



COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

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Karen Gude
U.S. Environmental Protection Agency/Office of Water
Tribal Program Coordinator
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RE: Forthcoming proposal to rescind and revise the definition of “waters of the United States”

Dear Ms. Gude:

The Columbia River Inter-Tribal Fish Commission (CRITFC) appreciates the opportunity to comment on the Administration’s efforts to rescind and revise the definition of “waters of the United States” per Presidential Executive Order 13778. CRITFC is a consortium of the four Columbia River treaty tribes, the Yakama Nation, Nez Perce, Warm Springs, and Umatilla, who established CRITFC in 1977 to ensure a unified voice in the overall management of their fishery resources. During consultation with EPA, our tribes learned that the Executive Order requires the Agencies to reinterpret the term “navigable waters” in a manner that is solely consistent with the opinion of Justice Scalia in *Rapanos v. United States* despite the fact that there was no majority opinion in that case. This new interpretation of the longstanding Clean Water Act (CWA) jurisdiction threatens the quality of waters that are essential to tribal resources, commercial ventures, culture, and the health of tribal members.

Under treaties negotiated with the United States in 1855,¹ the Commission’s member tribes – the Confederated Tribes and Bands of the Yakama Nation, the Nez Perce Tribe, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes of the Umatilla Indian Reservation – reserved to them sovereign rights; among these are rights to take fish on their ancestral homelands, and at all their usual and accustomed fishing places. This reserved right has not been diminished by time and its exercise has been upheld and affirmed in several U.S. Supreme Court decisions. The ceded territories of CRITFC’s member tribes extends to over 66,500 square miles in the states of Washington, Oregon, and Idaho and CRITFC is opposed to any actions in response to Executive Order 13778 that removes waters and wetlands from federal oversight in these areas.

CRITFC is committed to the protection of the waters that flow through our reservations and into our usual and accustomed fishing areas. Vast resources have been invested in our region to

¹ Treaty with the Yakama Tribe, June 9, 1855, 12 Stat. 951; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945; Treaty with the Nez Perce Tribe, June 11, 1855, 12 Stat. 957.

protect and restore essential habitat for the salmon, steelhead, and Pacific Lamprey that are so vulnerable to poor water quality conditions. In 1994, CRITFC initiated a survey of contaminants in fish tissue in the Columbia River Basin. The survey found the presence of 92 contaminants including DDT and its breakdown products, PCBs, PBDE flame retardants, and mercury, all of which pose potential health risks to people, fish, and wildlife. As the presence of contaminants measured in fish tissues from this study indicates, the impact of pollution on tribal resources is not a theoretical problem. It is essential that steps be taken to lower the level of toxic contaminants carried in our surface waters so that the fish we eat becomes a more healthful food and economic resource for our people.

CRITFC and our member tribes know that what happens in upstream headwaters and tributaries as well as within adjacent floodplains and wetlands can significantly impact the chemical, physical, and biological integrity of downstream and adjacent waters. Some of the most serious threats to the water that our tribes depend upon arise from activities on lands that lie upstream of our usual and accustomed fishing areas. These threats include pollution from landfills, toxic dumps, mining practices, inadequate septic and wastewater disposal systems, and contaminated runoff from agriculture and urban development.

In the 40 years since Congress adopted the CWA, the United States has made significant progress in reducing the discharge of pollutants to our nation's waters. However, progress toward achieving the ambitious CWA goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" has stalled and more and more waters are listed as impaired from disparate sources. This proposed reduction of CWA jurisdiction is unconscionable and contrary to the aspirations and intentions of the CWA.

The 2015 Clean Water Rule was a productive next step in clarifying the scope of CWA jurisdiction and it should not be withdrawn. Before the rule, floodplains, tributaries, headwaters, and wetlands (all critical to the quality of water that tribal members depend upon) were threatened by regulatory confusion and legal uncertainty. The uncertainty over which waters were protected under the CWA as "waters of the United States" left headstream waters and floodplains vulnerable to pollution, despite the fact that these areas provide numerous ecological services to downstream fisheries.

CRITFC believes that the 2015 rule provided clearer and more predictable guidelines and a science-based and legal framework for determining which waters are in-fact protected by the CWA. The 2015 rule clarified how smaller and seasonal streams and wetlands are connected physically, chemically, and biologically to larger water bodies downstream and would be covered under federal law similar to coverage prior to 2001. The rule provided clear and predictable protections while giving greater certainty to the regulated community by providing better guidance to federal and state regulators. It covered only water bodies that the CWA has traditionally covered and did not extend protection to any new types of waters that were not historically covered such as most ditches, artificial lakes, ponds, and artificial ornamental waters or water-filled depressions incidental to construction activity.

CRITFC's member tribes rely on the authority of the EPA and the U.S. Army Corps to effectively implement and enforce the CWA to prevent continued impairment of our fisheries

and drinking water supplies from activities that take place beyond reservation boundaries. As stewards of the water in the Columbia River Basin, CRITFC and our tribes do not support any reduction in Clean Water Act jurisdiction. Water quality in tributaries, floodplains, and wetlands is crucial to the health of our fisheries and must be protected.

Thank you for consideration of this important issue. If you have any further questions please contact myself or Dianne Barton, PhD, Water Quality Coordinator at 503-238-0667.

Sincerely,



Jaime A. Pinkham
Executive Director