

KEWEENAW BAY INDIAN COMMUNITY

Keweenaw Bay Tribal Center
16429 Beartown Road
Baraga, Michigan 49908
Phone (906) 353-6623
Fax (906) 353-7540

2021 TRIBAL COUNCIL

WARREN C. SWARTZ, JR., President
GARY F. LOONSFOOT, JR., Vice President
KIM KLOPSTEIN, Secretary
TONI J. MINTON, Assistant Secretary
DOREEN G. BLAKER, Treasurer

ROBERT "R.D." CURTIS, JR.
EDDY EDWARDS
DALE F. GOODREAU
RANDALL R. HAATAJA
SUSAN J. LAFERNIER
RODNEY LOONSFOOT
DON MESSER

October 4, 2021

Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
Department of Army
108 Army Pentagon
Washington, DC 20310-0104

RE: Docket ID No. EPA-HQ-OW-2021-0328-0001, Request for Recommendations: Waters of the United States

To Whom It May Concern:

On behalf of the Keweenaw Bay Indian Community, a tribal nation with more than 3,600 members, we submit these comments regarding Docket ID No. EPA-HQ-OW-2021-0328-0001, Request for Recommendations: Waters of the United States.

The Keweenaw Bay Indian Community (KBIC) is a federally recognized tribal nation that has reserved the inherent right to hunt, fish, trap, and gather in, on and over the lands and waters that were ceded to the United States under the 1842 Treaty of LaPointe. KBIC's traditional territory is composed of several hundred inland lakes and thousands of miles of rivers, streams, creeks, and an abundance of wetlands. Our L'Anse reservation alone includes approximately 19 miles of Lake Superior shoreline, 164 small lakes and ponds, more than 3,000 acres of wetlands, 80 miles of streams and rivers, and 49 miles of intermittent streams located within five watersheds that are wholly or partially within reservation boundaries. KBIC members depend on diverse healthy ecosystems and the fish, plants, and wildlife that these ecosystems support. Ojibwe people have historically used and continue to use natural resources for spiritual, cultural, medicinal, subsistence, and economic purposes. The ability to exercise these treaty rights is completely dependent upon clean water and healthy ecosystems. Treaty rights, environmental health, and tribal culture are all interconnected.

Water is sacred to our tribe. We treat water with respect and dignity as a living entity and work hard to protect it. The United States has a general trust responsibility to protect our lands, assets and resources.

LAKE SUPERIOR BAND OF CHIPPEWA INDIANS

"Home of the Midnight Two-Step Championship"

KBIC bears a disproportionate burden to environmental contamination due to our reliance on the local lands, air, and water for food, medicine, and cultural subsistence and the time that we spend participating in these activities. Some of our most important resources are the clean water that flows over and through our lands and the natural resources that depend upon it. High quality, clean water that is safe from contaminants is of vital importance for the health and well-being of our community. KBIC believes that it is within the best interest of the tribe to be proactive in protecting the land and waters of our ceded territory. KBIC depends upon these waters for both physical and spiritual sustenance. The courts have long recognized the federal trust responsibility, as has Congress and many federal agencies, including the Environmental Protection Agency (EPA) and United States Army Corps of Engineers (USACE). A revised WOTUS rule with the greatest protection possible for waters and connected treaty resources is part of the trust responsibility that the United States owes to tribes.

Our perspective is that all waters are deserving of Clean Water Act (CWA) protections that ensure the health of tribal members and their environment. EPA's Environmental Justice Policy says the agency's goal is to "be responsive to the environmental justice concerns of federally recognized tribes," and to strive "for open communication and meaningful involvement with indigenous peoples and communities." To meet these goals, EPA should consider our concerns outlined here regarding water pollution on our tribal lands, and should be responsive to these concerns, not by narrowing the categories of waters under the protection of the CWA, but by having a WOTUS rule, backed by appropriate regulations to uphold the rule, that is protective of all of our waters.

Along with EPA and USACE, KBIC co-manages water pollution prevention programs to maintain and protect water quality on tribal lands to a much greater extent than states. We are in the process of adopting our own water quality standards which recognize the disproportionate burden to environmental contamination as recognized in KBIC's human health criteria calculations which are more stringent than State of Michigan standards. KBIC is concerned if the Agencies reduce the scope of the waters they protect, this action will have a disproportionate adverse impact on tribes.

Protections to prevent any further pollution or destruction of clean water sources will only become more necessary into the future. Increasing global populations, associated farming needs, and a changing climate will put more demands on sources of clean water. This increased demand for clean water has already been evidenced by proposed withdrawals from the Great Lakes Basin and the need for the creation of the Great Lakes Water Compact.

KBIC recommends that the proposed changes to the WOTUS rule include the protections described below:

The proposed rule should include CWA protection for ephemeral streams. Ephemeral streams provide habitat for traditionally important plants and wildlife and for wildlife and aquatic organisms in downstream perennial waters. They require stringent protection as recharge zones for critically important groundwater aquifers and support biological and physical ecosystem processes that significantly influence nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality.

The proposed rule should include CWA protection for wetlands that do not abut or have a direct surface water connection to a WOTUS. Wetlands are one of the most important natural resources,

playing unique roles and serving many important ecological, environmental, and cultural functions that contribute to the overall health and well-being of the environment and all life. Wetlands are considered to be the medicine cabinet of the KBIC containing numerous plants used for medicinal purposes. These important medicinal plants grow in a variety of wetland habitats. There has already been an abundant number of wetlands lost across the United States due to a lack of protections.

Vernal pools and ephemeral streams should also have protections under the proposed rule to provide important habitats for the numerous amphibian species in our area. Many of these amphibians are already decreasing in population due to habitat loss and changing climate.

KBIC, as well as numerous other tribes, rely on federal protection of ephemeral streams as the regulatory link for the federal Spill Prevention Control and Countermeasure (SPCC) program, in which we depend on the EPA to implement and enforce. The SPCC program requires vital pipeline and tank inspections, spill response plans and associated training for operators. KBIC also depends on USACE to provide CWA section 404 protection for road construction activities and oil spill remediation work in ecologically sensitive and important ephemeral stream areas. If federal protection for ephemeral streams were to disappear, some existing oil and gas facilities in our area would no longer be subject to SPCC requirements or CWA section 404 and associated section 401 permitting processes. This situation could place KBIC's land, water resources, and downstream critical habitat for endangered species at significant risk of petroleum or sediment-related impairments.

Only a proposed discharge into a WOTUS triggers the requirement to have a National Pollutant Discharge Elimination System ("NPDES") permit under CWA section 402 or a dredge or fill permit under CWA section 404. Therefore, a narrower WOTUS definition means that fewer of these permits will be issued, and there will be less protection for our tribal waters for that reason alone.

KBIC is a fishing community and the proposed revisions to the definitions of WOTUS should have protections in place to prevent negative impacts on our fisheries, and consequent negative impacts on our cultural and subsistence uses of fish.

KBIC also believes that more studies should be conducted, especially in the Great Lakes Region to understand more about groundwater – surface water connections. Just because two waterbodies, or wetlands do not have a visible surface connection. Does not mean that hydrologic connections invisible to the human eye do not exist.

In conclusion, KBIC urges the Agencies to **include protections within the definition of WOTUS**, which implements the intent of the CWA, incorporates scientific principles, and implicitly recognizes our tribal view of water. The proposed revisions to the rule should result in protection of waters vital to our culture, health, well-being and sustenance. If the Agencies insist on revising the definition of WOTUS, they should incorporate scientifically based hydrological terms and definitions, not rely on arbitrary regulatory definitions that have no real meaning.

For all of the reasons discussed throughout this comment letter, the Agencies must at the least include in the definition of WOTUS all water sources that serve treaty rights and reserved water rights, whether on

or off tribal lands. The definition should protect waters on tribal lands and waters that lead to tribal lands, regardless of the category of water.

Please accept our comments regarding Docket ID No. EPA-HQ-OW-2021-0328-0001, Request for Recommendations: Waters of the United States. If you have any questions feel free to contact me or my staff.

Sincerely,

A handwritten signature in blue ink, appearing to read "Warren C. Swartz, Jr.", written in a cursive style.

Warren C. Swartz, Jr., President
Keweenaw Bay Indian Community
16429 Beartown Rd.
Baraga, MI 49908
(906) 353-6623

Cc: Evelyn Ravindran, KBIC Natural Resources Director
Kevin Carlisle, KBIC Tribal Attorney
Shannon DesRochers, KBIC Great Lakes Resource Specialist
Justin Woodruff, KBIC Water Resources Specialist