

GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION

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• MEMBER TRIBES •

MICHIGAN

Bay Mills Community
Keweenaw Bay Community
Lac Vieux Desert Band

WISCONSIN

Bad River Band
Lac Courte Oreilles Band
Lac du Flambeau Band

MINNESOTA

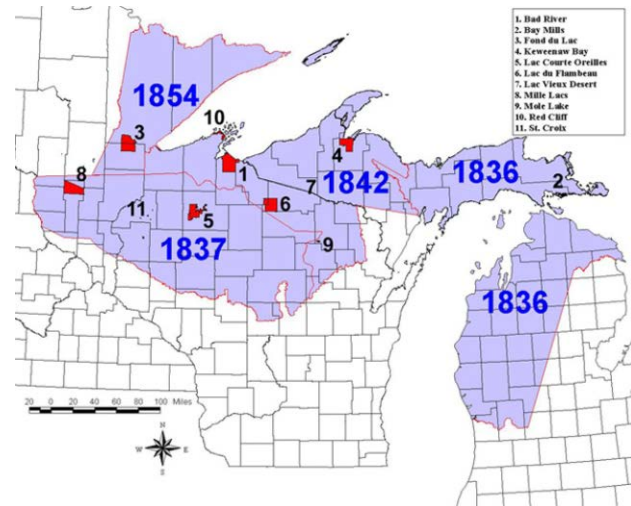
Fond du Lac Band
Mille Lacs Band

June 20, 2017

Ms. Karen Gude
Office of Water Tribal Program Coordinator
US Environmental Protection Agency
1200 Pennsylvania Ave. NW.
Washington, DC 20460

Dear Ms. Gude,

The Great Lakes Indian Fish and Wildlife Commission (GLIFWC or Commission) submits the following comments on the proposal to revise the definition of “waters of the United States” under the Clean Water Act. The Commission is a natural resource agency exercising delegated authority from 11 federally recognized Indian tribes in Michigan, Minnesota, and Wisconsin.¹ These tribes retain reserved hunting, fishing and gathering rights in territories ceded to the United States in various treaties (see map), rights that have been reaffirmed by federal courts, including the US Supreme Court.² The ceded territories extend over



¹ GLIFWC member tribes are: in Wisconsin – the Bad River Band of the Lake Superior Tribe of Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin, Sokaogon Chippewa Community of the Mole Lake Band, and Red Cliff Band of Lake Superior Chippewa Indians; in Minnesota – Fond du Lac Chippewa Tribe, and Mille Lacs Band of Chippewa Indians; and in Michigan – Bay Mills Indian Community, Keweenaw Bay Indian Community, and Lac Vieux Desert Band of Lake Superior Chippewa Indians.

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 March 18, 1996) (unpublished opinion); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 119 S.Ct. 1187 (1999); *United States v. State of Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979);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).

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portions of Minnesota, Wisconsin and Michigan and include portions of Lakes Superior, Michigan and Huron.

It must be noted that GLIFWC's focus is off-reservation, and it is from that perspective that these comments are submitted. GLIFWC staff's comments on this rule should not be construed as precluding comments by individual member tribes from their own sovereign and on-reservation perspectives.

GLIFWC member tribes reserved their ceded territory treaty rights in order to guarantee that they could continue their hunting, fishing, and gathering way of life (or "lifeway") in a manner that meets their subsistence, economic, cultural, medicinal, and spiritual needs. The full exercise of this lifeway requires access to clean, healthy and abundant natural resources, which require clean water to thrive. The federal government's treaty obligations, therefore, require it to provide water resources with the greatest federal protection possible. To do less would undermine the fulfillment of US treaty guarantees.

More generally, GLIFWC's member tribes understand that clean water is fundamental to life. They regard it as "the first medicine" and as the blood of their mother, the earth. With this perspective in mind, it would be difficult to overstate the importance of water to the spiritual, cultural, medicinal and subsistence practices that underlie the tribal lifeway. GLIFWC's member tribes also believe that actions affecting natural resources must be judged on how well they will protect seven generations hence. They seek to ensure that principles of ecosystem management and biological diversity recognize and protect the fundamental interdependence of all parts of the environment.

GLIFWC's governing Board of Commissioners (Board) consistently supports laws and policies that provide for the protection and restoration of water resources, and has taken a number of actions in this regard. Most relevant to the consideration of the scope of the term "waters of the US," in 2009, GLIFWC's Board passed a motion to support Senate Bill 787, the Clean Water Restoration Act, the goal of which was to restore federal jurisdiction over all waters and wetlands that were removed from federal oversight as a result of the *SWANCC* and *Rapanos* cases.

GLIFWC's Board supports the most expansive definition of "waters of the US" possible under the *SWANCC* and *Rapanos* decisions and, as discussed above, believes that such a definition is required by the United States' treaty obligations. It would not support a definition that restricts "navigable waters" to the waters identified by Justice Scalia in his *Rapanos* opinion. Executive Order 13778 directs the agencies to review the existing rule and to "consider interpreting the term 'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715

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(2006).” (emphasis added). The Executive Order does not *require* the agencies to interpret the term “navigable waters” in a manner consistent with Scalia’s opinion, it simply requires the agencies to consider that option. It is an option that the agencies should reject.

As EPA admits in the Consultation Plan sent to tribes on April 20, 2017, that the proposed rulemaking will result in a decrease in the number of waters protected under the Clean Water Act as compared to both current practice and the 2015 Clean Water Rule. To GLIFWC’s Board of Commissioners, this is an unacceptable result; greater protection for the nation’s navigable waters is consistent with treaty obligations and must be the goal, not diminished protection.

Thank you for the opportunity to submit these comments. Please feel free to contact me should you have any questions or need further information.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann McCammon Soltis". The signature is fluid and cursive, with a prominent initial "A" and a long, sweeping underline.

Ann McCammon Soltis
Director, Division of
Intergovernmental Affairs