

GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION

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www.glifwc.org



• 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

Red Cliff Band
St. Croix Chippewa
Sokaogon Chippewa

October 4, 2021

Submitted to: CWAwotus@epa.gov and usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil

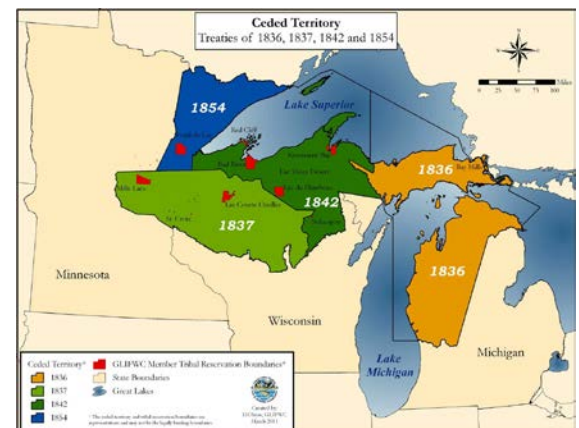
Mr. Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Mr. Jaime A. Pinkham
Acting Assistant Secretary of the Army for Civil Works
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314

Re: Notification of Consultation and Coordination on Revising the Definition of “Waters of the United States”

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

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



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.

by federal courts, including the US Supreme Court.² The ceded territories extend over 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

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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under the *SWANCC* and *Rapanos* decisions and, as discussed above, believes that such a definition is required by the United States' treaty obligations. In this case, restoring the regulations to those in place prior to the 2015 Clean Water Rule, amended to be consistent with the above-referenced Supreme Court decisions, would help restore tribes' ability to regulate and exercise sovereignty over their water resources. This is also an important step in light of the recently announced EPA initiative to protect tribal reserved rights in off-reservation waters.

Restoring the pre-2015 regulations should be the first step in strengthening and clarifying the definition of "waters of the US." Our experience is that for many years too much has been left up to "professional judgment" by agency staff when determining jurisdictional status. This has resulted in many decisions being made that were not protective of waters in tribal territories, yet those decisions could not be challenged because they were not based on verifiable facts. Updated protective and fact-based regulations would allow for consistent and defensible decision making.

Thank you for the opportunity to submit these comments. GLIFWC staff look forward to further engagement with EPA and the Army Corps as this initiative proceeds. 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 "A. Soltis", with a stylized flourish at the end.

Ann McCammon Soltis
Director, Division of Intergovernmental
Affairs