

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

TESTIMONY

of

ANN McCAMMON SOLTIS

**DIRECTOR, DIVISION OF INTERGOVERNMENTAL AFFAIRS
GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION**

on

**AB 463/SB 386
WETLAND REGULATORY REFORM BILL**

JANUARY 23, 2012

**WRITTEN TESTIMONY
OF
ANN MCCAMMON SOLTIS
DIRECTOR, DIVISION OF INTERGOVERNMENTAL AFFAIRS
GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION**

My name is Ann McCammon Soltis, Director, Division of Intergovernmental Affairs for the Great Lakes Indian Fish and Wildlife Commission (Commission or GLIFWC). Thank you for the opportunity to submit written testimony on AB 463/SB 386, the Wetland Regulatory Reform Bill.

At the outset, it must be noted that due to the short timeframes involved, GLIFWC staff have not had the opportunity to discuss these comments with GLIFWC's governing Board of Commissioners or Voigt Intertribal Task Force. The following comments have been developed by GLIFWC staff. The Commission's governing bodies may have additional comments on this legislation, and the legislature should talk with the tribes directly on a government-to-government basis as well as under the auspices of the *Lac Courte Oreilles v. Wisconsin* case, commonly known as the *Voigt* case.

It is important that "emergent marshes containing wild rice" are included in the list of wetlands in which the Department of Natural Resources may prohibit discharges under a general permit. However, this provision should specify that discharges to those wetlands **must** be subject to the requirements of an individual permit. Only in this way can the State have sufficient notice of activities in those wetlands so that it can carry out the consultation that is required by stipulations reached in the *Lac Courte Oreilles v. Wisconsin* case (see below).

Although sufficient time has not been provided to perform an in-depth legal analysis of the ramifications of this bill, it is clear that the State does not have unfettered discretion to exercise its management prerogatives to the detriment of the tribes' treaty rights and in ways that would be contrary to the requirements of the *Lac Courte Oreilles v. Wisconsin* case. The State may not legislate away the tribes' treaty rights; similarly, legislating to the detriment of treaty resources through destruction of their habitat may not be used to accomplish the same end.

More specific background information and comments on various provisions of AB 463/SB 386 follow.

I. GLIFWC – BACKGROUND AND ROLE WITH RESPECT TO ACTIVITIES IN THE CEDED TERRITORIES AFFECTED BY AB 463/SB 386

GLIFWC was founded in 1984 as a natural resources management agency exercising

delegated authority from its 11 federally-recognized Ojibwe¹ member tribes in Wisconsin, Michigan and Minnesota. Those tribes have reserved hunting, fishing and gathering rights in territories ceded to the United States in treaties with the United States.

GLIFWC's Voigt Intertribal Task Force comprises ten of those tribes.² GLIFWC and the Task Force were established by the tribes to protect and regulate the use of off-reservation natural resources. They serve the tribes by conserving and managing off-reservation fish, wildlife, and other resources, helping in the development and enhancement of institutions for tribal self-regulation of natural resources, and protecting the habitats and ecosystems that support those resources.

II. AB 463/SB 386 CANNOT UNDERMINE THE CONSULTATION REQUIRED UNDER *VOIGT* CASE STIPULATIONS

Whatever timeframes are contained in this bill, the State must consult with the Voigt Intertribal Task Force, as required by the *Voigt* case, before issuing any permit that would impact wild rice or other native plants in the ceded territory. The timelines in the bill appear to be inadequate to allow the tribes to fully consult with the state on these issues, or allow the state to exercise its management authority in a way that ensures the protection of the tribes' rights.

III. AB 463/SB 386 DOES NOT PROVIDE ADEQUATE PROTECTION TO WETLANDS OF SPECIAL IMPORTANCE, INCLUDING WETLANDS CONTAINING WILD RICE

Section 281.36 (3g) (d) states that the department *may* prohibit discharges into wetlands that are identified by the department as being one of the following:

1. Great Lakes ridge and swale complexes.
2. Interdunal wetlands.
3. Coastal plain marshes.
4. Emergent marshes containing wild rice.
5. Ephemeral ponds in wooded settings.
6. Boreal rich fens.

¹ The tribes also are referred to as Chippewa, or, in their own language, Anishinaabe.

²GLIFWC's Voigt Intertribal Task Force member tribes are: 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, Red Cliff Band of Lake Superior Chippewa Indians, Fond du Lac Chippewa Tribe, Mille Lacs Band of Chippewa Indians, Keweenaw Bay Indian Community and Lac Vieux Desert Band of Lake Superior Chippewa Indians.

7. Calcareous fens.

The section should be reworded to state that “the department *shall* prohibit discharges “ into those wetlands. In addition the department should be given greater latitude to identify wetland communities of special significance beyond those identified in the list above.

IV. AB 463/SB 386 UNDERMINES THE ALTERNATIVES ANALYSIS THAT PROVIDES PROTECTION FOR WETLANDS

The bill provides that “The department shall limit its review to those practicable alternatives that are located at the site of the discharge and that are located adjacent to that site if the applicant has demonstrated that the proposed project causing the discharge will result in a demonstrable economic benefit. . .” This limitation on the DNR’s ability to look at alternatives outside the immediate area could allow the destruction of high quality wetlands in areas where a relatively minor change in location could significantly reduce wetland impacts. It should be stricken.

V. AB 463/SB 386 SHOULD PRIORITIZE AVOIDANCE OF WETLAND FILL BEFORE MITIGATION IS CONSIDERED

As currently written, the bill emphasizes mitigation of wetland loss rather than avoidance. Similar to federal wetland regulations, state regulations should emphasize avoidance of wetland fill whenever possible. To do otherwise fails to recognize that some projects can be developed without wetland loss, through the process of avoidance. To turn to mitigation, which rarely produces high quality wetlands, without fully investigating avoidance, virtually guarantees the degradation of wetlands and wetland functional values.

VI. AB 463/SB 386 WOULD PROMOTE CONVERSION OF WETLANDS TO STATE REVENUE

Section 281.36 (3r) of the bill states that the department shall establish a mitigation program that applies to the issuance of wetland individual permits. The bill identifies in lieu fees as one of the preferred methods for mitigating for wetland loss. Institution of such a program would allow the conversion of wetlands to state revenue. Although the details of the in lieu fee program are left undefined in this bill, the concept of converting wetlands into cash is poor public policy and could facilitate wetland loss.

In addition to establishing an in lieu fee program, section 281.36 (3r) dictates that purchase of wetland credits in a wetland mitigation bank somewhere in the state and payment to the in lieu fee program are preferred over mitigation near the site of wetland impact. This would cause the benefits of the wetland functional values to be moved from

the area of the existing wetland to elsewhere in the state, potentially removing wetland resources from the ceded territory and thus from tribal access. As stated above, the State does not have unfettered discretion to exercise its management prerogatives to the detriment of the tribes' treaty rights and in ways that would be contrary to the requirements of the *Lac Courte Oreilles v. Wisconsin* case.

VII. AB 463/SB 386 REQUIRES ISSUANCE OF GENERAL PERMITS FOR WETLAND FILLS LESS THAN 10,000 SQUARE FEET

Section 281.36 (3g) (a) states that “the department *shall* issue a wetland general permit for each of the following types of discharges” (emphasis added) and lists ten categories under which the department must issue general permits. First, the department should be given the discretion to evaluate the types of activities that should be eligible for a general permit; the word “may” should replace the word “shall.” Second, since general permits do not receive the same level of scrutiny as individual permits, their use should be limited.

The categories listed in this section of the bill are very broad and encompass most types of activities. The categories should be narrowed and made more specific; vague wording such as “for industrial purposes” should be removed. The wording “the development of a waste disposal site is considered to be a development for industrial purposes,” which appears to be specifically designed for the mining industry, should be removed.

VIII. THE EFFECT OF FILLING MULTIPLE WETLANDS BY ONE PROJECT MUST BE CONSIDERED

The combined effect of filling multiple wetlands must be considered when decisions as to whether to issue a general or individual permit are made. The legislation should specify that the total acres of wetland fill for a project will be considered when determining whether a general permit is appropriate.

IX. AB 463/SB 386 RESTORATION SURCHARGE FEES FOR GENERAL PERMITS APPEAR TO BE INADEQUATE

Section 281.36 (11) states that the department shall set a surcharge fee to be charged for each application to proceed under a wetland general permit and that the fee may not exceed more than 50 percent of the market price for the purchase of credits from a mitigation bank. In general, the use of general permits should be avoided, as they are less protective of wetland resources than individual permits. However, if there are to be general wetland permits, there is no reason that the surcharge should be less than 100% of the market price for the equivalent purchase of credits from a mitigation bank. In the

section above “50%” should be changed to “100%.”

X. CONCLUSION

AB 463/SB 386 is troubling for the reasons outlined above. Concerns with the bill stem from the Commissions’ member tribes’ deeply held commitments to the protection of tribal lifeways that depend on high quality and abundant natural resources. There is no reason to change current law in these ways. In light of the State’s *Voigt* case obligations, and with so much uncertainty about the potential ramifications of this bill if enacted, it should either not be passed, or the ceded territories governed by the *Voigt* case should be exempted.