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Chippewa Ottawa Resource Authority

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USCG-2006-25767-406

Docket Management Facility (USCG-2006-2567)
U.S. Department of Transportation
Room PL - 401
400 Seventh Street, S.W.
Washington, DC 20590-0001

Re: Docket No. CGD09-06-123
U.S. Coast Guard Water Training Areas, Great Lakes

To Whom It May Concern:

The following comments are submitted on behalf of the five (5) federally recognized Indian Tribes which constitute the Chippewa Ottawa Resource Authority (CORA): Bay Mills Indian Community; Grand Traverse Band of Ottawa and Chippewa Indians; Little River Band of Ottawa Indians; Little Traverse Bay Bands of Odawa Indians; and Sault Ste. Marie Tribe of Chippewa Indians. The Chippewa Ottawa Resource Authority is the inter-tribal body established by these Tribes to carry out treaty-protected natural resource management and regulation functions.

Each of the member Tribes is the modern day political successor in interest to those bands who ceded land and water to the United States in the Treaty of March 28, 1836 (7 Stat. 491). The waters ceded comprise the eastern half of Lake Superior (east of Marquette), the portion of Lake Michigan north of Grand Haven and east of the Ford River, and the portion of Lake Huron north of Thunder Bay. Enclosed is a map of the three Lakes, on which the ceded waters are noted in green.

The 1836 Treaty reserved to the Tribes the right to fish in the Michigan waters of Lakes Huron, Michigan and Superior ceded to the United States. The continued existence of this right was adjudicated in *United States v. State of Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979) and the Tribes' right to regulate the fishery is recognized by the courts, as well. See, *United States v. Michigan*, 653 F.2d 277 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981).

The role of the Tribes in regulating this treaty-protected activity is recognized by the U.S. Coast Guard, as well. A Memorandum of Understanding (MOU) was first executed in June, 1995, by which the Coast Guard recognized the right of the Tribes to promulgate and enforce laws relating

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to commercial fishing vessel safety. A revised MOU was signed in February, 1999, and remains in effect to this day.

The Tribes have also consulted as needed with the U.S. Coast Guard about its regulations which might have an effect on the Tribes' members, resources and rights. The consultation process was formalized by the issuance of Executive Order 13175 (1999). The Tribes have utilized this process in seeking and obtaining categorical exemptions for fishing vessels operated by their members from certain commercial fishing vessel safety requirements, as recently as last year.

Based on the legal framework of treaty-acknowledged rights to fish in the Michigan ceded waters of Lakes Superior, Michigan, and Huron, and upon the government-to-government relationship with the U.S. Coast Guard, it is astonishing to read that proposed rule [safety zones and training areas] under 33 CFR Part 165:

does not have tribal implications under Executive Order 13175...because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

71 *Fed. Reg.* 43404 (Aug. 1, 2006)

That conclusion is erroneous, both on the facts and the law. If the Coast Guard had contacted CORA or any of its member Tribes, it would know that ten of the proposed safety/training zones are located in Michigan waters in which the Tribes' members have the Treaty-protected right to fish, and in which fishing activities occur throughout the fishing seasons. [The enclosed map notes the proposed zones in black.]

If the Coast Guard had sought input from the Tribes, it would know that the proposed safety/training zones encompass valuable fishing grounds and/or viable spawning grounds for lake trout and whitefish, which are the predominant species harvested by tribal fishers.

If the Coast Guard had sought input from the Tribes, it would know that the months of September and October are the most productive fishing months of the year, and that restricting access to the proposed safety/training zones during that time period has a serious detrimental impact on tribal fisher income.

If the Coast Guard had sought input from the Tribes, it would know that proposed federal actions which impair, impede or limit the exercise of rights protected by treaty with the United States are subject to legal challenge by the Tribes which reserved those rights. The courts of the United States have prohibited such actions when they are not expressly authorized by an act of Congress. See, e.g., *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

It should be acknowledged therefore, that the U.S. Coast Guard failed to follow the requirements of Executive Order 13175.

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It is not the purpose of these comments to simply argue that the proposed safety/training zone establishment is invalid simply for failure to consult with impacted Indian Tribes. Instead, the purpose of the submitted commentary is to offer the opportunity to engage in the government-to-government consultation process now. The Tribes are confident that they can provide meaningful, substantive and helpful comments on the proposed regulation. A sampling of the matters about which the Tribes have comment follow.

** The establishment of permanent safety zones in the Michigan waters of Lakes Superior, Michigan and Huron is unwarranted.*

Although the U.S. Coast Guard has a specific mission to protect the lands, waters and people of the United States within the Department of Homeland Security, the creation of permanent zones within which live fire training exercises may occur whenever the Captain of the Port shall decree is unprecedented. No other such zone exists within 33 C.F.R. Part 165. The notice of proposed rulemaking in the August 1, 2006, *Federal Register* lacks any explanation for the creation of such zones. Rather than engage in speculation as to the rationale, the Tribes propose:

1. Elimination of any reference to "safety zone" as describing the area in which live fire exercises occur. "Safety zones" are defined in 33 C.F.R. sec. 165.20 as an area with access limited to authorized persons, vehicles, or vessels, and allowing conditions of use to specified solely by the "COTP or the District Commander." 33 C.F.R. sec. 165.21. It is of great concern to the Tribes that any safety zone designated in the proposed rule could become permanently unavailable to tribal fishing activity, or such designation would require the permission of the Captain of the Port for fishing activity to be conducted. Either outcome is totally unacceptable, and any inference that such an outcome is under consideration by the U.S. Coast Guard should be eliminated.

2. The availability of cooperative joint exercises with branches of the U.S. military must be explored as a reasonable alternative to live fire exercises on the Great Lakes conducted by the U.S. Coast Guard. There exist many training facilities in the Great Lakes region which are utilized by Army, Navy, National Guard and Reserve units for conducting live fire or MILES exercises.

** The number of areas in which live fire exercises are contemplated in Lakes Superior, Huron and Michigan are excessive.* Two areas are set aside for the Sault Ste. Marie Coast Guard station, alone [termed "Superior Zone 1 (Whitefish Bay)" and "Superior Zone 2 (Sault Ste. Marie)"]. It is likely that a live fire exercise will be on-going in each area sequentially, thereby foreclosing fishing activity (including biological assessment, habitat improvement and monitoring) in numerous areas during the season. This imposes a significant burden on the treaty fishery.

** Training with live ammunition is inherently dangerous and should be scheduled at a time in which the risk is minimized to persons and property.* Therefore, the Coast Guard should require

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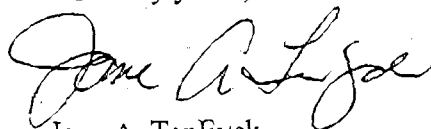
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live fire exercises to be conducted during the month of November, specifically from November 7th through November 29th. This time period is closed for fishing, due to whitefish spawning. It eliminates conflict with treaty fishing activity.

** Adequate advance notice of live fire training exercise is essential to public safety.* Provide adequate prior notice to the Tribes of the inception of a live fire exercise. Twenty-four hour advance notice is inadequate, as has been demonstrated by the exercise in Superior Zone 1 which was scheduled for September 14 and 15, 2006. It was impossible to contact all tribal fishers who had set nets in that zone, and it was only the cancellation of that exercise in the morning of September 14, 2006, which prevented fishers from being in the literal line of fire.

The Tribes invite the Coast Guard to discuss these issues further, at a time and place which are mutually acceptable.

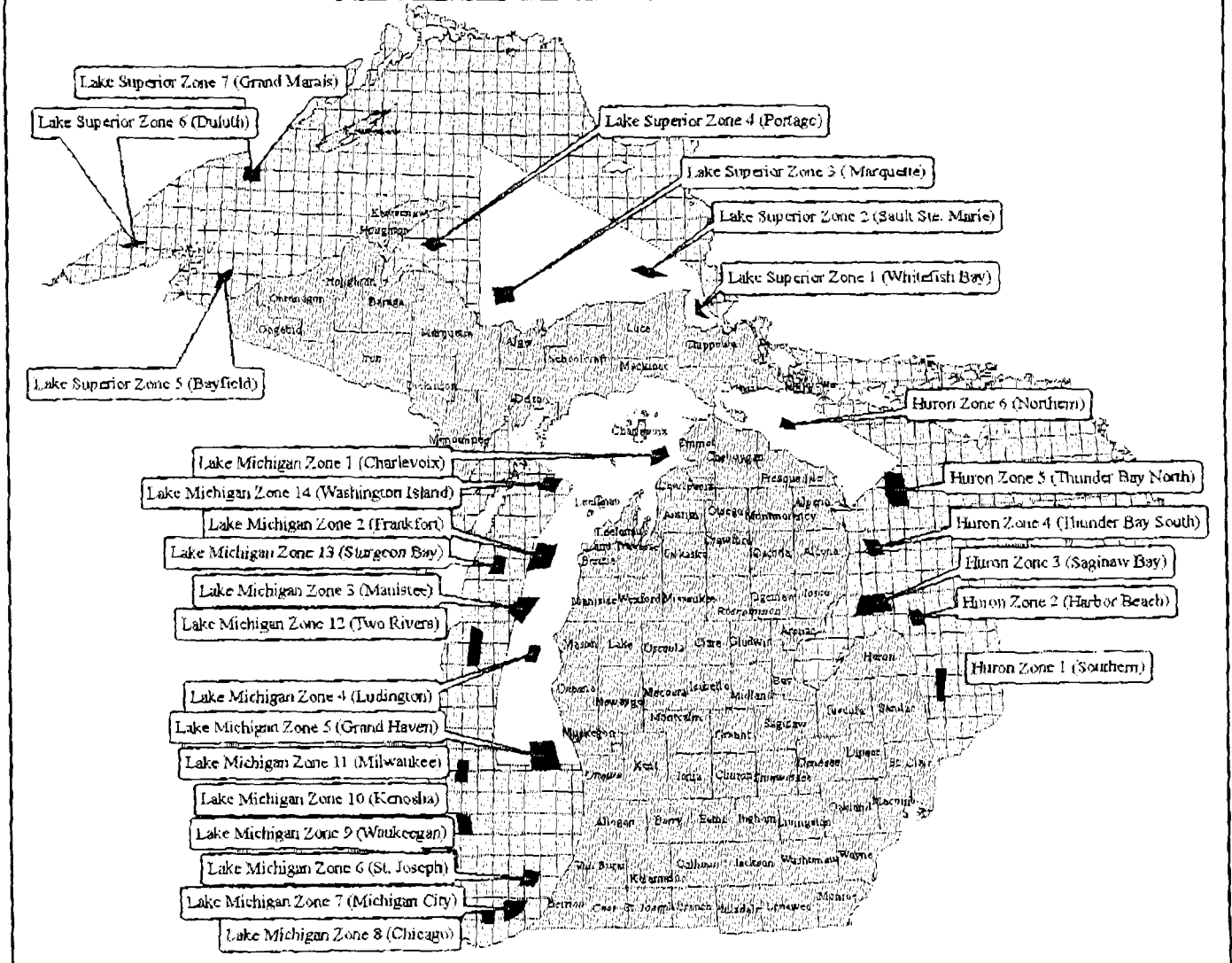
Sincerely yours,



Jane A. TenEyck
Executive Director

Attachment

Coast Guard Training Zones



Map Legend

- Coast Guard Proposed Live Fire Training Zones
- Great Lakes Statistical Grids
- Michigan County Boundaries

Map Produced by: Inter-Tribal Council of Michigan
 Date: September 2006