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ENVIR. APPEALS BOARD

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MARK M. NOLAN*
RANDY V. THOMPSON
ROBERT J. LEIGHTON, JR.

January 11, 2017

VIA FEDERAL EXPRESS

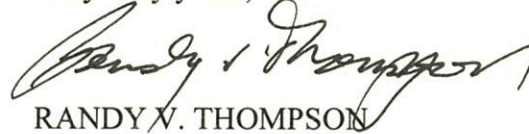
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East Building, Room 3334
Washington, DC 20004

**RE: U.S. Environmental Protection Agency Grant of Mille Lacs Band of Ojibwe's
Request for an Eligibility Determination Under the Clean Air Act,
CAA Sections 105 and 505(a)(2)**

Dear Clerk:

Enclosed for filing find Motion for Extension of Time to Appeal Decision with
Certificate of Service on behalf of the County of Mille Lacs, Minnesota.

Very truly yours,



RANDY V. THOMPSON

RVT:ljm/Enc.

c: **Via U.S. Mail (w/enc.)**
Barbara L. Wester
Associate Regional Counsel
Office of the Regional Counsel
United States Environmental Protection Agency, Region 5
77 West Jackson Blvd., (C-14J)
Chicago, IL 60604

Susan Klapel
Commissioner of Natural Resources
Mille Lacs Band of Ojibwe
43408 Oodena Drive
Onamia, MN 56359

Todd R. Matha
Solicitor General
Mille Lacs Band of Ojibwe
43408 Oodena Drive
Onamia, MN 56359

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

RECEIVED
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2017 JAN 12 AM 9:45

ENVIR. APPEALS BOARD

**In re: U.S. Environmental Protection
Agency Grant of Mille Lacs Band of
Ojibwe's Request for an Eligibility
Determination under the Clean Air
Act, CAA Sections 105 and 505(a)(2),**

MOTION FOR EXTENSION OF TIME TO APPEAL DECISION

On December 12, 2016 counsel for the County of Mille Lacs, Minnesota received a mailing dated December 1, 2016 (with envelope postmarked December 9, 2016) that appeared to be a cover letter from Robert A. Kaplan, Acting Regional Administrator, of the United States Environmental Protection Agency attaching the U.S. Environmental Protection Agency's Response to Comments, Mille Lacs Band of Ojibwe's Application for Eligibility for Two Programs Under the Clean Air Act Tribal Authority Rule (TAR). The latter document is dated November 23, 2016.

Copies of the mailing, the envelope showing the postmark date, and the date received, are attached.

Counsel for the County of Mille Lacs attempted to obtain information regarding this matter from Benjamin Giwojna of the EPA pursuant to the information stated on the December 1, 2016 letter. Because of the Christmas holiday season, Mr. Giwojna did not respond until late on January 3, 2017, at which point he advised that he was not the person to contact.

On January 5, 2017 we received an email from EPA attorney Barbara Wester apologizing for not responding sooner because both she and Benjamin Giwojna were out of the office until January 4, 2017. That email indicated that if we wished to receive a copy of the EPA's Decision Document, we were to make a request through the Freedom of Information Act. A further follow-up email to Barbara Wester inquired as to the date of the EPA Decision Document and her response indicated that there was a decision document signed by the Regional Administrator on December 7, 2016. That email chain is attached.

The County of Mille Lacs, through its counsel, on January 5, 2017 applied through the Freedom of Information Act process to obtain a copy of the Decision Document that was stated to have been signed on December 7, 2016. The email communications from Barbara Wester indicate that there is a signed Decision Document that Mille Lacs County has not received. No substantive response to the Freedom of Information Act Request has been received. The County of Mille Lacs is in no position to appeal without receiving and/or knowing what is in fact the Decision Document. This Motion for an Extension of Time to Appeal appears to be unnecessary, but is made in an abundance of caution.

The County of Mille Lacs, therefore, respectfully requests an extension of time to file an appeal until the thirty (30) days after either it receives the Decision Document or receives confirmation on which document or information is in fact the Decision Document.

Dated: January 11, 2017

NOLAN, THOMPSON & LEIGHTON, PLC

By 
Randy V. Thompson, Reg. No. 122506
Attorneys for County of Mille Lacs, Minnesota
5001 American Blvd. West, Suite 595
Bloomington, MN 55437
Telephone No. 952-405-7171
Email: rthompson@nmtlaw.com

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Extension of Time to Appeal Decision, were served by United States First Class Mail on the following persons this 11th day of January, 2017:

Barbara L. Wester
Associate Regional Counsel
Office of the Regional Counsel
United States Environmental Protection Agency, Region 5
77 West Jackson Blvd., (C-14J)
Chicago, IL 60604

Susan Klapel
Commissioner of Natural Resources
Mille Lacs Band of Ojibwe
43408 Oodena Drive
Onamia, MN 56359

Todd R. Matha
Solicitor General
Mille Lacs Band of Ojibwe
43408 Oodena Drive
Onamia, MN 56359

NOLAN, THOMPSON & LEIGHTON, PLC

By 
Randy V. Thompson, Reg. No. 122506
Attorneys for County of Mille Lacs, Minnesota
5001 American Blvd. West, Suite 595
Bloomington, MN 55437
Telephone No. 952-405-7171
Email: rthompson@nmtlaw.com



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
GREAT LAKES NATIONAL PROGRAM OFFICE
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590
DEC 01 2016

DEC 12 2016

Randy V. Thompson
Nolan, Thompson & Leighton, PLC
5001 American Boulevard West
595 Southgate Office Plaza
Bloomington, Minnesota 55437

Dear Mr. Thompson:

Thank you for your comment letters sent on behalf of Mille Lacs County on October 13, 2015 and November 19, 2015 regarding the Mille Lacs Band of Ojibwe's request for an eligibility determination under the Clean Air Act (CAA) Tribal Authority Rule. After considering all comments, the U.S. Environmental Protection Agency is granting the Tribe's request for "treatment as a state" status for CAA Sections 105 and 505(a)(2). A response to your comments is enclosed.

If you have any questions regarding this notification, please contact Benjamin Giwojna of my staff at (312) 886-0247 or giwojna.benjamin@epa.gov.

Sincerely,

A handwritten signature in black ink that reads "Robert A. Kaplan".

Robert A. Kaplan
Acting Regional Administrator

Enclosure

**U.S. Environmental Protection Agency's Response to Comments
Mille Lacs Band of Ojibwe's Application for Eligibility for Two Programs
Under the Clean Air Act Tribal Authority Rule (TAR)**

November 23, 2016

EPA regulations provide that upon determining that the application is complete, the Regional Administrator has thirty days to notify all appropriate governmental entities of the Tribe's application, including specifying the Tribe's description of the geographic boundaries of the reservation. Appropriate governmental entities are any state, federal, or tribal governments located immediately adjacent to the Tribe's Reservation. In this instance, the State of Minnesota has lands adjacent to the Mille Lacs Band's Reservation and was therefore notified of the Tribe's application. The State was provided with notification of the Tribe's complete application with supporting documentation and maps of the Reservation boundaries by letter dated September 8, 2015.

EPA also published newspaper notices in the *Minneapolis Star-Tribune* on September 13, 2015 and the *Brainerd Dispatch* on September 14, 2015, inviting local governments and citizens wishing to comment on the boundaries of the Tribe's Reservation to submit relevant information either to the State or directly to EPA. The comment period for the State and local governments and citizens expired on October 15, 2015.

The Minnesota Pollution Control Agency (MPCA) provided comments to EPA on October 13, 2015. No adverse comments were received from the State of Minnesota or MPCA. The MPCA's comment letter indicated support for the Band's TAR submittal and suggested that EPA seek verification from the Department of Interior regarding the status of trust parcels included in the application. EPA's regulations provide that affected governmental entities

. . . [S]hall have 30 days to provide written comments to EPA's Regional Administrator regarding any dispute concerning the boundary of the reservation. . . . In all cases, comments must be timely, limited to the scope of the tribe's jurisdictional assertion, and clearly explain the substance, bases and extent of any objections. If a tribe's assertion is subject to a conflicting claim, the EPA Regional Administrator may request additional information from the tribe and may consult with the Department of the Interior.¹

The Tribe provided a list of specific parcels and their township and range data, maps, and a certification by an appropriate governmental official that these trust lands are located within the jurisdiction of the Tribe. The State has raised no competing claim of jurisdiction nor identified any deficiency in the information provided by the Tribe. Absent such a claim, EPA does not find a sufficient basis to request information from the Department of Interior. Therefore, we find the Tribe had adequately demonstrated "the area over which the application asserts authority."²

EPA received two comment letters from Mille Lacs County which asserted (1) the Mille Lacs Band is not a federally recognized tribe; (2) the Tribe failed to show that it has authority over

¹ 40 C.F.R. §§ 49.9(c)-(d).

² 40 C.F.R. § 49.9(7)(a)(3)(i).

lands held in trust for the Minnesota Chippewa Tribe; and (3) Minnesota has CAA jurisdiction for all lands within the state borders.³ These comments are mistaken as discussed below.

The Mille Lacs Band, as explained in our Decision Document, is a federally recognized tribe which appears on the U.S. Department of Interior's annual list of federally recognized tribes. Additionally, in response to the comment, the Mille Lacs Band provided an exhaustive survey of the multiple additional sources of evidence for its federal recognition, of which we note only two. First, the six constituent Chippewa tribes together formed the federated structure of the Minnesota Chippewa Tribal (MCT) consortium in 1936, imbuing MCT with the inherent authority belonging to the individual member bands.⁴

Second, the Minnesota federal district court expressly found that the Mille Lacs Band is a federally recognized tribe in its decision affirming the continuing usufructory rights of the Mille Lacs and other Chippewa Bands under their treaty of 1837, and as affirmed by the Supreme Court in its 1999 decision *Minnesota v. Mille Lacs Band of Chippewa Indians*.⁵ As an additional note, Mille Lacs County itself has taken the position that the Mille Lacs Band is federally recognized in several instances, including a recent Mille Lacs County Attorney's Office opinion and in litigation before the Minnesota Supreme Court.⁶

Additionally, the County argues that the Tribe has not demonstrated its authority over those trust lands held by the Minnesota Chippewa Tribe.⁷ Since 1997, as explained in our Decision Document, MCT has divested its centralized authority to the individual member bands for their respective and, in certain cases concurrent with MCT, management of reservation lands and resources, including the authority to "manage, lease, permit, or otherwise deal with tribal lands within the Band's jurisdiction."⁸ The broad scope of this agreement ensures that each member band has authority for both those trust lands held by each member band as well as those MCT lands that fall within the boundaries of individual member bands' respective reservations.⁹ While, as previously noted, the Tribe's application includes a certification that the Tribe holds jurisdiction over all lands included in the application, including those held by MCT,¹⁰ the Tribe

³ Letter from Randy V. Thompson, Nolan, Thompson & Leighton, PLC, to Diane Nelson, EPA, October 13, 2015 [hereafter Nolan Letter I] and Letter from Randy V. Thompson to Diane Nelson, November 19, 2015 [hereafter Nolan Letter II].

⁴ "Evidence that the Mille Lacs Band is a Federally Recognized Tribe," Memorandum from Marc Slonim and Beth Baldwin, Ziontz Chestnut, to Barbara Wester, February 11, 2016, at 7 [hereafter "Slonim Baldwin Memorandum"].

⁵ *Mille Lacs Band v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd sub. Nom Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999). Slonim Baldwin Memorandum at 11, noting that the County was a party to this case and is bound by the Court's decision.

⁶ Joe Walsh, Mille Lacs County Attorney, "Mille Lacs County Attorney's Office Opinion on Tribal Law Enforcement Agencies Sharing Peace Officers with other Tribal Law Enforcement Agencies," August 10, 2015 [signed August 19, 2015]; Slonim Baldwin Memorandum at 12.

⁷ Nolan I, at 2; in Nolan II, the County additionally argues that the MCT Revised Constitution provides for individual enrollment in the MCT tribe, citing MCT Revised Constitution, Art. II (Nolan II, at 2). The Revised Constitution, however, provides more than this, namely, that MCT members must also be enrolled members of their respective Band. MCT Revised Constitution at Art. IV. See also, Slonim Baldwin Memorandum at 2-3, citing numerous additional authorities not enumerated here.

⁸ Minnesota Chippewa Tribe Land Ordinance, #3, §§ 102 and 302.

⁹ Minnesota Chippewa Tribe Land Ordinance, #3, §§ 102 and 302.

¹⁰ Certification of Trust Lands under the Jurisdiction of the Mille Lacs Band.

additionally provided MCT Resolution 29-16 which confirms the authority of the Tribe, under Land Ordinance #3, to exercise authorities sought in its TAR/TAS application and confirms the support of the Consortium for the Tribe's TAR/TAS application.¹¹

Finally, the County argues that the Band is precluded from obtaining any authority under the CAA because the State of Minnesota "has regulatory jurisdiction under the Clean Air Act over all lands within its territory."¹² In support of this position, the County cites *Oklahoma Department of Environmental Quality v. Environmental Protection Agency*, for the proposition that tribes must demonstrate authority to assert jurisdiction in areas of non-reservation Indian country,¹³ and cites Public Law 280 for the proposition that the State has assumed regulatory jurisdiction over the Tribe for CAA purposes by virtue of this statute.¹⁴ These arguments are mistaken for the reasons explained below.

First, the Tribe's application is comprised entirely of trust lands held by the Tribe or MCT. In its challenge to EPA's Indian Country New Source Review Rules, which were at issue in the *Oklahoma Department of Environmental Quality* case cited by the County, Oklahoma did not challenge a tribe's ability to assert jurisdiction over either formal or informal reservation lands.¹⁵ Rather, Oklahoma challenged only EPA's position regarding "non-reservation Indian country," which is limited to individual allotments and dependent Indian communities.¹⁶ No non-reservation Indian country lands are at issue in the Mille Lacs Band's application for CAA authority and therefore this case is not relevant to the application before EPA today.

Second, although the Tribe is not seeking regulatory authority in its application before EPA, the County argues, with no authority other than a citation to the statute it cites, and that the State has jurisdiction over the Tribe by virtue of Minnesota being "a Public Law 280 State."¹⁷ Public Law 280 was designed to convey jurisdiction over certain criminal and civil matters to certain states

The County appears to argue (Nolan I, at 2) that without an express grant in MCT Land Ordinance #3 over air resources to each member band, that the member bands may not exercise such authority. As discussed above, the Ordinance recognizes the primacy of individual member bands over their respective reservation lands, and the County provides no basis for establishing how the regulation of air quality for such lands can be considered separately from protection and regulation of the lands themselves (and which the County argues must belong to the State for air quality related to the lands within the state's borders).

¹¹ MCT Resolution 29-16 (January 14, 2016), enclosed with Slonim Baldwin Memorandum.

¹² Nolan I, at 2-3

¹³ Nolan I, at 2-3; Nolan II, at 2.

¹⁴ Nolan I, at 2.

¹⁵ 740 F.3d 185, 189: "Oklahoma petitions for review of the Indian Country NSR Rule 'only as it pertains to non-reservation 'Indian country' lands, including allotments and dependent Indian communities.' Oklahoma does not challenge the rule as it pertains to reservations, whether formal or informal."

¹⁶ 740 F.3d 185, 188:

In 1998 the EPA interpreted the geographic reach of the tribal jurisdiction created in 1990 to track the definition of "Indian country" in the federal criminal code [citations omitted]. . . More specifically, the EPA interpreted the term "reservation" in § 7601(d)(2)(B) to include formal reservations, Pueblos, and tribal trust lands, the latter two categories being essentially informal reservations [citations omitted]; it interpreted the phrase "other areas within the tribe's jurisdiction" to include "all non-reservation areas of Indian country," [citations omitted]. . . i.e., the "dependent Indian communities" and "Indian allotments" referenced in 18 U.S.C. § 1151(b)-(c).

¹⁷ Nolan I, at 2.

during the “Termination” period of U.S. Indian policies.¹⁸ The Statute generally does not apply to regulatory jurisdiction.¹⁹ In 1990, Congress amended the CAA to authorize EPA to treat Indian tribes as states.²⁰ In its preamble to the 1998 final rule implementing tribal CAA authorities, EPA noted in response to a comment that some states exercise statutory jurisdiction over non-Indian fee lands located on reservations that “EPA believes that the CAA delegation of authority to eligible tribes over reservations represents a more recent expression of Congressional intent and will generally supersede other federal statutes.”²¹ In reaching our decision today we need not resolve any alleged conflict between Public Law 280 and the CAA because the Tribe in this application is not seeking regulatory authority under the CAA. Therefore, Public Law 280 is not relevant to consideration of the Tribe’s application.²²

¹⁸ Cohen, *Handbook of Federal Indian Law*, § 6.04[3].

¹⁹ See Cohen at § 6.04[3][b][ii], citing, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

²⁰ 42 U.S.C. 7601(d). See also *Oklahoma Department of Environmental Quality*, at 187-188:

In 1990 the Congress amended the [Clean Air] Act to authorize the EPA “to treat Indian tribes as states,” § 7601(d)(1)(A), subject to the condition that “the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe’s jurisdiction. . . .

²¹ U.S. EPA, “Indian Tribes: Air Quality Planning and Management; Final Rule,” 63 *Fed. Reg.* 7254, 7256 (February 12, 1998).

²² As a final claim of an argument for unitary state authority within Minnesota’s borders, the County argues that the Tribe’s application, consisting as it does of disparate trust parcels, will impose burdensome notification requirements on the State pursuant to carrying out the notification for contiguous affected states under CAA § 505(a)(2). Neither the CAA nor the implementing regulations make any exception to eligibility for seeking authority on the basis that a State or Tribe has non-contiguous land holdings, nor does this argument fall within the scope of affected state comments under 40 C.F.R. § 49.9, which limit such comments to assertions of geographic boundaries. 40 C.F.R. § 49.9(b).




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Randy Thompson

From: Wester, Barbara <wester.barbara@epa.gov>
Sent: Thursday, January 05, 2017 3:51 PM
To: Randy Thompson
Subject: RE: Mille Lacs Band of Ojibwe's Application for Eligibility Under the CAA

randy – the decision document was signed by the regional administrator on december 7, 2016.

it appears that during the regional signoff process the cover letters to various entities regarding the decision became separated from the signoff package for the decision memorandum and, following signing of all the packages, the letters and attachments were consolidated for mailing on december 9.

again, i apologise for the delay in responding to your initial inquiry.

Barbara L. Wester
Associate Regional Counsel
Office of the Regional Counsel
U.S. Environmental Protection Agency, Region V
Mail Code C-14J
77 W. Jackson Blvd.
Chicago, IL 60604
ph: 312. 353.8514
wester.barbara@epa.gov

From: Randy Thompson [mailto:RThompson@NMTLaw.com]
Sent: Thursday, January 05, 2017 12:56 PM
To: Wester, Barbara <wester.barbara@epa.gov>
Cc: Randy V. Thompson <rthompson@nmtlaw.com>
Subject: RE: Mille Lacs Band of Ojibwe's Application for Eligibility Under the CAA

Barbara,

Can you provide us with the date of the EPA Decision Document for this agency determination?

That would be very helpful.

Randy V. Thompson
Nolan, Thompson & Leighton, PLC
5001 American Blvd. West, Suite 595
Bloomington, MN 55437
Phone: 952-405-7171

From: Wester, Barbara [mailto:wester.barbara@epa.gov]
Sent: Thursday, January 05, 2017 12:45 PM
To: Lori McGowan

Cc: Randy V. Thompson

Subject: RE: Mille Lacs Band of Ojibwe's Application for Eligibility Under the CAA

lori – i apologise for the delay in contacting you, both ben and i were out of the office until yesterday.

EPA's determination to find the mille lacs band eligible for certain provisions of the clean air act is documented in an agency determination signed by the regional administrator. there is no judicial filing or docket associated with this administrative action. the response to comments document that was sent to you as a courtesy represents the agency's response to the comments your office submitted.

if you wish to receive a copy of EPA's decision document, please submit a request through our freedom of information act website so that we may ensure the timely and formal transmittal of the information you wish to receive.

the website can be found at this link:

<https://foiaonline.regulations.gov/foia/action/public/home>

Barbara L. Wester

Associate Regional Counsel

Office of the Regional Counsel

U.S. Environmental Protection Agency, Region V

Mail Code C-14J

77 W. Jackson Blvd.

Chicago, IL 60604

ph: 312. 353.8514

wester.barbara@epa.gov

From: Lori McGowan [<mailto:LMcGowan@nmtlaw.com>]

Sent: Thursday, January 05, 2017 12:34 PM

To: Wester, Barbara <wester.barbara@epa.gov>

Cc: Randy V. Thompson <rthompson@nmtlaw.com>

Subject: FW: Mille Lacs Band of Ojibwe's Application for Eligibility Under the CAA

Barbara,

You left a voicemail message for me after 5 pm on Wednesday, January 4.

Randy Thompson and I have both attempted to reach you by phone today without success. It would be really helpful if you could respond to the questions I had sent to Benjamin Giwojna on December 29, 2016.

The cover letter we had received in December advised us to contact Benjamin with any questions and that was why the initial email was sent to him.

Thank you,

Lori McGowan

Nolan, Thompson & Leighton, PLC

5001 American Blvd. West, Suite 595

Bloomington, MN 55437

Phone: 952-405-7171

From: Lori McGowan [mailto:LMcGowan@nmtlaw.com]
Sent: Thursday, December 29, 2016 2:21 PM
To: giwojna.benjamin@epa.gov
Cc: Randy V. Thompson (rthompson@nmtlaw.com)
Subject: Mille Lacs Band of Ojibwe's Application for Eligibility Under the CAA

Benjamin,

I am the assistant to attorney Randy V. Thompson.

On December 12, 2016 we received the EPA's Response to Comments regarding the Mille Lacs Band of Ojibwe's Application for Eligibility for 2 Programs under the Clean Air Act Tribal Authority Rule.

The Response to Comments was dated November 23, the cover letter to us was dated December 1, the mailing envelope from the EPA was postmarked December 9, and we received it December 12.

If you can answer the following questions for me it will be very helpful:

- 1) Will the EPA be filing a Decision Document in this matter or is the Response to Comments considered the Decision?
- 2) If a Decision Document has already been filed in this matter, please send me a copy of that Decision Document. If you can send it by email that would be very helpful.
- 3) If a Decision Document will be forthcoming and there is any typical timeframe for when the Decision Document goes out after the Response to Comments, please advise.
- 4) When is a Docket No. given to a matter by the EPA?

Thank you for your assistance on this, Benjamin!

Lori McGowan
Nolan, Thompson & Leighton, PLC
5001 American Blvd. West, Suite 595
Bloomington, MN 55437
Phone: 952-405-7171