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03/28/2003 05:41 PM

To: CWAwaters@EPA  
cc:  
Subject: Attention Docket ID No. OW-2002-0050

To whom it may concern;  
Attached are my comments concerning the ANPRM for the CWA Regulatory Definition of Waters of the United States. In addition, I have copied them into the body of this email. Thank you for the opportunity to comment on this important issue.

Comments on ANPRM  
submitted by  
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Modifying the existing definition of water of the United States for the purposes of implementing the Clean Water Act would have some serious and substantial impacts to the Fort Peck Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation, Montana. Beneficial uses of these isolated wetlands and intermittent/ephemeral streams across the Reservation include providing habitat and food for large and small mammals as well as birds, providing water for agricultural purposes such as stock watering, and providing water from springs for use in cultural practices by Tribal members.

The Fort Peck Tribes' Water Quality Standards, approved by the US EPA, have incorporated the same definition as the federal regulatory definition under the Clean Water Act. By using the same definition, the Tribes are provided a backstop by EPA for enforcement of tribal water quality standards and dispute resolution for common border waters with other jurisdictions mainly states. To date, the Tribes have initiated at least one enforcement action with EPA using the "backstop" regulatory definition. Because getting CWA Section 303 approval does not enlist any regulatory/enforcement authority, the Tribes have employed EPA for an unauthorized discharge into a tribal water that is not navigable but is a tributary, although remotely to a navigable water.

If the Tribes were to pursue this action independently from EPA, we would have develop an entire regulatory program, which may not be too difficult, but the enforcement arm of regulatory program could be quite expensive. Enforcement penalty calculations and case development would have to be completed either tribal prosecutors or contract attorneys. Given the extraordinary caseloads currently placed on tribal prosecutors, it is a given that in order to effectively regulate, the Tribes environmental office would have to secure funding for an attorney as legal counsel for

the environmental program.

Although all elements of regulatory program would then be in place, whether the program could still effectively enforce on fee lands and/or non Indian perpetrators would still be in question. Cases would have to be fully evaluated for possible challenges to jurisdiction. Under the existing scenario, EPA does not directly challenge the Tribes' jurisdiction, it really becomes a non issue even though EPA uses the Tribes standards for enforcement. The final result could be increased releases to the environment of harmful substances.

Finally, disputes over border waters between states and tribes could develop as a result of differing definitions of waters protected under water quality standards. Non permitted discharges could occur in ephemeral streams or isolated wetlands which are not identified as protected waters on one side, while they would be required to meet permit limits on the other side of the stream if part of the definition of protected waters. One set of standards would apply on one side while no standards for discharge would exist on the other side of an ephemeral stream. EPA would have no consistency in how these disputes would be settled, whether they could be at all.

For those Tribes without standards, the new definition could result regulatory "havens" if a surrounding state adopted a definition that was more stringent than the federal definition of say, perhaps, navigable only.

Tribes under this scenario would then have to ramp up their regulatory program including developing standards or face the possibility of increased releases to the environment within the exterior boundaries of their reservations.

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