

GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION

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• 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

Red Cliff Band
St. Croix Chippewa
Sokaogon Chippewa

MINNESOTA

Fond du Lac Band
Mille Lacs Band

September 13, 2021

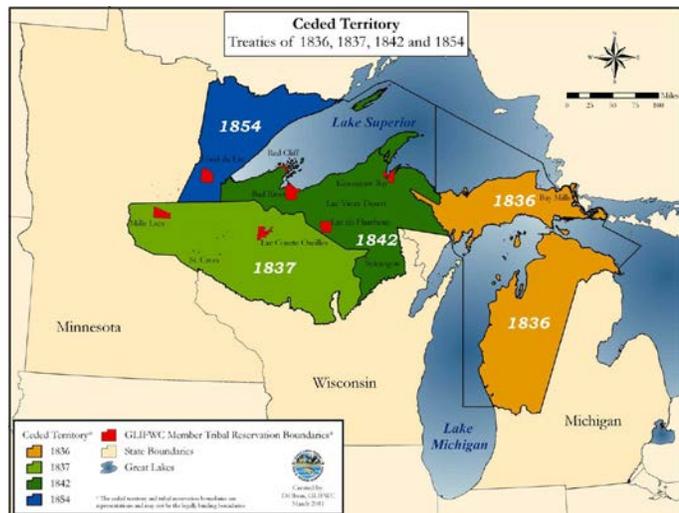
Submitted Via Email

Ms. Jennifer Brundage
Environmental Protection Agency
1301 Constitution Avenue NW
Washington, DC 20460

Re: Notification of Consultation and Coordination on Potential Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights

Dear Ms. Brundage:

Great Lakes Indian Fish and Wildlife Commission (“GLIFWC” or “Commission”) staff submit the following comments on the Notification of Consultation and Coordination on Potential Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights, signed June 22, 2021. 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 by federal



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.

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.

GLIFWC's focus is off-reservation treaty rights, and it is from that perspective that these comments are submitted. GLIFWC's Intergovernmental and Biological Services 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, in turn, require clean water. The federal government's obligations as a treaty signatory, therefore, require it to provide water resources with the greatest protection possible. To do less would undermine the fulfillment of US treaty guarantees.

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. The Board also supports tribal assertions of regulatory authority over reservation lands and waters, including assumption of various programs under the Clean Water Act. A number of GLIFWC's member tribes have assumed "treatment as a state" status under the Clean Water Act, have adopted water quality standards, and issue certifications pursuant to Section 401.

Because of the deep importance of water and its vital role in supporting resources located within the treaty ceded territories, GLIFWC staff welcome actions by the EPA to require protection of water during the establishment and/or revision of water quality standards that apply in ceded territories. Staff support the concepts outlined in the EPA's proposal for amending Clean Water Act regulations but believe EPA should also consider providing options related to enforcement of whatever regulatory approach is ultimately implemented. This could potentially take the form of a mandatory 401-type certification for permits in ceded territories.

Unfortunately, over the years, GLIFWC staff have encountered situations in which tribal input

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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into state water quality standards was not considered or where state water quality standards were not adequately enforced. For example, GLIFWC and tribes have had difficulty getting tribal priorities considered through the state's triennial water quality standard review process. Tribes have worked with Minnesota to add wild rice waters that are impaired (water quality exceeding the 10 mg/l sulfate standard) to the 303(d) list of impaired waters for over a decade. While there is no argument about the water quality measurements, the state has refused to list these waters as impaired and its legislature has attempted to forbid enforcement of the standard. Only recently has the EPA used its authority to require that the MPCA take the necessary step of adding sulfate impaired waters to the 303(d) list.

Because of long experience in trying to influence state water quality standards, GLIFWC staff recommend that EPA work directly with tribes to determine appropriately protective regulatory approaches to the protection of treaty resources. This approach would have several benefits:

- It would allow for the development of "ceded territory" standards that would be incorporated into state standards. This would appropriately recognize that the ceded territories pre-date state boundaries and that regulations that protect tribal resources are likely to be similar across the landscape.
- It would reduce political pressure that one state might feel to undermine or ignore a standard. Unfortunately, this is not a theoretical concern. Minnesota has had a sulfate standard in statute since 1973 but has ignored it until recently.
- It would reduce uncertainty and confusion for tribes. Monitoring the implementation of a numeric standard in one state, an antidegradation provision in another, and a narrative criteria in a third would be inefficient to say the least.
- It would save staff time for tribes, for EPA, and for states.

From an off-reservation perspective, tribes that reserved rights to hunt, fish and gather within ceded territories are not often the regulatory authority with control over the enactment or the enforcement of water quality standards. The tribes rely on other governments to exercise their authorities in ways that preserve and enhance the habitats that support healthy and abundant natural resources. This initiative, if implemented and enforced vigorously, will go a long way toward ensuring that other governments uphold treaty guarantees and that tribes have the regulatory tools they need to ensure appropriate enforcement.

GLIFWC looks forward to working closely with the EPA as this initiative proceeds. The comments herein are the start of a very valuable process that will benefit from close coordination as Clean Water Act regulations are amended, and then those amendments are implemented. I have asked Ann McCammon Soltis and Jennifer Vanator of my staff to be primary points of contact, they can be reached at 715-685-2102 (office) or amsoltis@glifwc.org, and 715-685-2104 (office) or jvanator@glifwc.org respectively. Thank you for your consideration of these comments.

Sincerely,



Michael J. Isham, Jr.

Executive Administrator