

BAD RIVER BAND OF LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS

CHIEF BLACKBIRD CENTER
Wisconsin 54861

Box 39 • Odanah,

June 20, 2017

Ms. Karen Gude
Office of Water Tribal Program Coordinator
US Environmental Protection Agency
1200 Pennsylvania Ave. NW.
Washington, DC 20460

Re: Comments on the Proposal to Revise the Definition of “Waters of the United States” under the Clean Water Act

Dear Ms. Gude,

As a sovereign nation, the Bad River Band of Lake Superior Tribe of Chippewa (Bad River Band or Tribe) is submitting comments related to the proposal to revise the definition of “waters of the United States” under the Clean Water Act. In addition to our inherent authority as a sovereign nation, specific authority for the Bad River Band to comment comes from: Section 106 of the National Historic Preservation Act of 1966 36CFR800.2 (c.2.i.A.) & (c.2.ii.) & (2.ii.C); Treatment as a State (TAS) authority for Water Quality Standards (Clean Water Act Sections 303(c)/401) and other Clean Water Act programs; and authority to exercise rights reserved under treaties signed with the United States. These authorities mean we can provide comments to support our interests in our Reservation lands along the south shore of Gitchigumi (Lake Superior) and Mooningwanekaaning (Madeline Island), our treaty territories within Michigan, Wisconsin, and Minnesota, and our cultural homelands extending from the Maine to Montana and along the Mississippi River.

Please note that these comments, while submitted on behalf of the Tribe, do not represent a form of government-to-government consultation. Nor do we accept that the webinar hosted by the US Environmental Protection Agency (USEPA) on May 18, 2017 constitutes consultation. The Tribe requests government-to-government consultation on this issue. The name and contact information for scheduling consultation is at the end of this letter.

Nibi (water) is the first medicine to the Chippewa, the blood of our mother, the earth, and we know that clean water is fundamental to the life of all peoples. Our perspective is that any threat to water is a threat to our life on a cultural, spiritual, economic, and physical level. Any actions that may affect aquatic health must be assessed to ensure that clean water is available and protected for the seventh generation—any weakening of regulations or rules that do not ensure adequate protection for water is not acceptable to the Tribe.

The first medicine, clean water, and the cultural, spiritual, economic, and physical activities clean water supports is closely connected to the science of how watersheds function. The Bad River Band believes

that any rulemaking should be based on that science. The USEPA (2015) report¹ *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* provides that science. A conclusion of the EPA from this report² is that:

“The scientific literature clearly shows that wetlands and open waters in riparian areas (transitional areas between terrestrial and aquatic ecosystems) and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality.”

This conclusion supports the Tribe’s opinion that for the federal government to meet their trust responsibilities, they must have federal jurisdiction over all waters and wetlands to ensure adequate protection of treaty resources. After all, the EPA² also states that:

“There is ample evidence that many wetlands and open waters located outside of riparian areas and floodplains, even when lacking surface water connections, provide physical, chemical, and biological functions that could affect the integrity of downstream waters. Some potential benefits of these wetlands are due to their isolation rather than their connectivity.”

To limit federal jurisdiction to those waters with a surface water connection to navigable waters as dictated by Justice Scalia’s opinion, is to ignore the science that supports the importance of these other waters and wetlands to the overall health of water and the environment. This narrow definition of water under federal jurisdiction would undermine the ultimate goal of the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the waters across the U.S. and would diminish our human health and the health of our communities that are dependent upon clean water and healthy functioning aquatic ecosystems.

Thus, the Tribe supports including the significant connection analysis that assesses the flow characteristics and function of the tributary and function performed by wetlands adjacent and non-adjacent to the tributary to determine the chemical, physical and biological connection with traditional navigable definition of “waters of the U.S.” under the *SWANCC* and *Rapanos* decisions. We do not support a definition that restricts “navigable waters” to the waters identified by Justice Scalia in his *Rapanos* opinion. Executive Order 13778 directs the agencies to review the existing rule and to “consider interpreting the term ‘navigable waters,’ as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).” (emphasis added). The Executive Order does not require the agencies to interpret the term “navigable waters” in a manner consistent with Scalia’s opinion; it simply requires the agencies to consider that option. It is an option that the agencies should reject.

As described in the Consultation Plan sent by the USEPA to the Tribe on April 20, 2017, the proposed rulemaking will result in a decrease in the number of waters protected under the Clean Water Act as compared to both current practice and the 2015 Clean Water Rule. As stated throughout this letter, the

¹ USEPA (US Environmental Protection Agency), 2015. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)*. U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-14/475F, 2015.

² USEPA, 2017. Overview: *Connectivity of Streams and Wetlands to Downstream Waters*. Accessed on June 15, 2017. <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>

Tribe finds this to be an unacceptable result; greater protection for the nation's navigable waters should be the goal, not diminished protection.

To conclude, the Bad River Band believes that the suggestions made by the USEPA And US Army Corps during the May 18, 2017 webinar are unacceptable, and the 2015 Clean Water Rule should not be revoked or replaced unless the federal agencies have robust scientific data to demonstrate a preferable approach that adequately accounts for the hydrologic connections between and among waterbodies. To Bad River's knowledge, USEPA hasn't offered that scientific data. The best science available is the USEPA (2015) report supporting the 2015 Clean Water Rule. To revise regulations in any way that would reduce the federal regulatory authority over waters and wetlands below what is outlined in the Clean Water Rule would be seen as a failure in the trust responsibilities of the federal government and a possible violation of the Tribe's treaty rights.

Thank you for the opportunity to submit these comments. We appreciate the time that USEPA and US Army Corps of Engineers staff will spend reviewing and responding to our letter. We look forward to opening formal consultation between the agencies as we move ahead in ensuring adequate protection of our waters.

Please contact Naomi Tillison, Natural Resources Director, if you have any questions and to schedule consultation. She can be reached at 715-682-7123 ext. 1561 or nrdirector@badriver-nsn.gov.

Sincerely,



Robert Blanchard

Robert Blanchard
Tribal Chairman
Bad River Band of Lake Superior Tribe of Chippewa

cc: Naomi Tillison, Natural Resources Director
Chip Smith, US Army Corps of Engineers
Kathy Mayo, U.S. EPA