Bad River Band Of Lake Superior Tribe Of Chippewa Indians

CHIEF BLACKBIRD CENTER Box 39 • Odanah, Wisconsin 54861

October 4, 2021

Ms. Radhika Fox, EPA
c/o CWAwotus@epa.gov
Mr. Jaime Pinkham, ACOE
c/o usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil

Re: Tribal Comments as Consultation on Waters of the Unites States (WOTUS) Rulemaking

Dear Assistant Administrator Fox and Assistant Secretary Pinkham,

The Bad River Band of Lake Superior Tribe of Chippewa Indians (henceforth, "Tribe") is a federally recognized Indian Tribe with its Reservation in the western region of the Anishinaabeg-Gichigami Territory on the northern shores of Wisconsin and Madeline Island. The Tribe also retains interest in lands ceded through the 1837, 1842 and 1854 Treaties with the United States in Wisconsin, Michigan, and Minnesota and treaty rights to the sacred waters of Anishinaabeg-Gichigami, or Lake Superior. In addition to our inherent authority, the Tribe has federally approved Water Quality Standards (since 2011) and Treatment-as-a-State authority from the EPA under multiple sections of the Clean Water Act.

With over 124,000 acres, the Bad River Reservation is located in the downstream third of the Mashkiiziibiing (Bad River) Sub-Basin. Over 200 miles of perennial streams and over 250 miles of intermittent or ephemeral streams flow within our Reservation. There are over 40,000 acres of mapper wetlands and 500 acres of lakes and ponds within our Reservation. Our Kakagon and Bad River Sloughs Complex, a wetland of international importance (or Ramsar site) comprises 13% of the coastal wetland within the entire Lake Superior Basin. The water resources within our Reservation and the food and medicine supported by them are the foundation for why the Bad River Reservation was established where it is, and the health of our people and others are dependent on the quality and quantity of connected waters.

The Tribe and the Tribe's Mashkiiziibii Natural Resources Department (henceforth, "MNRD") has submitted numerous comment letters over the years regarding proposed federal rule changes pertaining to the Clean Water Act, including but no limited to the definition of Waters of the United States (WOTUS). Additionally, we have participated in numerous webinars, discussions, and formal consultations on the subject as well. Throughout, the Tribe has supported the use of a wholistic approach to protect the nations' resources for the seventh generation by respecting and recognizing that water is the lifeblood of the earth and that all living beings depend on safe, clean water to survive. To keep water clean and safe there must be a scientific and traditional ecological knowledge approach to defining what is a WOTUS so that federal and tribal agencies can have the authority needed to successfully protect our nations' waters by regulating potential impacts.

Specifically, the Tribe has submitted the following letters in regard to the CWA and/or WOTUS in which our perspectives have been shared with the Army Corps of Engineers (ACOE) and/or Environmental Protection Agency (EPA):

- **June 20, 2017 – Comments on the Proposal to Revise the Definition of "Waters of the United States" under the Clean Water Act**
    - In this letter, amongst other items, the Tribe provides their perspective on the importance and necessity of clean water and supports keeping the 2015 Clean Water Rule unless robust scientific data to demonstrate a preferable approach that adequately accounts for hydrologic connections between and among waterbodies is found.
- **September 27, 2017 – Comments on the Definition of "Waters of the United States" Recodification of Pre-Existing Rules under the Clean Water Act (Docket ID No. EPA-HQ-OW-2017-0203)**
    - In this letter, amongst other items, the Tribe comments on the importance of upstream waters for Tribal health and provides additional references for the EPA to consider in their decision-making that articulate the importance of some of the proposed excluded waters to the overall health of an ecosystem.
- **March 19, 2018 – Water of the United States – Potential Effects for Tribal Waters**
    - In this letter, amongst other items, the MNRD provided comments to EPA regarding how proposed rule changes would impact the Tribe's ability to regulate our waters and requests that the EPA take additional steps when evaluating how proposed rule changes would affect waters on the Reservation and within the ceded territory.
- **May 21, 2018 – Comments on "Pollution of Surface Waters by Pollution from a Point Source through Groundwater with a Direct Hydrological Connection to Surface Water" (Docket ID No. EPA-HQ-OW-2018-0063)**
    - In this letter, amongst other items, the MNRD urges EPA to use sound science when deciding how discharges to groundwater with a direct hydrological connection to surface waters will be regulated as pollution to groundwater can pollute our surface water and vice versa.
- **August 13, 2018 – Comments on the Definition of "Waters of the United States" Recodification of Pre-Existing Rules under the Clean Water Act (Docket ID No. EPA-HQ-OW-2017-0203)**
    - In this letter, amongst other items, the Tribe once again articulates the Tribe's cultural, subsistence, health and economic well-being is dependent upon clean, healthy waters and that the federal government must meet their trust responsibilities by providing water resources with the greatest federal protection to ensure the clean water necessary to support the lifeways reserved by tribes under treaties.
- **April 15, 2019 – Docket ID No. EPA-HQ-OW-2018-0149 – Comments on Proposed Revised Definition of "Waters of the Unites States" 84 Fed. Reg. 4154 (Feb. 14, 2019)**
    - In this letter, amongst other items, the MNRD submitted comments regarding how the then proposed revised definition of WOTUS (now known as the

Telephone (715) 682-7123 *Natural Resources Department* Fax (715) 682-7118

Navigable Waters Protection Rule) violated tribal rights and failed to take into account impacts to tribal rights as part of the rulemaking.

We are once again attaching these letters for the EPA and the ACOE to review the Tribe's stance of the importance of clean water, the importance of appropriate regulatory authority, and the importance of the use of sounds science and a wholistic viewpoint when making regulatory rule changes. Please find all six letters attached.

In addition, the Tribe would like the EPA and ACOE to consider the following when creating new rules and definitions under the CWA:

- Surface water and groundwater are undeniably a connect resource. Draining an aquifer can lead to the drying up of surface waters just as much as reducing the quantity of surface water may impact groundwater levels. Additionally discharging pollutants into groundwater can lead to surface water pollution and polluting a surface water could lead to pollutants leaching into the groundwater. Any new rule should recognize the subsurface connections between water resources and not disqualify a resource from being regulated solely due to there not being a direct surface water connections between resources. We have recently been frustrated in our attempts to have ACOE staff recognize connectivity within our watershed as an intermittently flowing stream (flowed continuously for greater than two months) transitioned to very obvious sub-surface flow under several trees (approximately 5-10 feet) before reemerging to the surface. ACOE staff indicated that this "break" could exclude the upstream waters from being considered jurisdictional. Any new rule should make reasonable allowances for subsurface flow and groundwa er contributions to flow and use established sound science to help shape these conditions.
- In the new rule, intermittent flow in a tributary due to snowpack melt should be a condition that allows a stream to be considered jurisdictional regardless of a "continuously defined bed and banks" if an established flow path is identifiable. Additionally, the duration of flow should be clearly defined as any amount of flow (no minimum requirement for cubic feet per second or velocity) over a given duration (X number of days) in the new rule for added clarity. We support that this definition should vary based on ecological region and be based on sound science.
- In the new rule, definitions of jurisdictional waters should allow for regional variation due to climatic, landscape, and ecological differences. For example, a watercourse that flows in direct response to a precipitation event for a single day each year would have a different importance in the drier regions of the southwest than in the wetter areas of the northwest (or other areas) and should likely be considered jurisdictional in those regions. Our area is a region unlike others in this country, due to the microclimate generated from Lake Superior; from our shores to the upper parts of our watersheds we have an abundance of water resources (wetlands, river, lakes, ponds, estuaries, and streams) that are sustained by snowpack melt, groundwater, and levels of seasonal precipitation more akin to the temperate rainforests of the northwest. Depending on where you're standing, we have deep peats, red clays, shallow bedrock, porous sands, thin muck soils, or anything in between. We're one of the areas least studied and one of the most difficult to delineate; comparison of groundtruthed data to that housed in national datasets (like the

Telephone (715) 682-7123 *Natural Resources Department* Fax (715) 682-7118

National Hydrography Dataset) show that water resources are constantly underestimated and inadequately mapped. However, that's not to say that because water resources are abundant in our region they shouldn't be protected with as much importance as the one stream in the arid southwest in our previous example—we're drawing the comparison to illustrate that no single cookie-cutter approach is going to apply across the nation or even in smaller geopolitical divides.

- In the new rule, definitions should be clear and scientific based. The ACOE and EPA should draw upon in-house knowledge of the regions of the country like the work that EPA staff are completing to establish regional streamflow duration assessment methods (SDAMs). Information and knowledge or regional water resources published in reports or shared from others like the U.S. Geological Survey (USGS), States, Tribes and other organizations should also be considered.

These are just a few examples of items that should be considered in a regionally robust, clear, scientifically defensible rule that allows for the appropriate level of jurisdiction to protect, sustain, and use our nations' water resources today and for all seventh generations.

The health of our waters depends upon the health of groundwater and surface waters combined, including upstream connected waters. These are resources that are federal protected under both the treaties the Bad River Band is signatory to and the Clean Water Act. EPA's and ACOE's obligation to successfully implement the Clean Water Act and exert jurisdictional authority allows for the restoration and maintenance of the chemical physical and biological integrity of waters across the U.S.. To revise or create new regulations that in any way would reduce the federal regulatory authority over waters and wetland below what is needed to protect water resources to the level needed to sustain treaty resources and clean water for all citizens of the U.S. is a failure of trust responsibilities of the federal government in possible violation of Tribe's treaty rights and other U.S. citizens'.

Thank you for the opportunity to submit these comments. We appreciate the time that EPA and ACOE staff will spend reviewing and responding to our letter. We look forward to engaging in additional discussion as the rulemaking moves forward.

Please contact Naomi Tillison, Mashkiiziibii Natural Resources Director, if you have any questions. She can be reached at 715-682-7123 ext. 561 or nrdirector@badriver-nsn.gov.

Sincerely,

Michael Wiggins Jr.

Michael Wiggins, Jr.
Tribal Chairman
Bad River Band of Lake Superior Tribe of Chippewa Indians

Telephone (715) 682-7123 *Natural Resources Department* Fax (715) 682-7118

Cc: Naomi Tillison, Mashkiiziibii NRD
US Environmental Protection Agency - Region 5 Staff
US Army Corps of Engineers – St. Paul District Staff
Great Lakes Indian Fish and Wildlife Commission Staff

Enclosed: 6 Attachments

Telephone (715) 682-7123 *Natural Resources Department* Fax (715) 682-7118