

**Dr. Aaron Payment,  
Chairperson  
Sault Ste. Marie Tribe of Chippewa Indians**

**Testimony**

**For  
Consultation Between  
The Tribal Nations**

**And**

**The U.S. Environmental Protection Agency and the Department of the US Army**

**Regarding**

**Revision of the Definitions of “Waters of the United States”**

**October 14, 2021**

Aaron Payment, n'dizhnikaaz. Kina Baawaa'ting Anishinaabek Omaa go nda Onji-kida. My name is Aaron Payment. As the elected Chairperson of the Sault Ste. Marie Tribe of Chippewa Indians (“the Tribe”), the largest Tribe east of the Mississippi River, I am submitting this testimony on behalf of my Tribe. The testimony has been requested of all federally-recognized Tribes by the U.S. Environmental Protection Agency (the “EPA”) and the U.S. Army (“Army”) as a means of obtaining opinions and recommendations of the Tribes regarding the revision of the definitions of “Waters of the US”.

**Background:**

The EPA notes that the Clean Water Act (“CWA” and “the Act”) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.<sup>1</sup> The Act provided federal jurisdiction over “navigable waters” which is defined under the Act as, “Waters of the United States” (“WOTUS”).<sup>2</sup> The Act left the EPA and the Army to define WOTUS in regulations. Since then, WOTUS has been defined in regulations and has been addressed by the U.S. Supreme Court on multiple occasions.

In 2021, President Biden signed Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”, directing all federal agencies to review rules promulgated between January 2017 and January 2021 that are or may be inconsistent with the policy set forth in that order. Under this umbrella, the EPA and the Army have reviewed the definition of WOTUS and have decided to revise the definition of “Waters of the US”. The definition is significant because it determines which waters are subject to the CWA.

To the Sault Ste. Marie Tribe of Chippewa Indians, water is sacred, it is culturally important, critical to our religion, and it is the source of our food. For these reasons, it is imperative that it be clean and free from pollutants. The National Tribal Water Council (“NTWC”) notes that the United States has a trust responsibility to recognize and protect tribal lands, assets, and resources, which includes the water that flows over and through tribal lands and the natural resources that depend on that water; this relationship between the federal government and Indian tribes, which is recognized both in EPA’s Indian Policy and the Corps’ Tribal Consultation Policy, includes rights that require the federal government to provide additional protections for tribal waters compared to those for state waters<sup>3</sup>. Furthermore, the federal trust responsibility to Indian tribes is heightened by federal obligations to recognize and protect tribal treaty rights and other reserved water rights, and also by principles of environmental justice; all of these provide bases for greater protection of tribal waters.<sup>4</sup>

#### Recommendations

The Sault Ste. Marie Tribe of Chippewa Indians wants to work in partnership with the US Environmental Administration and the US Army in revising the definition of WOTUS in a manner that will best protect US waters. The CWA is meant to keep waters of the US clean and free from pollutants. Since its enactment it has been significantly weakened. We urge the current Administration to seek out necessary reforms to strengthen the CWA, not just from attacks made during the Trump Administration, but from *all* infringements made upon the CWA that have weakened the Act.

#### **Regional Variability, WOTT, and Interstate Waters:**

**The Sault Ste. Marie Tribe of Chippewa Indians stands with the NTWC in recommending that the EPA and Army include regional variability considerations in determining the definition of WOTUS.**<sup>5</sup> The federal trust responsibility to the Tribes requires the EPA and the Army to take into account the regional differences that impact Tribes and address factors such as climate, geology, and hydrology in developing a WOTUS definition for Tribal waters. For example, some Tribes rely on streams that flow seasonally and others rely upon wetlands to contribute to water flow and storage, and influence the chemical, physical, and biological integrity of downstream waters. Tribes consider these to be Tribal waters. According to the Navigable Waters Protection Rule (“NWPR”) many of these waters are considered “ephemeral” and are not protected.

**The Sault Ste. Marie Tribe joins the NTWC in urging the EPA and Army to include any waters within or flowing through Tribal trust lands that are designated by a Tribal government as “Waters of the Tribe” (“WOTT”) as a new category of WOTUS:** In this way, WOTT would be treated as WOTUS regardless of any narrowing of the definition by EPA, for purposes of being TAS (“treated in the same manner as a state”) approvals, approvals of Water Quality Standards, requests for CWA Section 401 certifications, grants, and other actions under the CWA involving Tribes.<sup>6</sup> This new category under WOTUS would satisfy the federal government’s trust obligations and those under treaties and other reserved water rights, and would not need an amendment to CWA.<sup>7</sup>

**The Tribe urges the EPA and the Army to include interstate waters as a separate category of WOTUS, as it was in the 2015 WOTUS rule. Additionally, the EPA and Army should define “interstate” waters to include waters that border upon or traverse Tribal lands, both between and from state to Tribe and between and from one Tribe to another.** We join NTWC in recommending these actions because otherwise, innumerable waterbodies within Tribal lands that are located downstream of interstate waters, which make up a network of waterbodies, will lose CWA protections. As an example, NTWC points out that protection of Tribal Water Quality Standards would be limited, as well as Tribes’ involvement in certifications of discharges in neighboring jurisdictions that would impact their waters; additionally, narrowing of federal responsibilities upstream of reservation waters could leave Tribes subject to more instances of state regulation of their water quality, that could moreover result in conflicting water quality regimes.<sup>8</sup> To meet their trust responsibility to the Tribes, the EPA and the Army need to protect this from happening to the Tribes.

#### **Scope of Jurisdiction Tributaries:**

The NWPR eliminated the protection of ephemeral streams and many intermittent streams, tributaries, and wetlands once protected by the CWA. In so doing, it excluded many Tribal waters from CWA protections.

**The Sault Ste. Marie Tribe of Chippewa Indians recommends the definition of “WOTUS” include perennial, intermittent, and ephemeral waters, nationally, or at least regionally.** To avoid confusion and aid in clarity, predictability, and certainty, we join the NTWC in urging the EPA and the Army “identify and propose, as part of the new rule, a science-based methodology, drawing upon EPA’s 2015 Connectivity Report, “Connectivity of streams and Wetlands to Downstream waters: A Review and Synthesis of the Scientific Evidence” (with updating for possible advances in the science since the Report was prepared), readily implementable by a hydrologist, water resources engineer or other professional (presuming a suitable educational background at the undergraduate level and relevant professional experience and training), that allows for identification of such jurisdictional ephemeral streams.”<sup>9</sup>

#### **Waste Treatment Systems:**

On May 19, 1980, the Environmental Protection Agency (EPA) revised its regulations defining waters of the United States, providing an exclusion for waste treatment systems (“WTS”) as follows:

*Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States*

According to EPA, the intent of the final sentence of the exclusion was to “ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a “waste treatment system”, or by discharging wastes into

wetlands. This clarification of the waste treatment system exclusion was later suspended by EPA without public notice or comment.<sup>10</sup> The Corps adopted the WTS exclusion without the explicit manmade waters limitation in 1986.<sup>11</sup> This created a harmful loophole: Mine developers have been able to define natural lakes, rivers, streams and wetlands as “waste treatment systems” which thereby are exempt from the CWA.

**The Sault Ste. Marie Tribe of Chippewa Indians strongly recommends this loophole be fixed by restoring the May 19, 1980 EPA regulation excluding WTS from the definition of WOTUS, in its entirety:**

*Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.*

**The Fill Rule:**

Under the Clean Water Act (CWA), a person who discharges “fill material” into waters of the U.S. must obtain a section 404 permit from the Army Corps of Engineers (Corps). Anyone who wants to discharge other pollutants must obtain a section 402 permit from the Environmental Protection Agency (EPA) or a state that has been delegated authority to issue such permits. Prior to 2002, EPA and the Corps had different definitions for this type of pollutant. The Corps, which administers section 404, defined fill as “any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body. *The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.*” 33 C.F.R. § 323.2(e) (2001) (emphasis added).

In 2002, EPA and the Corps adopted identical definitions of fill material to include discharges that *have the effect* of either replacing any portion of a water body with dry land or changing the bottom elevation of any portion of a water. The regulatory examples included overburden from mining. *See* 33 C.F.R. § 323.2; 40 C.F.R. § 232.2. The impact of this has been catastrophic. Section 404, intended to regulate the placement of rock, clay, sand, and other inert materials in water for construction, now allows permit disposal of contaminated materials in water.

**The Sault Ste. Marie Tribe of Chippewa Indians strongly recommends the EPA and the Army to revise the fill rule to exclude any pollutant subject to effluent limitations under Section 402.**

**Conclusion:**

Thank you for this opportunity to provide comment. We strongly agree with all the recommendations of the National Tribal Water Council. We also believe that the EPA and Army should rectify all issues that have weakened the CWA, not just those that occurred during the last Administration. If you have any questions or need additional information, please do not hesitate

to contact me or the Sault Ste. Marie Tribe of Chippewa Indians Legislative Director, Mike McCoy at [MMcCoy@saulttribe.net](mailto:MMcCoy@saulttribe.net)

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<sup>1</sup> “Summary of the Clean Water Act”. 33 USC Section 1251 et seq. (1972). U.S. Environmental Protection Agency Website. 2021. See also: <https://www.epa.gov/laws-regulations/summary-clean-water-act>

<sup>2</sup> CWA Section 502(7).

<sup>3</sup> Letter to Mr. Michael S. Regan, Administrator, US Environmental Protection Agency and to Mr. Jaime A. Pinkham, Acting Assistant Secretary of the Army for Civil Works, US Army Corps of Engineers, regarding Notice of Consultation and Coordination on Revising the Definition of “Waters of the United States” from the National Tribal Water Council. October 1, 2021. Page 4.

<sup>4</sup> See EN 3.

<sup>5</sup> Letter to Mr. Michael S. Regan, Administrator, US Environmental Protection Agency and to Mr. Jaime A. Pinkham, Acting Assistant Secretary of the Army for Civil Works, US Army Corps of Engineers, regarding Notice of Consultation and Coordination on Revising the Definition of “Waters of the United States” from the National Tribal Water Council. October 1, 2021. Pages 3 - 5.

<sup>6</sup> Letter to Mr. Michael S. Regan, Administrator, US Environmental Protection Agency and to Mr. Jaime A. Pinkham, Acting Assistant Secretary of the Army for Civil Works, US Army Corps of Engineers, regarding Notice of Consultation and Coordination on Revising the Definition of “Waters of the United States” from the National Tribal Water Council. October 1, 2021. Page 5.

<sup>7</sup> See EN 6.

<sup>8</sup> See EN 6.

<sup>9</sup> Letter to Mr. Michael S. Regan, Administrator, US Environmental Protection Agency and to Mr. Jaime A. Pinkham, Acting Assistant Secretary of the Army for Civil Works, US Army Corps of Engineers, regarding Notice of Consultation and Coordination on Revising the Definition of “Waters of the United States” from the National Tribal Water Council. October 1, 2021. Page 6.

<sup>10</sup> 45 Fed. Reg. 48620 (July 21, 1980).

<sup>11</sup> 33 C.F.R. § 328.3(a)(8).