

DRAFT 2018

Chad Konickson  
U.S. Army Corps of Engineers  
Regulatory Branch Chief, St. Paul District  
180 Fifth Street East, Suite 700  
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RE: Regional General Permits Minnesota Pollution Control Agency 401 Certification  
Clean Water Act Section 401 Water Quality Certification

Dear Chad Konickson:

This letter is submitted by the Minnesota Pollution Control Agency (MPCA) under authority of Section 401 of the Clean Water Act (CWA) (33 U.S.C. § 1251 et seq.), Minn. Stat. chs. 115 and 116 and Minn. R. 7001.1400-7001.1470, chs. 7050, 7052, and 7053. The MPCA has examined the final Regional General Permits (RGPs) and request for 401 Certification by the U.S. Army Corps of Engineers (USACE) for the following RGPs: Beach Creation and Nourishment, Beach Raking, Minor Discharges, Piers and Docks, Transportation, Utilities, and Wildlife Ponds, and is proposing to require conditions through the 401 Water Quality Certification.

RGPs authorize work in Waters of the United States and the USACE, can directly enforce conditions affecting Waters of the United States. Minnesota's water quality standards apply to all "waters of the state," which includes all Waters of the United States as well as other waters. "Waters of the state" include all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water in or bordering Minnesota (Minn. Stat. § 115.01, subd. 22).

Activities that impact waters of the state that are not Waters of the United States must comply with state law and state water quality standards. The MPCA has jurisdiction over waters of the state and can enforce the conditions below in waters of the state. The term "waters" as used in the conditions of this draft Certification, apply to the respective jurisdiction of each agency.

Certain conditions, as identified below, require case-by-case review and interpretation by the MPCA. After such interpretation, the conditions are enforceable by the MPCA or the USACE.

#### Exclusion from 401 Certification of the RGPs

##### **Prohibited Outstanding Resource Value Waters**

The MPCA's antidegradation standard (Minn. R. 7050.0270) requires that the MPCA issue control documents that "prohibit a net increase in loading or other causes of degradation to prohibited outstanding resource values waters..." For this reason, the MPCA is denying certification for projects in prohibited outstanding resource value waters (ORVWs) without prejudice because it does not believe RGP authorizations for broad categories of activities, where specific impacts may vary, is appropriate for activities in these waters. Therefore, the MPCA excludes from this general 401 Certification of the RGPs

any project in a listed prohibited ORVW in Minnesota, as identified in Minn. R. 7050.0335, subp. 3, and listed below. Such projects would require individual 401 Certification from the MPCA.

**Minn. R. 7050.0335 DESIGNATED OUTSTANDING RESOURCE VALUE WATERS.**

**Subp. 3. Prohibited outstanding resource value waters.** For the purposes of parts 7050.0250 to 7050.0335, the following surface waters are prohibited outstanding resource value waters:

- A. Waters within the Boundary Waters Canoe Area Wilderness;
- B. Those portions of Lake Superior north of latitude 47 degrees, 57 minutes, 13 seconds, east of Hat Point, south of the Minnesota-Ontario boundary, and west of the Minnesota-Michigan boundary;
- C. Waters within Voyageurs National Park;
- D. The following scientific and natural areas:
  - 1) Boot Lake, Anoka County;
  - 2) Kettle River in Sections 15, 22, 23, T.41, R.20, Pine County;
  - 3) Pennington Bog, Beltrami County;
  - 4) Purvis Lake-Ober Foundation, Saint Louis County;
  - 5) Waters within the borders of Itasca Wilderness Sanctuary, Clearwater County;
  - 6) Iron Springs Bog, Clearwater County;
  - 7) Wolsfeld Woods, Hennepin County;
  - 8) Green Water Lake, Becker County;
  - 9) Black Dog Preserve, Dakota County;
  - 10) Prairie Bush Clover, Jackson County;
  - 11) Black Lake Bog, Pine County;
  - 12) Pembina Trail Preserve, Polk County; and
  - 13) Falls Creek, Washington County; and
- E. The following state and federal designated wild river segments:
  - 1) Kettle River from the site of the former dam at Sandstone to its confluence with the Saint Croix River; and
  - 2) Rum River from Ogechie Lake spillway to the northernmost confluence with Lake Onamia.

401 Certification of the RGPs

Based on a review of the RGPs and evaluation of information that is relevant to water quality considerations, the MPCA proposes to certify the general permits (excluding projects in the above-listed waters) because there is reasonable assurance that the activities authorized by the RGPs will be conducted in a manner that will not violate applicable water quality standards so long as the work is completed in accordance with the below-specified conditions, which shall become conditions of the RGPs. Additionally, based on a review of the determinations specified in Code of Federal Regulations (CFR), title 33, part 320, subpart 4, and CFR title 40, part 230, subpart 7, the MPCA has preliminarily determined that the antidegradation standards described in Minn. R. 7050.0270 can be satisfied by issuing a 401 Certification with the below conditions:

### General conditions

All activities authorized by the above-listed RGPs must comply with the conditions below:

1. Permittees must ensure that all waters in or bordering the project area that are not proposed to be impacted by the project are clearly identified prior to construction. This may be done through demarcation of the construction area on plan sheets or through marking boundaries in the field, for example construction staking, flagging, or the use of silt fences along boundaries. The permittee must not impact these areas while conducting activities authorized by the RGPs.
2. The permittee must install in-water Best Management Practices (BMPs) to minimize total suspended solids (TSS) and sedimentation for any work conducted below the ordinary high water level (OHWL) as defined in Minn. Stat. § 103G.005, subp. 14, of any water or within the delineated boundaries of wetlands.

The permittee must document the in-water BMPs to be used during the authorized work prior to disturbing any land at the site; this documentation may be stand-alone or part of an Erosion Control Plan, Construction Plan, or other relevant construction document. This documentation is not required to be submitted to the MPCA, but must be kept on-site during active construction by the contractor until the project is complete. Proper installation of BMPs is required before conducting the authorized in-water activities and properly maintained throughout the duration of the project's in-water work. While conducting the authorized work, the permittee must visually monitor the BMPs to ensure that the BMPs are working as intended to reduce TSS or sedimentation. If the project activities cause an observable increase in TSS or sedimentation as described in Minn. R. 7050.0210, subp. 2, outside or downstream of the authorized defined working area, then the project activities must immediately cease and any malfunctioning BMPs must be repaired, or alternative BMPs must be implemented. This certification does not authorize the violation of applicable water quality standards outside or downstream of the defined work area. Minnesota water quality standards are located in Minn. R. ch. 7050.

Information on the types of BMPs that may be suitable for in-water work is located in the Minnesota Department of Natural Resources Manual titled *Best Practices for Meeting DNR General Public Waters Work Permit GP 2004-0001*, located at: [http://www.dnr.state.mn.us/waters/watermgmt/section/pwpermits/gp\\_2004\\_0001\\_manual.html](http://www.dnr.state.mn.us/waters/watermgmt/section/pwpermits/gp_2004_0001_manual.html).

The MPCA is responsible for interpretation of the requirements of this condition, determining compliance with the requirements of this condition, and enforcement of this condition. The point of contact at the MPCA for questions regarding this condition is [401Certification.pca@state.mn.us](mailto:401Certification.pca@state.mn.us).

3. The permittee must ensure that any dewatering activities do not create nuisance conditions as defined in Minn. R. 7050.0210, subp.2. The permittee must use BMPs that minimize TSS and sedimentation by removing solids in the water before discharging the water. The permittee must document the in-water BMPs prior to beginning any dewatering; this documentation may be stand-alone or part of an Erosion Control Plan, Construction Plan, or other relevant construction document. The permittee must ensure that properly installed BMPs are in place before conducting the authorized activities and are maintained throughout the duration of the dewatering work.

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4. The permittee must ensure any earthen material used to construct or improve temporary or permanent dikes or dams, including cofferdams, or any roads, is contained in a manner that will prevent any of the earthen material from eroding into the water. The permittee must completely remove temporary structures and restore original bathymetry or contours at project completion.
5. The permittee must ensure that the authorized activities do not exacerbate any existing impairments of a CWA 303-(d) listed impaired waters. The following MPCA webpages contain more information and search tools available to determine which waters in Minnesota are impaired: <http://www.pca.state.mn.us/lupg1125> and <http://www.pca.state.mn.us/mvri1126>. The applicable water quality standards are located in Minn. R. ch. 7050.

The MPCA is responsible for interpretation of the requirements of this condition, determining compliance with the requirements of this condition, and enforcement of this condition. The point of contact at the MPCA for questions regarding this condition is [401Certification.pca@state.mn.us](mailto:401Certification.pca@state.mn.us).

6. The permittee must ensure that any fill used in waters must be clean fill that is free of any solid waste, toxic or hazardous contaminants, and invasive species as defined in Minn. Stat. ch. 84D and Minn. R. 6216, including those discussed in *A guide to Nonnative Invasive Plants Inventory in the North by Forest Inventory and Analysis*, 2009, C. Olson and A. Cholewa. [http://www.nrs.fs.fed.us/pubs/gtr/gtr\\_nrs52.pdf](http://www.nrs.fs.fed.us/pubs/gtr/gtr_nrs52.pdf).
7. The permittee must provide: a) a copy of this Certification; b) documentation of any required BMPs under above conditions; and c) any written demarcation of waters to any prime contractor responsible for completing the project's authorized activities. The permittee must also ensure that there is a mechanism in place requiring each prime contractor to provide the same information to all subcontractors, at any level, responsible for fabricating or providing any material for the project or performing work at the project site. In addition, copies of these documents and any other relevant regulatory authorizations related to impacts to waters must be available at or near the project site for use by contractors or staff responsible for completing the project work and must be available within 72 hours when requested by MPCA staff.
8. The permittee must allow representatives from the MPCA to inspect the proposed project site and the authorized activity to ensure that the project is constructed, and BMPs maintained, in accordance with this Certification.
9. The permittee is responsible for ensuring that all requirements of this Certification are met.
10. This Certification includes and incorporates by reference the general conditions of Minn. R. 7001.0150, subp.3.

#### **Certain Restricted ORVWs**

The MPCA's antidegradation standard (Minn. R. 7050.0270) requires that the MPCA issue control documents that "restrict net increases in loading or other causes of degradation as necessary to

maintain the exceptional characteristics for which the restricted outstanding resource value waters...were designated." Projects authorized by the RGPs in the following Restricted Outstanding Resource Value Waters must meet the additional BMPs listed under "Additional BMPs for Restricted Outstanding Resource Value Waters" below in order to ensure protection of the exceptional characteristics of these waters. Projects that will potentially impact calcareous fens identified as restricted ORVWs in Minn. R. 7050.0335, subp. 1 are not required to meet the additional BMPs below as they are either excluded from RGP coverage altogether (Minor discharges, and Beach Creation and Nourishment) or are required to have an approved Fen Management Plan from the Minnesota Department of Natural Resources (Transportation, Utility, Beach Raking, Piers and Docks, and Wildlife Ponds) which is sufficient to ensure maintenance of the exceptional characteristics for which the fens were designated as restricted ORVWs.

**Minn. R. 7050.0335 DESIGNATED OUTSTANDING RESOURCE VALUE WATERS.**

**Subpart 1. Restricted outstanding resource value waters.** For the purposes of parts 7050.0250 to 7050.0335, the following surface waters are restricted outstanding resource value waters:

- A. Lake Superior, except those portions identified in subpart 3, item B, as a prohibited outstanding resource value waters;
- B. Those portions of the Mississippi River from Lake Itasca to the southerly boundary of Morrison County that are included in the Mississippi Headwaters Board comprehensive plan dated February 12, 1981.
- C. Lake trout lakes, both existing and potential, as determined by the commissioner in conjunction with the Department of Natural Resources, outside the boundaries of the Boundary Waters Canoe Area Wilderness and Voyageurs National Park and identified in parts 7050.0460 to 7050.0470;
- D. The following state and federal designated scenic or recreational river segments:
  - 1) Saint Croix River, entire length;
  - 2) Cannon River from northern city limits of Faribault to its confluence with the Mississippi River;
  - 3) North Fork of the Crow River from Lake Koronis outlet to the Meeker-Wright county line;
  - 4) Kettle River from north Pine County line to the site of the former dam at Sandstone;
  - 5) Minnesota River from Lac qui Parle dam to Redwood County State-Aid Highway 11;
  - 6) Mississippi River from County State-Aid Highway 7 bridge in Saint Cloud to northwestern city limits of Anoka;
  - 7) Rum River from State Highway 27 bridge in Onamia to Madison and Rice Streets in Anoka.

**Additional BMPs for Restricted Outstanding Resource Value Waters:**

- 1. The permittee must have a written plan, kept on site that shows a practicable means of control to prevent TSS in the water. It must include methods to minimize degradation of water, including avoidance of impacts, construction-phasing, seasonal construction where practicable, minimizing the length of time soil areas are exposed, prohibitions, pollution prevention through adequate BMPs, and other management practices published by state agencies.

The MPCA is responsible for interpretation of the requirements of this condition, determining compliance with the requirements of this condition, and enforcement of this condition. The point of contact at the MPCA for questions regarding this condition is [401Certification.pca@state.mn.us](mailto:401Certification.pca@state.mn.us).

2. The permittee must inspect the site daily to ensure that BMPs are functioning properly and to determine if additional BMPs are required.
3. Where practicable, the permittee must establish and maintain an undisturbed buffer zone of at least 100 linear feet from the restricted ORVW, except in the immediate area of the in-water work.
4. Whenever any construction activity is within 200 feet of a restricted ORVW, the permittee must stabilize all exposed soils within 24 hours after completing the construction activity.

**Additional conditions for Transportation RGP projects involving bridge work:**

The MPCA requires the following conditions for any project that is authorized under the Transportation RGP to conduct bridge work:

1. During bridge painting, cleaning, or restoration activities, the permittee must use BMPs such as curtains or other reliable methods designed to prevent the discharge of paint, chemicals, grouting, or other contaminants to waters. These BMPs must remain in place for the duration of the project's painting, cleaning or restoration activities.

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2. The permittee must not conduct bridge demolition activities that use explosive devices to implode or collapse a bridge or any portion of a bridge into any water.
3. The permittee must not use broken concrete from any existing bridge as riprap bank protection unless, 1) it is crushed to the diameter which is greater than 6 inches and no larger than 30 inches, 2) all steel reinforcement bars and asphalt have been removed, and 3) it does not contain any contaminants of concern listed in Minn R. 7035.2860, subp. 4.
4. If the permittee plans to place riprap grouted with concrete under a bridge for permanent stabilization, then plywood sheeting, sheet piling, sandbags, or other suitable material must be placed at the base of the riprap prior to conducting the grouting activity to ensure no grout reaches the waterbody. The material must remain in place until all concrete grouting has cured.

**Additional conditions for Utility RGP projects:**

The MPCA requires the following conditions for activities authorized under the Utility RGP:

1. Prior to the start of each segment of construction, for any trenching that will pass through, over, under or around any perceptible flow of water, the permittee must create a written spill prevention plan, to be kept on-site, that details the steps that shall be taken to prevent, mitigate, and cleanup any spill from any product - including drilling mud - from entering any waters. The plan must include



a directive to contact the State Duty Officer at 651-649-5451 for any spill greater than five gallons, and must include details regarding methods of disposal for the spill material.

2. The permittee must utilize low flow and winter construction methods whenever possible.
3. When using Horizontal Directional Drilling (HDD), the permittee must use drilling muds that do not contain any hazardous materials. The permittee must keep a Safety Data Sheet (SDS) on site for the HDD muds used.
4. The permittee must restore trenches approaching and leading away from any water to preconstruction contours prior to beginning work on the next segment of trench. The permittee must limit any open trench, for all related projects authorized by the Utility RGP, to 5280 linear feet at any given time.
5. The permittee must stabilize all exposed soil areas whenever any construction activity has permanently or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days.
6. The permittee must use dry construction methods, e.g. coffer dams, horizontal directional drilling, dam and pump, flume, stream diversion, etc. for any maintenance or repair of any utility that will occur within flowing water.

**Notifications:**

The following notifications are not conditions of the proposed MPCA CWA 401 Certification of the RGPs. They provide information that can help reduce the potential environmental impacts, or they provide notification to the public in Minnesota that certain discharges in waters are also regulated under other rules administered by the MPCA:

1. It is the permittee's responsibility to fully comply with all MPCA rules governing waters of the state, including MPCA rules governing wetlands (Minn. R. 7050.0186), which require a permittee to provide compensatory mitigation for a project's unavoidable permanent impacts to wetlands, including those that are not subject to federal jurisdiction under section 404 of the CWA.
2. Minn. R. chs. 7001 and 7090 require any activity that will disturb one acre or more of land to first acquire a National Pollutant Discharge Elimination System Permit (NPDES)/State Disposal System (SDS) General Stormwater Permit from the MPCA for discharging stormwater during construction activity. Both the owners and operators of construction activity disturbing one acre or more of land are responsible for obtaining and complying with the conditions of the NPDES/SDS General Stormwater Permit prior to commencing construction activities. Sites disturbing less than one acre within a larger common plan of development or sale that is more than one acre also need permit coverage. A detailed Stormwater Pollution Prevention Plan (SWPPP), containing both temporary and permanent erosion and sediment control plans, must be prepared prior to submitting an application for the NPDES/SDS General Stormwater Permit. In addition, any project that will result in over 50 acres of disturbed area and has a discharge point within one mile of a special or impaired water is required to submit its SWPPP to the MPCA for a review at least 30 days prior to the commencement of land disturbing activities. If the SWPPP is out of compliance with the terms and conditions of the

NPDES/SDS General Stormwater Permit, further delay may occur. For more information, please visit the following webpage: <https://www.pca.state.mn.us/water/construction-stormwater>.

3. Chloride from winter road salt affects water quality. The MPCA encourages public road authorities pursuing projects under the general permit to consider the use of BMPs to reduce the use of chloride. General information about chloride and water quality, including the Twin Cities Metropolitan Area Chloride Management Plan, is located at <http://www.pca.state.mn.us/r0pgb86>.
4. When riprap is used, the permittee should consider placing riprap in the following manner:
  - a. Use natural rock (cannot average less than 6 inches or more than 30 inches in diameter) that is free of debris that may cause pollution or siltation.
  - b. A filter of crushed rock, gravel, or filter fabric material can be placed underneath the rock.
  - c. The riprap should be no more than 6 feet waterward of the ordinary high-water level (OHWL) as defined in Minn. Stat. chs. 103G.005, subp.14.
  - d. The riprap should conform to the natural alignment of shore and should not obstruct navigation or the flow of water.
  - e. The minimum finished slope waterward of the OHWL should be no steeper than 3 to 1 (horizontal to vertical).
5. Minn. R. 7001.0030 requires that, prior to testing the structural integrity of any newly installed pipeline or any existing pipeline maintained or repaired that is authorized by the RGP, the permittee must obtain NPDES/SDS Permit coverage from the MPCA. The NPDES/SDS Permit regulates the discharge of water and trench waters associated with this activity.

**Disclaimer:**

Section 401 Certification does not release the permittee from obtaining all necessary federal, state, and local permits. It does not limit any other permit where requirements may be more restrictive. It does not eliminate, waive, or vary the permittee's obligation to comply with all other laws and state water statutes and rules through the construction, installation, and operation of the project. This proposed Certification does not release the permittee from any liability, penalty, or duty imposed by Minnesota or federal statutes, regulations, rules, or local ordinances and it does not convey a property right or an exclusive privilege. This proposed Certification does not authorize impacts to any waters beyond the project area.

This proposed Certification does not replace or satisfy any environmental review requirements, including those under the Minnesota Environmental Policy Act (MEPA) or the National Environmental Policy Act (NEPA). In accordance with MEPA, Minn. Stat. § 116D.04, subd. 2b, and related rules, projects that are required to complete an Environmental Assessment Worksheet (EAW) or an Environmental Impact Statement (EIS) may not be started until:

- A petition for an EAW is dismissed
- A negative declaration on the need for an EIS has been made
- An EIS has been determined to be adequate, or
- A variance has been granted by the state Environmental Quality Board.

An Environmental Review, required by law, for any project, must be complete in order for any state permit or Certification to be valid.



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The MPCA reserves the right to modify this proposed Certification or revoke this Certification as provided in Minn. R. 7001.0170.

Pursuant to Minn. R. 7001.1450, failure to comply with any of the conditions in this proposed Certification may result in the MPCA invalidating or revoking this proposed 401 Water Quality Certification on a project-by-project basis.

If you have any questions on this proposed Certification, please contact Jim Brist at 651-757-2245, or [401Certification.pca@state.mn.us](mailto:401Certification.pca@state.mn.us).

Sincerely,

Melissa Kuskie  
Supervisor, Agency Rules Unit  
Resource Management and Assistance Division

MK/JB:ds

cc: Janice Cheng, EPA  
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