

Bay Mills Indian Community's Comments Regarding Revised Definition of "Waters of the United States"

Introduction

The Bay Mills Indian Community is a federally recognized Indian Tribe and signatory to the Treaty of March 28, 1836 (7 Stat. 491) by which the right to hunt, fish, and gather in and on the ceded lands and waters of the 1836 Ceded Territory—including headwaters and wetlands—was expressly reserved for all time. We respectfully submit these comments as the original stewards of this continent's waters.

The purpose of these comments is to oppose the proposed definition of the waters of the United States and the consideration of Justice Scalia's interpretation of "navigable waters" in *Rapanos v. United States*, 547 U.S. 715 (2006) as they blatantly ignore science, remove protection for the nation's most imperiled waters, and ultimately infringe on our rights to hunt, fish, and gather as reserved for perpetuity by the 1836 Treaty of Washington.

Embracing Federalism To Protect The Nation's Waters Diminishes Federal Trust Responsibility And Threatens Tribal Treaty Resources

Removing regulations as would be done with the proposed definition and relying on cooperative federalism among stakeholders to manage the nation's waters could essentially leave Tribes without a voice in protecting treaty reserved resources in ceded territories. The proposed definition could allow upstream degradation of waters that may impact tribal waters or treaty rights. We rely on federal trust responsibility to protect our Tribal resources and treaty rights.

Incomplete, Dictionary-based Regulatory Definitions Rather Than Concrete, Scientific Definitions Put Our Waters At Risk

Hydrologic Connectivity

Bay Mills Indian Community has serious concerns with the proposed definition's ignorance or misinterpretation of the scientific definition of hydrologic connectivity. Hydrologic connectivity is not a type of physical connection between waters, but instead incorporates the direct and indirect physical, chemical, and biological connections between the Nation's waters. The proposed definition of waters of the United States only acknowledges physical hydrological connectivity by requiring a direct hydrological surface connection to a jurisdictional water or traditional navigable water in order for a waterbody or wetland to be considered jurisdictional. This approach completely ignores chemical and biological connectivity of this nation's waters. This poses a direct disregard of the objective of the Clean Water Act "to restore and maintain the physical, chemical, and biological integrity of the Nation's waters."

For this same reason, Bay Mills Indian Community also opposes the classification of non-navigable, isolated lakes, ponds, and upland ditches as non-jurisdictional. Physical, chemical, and biological connectivity must be considered.

The USEPA's January 2015 publication titled, "Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence" provides ample evidence to inform the Agencies' decisions on hydrologic connectivity and the best practices for protecting the Nation's waters and keeping them free from pollution.

Definition of 'Tributary'

The proposed rule defines jurisdictional tributaries based on flow permanence, and not by existing, concrete, science-based descriptors (i.e., bank, bank-full width, high water mark, etc.). Though the agencies tout the benefits of this approach as eliminating the significant-nexus test, the proposed definition would create more gray area and mandate a need for flow permanence documentation, hydrologic analyses, and groundwater modeling.

Definition of 'Adjacent Wetlands'

Bay Mills rejects the proposed, incomplete definition of 'adjacent' that requires an adjacent wetland to be adjoining or abutting jurisdictional waters. To fully protect the Nation's navigable waters, a significant nexus must be scientifically examined to determine if physical, chemical, and/or biological connectivity exists to jurisdictional waters.

Conclusion

The proposed definition of the Waters of the United States is a direct threat to the Bay Mills Indian Community. This definition and the directives behind it would strip protections for many of the Nation's waters and would threaten treaty resources while diminishing the federal government's trust responsibility to Tribes.

It is apparent that the proposed definition of the waters of the United States fails to incorporate science. It is Bay Mills Indian Community's belief that protecting our waters should be the main goal. Ignoring science that protects our waters and treaty resources to justify the diminishing of federal regulations and boosting of economic growth is unacceptable.