

# GREAT LAKES INDIAN FISH AND 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

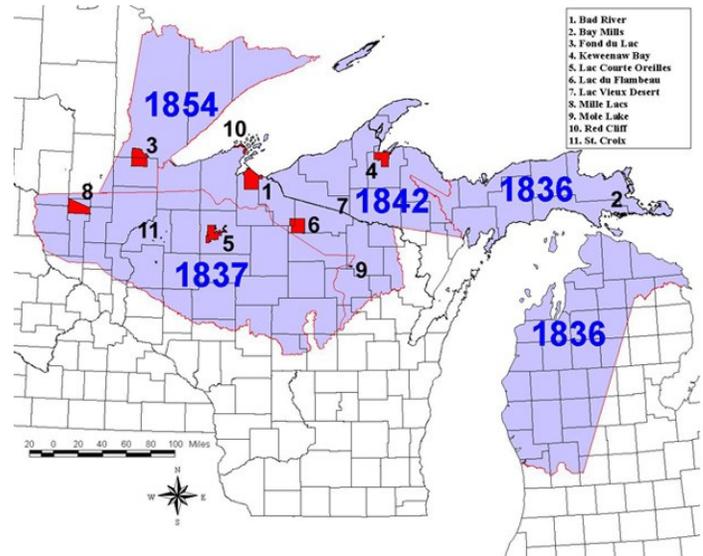
May 21, 2018

Mr. Scott Wilson  
Office of Wastewater Management  
Water Permits Division (MC4203M)  
1200 Pennsylvania Ave NW

Re: Docket EPA-HQ-OW-2018-0063: Clean Water Act Coverage of Discharges of Pollutants via a Direct Hydrologic Connection to Surface Water

Dear Mr. Wilson:

The Great Lakes Indian Fish and Wildlife Commission (GLIFWC or Commission) submits the following comments in relation to EPA policy on Clean Water Act (CWA) coverage of discharges of pollutants via a direct hydrologic connection to surface water. The Commission is a natural resource agency exercising delegated authority from 11 federally recognized Indian tribes in Michigan, Minnesota, and Wisconsin.<sup>1</sup> 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 courts, including the US Supreme Court.<sup>2</sup> The ceded territories extend over portions of Minnesota, Wisconsin and Michigan and include portions of Lakes Superior, Michigan and Huron.



<sup>1</sup> 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.

<sup>2</sup> 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).

It must be noted that GLIFWC's focus is off-reservation, and it is from that perspective that these comments are submitted. GLIFWC 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 require clean water to thrive. The federal government's treaty obligations, therefore, require it to provide water resources with the greatest federal protection possible. To do less would undermine the fulfillment of US treaty guarantees.

**Applicability of the CWA to waters discharged by way of an underground connection:**

Historically, EPA application of the CWA to discharges to surface waters by way of a direct hydrologic underground connection has been appropriate. To restrict the application of the CWA when there is a direct hydrologic connection from the point of discharge, through groundwater, to surface water flies in the face of logic and is contrary to the intent of the CWA. The majority of case law has supported the EPA asserting CWA authority over waters discharged to the ground that, after a relatively short travel distance, discharge to and pollute surface waters. This conclusion is based on the scientific consensus that groundwaters and surface waters are in some cases very closely linked. As noted in the notice soliciting comment, and in EPA guidance, the applicability of the CWA to discharge situations is site and fact specific. And it is applicable when there is a direct hydrologic connection and there is the potential for exceedance of surface water quality standards due to the discharge

A discharger should not be able to avoid the requirements of the CWA simply by building a gravel berm between its discharge and a nearby surface water, or by discharging into a gravel lined pit that has a direct hydrological connection to a nearby surface water body. If waters discharged to the ground reach a surface water body with inadequate dilution or attenuation, and in enough quantity to cause a potential violation of surface water quality standards, then the CWA must be applied. It is proper for the agency to determine whether a discharge to the ground threatens surface water quality by engaging in a site-specific factual inquiry. The EPA must fulfill its responsibilities under the CWA to evaluate that threat, or ensure that states evaluate that threat under their delegated NPDES programs.

**Ability of states to regulate discharges to surface waters by way of groundwater:**

It appears unlikely that discharges by way of sub-surface connection to surface waters can be adequately regulated through existing state groundwater programs for, at least, two important reasons:

1) In the region which encompasses the Chippewa ceded territories, some states do not apply limits on groundwater quality until the groundwater passes off of the property of the discharger (Minnesota), or only at a specified compliance boundary located at a distance from the point of discharge (Wisconsin, Michigan). This can create a situation where the discharge passes through the ground and discharges to a surface water prior to crossing the property boundary or the compliance boundary. In those cases, the discharge emerges and pollutes surface waters prior to crossing the property/compliance boundary. The discharge to the ground may or may not violate state groundwater standards at the property/compliance boundary. High volume discharges to the ground, such as those seen at some infiltration ponds and some tailings basins, pressurize the aquifer, causing the discharge waters to rapidly emerge to the land surface. Jurisdictional surface water features within the property/compliance boundary are not protected by state groundwater standards that are enforced at the property or compliance boundary. For example, at the Minntac Mine tailings basin ponds in Minnesota, compliance with groundwater regulations is proposed at the property boundary, yet there are wetlands, lakes and rivers within the property boundary that receive tailings basin water when it re-emerges after a short path through the ground. Because of their direct hydrologic connection to the tailings basin ponds at the Minntac Mine, there are exceedances of multiple constituents in those surface water bodies.

2) In the Chippewa ceded territories, the states have implemented groundwater standards which are inadequate to prevent exceedances of surface water standards from groundwater discharges to the surface. Groundwater standards are frequently based on drinking water standard guidelines. Those drinking water standards are protective of human consumption, but are not adequate to protect surface water aquatic systems. Michigan addresses this by specifically regulating discharges to groundwater that then vent to the surface through its "Groundwater/Surface Water Interface" regulations. In other states, when pollutants are discharged to the ground they may not violate groundwater standards, yet when that water emerges, via a direct hydrologic connection to a surface water, it may cause an exceedance of a surface water standard. An example of this is in Minnesota at the Minntac tailings basin ponds. Those ponds, which receive thousands of gallons per minute of mine wastewater, discharge constituents into the ground at levels that far exceed the limits for surface waters. The direct hydrological connection from the ponds, to groundwater, then to surface waters, acts as a conveyance for those constituents. State draft groundwater permits for that project have a goal of 250 mg/L of sulfate in groundwater, yet the surface water standard is 10 mg/L of sulfate. The basin pond water, re-emerging outside the basin berm, far exceeds the surface water 10 mg/L sulfate standard. In another example, the Minnesota Health Risk Limit (HRL) for selenium in groundwater is 30 ug/L, yet the applicable surface water standard is 5 ug/L. Because groundwater standards are often less restrictive than surface water standards, water re-emerging from a discharge to the ground into nearby surface waters can cause exceedances of surface water quality standards for multiple constituents, yet may not violate state groundwater standards.

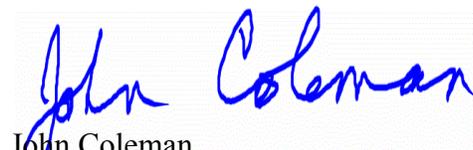
The EPA should continue to assert Clean Water Act authority over discharges to groundwater that are in direct hydrologic connect to jurisdictional surface waters. The application of that CWA authority should be determined based on an analysis of the site and the

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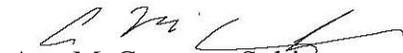
facts of the discharge, as has been done in the past.

Thank you for the opportunity to submit these comments. Please feel free to contact either me (608-263-2873) or Ann McCammon Soltis (715-682-6619) should you have any questions or need further information.

Sincerely,



John Coleman  
Environmental Section Leader



Ann McCammon Soltis  
Director, Division of Intergovernmental Affairs