



COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

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VIA U.S. MAIL AND EMAIL

Ms. Diane Regas
Director, Office of Wetlands, Oceans & Watersheds
U.S. Environmental Protection Agency
ATTN: Water Docket, Mailcode 4101T
1200 Pennsylvania Ave NW
Washington, DC 20460-0001
ow-docket@epa.gov

RE: Comments on the ANPR "Clean Water Act Regulatory Definition of 'Waters of the United States'"
Docket No. OW-2002-0050

Dear Ms. Regas:

The Columbia River Inter-Tribal Fish Commission (CRITFC)¹ appreciates this opportunity to provide comments on the proposed rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" (hereinafter "ANPR"). The CRITFC member tribes have interest in this ANPR due to its potential to affect valuable treaty and cultural resources, specifically anadromous salmonids and lamprey. We are concerned that too many pollutants and toxic materials have entered the waters that support these fish with insufficient effort directed towards water quality improvement. Instead of breaking down the current regulations supporting the Clean Water Act, we believe that time is better spent on regulatory enforcement. Accordingly, we encourage the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) to retain the regulations as they currently stand.

EPA and the Corps are obliged to enforce the Clean Water Act (CWA) in a matter that meets the congressional intent of the Act. The CWA was passed to "restore and maintain the chemical,

¹ In 1977, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Nez Perce Tribe, and the Yakama Nation created the Columbia River Inter-Tribal Fish Commission (CRITFC). These four tribes have 1855 treaty rights to take fish that pass their usual and accustomed fishing places. Consequently, it is of critical importance to the tribes to protect and conserve the habitat and life cycle of the fisheries. CRITFC functions to protect, promote, and enhance the Columbia River Basin's anadromous fish resources consistent with the treaty-secured interests of its member tribes by formulating a broad, general fisheries program, and providing technical and legal support.

physical, and biological integrity of the Nation's waters."² In addition, Congress sought to protect those resources that depend on clean water for survival, such as fish: "it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife ... be achieved by July 1, 1983."³ The failure to achieve this goal is evidenced by the preponderance of 303(d) listed water bodies. Nonetheless, EPA and the Corps must continually work towards achieving this goal.

Congress intended for the CWA to have an expansive jurisdiction in order to meet its goals. The CWA defines "navigable waters" as "the waters of the United States,"⁴ a definition much broader than mere "navigable-in-fact" as required under the Rivers and Harbors Act that preceded the CWA.⁵ In fact, Congress intended that the term "navigable waters" should be given the "broadest possible constitutional interpretation" as permitted by the Commerce Clause.⁶ Notwithstanding the "Migratory Bird Rule", the current regulations correctly set the jurisdiction of the CWA in accordance with Congress' intent for the Act. The EPA and the Corps should not limit the jurisdiction of the CWA without the express authorization of Congress.

The *SWANCC*⁷ Court struck down the "Migratory Bird Rule" as applied to the Corps' § 404 authority over an isolated man-made seasonal pond, but the ruling does not expressly or impliedly invalidate the definitions of navigable waters found in 33 CFR § 328.3(a)(3). The decision, on its face, narrowly applied to waters over which CWA jurisdiction was based solely on the Migratory Bird Rule. The case did very little to change the general meaning of "navigable waters" under the CWA. Chief Justice Rehnquist noted that the term "navigable waters" must be read as "the significant nexus between the [water body] and 'navigable [in fact] waters'."⁸ While this supposedly eliminates the current "hydrological connection" test (i.e. applying CWA jurisdiction over all waters that are hydrologically connected to a navigable-in-fact water body), in practical terms, it does little to change the jurisdiction currently employed by the regulations. The current regulations, without the "Migratory Bird Rule", are clearly connected to interstate commerce and follow Congress' intent to expand jurisdiction under the CWA to the extent of Congress' Commerce Clause powers. This extended jurisdiction furthers the express and unambiguous intent of Congress to incorporate a broad and systematic view of the goal of maintaining water quality.

CRITFC is most concerned with the cumulative effect that this ANPR could have on fish. Limiting the CWA jurisdiction beyond what the Supreme Court called for diminishes the power of the CWA and gets us no further to achieving its water quality goals. It is a fact that water bodies are connected to each other in far more ways than we understand and that many "isolated" water bodies impose significant effects on navigable-in-fact water. For example, wetlands are essential to the health of water systems. Wetlands stabilize sediments and inorganic chemicals, retard runoff,

² 33 U.S.C. § 1251(a).

³ 33 U.S.C. § 1251(a)(2).

⁴ 33 U.S.C. § 1344(a).

⁵ See Rivers and Harbors Act, 33 U.S.C. § 403; 33 C.F.R. §§ 322.2, 329.4 ("Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce").

⁶ See S. Rep. No. 1236, 92d Cong., 2d Sess. 144. See also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *United States v. Eidson*, 108 F.3d 1336, 1341-42 (11th Cir. 1997).

⁷ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

⁸ See *SWANCC*, 531 U.S. at 168.

provide a nutrient base to aquatic ecosystems and help manage nutrient loading and temperatures. Wetlands that are not adjacent to navigable waters (i.e. "isolated") may in fact have a significant nexus to the navigable water if they are filled, resulting in increased sediment and chemical runoff spilling into the navigable water.⁹ Tributaries are also very important in similar regards, even when they are far removed from the "navigable-in-fact" mainstem. Additionally, tributary flow can carry toxic contaminants and conventional pollutants to navigable waters. A drainage pit used for dumping agricultural waste that is then connected to a navigable water body via a human-made conveyance will adversely affect the water quality of navigable waters. This ANPR throws CWA jurisdiction over all of these non navigable-in-fact water bodies into question. But, without the capacity to monitor and enforce CWA regulations on these water bodies, the CWA loses much of its power and ability to achieve its water quality goals, and to ultimately protect fish and wildlife.

CRITFC appreciates this opportunity to comment on the proposed rule change. Should you have questions regarding these comments, please contact Julie Carter or Christine Golightly at (503) 238-0667.

Sincerely,



Donald Sampson

Executive Director

Columbia River Inter-Tribal Fish Commission

cc:

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⁹ See, e.g., *FD & P Enterprises, Inc. v. United States Army Corps of Engineers*, 239 F. Supp.2d 509 (D.N.J. 2003).