overemphasize enough on how important clean water is in order to meet their cultural, subsistence, economic, medicinal and spiritual needs.



Lac du Flambeau Tribal Reservation and ceded territory (within yellow borders)

The LdF Tribe submits the following questions and comments in regards to the potential revisions to the federal WQS regulations to protect tribal reserved rights. This includes questions that were brought forth during the August 10th 2021 consultation meeting.

The LdF Tribe supports the proposed rulemaking that recognizes “States and EPA must not impair tribal reserved rights when establishing, revising, and approving WQS,” while also recognizing the federal obligation and trust responsibility cannot be delegated. There are many instances where States have failed to protect treaty rights and many more instances where the State lacks a WQS for a treaty resource. The LdF Tribe encourages the EPA to promulgate federal WQS for treaty resources. A specific example would be a WQS for wild rice, more examples can be provided at a later consultation. In this instance, the LdF Tribe holds treaty reserved rights within the ceded territory of Wisconsin, Minnesota, and Michigan. Minnesota has failed to implement their wild rice water quality standard for decades and Wisconsin lacks the existence of a wild rice water quality standard. Participation in each states water quality review process is lengthy and does not produce results that are protective of treaty reserved rights.

The LdF Tribe is not confident with EPA’s ability to enforce any potential revisions to regulations in order to protect tribal treaty rights; or to promulgate WQS for States that would be protective enough to meet our subsistence, economic, cultural, medicinal and spiritual needs.

How will EPA remedy the problem as stated above?

In the EPA's presentation given to the Tribes during the consultation on August 10th 2021, it states that "States and EPA must not impair tribal reserved rights when establishing, revising, and approving WQS." How exactly is EPA going to ensure that the States not impair tribal reserved rights? LdF Tribe understands that EPA will review the State's WQS to ensure they are in compliance with 40 CFR Part 131 (and 132 for the Great Lakes), but what will be EPA's steps to ensuring that the States are in compliance with the potential new revisions?

In EPA's response letter to the August 10th 2021 consultation, EPA stated that the following bullet items were not within the scope of this potential rule. All these factors are either indirectly or directly tied to WQS and to treaty reserved rights. Any revisions to the regulations at 40 CFR Part 131 must be able to address the inadequacies of agencies not protecting tribal reserved rights, which does include but not limited to:

- Lack of state enforcement of Minnesota's existing numeric sulfate criterion
- Reducing mercury pollution and detecting and remediating potential PFAS pollution in lakes where the Band has reserved rights to fish
- Addressing impacts to other media which are interconnected with surface water, including air, soil, and groundwater.
- Addressing pharmaceutical pollution
- The state of Wisconsin's allowance of permitting by state, county, and municipal agencies within the reservation without the tribe's input in many different arenas, from septic sewage to surface water discharges

How exactly are they not within the scope of this potential rule?

The LdF Tribe understands that EPA must operate under a set of regulations in regards to the 90-day consultation period but the timing of the consultation period occurred at an inopportune time. The 90-day consultation period occurred in the months of June-September, which coincides with Tribal Natural Resource Departments fieldwork, and as EPA knows, is a very busy time for all.

The LdF Tribe is looking for language within the revisions or framework of how they will address all the comments and questions below and what method they will be using to address all Tribal comments and concerns.

- As EPA anticipates proposing this rule in early 2022, does the EPA have a draft proposal of the revisions? In order to provide beneficial and meaningful comments, the Tribe needs to know the whole picture of what is going to be in the revisions.
- Are there any Tribal representatives being consulted (other than this official consultation period) in drafting the proposal? Who will be drafting the revisions? In addition, who would be EPA's expert on tribal reserved rights?

- Understanding that EPA would like these revisions to be successful on all parties, but would it not make more sense to have Tribal representatives working directly with EPA on writing these revisions?
- During a Tribal Water Division call on August 24th, there were concerns in regards to exposing treaty rights to litigation risks during this process, what solutions does EPA have to ensure that Tribal Treaty Rights will not be impacted?
- During the same Tribal Water Division call, it was indicated by EPA legal counsel that this framework should have flexibility built into it to consider different types of treaties within Region 5; What would that flexibility look like? How would EPA deal with different treaties?
- How will the EPA respond to comments from States and other agencies that do not support the revisions?
 - Will the Tribes get an opportunity to receive and address those comments before final decision are made by EPA?
- What are the deciding factors on whether the revisions will take place or not? Who has more influence on the deciding factors, the States or Tribes?
- There are many waterbodies that under the current WOTUS rule would not be covered by CWA but they are considered an important part of the tribal reserved rights. How will they be covered under these revisions?
- If the States have to develop WQS that would protect tribal reserved rights, how will State/EPA enforce WQS for waterbodies that are not currently supporting WQS under tribal reserved rights?
- How will accumulative impacts to the ecosystem be considered in the revisions?

The Lac du Flambeau Tribe supports all comments contained in the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) and the National Tribal Water Council (NTWC) letters to EPA in regards to the revisions to the federal regulations to protect tribal reserved rights. The LdF Tribe specifically wants to promote the NTWC comments in regards to 401 certification and co-management of water quality standards within ceded territory:

“NTWC also recommends that EPA expand its 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.¹ Finally, NTWC 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.”

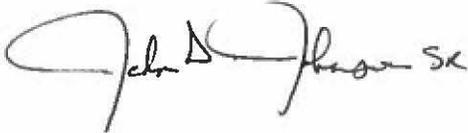
In summary, the LdF Tribe strongly supports EPA’s effort to recognize tribal reserved rights and to revise the federal WQS regulations to protect them, in all the ways outlined in EPA’s Letter.

¹ *Winters v. United States*, 207 U.S. 564 (1908).

The LdF Tribe looks forward to working with EPA, answering the questions put forward in this document and on revising the federal regulations in order to protect the Tribal reserved rights for the future seven generations.

Thank you for taking your time to gather Tribal comments, questions, and recommendations.

Sincerely,

A handwritten signature in black ink that reads "John Johnson Sr." The signature is written in a cursive style with a large initial "J" and a distinct "Sr." at the end.

John Johnson Sr.
President
Lac du Flambeau Band of Lake Superior Chippewa Indians

Cc: Karen Gude, US EPA Office of Water, gude.karen@epa.gov