



The Saginaw Chippewa Indian Tribe Of Michigan

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RE: Proposal to Rescind and Revise Clean Water Rule: Definition of “Waters of the United States”; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015).

Karen Gude:

This letter serves as the Saginaw Chippewa Indian Tribe of Michigan’s (Tribe) official comments regarding the Environmental Protection Agency’s (EPA) proposed action to rescind and revise the definition of “waters of the United States” (Clean Water Rule: (CWR) Definition of “Waters of the United States”; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015)) under Presidential Executive Order (EO) 13778. The Tribe would like to request the EPA reevaluate the impacts of EO 13778 after taking our comments into consideration. The Tribe has reviewed the documents associated with the EO 13778 and the CWR: Definition of “Waters of the United States”; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015) in its entirety and we reject the proposal to rescind and revise the CWR. The Tribe finds that the proposed interpretation negatively impacts tribal waters, fails to adequately protect water quality, creates inconsistency with Tribal priorities, and ultimately does not align with the Nation’s best interests.

We understand that we have the right to request consultation with the EPA regarding this matter in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes*, Presidential Memorandum issued November 5, 2009, and Executive Order 13175. As the implementation of the proposed action would affect our Tribe, we respectfully request consultation with the EPA on this issue.

The following comments reflect the position of the Tribe on the EO 13778:

The Proposed Interpretation Will Impact Tribal Waters

The Federal government is trusted with the responsibility of protecting lands and waters within Tribal boundaries by ensuring that regulations adequately protect water quality in these areas. A change in interpretation of “waters of the U.S.” will alter how water bodies are regulated under the CWA, including waters within Tribal boundaries. If the interpretation is narrowly applied, as suggested by the EO, the Federal government will fail to uphold its responsibility of protecting lands and waters, including those within Tribal boundaries.

The Proposed Interpretation Will Fail to Adequately Protect Water Quality

The goal of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” We believe that the proposed interpretation will not align with the goals of the Act.

While it is our understanding that the intent of the EO is to provide clarification and predictability within the law, we think the goal would be more attainable by applying a broader interpretation of the definition.

In a letter to Tribal Leaders dated April 20, 2017, the EPA stated that the CWA is one of the most effective environmental laws in the U.S. The CWR interpretation of “waters of the U.S.” is more protective of environmental and water quality. Under the broad CWA interpretation of the definition, the law proactively protected water quality across the states, which resulted in lower costs and less reliance on reactive methods like restoration and mitigation.

The Interpretation of “Navigable Waters” by Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006) is Not Consistent with CWA Intent nor Tribal Priorities

The EO asks us to reconsider Justice Scalia’s interpretation of protected waters as stated in the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006.) Upon review of this opinion, we learned that interpretation would limit the waters that are subject to CWA regulations. Justice Scalia believed CWA jurisdiction should be limited to relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters. This moves away from the prior interpretation and intent by the Conference Report accompanying the CWA. This Report explained that “[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.” S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

Based on the Tribe’s history, culture, and practices, it is important that we protect more than just “navigable waters,” in its narrow meaning. In our culture, even small water bodies are significant, whether they can be used for transportation or not, they are still invaluable resources for drinking water, sustenance fishing, and ceremony. It is necessary that these types of uses are considered and protected. To support these values and traditions, the law must allow for “waters of the U.S.” to mean more than just those that are navigable.

The way the CWR interprets “waters of the U.S.” is more consistent with the Tribe’s priorities as it pertains to water quality, because it is more stringent, protective, and inclusive. The Tribe works tirelessly to protect its valuable water resources. Water is life and that is how it should be treated. The regulation of all water bodies is important because they are all relevant to the interconnected watersheds and ecosystems in which we live. Just because a water body is not “navigable” does not mean it will not impact human, economic, and environmental health and community wellbeing.

The CWR has built a framework that encourages collaboration between agencies, organizations, and industry. The Tribe respects and appreciates the relationships we have been able to form with other organizations, which were built with a common goal of protecting our water under the CWA. Many of these partnerships exist because of grant funds under the CWA which allows us to work efficiently, effectively and collaboratively with other organizations. These partnerships could be at risk if the legal framework and motivation for achieving CWA projects is refocused.

The Proposed, Narrow Interpretation of the CWA is Not Economically Friendly

The EO claims that the CWR is not economically friendly and that the more narrow interpretation of “waters of the U.S.,” is predicted to lower the cost and time of additional permitting for businesses and governments as projects are built. While the Tribe herby supports efficiency, in this case we do not agree that it outweighs the benefits (direct and indirect) we receive from having better water quality. With a broader interpretation, we can proactively protect Tribal waters. Proactive regulation provides benefits like lower stormwater management and restoration costs. Narrowing the definition, places increased costs on our communities to reactively improve water quality. Furthermore, the law will become increasingly difficult to interpret as we experience a changing climate, alternatively, CWR interpretation will be clearer, more predictable, and easier to apply.

According to the U.S. EPA report “Economic Analysis of the EPA-Army Clean Water Rule,” (2015) the CWA, provides indirect benefits that substantially outweigh the costs of regulation. Annual indirect costs and benefits using the original number of U.S. Office of Resource Management’s other water records quantified in this report include those associated with Concentrated Animal Feeding Operations (CAFO), stormwater administration and implementation, permit applications and wetland mitigation. Even in a conservative analysis comparing the high costs to low benefits, and additional costs which the associated benefits are not accounted for, the annual benefits outweigh the costs at \$306.6 and \$338.9 million, respectively.

Furthermore, the socio-economic analysis of costs and benefits described in the U.S. Army Report “Finding of No Significant Impact, Adoption of the Clean Water Rule: Definition of Waters of the United States” concluded that “indirect incremental benefits are expected to exceed the indirect incremental costs” if the CWR was adopted (2015.) This CWR meant that the “other waters” category would increase positive jurisdictional determinations by changing the baseline for which the “No Action” conclusion is allowed.

The Proposed Revised Interpretation is Not in the Nation’s Best Interest

The CWA has a history of protecting human health, economies, businesses, and the environment. Even with the most stringent standards that have historically regulated water pollution, there are still many pollution-associated issues impacting our local waters including high bacterial levels and toxic chemical contamination. Economies within the Great Lakes basin depend on clean water for a tourism-based economy. Of equal importance is the ecological health of our water life, which has continued to decline over the years as a result of expanded development and industry. Clean water is the most necessary component for life to exist; no other component holds more significance. Therefore, it is in the best interest of the Nation to protect water quality to the highest level possible.

Please consider our comments as you evaluate the proposed action to rescind and revise the definition of “waters of the United States” (Clean Water Rule: Definition of “Waters of the United States”; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015)) under Presidential Executive Order 13778. We appreciate the opportunity to work collaboratively with the EPA, and we thank you for this opportunity to provide meaningful comment.

Sincerely,

A handwritten signature in blue ink, appearing to read "Frank J. Cloutier".

Frank J. Cloutier, Tribal Chief
Saginaw Chippewa Indian Tribe